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**Council for Trade-Related Aspects
of Intellectual Property Rights**

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REVIEW OF LEGISLATION

CHINA¹

The present document reproduces the introductory statement made by the delegation of China, the questions put to it and the responses given in the review of its legislation at the Council's meeting of 17-19 September 2002.²

I. INTRODUCTORY STATEMENT

As a new Member of the WTO, China welcomes this opportunity for review of legislation and protection of intellectual property rights by the TRIPS Council. China is fully committed to the strengthening and improvement of the multilateral trading system. We take our obligations under the WTO very seriously. That is why for this review we have a strong team from the capital. They include experts and senior representatives of the Office of Legal Affairs under the State Council, State Intellectual Property Office, National Copyright Administration, State Administration of Industry and Commerce and Ministry of Foreign Trade and Economic Cooperation. They have played a pivotal role in preparing all the documents and providing the answers to the questions for various delegations. I am sure their presence will be conducive to improving mutual understanding.

Mr. Chairman, since this process is a combination of legislative review as well as transitional review under paragraph 18 of the protocol of China's accession, I would like to focus on three aspects. One is the performance of our obligations of notification. The second is the progress of China's efforts to make the relevant rules and regulations consistent with the TRIPS Agreement and the third is China's efforts regarding the enforcement of the laws and regulations on IPR protection.

A. NOTIFICATION

Pursuant to Article 63.2 of the TRIPS Agreement, China notified all eight "main dedicated laws" related to IPR protection on 21 May 2002, including the Copyright Law, Patent Law, Trademark Law and Implementing Regulations of the Patent Law of the People's Republic of China. The newly amended Implementing Regulations of the Copyright Law and Implementing Regulations of the Trademark Law were notified on 23 August 2002. On 12 July 2002, the Criminal Law, Anti-

¹ As regards laws and regulations relevant to the area under review and notified by China under Article 63.2 of the Agreement, reference is made to documents IP/N/1/CHN/1 and Add.1; IP/N/1/CHN/C/1 and 2; IP/N/1/CHN/I/1 and 2; IP/N/1/CHN/L/1 and 2; IP/N/1/CHN/P/1; IP/N/1/CHN/T/1 and IP/N/6/CHN/1.

² The minutes of this meeting have been circulated as documents IP/C/M/37 and IP/C/M/37/Add.1.

Unfair Competition Law and Civil Procedure Law were also notified to the TRIPS Council in summary as "other laws and regulations".

Pursuant to the Decision of the TRIPS Council of 21 November 1995 (IP/C/5), China notified its responses to the Checklist of Issues on Enforcement relating to the TRIPS Agreement on 12 July 2002.³

Pursuant to Article 69 of the TRIPS Agreement, information on contact point in China was notified on 1 August 2002.

Apart from the notification obligations set down by the TRIPS Agreement and the TRIPS Council, China has provided question by question responses to the lists of questions received prior to the review from six Members, including Australia, Canada, EC, Japan, Switzerland and US. Among them, the responses for Australia, EC, Japan and US were submitted on 23 August 2002, while the answers for Canada and Switzerland were submitted on 2 September 2002. Questions from the Republic of Korea were received just days before this meeting. We tried our best to provide responses to some of their questions just a moment ago. Furthermore, China has also provided the TRIPS Council with the information as requested by the Annex 1 of the Protocol on China's Accession.

With the conclusion of the foregoing preparation, China has provided complete information to the Council for this review as requested by the TRIPS Agreement, related decisions by the Council and China's Accession Protocol. It is worth mentioning that the laws and regulations of China's IPR protection are characterized by their broad coverage and great quantity. The notification to the WTO and the provision of requested information for the review entail huge tasks, not the least of which is translation, and require enormous input of manpower and financial resources. The fulfilment of the tasks by Chinese government despite of tremendous difficulty is a further demonstration on the sincerity and resolve of China to honour its obligations on transparency and implement its commitments.

B. PROGRESS OF LEGISLATION

China's IPR protection system began taking shape as early as the 1970s and it has since become a principal component of China's policy of economic reform and opening-up. The Chinese government believes that the intellectual property protection system plays an important role in promoting scientific and technological innovation, cultural prosperity and economic development. On the front of attracting foreign investment, effective IPR protection is an important contributing factor for the inflow of foreign investment.

Long before China's accession to the WTO, an across-the-board amendment of IPR laws and regulations was initiated with a view to bringing the IPR protection in line with the requirements laid down by the TRIPS Agreement. The process has been completed so far.

This massive overhaul of IPR legislation covered almost every major IPR related laws and regulations, including the Copyright Law, Patent Law, Trademark Law, Implementing Regulations of Patent Law, Regulations on Protection of Computer Software, Implementing Regulations of Copyright Law and Implementing Regulations of Trademark Law of the People's Republic of China. Apart from that, a series of new regulations including Regulations on Protection of Layout-Designs of Integrated Circuits and Regulations on Protection of New Varieties of Plants have been promulgated.

³ Document IP/N/6/CHN/1.

The revised Copyright Law extends the scope of protection, clearly defines the right of performers and producers, adds the provisional measures of property and evidence preservation, stipulates the amount of statutory damages and enhances the administrative sanction on the infringements that harm the public interests. The Law is now in full compliance with the requirements of the TRIPS Agreement.

The revised Trademark Law specifically provides for the protection of geographic indications and well-known trademarks, expands the scope of eligible subject matter of a trademark, stipulates the right of priority, adds the judicial review to the administrative decisions relating to trademark registration and strengthens the cracking down on trademark infringement.

The revised Patent Law sets the conditions for granting compulsory licenses, and adds the provision of judicial review for the administrative decisions regarding patent of utility model and design. Regulations on Protection of Layout-Designs of Integrated Circuit issued in April 2001 define the protection of the layout-designs of the integrated circuit.

In the revised Patent Law, Trademark Law and Copyright Law, provisional measures to stop infringing acts before the trial has been stipulated to further strengthen the protection of right owners.

Thanks to these major amendments made to the related laws and regulations in this regard, the legislation for IPR protection in China has been greatly improved and has achieved full compliance with the TRIPS Agreement of the WTO.

It is the view of my government that the extensive involvement in international exchange and cooperation on IPR protection is a principal approach to draw on the advanced experience from other countries and enhance the capacity and level of China's IPR protection.

Since the 1980s, China has joined in succession a number of major international conventions, treaties and agreements on IPR protection, namely the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, the Universal Copyright Convention, the Madrid Agreement Concerning the International Registration of Marks, the Madrid Protocol Concerning the International Registration of Marks, the Nice Agreement Concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks, the Lugano Agreement of Establishing International Classification of Industrial Designs, the Patent Cooperation Treaty, the Strasbourg Agreement on the International Patent Classification, the Geneva Convention for Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purpose of Patent Procedures and the Convention for the Protection of New Plant Varieties.

While actively participating in the related international conventions, the Government of China has entered into bilateral cooperation with a number of countries on intellectual property protection, such as the EU-China Intellectual Property Right Cooperation Program. Projects of this kind have helped China train its professionals in the field of intellectual property protection and enhance the legal consciousness of the government officials for trade administration. These bilateral activities have played a positive role in bringing China's IPR protection system up to international standards and promoting the development of trade.

C. ENFORCEMENT

The IPR protection provided by the Chinese Government does not stop at the achievements made with respect to legislation. Concurrent with the continuous improvement of domestic legislation, consistent priorities have also been given to the issues related with IPR protection like the sharpening of the awareness of IPR protection among the general public and the strengthening of the enforcement of IPR laws and regulations so as to ensure an effective IPR legal system on the national scale.

The enforcement of IPR protection in China follows the pattern of "Parallel Channels and Coordinated Operation". Where infringement occurs, the right holders of intellectual property may either bring a lawsuit to the court or file a complaint to the governing administrative agencies. Here I particularly want to say a little more about the administrative measures for IPR protection in China. The administrative agencies may take various measures as remedies for IPR protection, including orders to stop the infringement and imposition of fines. Cooperation among governmental agencies responsible for IPR enforcement has been continuously strengthened. In May 2001, the State Administration of Industry and Commerce, the Ministry of Public Security and the State Intellectual Property Office convened the State Council IPR work conference and reached consensus on establishment of an inter-agency liaison mechanism, including information sharing system and enforcement coordination system. Administrative measures are welcomed by the right holders for their quick response to the infringing activities and low cost.

The Chinese government at all levels is fully aware of the role played by IPR protection in promoting economic development. Local authorities have promulgated a large number of regulations strengthening IPR protection in line with those at national level. Effective measures including the cross-region joint actions are also taken to eliminate regional protectionism for infringers and crack down on illegal practice like counterfeiting. Cooperative networks on trademark enforcement have been established in provinces of East China and North-East China. Members may refer to the documents provided by the Chinese delegation for further details and related statistics on IPR enforcement in China in 2001.

In respect of the enforcement of the Trademark Law, in 2001 there were 41,163 trademark law violation cases in total. Infringers were ordered to pay the right owners damages of RMB 3,343,400 in total and there were 86 cases transferred to criminal procedures. In respect of enforcement of the Copyright Law, in 2001 copyright administrative authorities accepted 4,416 cases in total, among which 4,306 cases have concluded with rulings. Among those concluded, 3,607 cases ended with imposing a fine upon the infringers; 633 cases ended with mediation; and 66 cases were transferred to criminal procedures. The Committee on Protection of Quality and Brands for Foreign Invested Enterprises in China acknowledges the great importance attached and effective measures taken by Chinese Government at all levels to crack down on counterfeited products.

Effective IPR protection is the incubator for inventions and creations, and also the driving force behind economic development and social innovation. Upgrading the level of protection for IPR is an irreversible trend and will, in the long run, serve the common interests of all countries.

D. CLOSING REMARKS

We appreciate very much the comments and questions given by various delegations. We thank them all for their active participation and their input for this review. I would like to make some brief comments on questions that seem to be of common concern to other Members.

1. Copyright

After the revised Implementing Regulations enter into force, each local copyright administration department may investigate and deal with all infringing acts (including those involving foreign right owners) taking place in its own administrative area, without the necessity of requiring approval by the copyright administration department under the State Council. Accordingly, there is no different procedure applicable to domestic cases involving foreign companies as regards administrative penalties.

Article 21 of the revised Implementing Regulations of Copyright Law provides that the use in accordance with the Copyright Law of a published work without permission from copyright owners shall not conflict with a normal exploitation of the work and shall not unreasonably prejudice the legitimate interests of the copyright owner. This provision is in conformity with the renowned "three-step standard of examination" enshrined in the Berne Convention and the TRIPS Agreement. In the enforcement of the Copyright Law, the application of either the "reasonable exploitation" or the "legitimate statutory licensing" shall not be in violation with the above-mentioned provision.

2. Patents

The consultation process provided for in Article 57 of the Patent Law of the People's Republic of China is optional. It is neither mandatory nor a prerequisite for instituting legal proceedings in the court. It is our understanding that consultation before taking legal actions or going for dispute settlement out of court is a regular practice to settle disputes in most countries.

According to Article 10 of the Patent Law of the People's Republic of China, where Chinese entities or individuals intend to assign their right to apply for patent or patent right to foreigners, they must obtain the approval of the competent department concerned of the State Council. This does not and is not able to apply to foreigners assigning their right to apply for a patent or patent right to a Chinese entity or individuals or to foreigners. So there is no conflict between Article 10 of China's Patent Law and Article 3 of the TRIPS Agreement.

3. Trademarks

The requirement for foreigners to use a designated trademark agency is an international practice rather than something unique in China. Such practice is in full compliance with the requirement of the paragraph 3 of Article 2 of the Paris Convention and Article 3 of the TRIPS Agreement. The problem that "only some trademark agents can be used by foreign enterprise" no longer exists. From 1 January 2001, all trademark agencies legally established are entitled to deal with foreign business on trademarks. Moreover, foreigners who need to use an agent refer to those who are not domiciled or do not have industrial or commercial establishment in China.

According to the Trademark Law and its Implementing Regulations, the protection to well-known marks is applied equally to domestic and foreign right holders. China has provided a very high level of protection for foreign well-known marks such as IBM, ADIDAS, NIKE, just to mention a few. The information on a list of well-known trademarks and the website that provides that information⁴ are not accurate. I must clarify two points in this regard. Firstly, the list is simply a record of cases that the Trademark Office has dealt with. It does not mean that those not on the list are not protected as well-known marks. Secondly, the protection of well-known marks is specifically provided in the newly revised Trademark Law and its Implementing Regulations. The specific procedural rules on determination of the well-known marks are under revision. Where a dispute

⁴ This was referred to in question 11 on page 62.

arises, the well-known trademark owner may be enlisted by approaching either administrative or judiciary authorities for determination on whether his mark is well-known or not. Where a mark is so determined, the application of registration of the other party shall be rejected. The disputed registration shall be cancelled and the use of the disputed mark shall be prohibited.

4. Layout-designs of integrated circuits

The provisions of the Regulations on the Protection of Layout-Designs of Integrated Circuits are fully in conformity with the provisions in Section 6 of Part II of the TRIPS Agreement. If the discrete complies with the provisions of Article 2 and Article 4 of the Regulations, it can be protected through applying for registration of layout-designs under the Regulations. Where the discrete does not meet the requirements of the Regulations and thus can not be protected by the regulations, it is still possible to be protected as trade secrets under the Anti-Unfair Competition Law. In addition, if the technology involved in the discrete meets the requirements for applying for patent as provided for in the Patent Law, it may seek patent protection through applying for a patent.

5. Geographical Indications

In China, geographical indications are protected mainly under the system of trademark law and its implementing regulations. Articles 3, 16, 52 and 53 of the Trademark Law and the relevant provisions of the revised Implementing Regulations provide adequate protection for geographical indications required in paragraph 2 of Article 22 of the TRIPS Agreement. In addition, the Anti-Unfair Competition Law also provides protection for geographical indications.

6. Enforcement

In China, administrative authorities have the authority to impose sufficient penalties to prevent or deter further infringement. For instance, in accordance with Article 47 of the Copyright Law, copyright administration may impose administrative penalties on an infringer who also prejudices the public interests. Such penalties include: ordering the infringing act to be ceased; confiscating the unlawful income; confiscating or destroying the infringing copies; imposing a fine and confiscating the material, tools and instrument mainly used to produce infringing copies.

For serious offenders, the provisions provide sufficient legal basis for preventing or deterring further infringement through judicial procedures.

For infringement of trademarks and copyright, the offender shall be sentenced to a set term of imprisonment of not more than three years or criminal detention and concurrently or independently be sentenced to a fine. If the sum from sale is high, the offender shall be sentenced to a set term of imprisonment of no less than three years and not more than seven years and concurrently be sentenced to a fine. In accordance with Article 48 of the Copyright Law, an infringer has to pay compensation for damages pursuant to the actual loss of the right owner or to the unlawful income of the infringer. Where the actual loss of the right owner or the unlawful income of the infringer can not be determined, the court may decide on compensation not more than RMB 500,000. Generally speaking, the maximum of RMB 500,000 is per lawsuit.

For infringement of patents, the offender shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention and concurrently or independently be sentenced to a fine.

China's protection of intellectual property is fully in compliance with the requirements set forth in Article 61 of the TRIPS Agreement in respect of criminal law and criminal punishment. The degree of China's criminal punishment is one of the severest in the world.

These are the initial comments and answers to some of the questions raised at the meeting. For other questions we have either provided written answers before the meeting or will provide them as soon as possible after the meeting.

I strongly believe this review has been very helpful for China to further strengthen our enforcement of IPR protection. China has every reason to provide a high level of IPR protection since we have a growing number of local inventions and famous trademarks to be protected. Besides, whether we can attract more foreign investment to China and whether the foreign enterprises would like to bring in new technologies to China depends very much on the level of our protection of IPRs. Although this is the first year of China's membership, we have already seen a sharp increase in the inflow of foreign investment which demonstrates the great determination of the Chinese Government to protect IPRs and the progress we have achieved so far in this field.

II. REPLIES TO QUESTIONS POSED BY AUSTRALIA

A. TRADEMARKS AND GEOGRAPHICAL INDICATIONS

1. What legislation does China have in place to implement protection of geographical indications as required by Articles 22 and 23 of the TRIPS Agreement?

The legislation in China implementing the protection of geographical indications as required by Articles 22 and 23 of the TRIPS Agreement is the Trademark Law of the People's Republic of China. In addition, Anti-Unfair Competition Law of the People's Republic of China also contains provisions protecting geographical indications.

2. How are geographical indications defined under the relevant legislation?

There is a definition of geographical indications in Article 16 of the Trademark Law. It reads: geographical indications mentioned in the preceding paragraph are indications which identify a good as originating in a region, where a given quality, reputation or other characteristic of the goods is essentially attributable to its natural or human factors.

3. Does China provide protection for geographical indications from other countries?

Yes, China does provide protection for geographical indications from other countries.

4. How many geographical indications are currently recognised by China, and how many proposed geographical indications are currently being considered for recognition by China?

There are 57 geographical indications currently recognized in the form of geographical origin certification marks under the Trademark Law and its Implementing Regulations. Another 43 applications are under examination. Since whether a geographical indication shall be protected or not is determined only after examination, it can not be determined in advance how many should be protected.

5. Does China's legislation provide a mechanism to adjudicate between competing claims for recognition of a particular geographical indication?

The trademark opposition, cancellation, review and adjudication procedure and judicial procedure can be used to adjudicate between competing claims for recognition of a particular geographical indication.

6. How does China's trademark legislation define a trademark? Are letters, numbers, shapes and colors eligible for registration as trademarks, as required by Article 15 of the TRIPS Agreement?

Article 8 of the Trademark Law defines a trademark as follows: any visual sign capable of distinguishing the goods or services of one natural person, legal person or any other organization from those of others, including words, devices, letters, numeral, three-dimensional symbols, combinations of colours or the combination of the said elements may be applied for the registration of a trademark. Therefore, letters, numbers, shapes and colours, as required by Article 15 of the TRIPS Agreement, are eligible for registration as trademarks in China.

7. How does China meet the obligations of Article 21 of the TRIPS agreement concerning the licensing and assignment of trademarks?

Articles 39 and 40 of the Trademark Law provide for the licensing and assignment of trademarks. These articles are in full compliance with Article 21 of the TRIPS Agreement.

B. COPYRIGHT

8. How does China meet the obligations of Article 14 of the TRIPS Agreement concerning the protection of performers, producers of phonograms and broadcasting organizations?

China meets the obligations of Article 14 of the TRIPS Agreement concerning related rights through Articles 10.1 (11), 37.1, 41.1 and 44.1 of its Copyright Law.

9. What procedures are available to a person seeking to enforce his or her copyright?

- (a) What remedies are available to a person whose copyright has been infringed?**
- (b) If awards of damages are available, how are the amounts of damages assessed?**
- (c) If monetary fines are imposed on copyright infringers, how is the amount of the fine assessed?**

In China, civil, administrative and criminal procedures are all available to any person seeking to enforce his or her copyright.

- (a)** A person whose copyright is infringed may institute proceedings in a people's court to require the infringer to cease the infringing act, eliminate the effects of the act, make an apology and pay compensation for damages. He or she may also request the copyright administration department to settle the dispute by mediation. Where an infringing act also prejudices the public interests, the copyright administration department may, at the request of the copyright owner or in the light of its authority, order the infringing act to be ceased, confiscate unlawful income, confiscate or

destroy the infringing copies, and impose a fine. In case of serious circumstance, the copyright administration department may also confiscate the material, tools and instrument mainly used to produce infringing copies. If the infringing act constitutes a crime as provided for in Article 217 or 218 of the Criminal Law of the People's Republic of China, criminal liability will be imposed on the infringer either through private prosecution or public prosecution by the prosecutor. In addition, when infringing copies are imported or exported, the copyright owner may, according to the Regulations on the Customs Protection of Intellectual Property, request the Customs to prevent the infringing copies from being imported or exported.

- (b) According to Article 48 of the Copyright Law of the People's Republic of China, an infringer has to pay compensation for damages pursuant to the actual loss of the right owner or to the unlawful income of the infringer. The compensation is supposed to include the reasonable expenses that the right owner has paid for preventing the infringement. Where the actual loss of the right owner or the unlawful income of the infringer can not be determined, the people's court may decide a compensation not more than RMB 500,000.

- (c) Article 36 of the revised Implementing Regulations of the Copyright Law provides:

"[w]here anyone commits any infringing act as mentioned in Article 47 of the Copyright Law and the act constitutes a prejudice of the public interests, the copyright administration authorities may impose a fine of three times as much as the amount of illegal business value. In case of difficulty in calculating the amount of illegal business value, the copyright administration department may impose a fine not more than 100,000 yuan in RMB."

Copyright administration authorities will determine the amount of a fine depending on the infringement circumstances, such as the fault of the infringer, length of infringing duration, extent of infringing act, etc.

C. BIOTECHNOLOGY

10. What intellectual property protection is available for biotechnology inventions? Does the People's Republic of China exclude from patentability any of the items listed in Article 27.3 of the TRIPS Agreement?

According to the Patent Law of the People's Republic of China, except for subject matters which are referred to in Article 25 of the Patent Law of the People's Republic of China (for example, animal and plant varieties, but not including processes used in producing animal and plant varieties, and the methods for the diagnosis or for the treatment of diseases etc.), other inventions, including biotechnology invention of all kinds, are all eligible for applying for patents, so long as they possess novelty, inventiveness and practical applicability, and meet other requirements prescribed by the Patent Law of the People's Republic of China.

It should also be noted that, new plant varieties can be protected under Regulations on the Protection of New Varieties of Plants, which entered into force on 1 October 1997.

III. REPLY TO QUESTION POSED BY CANADA

1. What recourse do right-holders have in respect of wilful trademark counterfeiting or copyright piracy on a commercial scale, as required by Article 61 of the TRIPS Agreement?

Please refer to the answer to question 25 from Japan.

IV. REPLIES TO QUESTIONS POSED BY THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES

A. GENERAL PROVISIONS

1. Please state precisely when the relevant laws, regulations and measures relating to the implementation of the TRIPS Agreement would be notified to the WTO and thus be made available to all Members. The present analysis is based on unofficial translations of laws and regulations, or in some cases mere draft versions of them.

To implement the TRIPS Agreement, we have already completed the enactment and amendment of IPR-related laws and regulations. Relevant laws, regulations and measures in China relating to the implementation of the TRIPS Agreement have been notified to WTO in July, with which China's obligation on notification under Article 63.2 of the TRIPS Agreement is fulfilled.

2. Please confirm that Chinese IPR laws treat all foreigners in accordance with the principle of national treatment as set forth in Article 3 of the TRIPS Agreement. More precisely, please confirm that copyright enforcement actions by local copyright bureaux involving foreign right-holders no longer require clearance by the National Copyright Administration in Beijing.

The revised Implementing Regulations of the Copyright Law of the People's Republic of China has deleted the provision which designated the copyright administration department under the State Council (the National Copyright Administration of China) to investigate and deal with infringing acts involving foreign right owners taking place in the territory of China. After the revised Implementing Regulations enters into force, all local copyright administration departments may investigate and deal with all infringing acts (including those involving foreign right owners) taking place in its own administrative area, without the necessity of requiring clearance by the copyright administration department under the State Council.

3. Please state whether your IP legislation includes measures to protect public health and nutrition, and to promote the public interest in sectors of vital importance to your socio-economic and technological development as mentioned under Article 8 of the TRIPS Agreement. If yes, please describe these measures and explain how such measures are consistent with the provisions of the TRIPS Agreement.

The Patent Law, the Trademark Law, the Copyright Law and their Implementing Rules (or Implementing Regulations) contain relevant provisions to protect public health and nutrition, and to promote the public interest in sectors of vital importance to socio-economic and technological development. All these provisions are in compliance with the TRIPS Agreement.

Article 5 of the Patent Law stipulates that:

"No patent right shall be granted for any invention-creation that is contrary to the laws of the State or social morality or that is detrimental to public interests."

Article 49 of the Patent Law clarified a compulsory licence where the public interest so requires. Article 9 of the Implementing Rules of the Patent Law gave a definition to the meaning of "the invention-creation that is contrary to the laws of the state." Article 72 of the Implementing Rules of the Patent Law defined the conditions for granting a compulsory licence. These provisions are all in compliance with Articles 27 and 31 of the TRIPS Agreement.

Article 6 of the Trademark Law provided for the mandatory registration of a trademark. Article 4 of the Implementing Regulations of the Trademark Law defined "the goods that must bear a registered trademark" as "the goods that must bear a registered trademark according to the State laws and regulations." These provisions meet the requirements of the TRIPS Agreement.

Items (3), (4), (5), (6), (7), (8), (9), (11) and (12) of paragraph 1 of Article 22 of the Copyright Law stipulated fair use of a work for the public interests. Article 23, paragraph 2 of Article 42 and Article 43 stipulated statutory licence to use works or phonogram. These provisions meet the requirement of Article 13 of the TRIPS Agreement.

4. China is a signatory to many international intellectual property agreements. Please state whether the Chinese Government also intends to join the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

Relevant Chinese authorities are presently studying the content of the above-mentioned two treaties.

B. COPYRIGHT AND RELATED RIGHTS

5. Please state how your legislation grants the retroactive protection provided pursuant to Article 18 of the Berne Convention (the obligation of which derives from Article 9 of the TRIPS Agreement) and Article 14.6 of the TRIPS Agreement.

Article 59 of the revised Copyright Law of the People's Republic of China provides that:

"The rights of copyright owners, publishers, performers, producers of sound recordings and video recordings, radio stations and television stations as provided for in this Law, of which the term of protection specified in this law has not yet expired on the date of this Law's entry into force, shall be protected in accordance with this Law."

This provision is consistent with Article 18 of the Berne Convention and with Article 14.6 of the TRIPS Agreement.

6. Please state where your legislation provides exceptions and limitations to copyright and related rights, how these exceptions and limitations comply with the "three-step" test in Article 9.2 of the Berne Convention and with Article 13 of the TRIPS Agreement.

Articles 22, 23, 32.2, 39.3, 42.2 and 43 of the revised Copyright Law provide for exceptions and limitations to copyright and related rights respectively. Article 21 of the revised Implementing Regulations of the Copyright Law also provides that:

"The use in accordance with the Copyright Law of a published work without permission from copyright owners shall not conflict with a normal exploitation of the work and shall not unreasonably prejudice the legitimate interests of the copyright owner."

All of the above-mentioned provisions concerning exceptions and limitations are consistent with Article 9.2 of the Berne Convention and Article 13 of the TRIPS Agreement.

7. Article 47 of the revised Chinese Copyright Law (which came into effect as of 27 October 2001, hereafter "new Copyright Law") states that if an infringement constitutes a criminal offence, criminal liability shall be pursued according to the Criminal Law. Does this mean that infringement will be prosecuted at the initiative of the public prosecutor, or does the copyright holder have to file an application?

Where an infringing act constitutes a crime provided for in Article 217 or 218 of the Criminal Law of the People's Republic of China, the prosecutor may institute a public prosecution pursuant to law, without the necessity of application by the copyright owner.

8. Since the Criminal Law of China only contains two articles that relate to criminal penalties for copyright offenders, these articles cannot cover all kinds of criminal copyright offences listed in Article 47 of the new Copyright Law. Under which circumstances will an infringement be considered a criminal offence? Does the Government of China intend to modify its Criminal Law in order to define more specifically criminal copyright offences?

The provisions "Where the act constitutes a crime, the person who commits the act shall be imposed upon criminal liability in accordance with the law" of Article 47 of the Copyright Law mean that the criminal liability shall be investigated according to the Criminal Law instead of the Copyright Law. Anyone who commits an infringing act provided for in Article 47 of the Copyright Law is subject to civil liabilities. He or she may also be investigated and punished by the copyright administration department if the infringing act also prejudices the public interests. Moreover, he or she will be invoked criminal liabilities if the act constitutes a crime. As to the circumstances under which an infringement will be considered a criminal offence, please refer to the answer to question 25 from Japan.

According to the Constitution of the People's Republic of China, the Criminal Law can only be enacted or amended by the National People's Congress (NPC). Consequently, it is a matter of the NPC to determine whether the Criminal Law should be amended pursuant to concrete conditions of the social life.

9. Under the new Copyright Law, copyright owners may apply to the People's Court for preliminary injunctions and property preservation. The procedure foresees that the right holder should prove his ownership. How should proof of such ownership be provided? How is Article 15(1) of the Berne Convention complied with?

Article 49 of the Copyright Law provides that "[a] copyright owner or an owner of right related to copyright who can present evidence to prove that another is committing, or is about to commit, an infringement which, if not being prevented promptly, is likely to cause irreparable harm to him, may, before instituting proceedings, apply to a people's court for an order of desisting the relevant act and for measures of property preservation."

A people's court which deals with the application provided for in the preceding paragraph shall apply the provisions in Articles 93 to 96 and Article 99 of the Civil Procedure Law of the People's Republic of China.

Article 11.4 of the Copyright Law also provides that "[t]he citizen, legal entity or other body whose name is mentioned in connection with a work shall, in the absence of proof to the contrary, be deemed to be the author of the work."

According to the above-mentioned provisions, if there is no proof to the contrary, the name of a right owner that is mentioned in connection with a work may prove his ownership in applying to the people's court for preliminary injunctions and property preservation.

The above-mentioned provisions are in compliance with Article 15(1) of the Berne Convention and the TRIPS Agreement.

10. In conformity with Article 45.2 of the TRIPS Agreement, Article 48 of the new Copyright Law provides for the possibility of applying "Statutory damages". The upper limit set in the new Copyright Law is RMB 500,000. Which are the criteria that are applied to determine the amount of the compensation (i.e. whether it is RMB 500,000 or less)? Please specify whether the ceiling set for statutory damages is per lawsuit or per piece of the infringed copyright work.

In accordance with Article 48 of the Copyright Law, an infringer has to pay compensation for damages pursuant to the actual loss of the right owner or to the unlawful income of the infringer. The compensation is supposed to include the reasonable expenses that the right owner has paid for preventing the infringement. Where the actual loss of the right owner or the unlawful income of the infringer can not be determined, the people's court may decide on a compensation not more than RMB 500,000. As for the specific amount of the compensation in respect of each case, the people's court will decide within the limit provided for in the Law (not more than RMB 500,000), depending on the infringement circumstances, such as fault of the infringer, length of infringing duration, extent of infringing act, etc.

Generally speaking, the maximum of RMB 500,000 is per lawsuit.

11. Please explain how your legislation deals with copyright piracy and, in particular, with material made available, without authorization of the right owner, over the Internet.

Chapter V of the Copyright Law specifically provides for "legal liability and enforcement measures", which contains Articles 46 to 52 concerning legal liability and enforcement measures on copyright infringement. In case of infringing copies being imported or exported, the copyright owner may request the customs to prevent the infringing copies from importing or exporting according to the Regulations on the Customs Protection of Intellectual Property Rights. In case where the infringing act constitutes a crime as provided for in Article 217 or 218 of the Criminal Law of the People's Republic of China, the private prosecution by the copyright owner or the public prosecution by the prosecutor may lead to imposition of criminal liability on the infringer.

In accordance with the provisions of Article 10.1(12) of the Copyright Law, a work may not be communicated to the public over the Internet without the permission of the copyright owner. Article 47 of the Copyright Law is also applicable to the communication of works to the public through information network without the permission of the copyright owners. Furthermore, the State Council will consider to establishing regulations on the protection of the right of communication through information network in respect to specific copyright matters.

C. TRADEMARKS

12. Please explain whether or not your trademark registration authority will refuse a trademark application if it contains a geographical indication. Please explain how the new

Trademark Law of the People's Republic of China (hereafter "new Trademark Law"), which took effect on 1 December 2001, implements Article 23.2 of the TRIPS Agreement.

Under the new Trademark Law, Articles 16 and 28 provide that the Trademark Office, i.e. the trademark registration authority in China, shall, ex officio, refuse a trademark application if it contains a geographical indication. The requirement in paragraph 2 of Article 23 of the TRIPS Agreement has been fully met in Chinese trademark legislation in that the Law permits both the Trademark Office to act ex officio and the interested parties to request the Trademark Office to act under Article 30 or Article 41.

13. Article 13 of the new Trademark Law provides protection to a well-known mark even if it is not registered in China. Please explain whether, in order to benefit from protection under the Law, a well-known mark has to be used in the People's Republic of China or simply known in that territory. Article 14 of the new Trademark Law mentions that, in order to determine a well-known mark, duration of use should be taken into consideration. Does this refer to use outside the Chinese borders as well?

The protection of a well-known trademark in China does not necessarily require the mark be actually used in China. A mark may enjoy the protection of a well-known mark under the Law only if it is well known by the public in the territory of China. Article 14 of the new Trademark Law provides that when determining a well-known trademark, the duration of the use of the mark shall be taken into consideration, which includes use outside of the Chinese territory.

14. The new Trademark Law does not seem to accommodate Article 6bis(1) of the Paris Convention, which extends protection of well-known trademarks to cases in which only "an essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith". Please clarify.

No, the provision in Article 14 of the new Trademark Law is not, in terms of verbal expression, exactly identical with Article 6bis of the Paris Convention. But this does not prevent the completely identical degree of protections of the two articles.

15. The new Trademark Law gives the parties an opportunity for judicial review of final administrative decisions. What kind of chamber will handle such cases? China has created specific IPR courts with specialized judges. Since the issues involved in decisions taken by the Trademark Review and Adjudication Board are very technical, even if they are administrative decisions, such decisions should be reviewed by a judicial body specialized in Intellectual Property matters.

Please refer to question 38 and to the answer to question 24 from the United States.

16. The new Law does not appear to cover "offer for sale". The expression "in the course of trade" (Article 16 of the TRIPS Agreement) is generally agreed to cover "offer for sale". Please clarify. Contrary to the Trademark Law, the Chinese Patent Law does incorporate in its Article 11 "offers for sale".

No, there is no provision on "offer for sale" in the Trademark Law as in the Patent Law. This is because the act of "offer for sale" can be curbed under relevant provisions of the Trademark Law and its Implementing Rules. To "offer for sale", a party must have illegally used other party's trademark in the process of trade, (even if he does not use the mark directly on the goods), which will constitute an infringement as provided for in Article 52 of the Trademark Law and shall be punished accordingly.

17. Please explain whether the new Trademark Law provides protection for sound marks and for olfactory (smell) marks as Article 15.1 of the TRIPS Agreement appears to permit. Can the applicant, in relation to a sign which is not inherently distinctive, invoke acquired distinctiveness through use (second to last recital Article 15.1 of the TRIPS Agreement)?

The new Trademark Law does not protect sound marks or smell marks, which is consistent with paragraph 1 of Article 15 of the TRIPS Agreement. If a sign is not inherently distinctive but has acquired distinctiveness through use, it can also be registered under Article 11 of the Trademark Law.

18. Please explain how Article 22.1 of the new Trademark Law is compatible with Article 19.2 of the TRIPS Agreement. Will use of a trademark by a person other than the owner of the trademark only be recognized as "use" in the sense of Article 19.2 of the TRIPS Agreement when the latter gave a right of exploitation under a licensing contract?

It is impossible to explain how Article 22.1 of the new Trademark Law is compatible with Article 19.2 of the TRIPS Agreement, simply because the two Articles do not match with each other, dealing with different issues. Regarding the second part of the question, the use of a mark by another party authorized by the registrant of the mark shall be deemed as the use of the mark by the registrant.

19. Article 41 of the new Trademark Law provides that, on request, the registration may be cancelled after an uninterrupted period of at least five years of non-use. Please explain whether resumption of use after a period of more than five years of non-use, may lead to a revival of the exclusive rights.

This question is not accurate. The provision on cancellation of the registration of a mark due to its non-use for three (not five) consecutive years lies in Article 44, while Article 41 provides the adjudication on disputes. If the owner of a registered trademark has begun to resume the use of the mark the day before another party files an application for cancellation of three year non-use, the registration shall be maintained.

20. Article 30 of the new Trademark Law provides for a term of 3 months to file an opposition. Article 17 of the implementing regulations ("IR") specifies that the time to file a reply to an opposition is only 30 days from receipt of the notification of opposition. Experience shows that such a period is extremely short, especially when the applicant is a foreign company and even more when the application was filed through WIPO (International Registrations). Would the Chinese Government, at least in cases where the applicant is a foreign company, consider prolonging this term to a minimum of two months?

The new Implementing Regulations still provides that the time to file a reply to an opposition is 30 days. However, it further specifies that after filing an opposition or a reply to an opposition with the Trademark Office, where any interested party needs to supplement any relevant evidence, he or she shall file the documents within 3 months from the date of filing the opposition or the reply.

21. Article 31 of the IR provides that once the trademark is registered the use of the symbol ® or its Chinese equivalent on the goods or packaging. This is somewhat unusual as it is normally up to the owner to decide whether to use the registration symbol or not.

The provision on the use of registration symbols in the new Implementing Regulations is not compulsory but rather optional. The term used is "may" instead of "shall".

D. GEOGRAPHICAL INDICATIONS

22. While there is a Chinese law establishing a specific system of geographical indication protection, it appears that geographical indications in China can also be indirectly protected via registration as a Collective or Certification mark. China, however, needs to provide adequate protection to geographical indications in conformity with Section 3 of Part II of the TRIPS Agreement. It is important that China defines the scope of protection for GIs and that it provides proper protection through a uniform registration procedure.

In China, at the level of law adopted by the People's Congress and the regulations promulgated by the State Council, geographical indications are protected mainly under the Trade Mark Law and the Anti-Unfair Competition Law. There are explicit provisions in the Trademark Law that GIs will be protected as collective marks and certification marks. In addition, geographical indications can also seek protection under Anti-unfair Competition Law. With the provisions in these laws and regulations, China is able to provide adequate protection to geographical indications in conformity with Section 3 of Part II of the TRIPS Agreement.

23. Please give the definition of a geographical indication in Chinese legislation.

The definition under Article 16 of the Trademark Law reads "[t]he geographical indication mentioned in the preceding paragraph means indications which identify a good as originating in a region, where a given quality, reputation or other characteristic of the goods is essentially attributable to its natural or human factors".

24. Please describe and explain the provisions in Chinese legislation establishing a link, if any, between the characteristics of an indication and its geographical origin.

It can be seen from the above mentioned definition of a geographical indication under Article 16 of the Trademark Law that there must be some close relationship between a geographical indication and the geographical origin it indicates on the good, including natural or human factors. Otherwise, the sign shall not be regarded as a geographical indication.

25. Please describe how additional protection is granted by Chinese legislation to wines and spirits. Please mention other types of products, if any, which might be covered by such additional protection.

Articles 3, 28 and 52 of the Trademark Law can provide protection for wines and spirits as required in Article 23 of the TRIPS Agreement.

26. Please explain what use has been made in China of the exceptions under Article 24 of the TRIPS Agreement. Please provide examples of the use of the exceptions by courts, or lists of names considered as generic in your jurisdiction.

Paragraph 2 of Article 10 and Article 16 of the Trademark Law are related to the exceptions provided in Article 24 of the TRIPS Agreement.

27. Please explain how foreign geographical indications enjoy the protection prescribed by Articles 22 and 23 of the TRIPS Agreement. We understand that the State Administration for Quality Supervision and Inspection and Quarantine (AQSIQ) is responsible for the registration and protection of geographical indications in China. Can you please provide us with an overview of all the geographical indications that are currently protected in China?

Regulations on the Registration and Administration of Collective and Certification Marks was issued in 1994 by the State Administration for Industry and Commerce and geographical indications have been protected under the system of certification marks thereafter. The principle that geographical indications are protected in China under the system of collective and certification marks is further stated in the new Trademark Law, revised on 1 December 2001, and its Implementing Regulations. Therefore, owners of foreign geographical indications may enjoy the protection provided in Articles 22 and 23 of the TRIPS Agreement under the Trademark Law and its Implementing Regulations. To date, there are 57 registered geographical indications as certification marks, including three foreign ones.

E. INDUSTRIAL DESIGNS

28. Has the protection of textile designs been incorporated in the industrial design provisions of China's Patent Law? Apparently, textile designs could only be protected, under China's provisions on the implementation of the WIPO Copyright Treaty, as works of applied art.

It is mentioned in this question that textile designs could only be protected, under China's provisions on the implementation of the WIPO Copyright Treaty, as works of applied art. However, China has not acceded to the WIPO Copyright Treaty. Therefore there is not yet a legislation on the implementation of the WIPO Copyright Treaty in China with which textile designs can be protected as works of applied art.

According to the definitions prescribed in the Patent Law of the People's Republic of China and its Implementing Regulations, textile designs can be protected under the patent system. In fact, there are already a lot of textile designs being granted patent right in China.

F. PATENTS

29. Please explain how Article 5 of China's Patent Law complies with Article 27.2 of the TRIPS Agreement. Article 5 of China's Patent Law stipulates that inventions that violate laws of China or social morality or prejudice public interest would not be entitled to patent protection. How does this match with the wording used in Article 27.2 of the TRIPS Agreement, which specifies that Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect order public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law? Please also explain how the scope of Article 9 of the Implementing Regulation matches with the terms used under Article 27.2 of the TRIPS Agreement.

Please refer to the answer to question 20 from Japan.

30. Article 49 of China's Patent Law stipulates that compulsory licences may be granted exceptionally without the requirement that efforts were made to obtain authorization from the right holder. Please explain how this is compatible with Article 31(b) of the TRIPS Agreement where the obligation that efforts must be made to obtain authorization from the right holder prior to the granting of a compulsory licence can only be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use.

Article 31(b) of the TRIPS Agreement prescribes that efforts should be made to obtain authorization from the right holder prior to the granting of a compulsory licence. The same paragraph of the Article also clearly prescribes that these requirements may be waived by a Member in case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. Article 48 of the Patent Law provides exactly the same.

According to Article 49 of the Patent Law of the People's Republic of China, where national emergency or any extraordinary state of affairs occurs, or where public interest so requires, the patent administration department under the State Council may grant a compulsory licence. These are the so-called exceptional cases, provided by Article 31(b) of the TRIPS Agreement, in which the obligation to obtain authorization from the right holder prior to the grant of a compulsory licence can be waived. In other cases, under Article 48 and Article 52 of the Patent Law, efforts have to be made to obtain authorization from the right holder before granting a compulsory licence. We believe that the provisions of Article 49 of the Patent Law are in full conformity with Article 31(b) of the TRIPS Agreement.

31. Article 31(f) of the TRIPS Agreement stipulates that "use under a compulsory licence shall be authorized predominantly for the supply of the domestic market". Please describe how the Chinese Patent Law complies with this Article.

According to Paragraph 4 of Rule 72 of the Implementing Regulations of the Patent Law of the People's Republic of China, the decision of the patent administration department under the State Council granting a compulsory licence for exploitation shall limit the exploitation of the compulsory licence to be predominately for the supply of the domestic market. This provision of the Patent Law fully complies with Article 31(f) of the TRIPS Agreement.

32. Please describe how the Chinese Patent Law complies with Article 4(D) of the Paris Convention which states that when legalized documents need to be submitted, a reasonable term should be granted. The Chinese Patent Law requires that when Paris Convention priority is claimed the applicant has to submit the legalized documents at the moment the priority is claimed (Article 34 Implementing Regulation).

It seems that there is some misunderstanding on this issue. According to the question put to us, the Patent Law (Rule 34 of the Implementing Regulations) requires that when priority right under the Paris Convention is claimed, the applicant has to submit the legalized documents at the moment when the priority is claimed. However, the fact is that it is clearly provided in Article 30 of the Patent Law that any applicant who claims the right of priority shall make a written declaration when the application is filed, and submit, within three months, a copy of the patent application document which was first filed. Therefore, Rule 34 of the Implementing Regulations does not mean that legalized documents should be submitted at the moment when the priority is claimed. It prescribes that where an application is filed or the right of foreign priority is claimed by an applicant having no domicile or business office in China, the patent administration department under the State Council may, when it deems necessary, require the applicant to submit the documents such as a certificate concerning the nationality of the applicant.

Here, we would also like to quote the relevant provisions in the Paris Convention. Article 4(D)(1) of the Paris Convention provides that each country shall determine the latest date on which declaration of priority must be made. Article 4(D)(3) of the Paris Convention prescribes that the countries of the Union may require any person making a declaration of priority to produce a copy of the application at any time within three months of the filing of the subsequent application. Article 4(D)(5) of the Paris Convention prescribes that countries may require further proof after the declaration of priority.

Therefore it is obvious that the provisions in the Patent Law of the People's Republic of China and its Implementing Regulations on matters relating to right of priority complies fully with the Paris Convention.

G. PLANT VARIETY PROTECTION

33. In March 1997, the Chinese Government promulgated the Regulation on the Protection of New Plant Varieties (*sui generis* system as provided for by Article 27.3 of the TRIPS Agreement). Please describe how the protection of plant varieties is regulated by this Regulation. Please provide an English version of the text of the Regulation.

According to the Regulations on Protection of New Varieties of Plants, plant varieties are protected through granting of variety rights. The Regulations contain clear provisions regarding content of the variety right, conditions for granting such right, the examination and approval procedures thereof, transference and termination of variety right, and penalties.

English version of the Regulations has been notified to the TRIPS Council.

H. LAYOUT-DESIGNS (TOPOGRAPHIES) OF INTEGRATED CIRCUITS

34. Please describe how Chinese legislation complies with Articles 36 to 38 of the TRIPS Agreement. Please provide an English version of the text of the Regulation on the Protection of Layout-Designs of Integrated Circuits which became effective in October 2001.

"The Regulations on the Protection of Layout-Designs of Integrated Circuits" was promulgated on 2 April 2001, and came into effect on 1 October 2001. The provisions in the Regulations are in full conformity with Articles 36 to 38 of the TRIPS Agreement. Text of the Regulations, together with the English translation, has been notified to the TRIPS Council.

I. PROTECTION OF UNDISCLOSED INFORMATION

35. Please explain how Chinese legislation defines undisclosed information. Please explain how Article 39.3 of the TRIPS Agreement has been implemented in the legislation.

Currently, the concept of "undisclosed information" is difficult to define not only in China. In general, protection of undisclosed data of Article 39.3 of the TRIPS Agreement may include two steps. First, before the approval of marketing authorization, all undisclosed data submitted to the drug administration authorities in China shall not be disclosed. Second, after the approval of marketing authorization of a pharmaceutical product utilising new chemical entities, all undisclosed data shall not be disclosed, except for the product specifications for quality control and the insert sheet for patients and doctors. For more details, please refer to Article 35 of the Implementation Provisions of the Drug Administration Law of the People's Republic of China.

36. Please explain whether or not Chinese legislation grants a defined period of time for the protection of undisclosed information. If so, please specify it.

Please refer to the reply to question 37.

37. Please explain how China intends to protect undisclosed test data and other data submitted to Chinese authorities to obtain marketing approval for pharmaceuticals against unfair commercial use and disclosure.

According to Article 35 of the Implementation Provisions of the Drug Administration Law of the People's Republic of China, the government shall provide protection to the undisclosed test and other data, which was gathered and submitted by the manufacturer or distributor as required in support of applications for marketing approval of pharmaceutical products which utilised new chemical entities, against unfair commercial use. Within 6 years from the date on which a manufacturer or distributor was granted marketing approval of a pharmaceutical product utilised new chemical entities, if any second applicant applies for market authorization using the said undisclosed data without the permission of the prior applicant, the competent authority for drug administration shall not grant the market authorization, except for that the second applicant submits his own data. The competent authority for drug administration shall not disclose the said data, except where (a) the disclosure of such data was necessary to protect the public, or (b) steps were taken to ensure that the data are protected against unfair commercial use.

J. ENFORCEMENT

38. The new Trademark Law gives the parties an opportunity for judicial review of final administrative decisions. This is in conformity with Article 41.4 of the TRIPS Agreement. Please indicate whether decisions taken by the Trademark Review and Adjudication Board will also be open for judicial review by the specialized IPR courts.

Please refer to the answer to question 24 from the United States.

39. Please describe how your legislation authorizes judges to order production of evidence by the opposing party. Please give precise information on what measures are taken to ensure the protection of confidential information.

Relevant laws in China have following stipulations regarding obtaining evidence from defendant:

1. Defendant is clearly required to submit evidence, i.e., reversed burden of proof on defendant. For example, in a patent infringement case, if the subject patent claims a method, the alleged infringer has the burden of proof to provide evidence of the method it used. Under the circumstance of reversed burden of proof, if the obliged party does not fulfill its obligation, he or she will bear the consequences, such as losing the lawsuit.
2. It is stipulated in relevant laws in China that any party of a lawsuit may request preservation of evidence during litigation. The people's courts may also impose the preservation of evidence on its discretion. The Patent Law, the Trademark Law, the Copyright Law and relevant judicial interpretations also established provisional measures of preservation of evidence before filing a lawsuit. This is one of the measures to obtain evidence that are under the control of the defendant. (Please also refer to the reply to questions 6 and 7 from Switzerland).
3. Article 65 of the Civil Procedure Law of the People's Republic of China stipulates that the people's courts have the authority to investigate and collect evidence from the relevant organizations or individuals. In the judicial interpretation of "Provisions Regarding Evidences in Civil Litigation," the Supreme People's Court has ordered that the involved party may request the people's court to obtain evidence if the litigation involving national secrecy, trade secrets, or personal privacy. The people's courts have the discretion to order the involved parties to surrender the evidence, or initiate an investigation on and obtain evidence from the involved parties.

As to the confidential information, according to Article 120 of the Civil Procedure Law, cases involving business secrets shall not be tried publicly if the party involved so requires. Article 48 of the "Provisions Regarding Evidences in Civil Litigation" stipulated that for the evidence that involves national secrecy, trade secret, personal privacy, or other information that shall be kept confidential under relevant laws, these evidences shall not be examined in public trial. If some part of the content of the evidence is irrelevant to the subject lawsuit, the involved party may request the people's court conducting evidence examination only on the relevant part of the content of the evidence and not the irrelevant part thereof.

40. Please quote provisions of your legislation that authorize judges to order a defendant to desist from an infringement.

Please refer to the answers to questions 6 and 7 from Switzerland.

41. Please quote what provisions of your legislation authorize judges to order the payment of the right holder's expenses by the infringer.

Please refer to the answer to question 9 from Switzerland.

42. Please explain if and how judges have the authority to order that infringing goods are placed outside channels of commerce or destroyed.

Please refer to the answer to question 7 from Switzerland.

43. Please quote what provisions of your legislation authorize judges to indemnify a defendant in the event of abuse by the plaintiff.

According to the Civil Procedure Law, the Patent Law, the Trademark Law, the Copyright Law and relevant judicial interpretations of the Supreme People's Court, to the alleged infringement, people's courts may take measures of property preservation, interlocutory injunction before or during the litigation (advance execution), etc. To prevent damages to the alleged party that might be caused by abuse of the right in the above-mentioned measures, the relevant laws have the following stipulations.

For property preservation, Article 96 and Article 254 of the Civil Procedure Law stipulate that if an application for property preservation is wrongfully made, the applicant shall compensate the party against whom the application is made for any loss incurred from the property preservation.

For interlocutory injunction, Article 61 of the Patent Law, Article 57 of the Trademark Law, Article 49 of the Copyright Law and Rule 32 of the Regulations on Protection of Layout-Designs of Integrated Circuits clearly provide that the measure shall be adopted according to the above-mentioned Article 96 of the Civil Procedure Law.

For advance execution, Article 98 of the Civil Procedure Law stipulates that if the party applying for the advance execution loses the lawsuit, it shall compensate the person against whom the application is made for any losses incurred from the advance execution.

In addition, the relevant laws have adopted certain restrictive conditions for applying the above-mentioned measures, such as that the people's court may require the applicant to provide security. Also, about applying for property preservation before filing a lawsuit, it is stipulated that the applicant must provide security for such an application (Article 93 of the Civil Procedure Law).

44. Please identify the competent authorities in your jurisdiction who receive requests from right holders for an application to suspend the release of counterfeit goods by the customs authorities.

Article 6 of the Regulations on Customs Protection of Intellectual Property Rights provides that the holders of the intellectual property rights who pursue the protection from the Customs for their rights related to import or export shall record their rights with the Customs and file an application to the Customs for taking protective actions when they deem necessary. So, the Customs is the competent authority in China that receives the application to suspend the release of counterfeit goods.

45. Please describe how Articles 42 and 43 of the TRIPS Agreement have been implemented in the judicial rules of civil procedures. Do the fees for filing an infringement action still depend on the damages that are being requested? A foreign company must comply with various administrative requirements before a procedure can be lodged (for example the obligation to legalize powers of attorney and the obligation to provide "securities"). Please explain whether Chinese civil procedures grant equal protection to foreigners and Chinese nationals.

Relevant laws in China are fully in compliance with Articles 42 and 43 of the TRIPS Agreement and there are no contradictions. Court fees are still calculated on the basis of the total amount of the requested compensation. When a foreign company is going to initiate a lawsuit in a people's court in China, it must appoint Chinese lawyers if it needs lawyers as its agent ad litem. This is in conformity with international practices. In considering of the inconvenience in the aspects of documents delivery and communication in a lawsuit concerning foreign interests, in order to protect the legitimate right of the foreign party, the Civil Procedure Law does not impose a strict deadline for completing a lawsuit involving foreign interests. Even if the plaintiff of a lawsuit concerning foreign interests is a Chinese organization or individual, this principle also applies in order to protect the legitimate right of the foreign party. Therefore, the procedures of the Chinese civil litigation provide equal protection of the legitimate right of both Chinese and foreign parties. In comparison with Chinese party, a foreign party does not suffer any unequal limitation on rights.

46. Article 45 of the TRIPS Agreement stipulates that "the judicial authority shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury suffered". Please indicate how the Chinese civil judicial remedies comply with this TRIPS obligation. What shall be taken into consideration to calculate the amount of damages? Shall the infringer's profits, inventory and past activity be considered?

Please refer to the answer to question 9 from Switzerland.

47. China, when amending the Patent Law for the second time in 2000, introduced Article 61 which regulates provisional measures (in line with Article 46 of the TRIPS Agreement). Please clarify whether holders of intellectual property rights other than patents can also rely on a similar procedure. Are additional judicial interpretations that specify the procedure for the handling of such preliminary injunctions in IP-related litigation available?

Article 61 of the Patent Law of the People's Republic of China stipulated both measures of interlocutory injunction and property preservation before lawsuit. As a matter of fact, the measure of property preservation before law suit has already been adopted in the Civil Procedure Law and applies to all kinds of civil litigation, including intellectual property litigation. As for the interlocutory injunction, it has also been stipulated in the Trademark Law, the Copyright Law, and the Regulations on Protection of Layout-Design of Integrated Circuit. The Supreme People's Court has recently

issued corresponding judicial interpretations concerning the Patent Law and the Trademark Law, which include detailed rules on this matter. The judicial interpretation concerning the Copyright Law is under drafting.

48. Most IPR enforcement in China is carried out by administrative actions. Do administrative authorities have the authority to impose sufficient penalties to prevent or deter further infringement? Are cases involving repeat offenders and wilful piracy and counterfeiting referred to the appropriate authorities for initiation of criminal proceedings? Can China provide some relevant statistics of cases that have led to prosecution under the criminal law provisions?

Administrative authorities have the authority to impose sufficient penalties to prevent or deter further infringement. In accordance with Article 47 of the Copyright Law, copyright administration department may impose administrative penalties on an infringer who also prejudices the public interests. Such penalties include (i) ordering the infringing act to be ceased; (ii) confiscating the unlawful income; (iii) confiscating or destroying the infringing copies; (iv) imposing a fine; and (v) confiscating the material, tools and instrument mainly used to produce infringing copies. The provisions on these penalties together with civil and criminal liabilities may provide sufficient legal basis for preventing or deterring further infringement.

In accordance with the Administrative Penalties Law, the Copyright Law, and the Provisions on the Transfer of Susceptible Criminal Cases by Administrative Law Enforcement Bodies, a copyright administration department, in investigating and dealing with an infringement pursuant to law, should, if finding that the infringing act constitutes a crime, transfer the case to the judicial authorities for investigating criminal liabilities of the infringer.

Administrative authorities have the authority to impose sufficient penalties to prevent or deter further infringement. Paragraph 4 of Article 55 of the Trademark Law provides that the administrative authorities may check up such articles as related to the infringing act and may seal or take into custody articles which are proven to have infringed upon another party's exclusive right to use a registered trademark.

Article 54 provides that where a crime is suspected to have been committed, the case shall be promptly transferred to the judicial authorities to be dealt with in accordance with the law.

Cases involving repeated offenders and wilful piracy and counterfeiting referred to the appropriate authorities will be transferred to the relevant public procurator for the initiation of criminal proceedings if it constitutes a crime. (Please also refer to the answer to question 49)

As for the statistics of cases, please refer to the answer to question 27 from the United States.

49. As currently applied, the monetary thresholds for bringing a criminal case are very high and seldom met. Has the judicial authority made the necessary adjustment to lower those thresholds so as to permit effective action that would deter future piracy and counterfeiting?

Regarding the prosecution standard, on 9 July 2001, the State Council issued the Provisions on the Transfer of Susceptible Criminal Cases by Administrative Law Enforcement Bodies on 18 April 2001, the Supreme People's Procuratorate together with the Ministry of Public Security issued the "Standard for Criminal Prosecution in Economic Offenses". These are the two important regulations in perfecting the linkage between the administrative punishments and the criminal penalties. These two Regulations warrant in both substantive and procedural aspects that criminal offence on intellectual property rights will enter judicial procedure and receive criminal penalties. For

the criminal offence on intellectual property right prosecuted by the People's Procuratorate according to the standard for prosecution mentioned above, the alleged infringer shall be punished if the alleged infringement constitutes criminal offence as judged by the people's court through public trial with solid and sufficient evidence.

As for cases that has not reached the criteria set in the above two regulations, the infringed party can have the right of private prosecution (i.e. to initiate a criminal case by the infringed party in a people's court) or if public interest has been damaged, administrative penalties will be imposed on the infringing party.

In China, infringement of intellectual property rights on a minor scale is sanctioned as violation of administrative law, rather than criminal offence. The legal consequences of these minor scale violations are similar to that of police offence in the United States of America or misdemeanour in France.

50. The new Regulation of the People's Republic of China Governing Customs Protection of Intellectual Property Rights came into effect in October 1995. Concern as to the compatibility of this regulation with obligations under Articles 51 to 60 of the TRIPS Agreement were expressed in the past. The Chinese Government has committed itself to revise the Regulation to make it fully compliant with the relevant provisions of the TRIPS Agreement. When may we expect the Regulation to be revised?

The provisions of the Regulations Governing Customs Protection of Intellectual Property Rights have no contradictions with Articles 51 to 60 of the TRIPS Agreement. Chinese government has fully fulfilled the obligation in providing holders of intellectual property rights with procedures related to border measures, in compliance with the relevant provisions of the TRIPS Agreement (Articles 51 to 60).

51. Would the right holder and the consignee, in accordance with Article 57 of the TRIPS Agreement, have the right to inspect the goods that were seized (retained) by Customs?

Yes, the right holder and the consignee are permitted to inspect the suspected infringing goods according to the Customs Law and enforcement practice.

52. Article 14 of the Regulation of the People's Republic of China Governing Customs Protection of Intellectual Property Rights provides that the IP owner is to pay a security equal to the value of the goods concerned. Article 53 of the TRIPS Agreement stipulates however that "such security or equivalent assurance shall not unreasonably deter recourse to these procedures". Please explain how Article 14 of China's Custom Regulation complies with Article 53 of the TRIPS Agreement.

The requirement of deposit by right holders with a security which is equal to CIF value of the import goods or FOB value of the export goods is out of the following considerations:

Since the Customs authorities takes the obligation to protect various intellectual property rights (trademarks, copyrights and neighbouring rights, patents and Olympic signs) and such enforcement might be rather risky, sufficient security value is necessary to protect the appropriate rights and interests of the defendants and the Customs authorities to prevent the applicant from abusing its rights, which is the requirement of Articles 53 and 56 of the TRIPS Agreement.

In order to reduce the applicants' burden to deposit the security, Article 68 of the Customs Law of the People's Republic of China provides that the security and equivalent assurance might be

deposited in RMB, convertible foreign currencies, draft, cashier's check, check, bond, certificate of deposit and banking assurance and other financial instruments. Therefore, the Customs' requirements of security will not unreasonably deter the right holders' recourse to these procedures of border measures.

53. Article 56 of the TRIPS Agreement provides that the applicant may be ordered to pay appropriate compensation because of wrongful detention of goods. Please explain how Chinese legislation complies with this article of the TRIPS Agreement.

The Regulations Governing Customs Protection of Intellectual Property Rights provides that the Customs shall refund, upon effectiveness of the decisions made by the Customs authorities or competent authorities of the intellectual property rights or of the judgment or ruling made by the people's court, the securities which have been deposited by the parties concerned after deducting the expenses and the sum for compensating the possible losses suffered by the parties concerned due to the improper application lodged by the right holder.

In practice, the compensation should be made according to the judgment or ruling of the people's court and the Customs has obligation to provide assistance upon requirement.

54. Will the amended version of the Regulation of the People's Republic of China Governing Customs Protection of Intellectual Property Rights include ex officio actions as allowed by Article 58 of the TRIPS Agreement?

Article 18 of the present version of the Regulations Governing Customs Protection of Intellectual Property Rights provides that the Customs shall be entitled to seizing the goods, without application for such seizures from the right holders beforehand, suspected of infringing the rights recorded with the General Administration of Customs. So "ex-officio actions" are allowed and are a common practice in China.

V. REPLIES TO QUESTIONS POSED BY JAPAN

A. COPYRIGHT

1. Please explain exceptions or exemptions of the National Treatment and Most-Favoured-Nation Treatment under the Copyright and Neighbouring Rights Law of your country, if any, as permitted in Articles 3 and 4 of the TRIPS Agreement.

There are no exceptions or exemptions of the National Treatment and MFN Treatment in the Copyright Law of China.

2. Please indicate whether the forms of works under Article 3(1) to (9) of the Copyright Law would be a non-exclusive list. Please explain (i) the relevant laws or administrative regulations and (ii) specific form(s) of works about "other works as provided for in laws and administrative regulations" under Article 3 (9) of the Copyright Law.

With regard to protected works, the Copyright Law of China gives a non-exhaustive list as the Berne Convention does. Article 3 of the said Law enumerates common categories of creations to illustrate literary, artistic and scientific works, and the expression "other works as provided for in laws and administrative regulations" in (9) of this Article shows that the enumeration of the above-mentioned works is purely one of examples and not limitative.

The expression "other works as provided for in laws and administrative regulations" mainly refers to the new categories of works which are not known at present but possibly will emerge in the future with the development of science and technology.

3. Please explain exhaustively (i) the relevant law(s) and (ii) specific form(s) of works stipulated in the first sentence of Article 4 of the Copyright Law, which provides "Works the publication or distribution of which is prohibited by the law shall not be protected by this Law".

The first sentence of Article 4 of the Copyright Law refers to the works of which the publication or distribution is prohibited by such laws and regulations as the Criminal Law, the Regulations on the Administration of Publishing Industry, the Regulations on the Administration of Broadcasting, the Regulations on the Administration of Audiovisual Products, the Regulations on the Administration of films, and the Regulations on the Administration of Telecommunication.

4. Please provide the relevant regulation(s) and/or provisions for the protection of "expressions of folklore" for implementing Article 6 of the Copyright Law.

The regulation for protection of "expressions of folklore" is under study and drafting at present.

5. Please explain whether the right of distribution, stipulated in the Article 10.1(6) of the Copyright Law, would be exercised to the copy or reproductions of a work which have been put in circulation in foreign country.

The right of distribution provided for in Article 10.1(6) of the Copyright Law is subject to international exhaustion in respect of legal copies of a work once they have put into circulation (i.e. with the consent of the copyright owner).

6. Please indicate the detail of "other rights which shall be enjoyed by copyright owners" stipulated in the Article 10.1(17) of the Copyright Law.

"Other rights which shall be enjoyed by copyright owners" mainly refer to the rights which may be recognized to control new exploiting manner or form of works emerging with the development of new technology.

7. Please provide the relevant separate regulation(s) and/or provisions for the protection of "the right of communication through information network" for implementing Article 58 of the Copyright Law.

The regulations for the protection of "the right of communication through information network" are in course of study and drafting at present.

8. Please explain whether any kind of different procedures for between domestic cases and cases involving foreign companies would apply in the case of public copyright infringement.

In respect of administrative penalties, the revised Implementing Regulations of the Copyright Law of the People's Republic of China has deleted the provision which designated the copyright administration department under the State Council (the National Copyright Administration of China) to investigate and deal with infringing acts involving foreign right owners taking place in the territory of China. After the revised Implementing Regulations enters into force, each local copyright administration department may investigate and deal with all infringing acts (including those involving

foreign right owners) taking place in its own administrative area, without the necessity of requiring clearance by the copyright administration department under the State Council. Accordingly, there is no different procedure applicable to domestic cases and cases involving foreign companies as regards administrative penalties.

Additional question 1: According to Article 11*bis* of the Berne Convention, authors shall be granted the exclusive rights of broadcasting. However, Articles 42 and 43 of the Copyright Law do not grant such right. Please explain the consistency between Article 11*bis* of the Berne Convention and Articles 42 and 43 of the Copyright Law.

According to the Article 11*bis*(2) of the Berne Convention, the countries of the Union have the right to determine the conditions (...). The conditions in Articles 42 and 43 of the Copyright Law do belong to such case.

Additional question 2: Please explain the detailed criteria concerning "justifiable extent" stipulated in the Article 22(7) of the Copyright Law.

Article 21 of the newly revised Implementing Regulation to the Copyright Law of China imported the so called three-step test principle from Article 13 of the TRIPS Agreement. That means if the use is exceeded, it should be in conflict with Article 23 of Copyright Law.

Additional question 3: Concerning Article 22(9) of the Copyright Law, please explain the reason why the performances for non-profit-making purposes are not exempted from copyright.

Please see the response to additional question 2.

Additional question 4: Please explain why the meaning of "the copyright owner has declared that such exploitation is not permitted" stipulated in Article 39(3) of the Copyright Law.

Article 39(3) is a limitation to copyright, the so called "statutory licence". Normally the right-holder does not enjoy any prohibition right under the statutory licence provisions. But China's Copyright Law still gives the right-holder a prohibition right. Therefore, this Article is not in conflict with Article 5 of the Berne Convention, as incorporated in Article 9 of the TRIPS Agreement, which requires that the exercise and enjoyment of rights not be subject to any formality.

Additional question 5: Concerning Articles 42 and 43 of the Copyright law, in the absence of agreement about the remuneration, the court-like judicial procedure may be necessary in order to decide the amount of remuneration. Please explain which concerning government authority will play such role.

The Regulation of the remuneration paid by broadcasting organizations should be stipulated by the State Council.

Additional question 6: Concerning Articles 42 and 43 of the Copyright Law, please explain the progress of creating the remuneration table which broadcasting organizations' payment.

Please see the response to additional question 5.

Additional question 7: What is the difference between "a cinematographic work to which are assimilated works expressed by a process analogous to cinematography" in Article 10(7) and "video-recording" in Article 46(8)?

A cinematographic work is an object of copyright and a video-recording is an object of neighbouring rights.

Additional question 8: Concerning Article 41 of the Copyright Law, please explain the reason why phonogram producers are not granted the right of a single equitable remuneration for the use of phonograms for broadcasting.

Because Article 14 of the TRIPS Agreement does not provide such a right to phonogram producers.

Additional question 9: Concerning Article 50 of the Copyright Law, it seems to be impossible to "make a ruling within forty-eight hours". Please explain how these provisions work, referring to actual examples.

This Article is complied with under the Civil Procedure Law.

Additional question 10: Please explain the progress of new enforcement regulations of the Copyright Law. Please confirm that the Regulations concerning the implementation of international copyright treaties are abolished. Please explain the reasons why Chinese Government did not provide these regulations for the review.

After the Implementing Regulations of the Copyright Law came in effect, the provisions of other regulations which are in conflict with the new Implementing Regulations of the Copyright Law should be abolished. The Chinese Government has already provided these Regulation to the TRIPS Council.

Additional question 11: Please confirm it could be understood that judicial interpretation issued by the Supreme People's Court is based on the competence given to the Supreme People's Court and that the judicial interpretation is substantially rather amendment of laws and regulations than exercise of judicial power. It should be very much appreciated if the Chinese Government could provide us with the judicial interpretation.

The judicial interpretation is based on the competence given to the Supreme People's Court. We would like to inform you the related information after we get it.

Additional question 12: Please explain the progress of the Chinese Government's commitments at the time of accession to WTO, that "China's administrative authority would recommend that the judicial authority make necessary adjustments to lower the thresholds so as to address these concern." (WT/ACC/CHN/49, paragraph 304).

According to paragraph 305 of China's Working Party Report, the Chinese Government has already given the recommendation to revise the judicial interpretation for criminal copyright violations to the Supreme People's Court.

B. TRADEMARKS

9. According to Article 19 of the TRIPS Agreement, a trademark registration may be cancelled "after an uninterrupted period of at least three years of non-use". At the same time, however, this article stipulates "unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner" and thus it provides a safeguard.

Article 44(4) of the Trademark Law of your country, however, stipulates that a trademark is to be cancelled after an uninterrupted period of three years of non-use and no provision of safeguard is contained in this article. Please explain how the safeguard in the TRIPS Agreement can be secured under the Trademark Law.

As for the safeguard for the cancellation of a registration, the Implementing Regulations of the Trademark Law stipulates: "The trademark Office shall notify the trademark registrant and require the latter to furnish, within two months from receipt of the said notification, proof of use of the said trademark or otherwise fair reasons for non-use thereof...". "The fair reasons for non-use" here has exactly the effect of safeguard.

10. Please explain whether Article 18 of the Trademark Law is consistent with National Treatment in Article 3.1 of the TRIPS Agreement.

Please refer to the answer to question 8 from the United States.

11. Regarding the provisions on "well-known trademark" in Articles 13 and 14 of the Trademark Law, please explain any complementary criteria for the judgment of those provisions. Does your country have a plan to make a list of well-known trademarks owned by foreign companies? (The current list includes only Chinese companies' trademarks.) And we would like to confirm whether the requirements stipulated in Article 14 of the Trademark Law are limited only to the situation in your country or are applied to the situation in countries other than China, too.

Please refer to the answer to question 9 from the United States.

12. Article 6 of the Trademark Law can be interpreted that the trademark to be used on the goods predetermined by the law should be surely applied for the trademark registration and that such trademark may not be used on such goods prior to its registration. Does this Article have the problem in relation to the Article 20 of the TRIPS Agreement which stipulates that the commercial use of trademark should not be unjustifiably encumbered by special requirements?

Provisions of Article 6 of the Trademark Law do not belong to the situations stipulated in Article 20 of the TRIPS Agreement, in which "the use" means the use of a mark in the course of trade after its registration and its main purpose is to prevent unreasonable use in a special form or manner, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. Article 6 of our Trademark Law requires registered trademarks be used on certain particular goods, having nothing to do with the form or manner of their use after the marks are registered. Therefore, this kind of requirement is irrelevant to the stipulations in Article 20 of the TRIPS Agreement.

C. GEOGRAPHICAL INDICATIONS

13. Please explain how legislation of your country implements Article 22.2 of the TRIPS Agreement, regarding geographical indications.

In China, geographical indications are protected mainly under the system of trademark law and its implementing regulations. Articles 3, 16, 52 and 53 of the Trademark Law and the relevant provisions of the revised Implementing Regulations provide adequate protection for geographical indications required in paragraph 2 of Article 22 of the TRIPS Agreement. In addition, Anti-Unfair Competition Law also provides protection for geographical indications.

14. Please explain how legislation of your country implements Article 23.1 of the TRIPS Agreement, regarding Geographical Indications. In particular, please provide the specific products other than wine and spirits, if any, which are subject of similar protection as provided under the Article 23.1.

The relevant provisions in Trademark Law, such as Articles 3, 16, 28, 30, 41, 52 and 53 provide protection for geographical indications, including protection for wines and spirits as required by Article 23 of the TRIPS Agreement. These protections also apply to other products.

D. PATENTS

15. Under Article 19 of the Chinese Patent Law, foreign applicants are required to carry out procedures to obtain a patent right in the People's Republic of China through a patent attorney designated by the Chinese government. Please explain how this condition can be considered as being consistent with Article 3.1 of the TRIPS Agreement on National Treatment.

While Article 3.1 of the TRIPS Agreement provides for the principle of National Treatment, the said Article also provides that the principle of National Treatment is subject to the exceptions as already provided for in the Paris Convention, the Berne Convention, the Convention of Rome or the Treaty on Intellectual Property in Respect of Integrated Circuits. Article 2(3) of the Paris Convention reads: "The provisions of the laws of each of the countries of the Union relating to judicial and administrative procedure and to jurisdiction, and to the designation of an address for service or the appointment of an agent, which may be required by the laws on industrial property are expressly reserved". Secondly, it is international practice to require a foreign applicant, who has neither domicile nor real and effective industrial or commercial establishments in the territory of a country in which the patent application is filed, to appoint a representative to proceed before the patent office of the countries concerned. For instance, Article 8.1 of the Japanese Patent law provides that a resident abroad shall appoint a "patent administrator" who has his domicile or residence in Japan to proceed before the Japanese Office with respect to his patent. Therefore, it is our understanding that Article 19 of the Chinese Patent Law relating to the appointment of an agent is in full consistency with the provisions in the TRIPS Agreement.

16. Article 62.2 of the TRIPS Agreement stipulates that "Members shall ensure that the procedures for grant or registration" "permit the granting or registration of the right within a reasonable period of time..." How long does the procedure for grant or registration usually take in your country? Please discuss if the period of time is considered as a reasonable period of time. As regards legal actions, Article 41.2 of the TRIPS Agreement stipulates that "Procedures concerning the enforcement of intellectual property rights ... shall not ... entail ... unwarranted delays." The Civil Code of the People's Republic of China provides for certain time limits for lawsuit procedures. Please explain if such time limits are also applicable where interested parties are foreign nationals.

There are actually two issues in this question. One relates to whether there are time limits for the grant or registration of a patent in China. The other relates to whether time limits as provided for in the Civil Procedure Law of the People's Republic of China apply to parties in the lawsuit even if they are foreigners.

For the first question, we believe that TRIPS Agreement has made no specific time limits requirements for the grant or registration of patent right. So far as we know, few countries have made such time limits in their laws or regulations. The Chinese government has always attached great importance to the grant or issuance of patent right within a reasonable period of time. In Article 21 of

the Chinese Patent Law, it is provided that "The patent administration department under the State Council and its Patent Reexamination Board shall handle any patent application and patent-related request according to law and in conformity with the requirements for being objective, fair, correct and timely." We are confident that the time period of ours for the grant of patent right in China is reasonable.

For the second question, Article 5 of the Civil Procedure Law of the People's Republic of China stipulated that "The Aliens, stateless persons, foreign enterprises and organizations that bring suits or enter appearance in the people's courts shall have the same litigation rights and obligations as citizens, legal persons and other organizations of the People's Republic of China". Therefore, most of the time limits for civil procedures provided for in the Civil Procedure Law (not General Principles of the Civil Law) of the People's Republic of China generally apply to suits where parties concerned are foreign nationals. However, it should be noted that some time limits for lawsuits where all parties are residents in China do not apply to law suits which involve foreigners who live abroad as parties concerned. For instance, as an exception to Article 147 of the Civil Procedure Law of the People's Republic of China in which the time limits for appeal is 15 days for judgement and 10 days for order, Article 249 of the Civil Procedure Law provides clearly that the time limits for appeal is 30 days if an party of the suit has no domicile within the territory of China.

17. Article 57 of the Chinese Patent Law obliges that, where a conflict arises over a patent right, interested parties should discuss the matter with each other before seeking a remedy at the court or the governmental agency concerned. On the other hand, Article 41.2 of the TRIPS Agreement stipulates that "Procedures concerning the enforcement of intellectual property rights ... shall not be unnecessarily complicated ... or entail ... unwarranted delays." Please give us an explanation about the consistency between the said obligation in the Chinese Patent Law and the above provision of the TRIPS Agreement.

According to Article 57 of the Patent Law of the People's Republic of China, "Where a dispute arises as a result of the exploitation of a patent without the authorization of the patentee, that is, the infringement of the patent right of the patentee, it shall be settled through consultation by the parties". However, the Article continues to provide that "Where the parties are not willing to consult with each other or the consultation fails, the patentee or any interested party may institute legal proceeding in the people's court". Therefore, the consultation process provided for in Article 57 of the Patent Law of the People's Republic of China is optional. It is neither mandatory nor a prerequisite for instituting legal proceedings in the court. It is our understanding that consultation before taking legal actions or going for dispute settlement outside of court is a regular practice to settle legal disputes in most countries.

18. The Chinese Trademark Law and the Copyright Law stipulate provisions on procedures to preserve relevant evidences in the case of an infringement. Please explain how such procedures are ensured under the Patent Law in your country.

Although the procedure to preserve relevant evidences before legal proceedings is not explicitly provided for in the Patent Law of the People's Republic of China, Article 74 of the Civil Procedure Law of the People Republic of China provides that "Under circumstances where there is a likelihood that evidence may be destroyed or lost, or difficult to obtain later, the participants in the proceedings may apply to the people's court for preservation of the evidence. The people's court may also on its own initiative take measures to preserve such evidence". Furthermore, Article 16 of the "Provisions Concerning the Application of Laws Regarding the Suspension of the Infringement of Patent Rights Before Legal Proceeding are Instituted" issued by the Supreme People's Court provides that the people's court, upon the request of parties concerned, at the time of taking measures to suspend the infringement of patent rights, may adopt the preservation of evidences according to

Article 74 of the Civil Procedure Law of the People's Republic of China. Therefore, the interested parties in a patent infringement suit may request the people's courts to adopt preservation of evidences according to the provisions of the Civil Procedure Law of the People's Republic of China.

19. Please explain "new" (Article 27.1 of the TRIPS Agreement) in the Chinese Patent Law.

According to Article 22.2 of the Patent Law of the People's Republic of China, "Novelty means that, before the date of filing, no identical invention or utility model has been publicly disclosed in publications in the country or abroad or has been publicly used or made known to the public by any other means in the country, nor has any other person filed previously with the Patent Administration Department Under the State Council an application which described the identical invention or utility model and was published after the said date of filing". These provisions are in conformity with Article 27.1 of the TRIPS Agreement.

20. Article 5 of your Patent Law prescribes that no patent right shall be granted for any invention-creation that is contrary to the laws of the State. Please explain what kind of law comes under such "laws of the State" concretely. (Article 4^{quater} of the Paris Convention, which shall be applied *mutatis mutandis* by Article 2.1 of the TRIPS Agreement, prescribes that a patent is neither rejected nor invalidated by reason that the sale etc. of goods which is the subject of patent are restricted by the domestic laws and regulations.)

According to Article 5 of the Patent Law of the People's Republic of China, "No patent right shall be granted for any invention-creation that is contrary to the laws of the State or social morality or that is detrimental to public interest". In order to clarify what is meant by "invention-creation that is contrary to the laws of the State", it is stipulated in Rule 9 of the Implementing Regulations of the Patent Law of the People's Republic of China that "Any invention-creation that is contrary to the laws of the State referred to in Article 5 of the Patent Law shall not include the invention-creation merely because the exploitation of which is prohibited by the laws of the State". Therefore, with the explanation of Rule 9 of the Implementing Regulations, the provision of Article 5 of the Patent law of the People's Republic of China is in consistency with Article 27.2 of the TRIPS Agreement.

For instance, the Law on the Administration of Guns of the People's Republic of China prohibits the making or sale of guns without the permission of competent authorities. However, inventions relating to guns are eligible for applying and for being granted patent right.

21. Article 10 of Chinese Patent Law prescribes that "any assignment, by a Chinese entity or individual, of the right to apply for a patent, or of the patent right, to a foreigner must be approved by the competent department concerned of the State Council." Please explain whether applying this Article to the case foreigner is concerned does not conflict with the principle of the National Treatment in Article 3 of the TRIPS Agreement.

According to Article 10 of the Patent Law of the People's Republic of China, where Chinese entities or individuals intend to assign their right to apply for patent or patent right to foreigners, they must obtain the approval of the competent department concerned of the State Council. This restriction does not and is not able to apply to foreigners assigning their right to apply for a patent or patent right to Chinese entity or individuals, or to other foreigners. Therefore, we do not see that Article 10 of the Patent Law of the People's Republic of China conflicts with the principle of National Treatment as provided for in Article 3 of the TRIPS Agreement.

Besides, this provision is also in full conformity with Article 8 of the TRIPS Agreement which reads: "Members may, in formulating or amending their laws and regulations, adopt measures

necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement". And "Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology".

E. PROTECTION OF UNDISCLOSED INFORMATION

22. Please explain how legislation of your country implements Article 39.1 and 39.2 of the TRIPS Agreement. In particular, please indicate (i) titles of law and/or legislation and (ii) their provisions for the protection of undisclosed information under Article 39.2.

The laws and regulations implementing Article 39.2 of the TRIPS Agreement are Anti-unfair Competition Law of the People's Republic of China and Regulations against Infringement of Business Secrets. Relevant provisions are Article 10 of Anti-unfair Competition Law of the People's Republic of China and Article 2 and 3 of Regulations against Infringement of Business Secrets.

23. Please indicate the relevant legislation and/or provisions for implementing Article 39.3 of the TRIPS Agreement, regarding the test or other data submitted to the government for approving the marketing of pharmaceutical or of agricultural chemical products.

Please refer to the answer to question 22 from the United States.

F. ENFORCEMENT

24. Regarding disposal of counterfeit trademark goods in Articles 46 and 49 of the TRIPS Agreement, please cite the relevant provisions of your country's law and explain the operations.

According to Article 53 of the Trademark Law of the People's Republic of China, State Administration of Industry and Commerce of the People's Republic of China ("AIC") is in charge of investigation and dealing with the infringement of the exclusive right of trademark, including such infringement as counterfeiting trademark. In the event that AIC finds the existence of infringement, it is empowered to order the infringer to immediately stop the infringing act, to confiscate, destroy the infringing products and the facilities for producing the infringing products and forging the trademark. According to Article 134 of General Principles of the Civil Law of the People's Republic of China, the people's courts may also confiscate the products with counterfeit trademark. The AIC and the people's court may take the above measures at its own initiative.

25. Regarding Article 61 of the TRIPS Agreement, please explain the elements of criminal penalties on acts of infringement of intellectual property rights. Please explain whether penalties are consistent with Article 61 of the TRIPS Agreement, which requires remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity.

With regard to the elements of criminal penalties on acts of infringement of intellectual property rights, there are no general provisions in Criminal Law of the People's Republic of China. Criminal Law of the People's Republic of China now stipulates seven specific types of criminal acts regarding the infringement of intellectual property rights after its amendment in 1997.

- (i) Crimes of counterfeiting registered trademark (Article 213)

Manifestation of the acts: Using a trademark identical with another person's registered trademark on the same kind of goods without permission from the owner of the registered trademark.

Conviction standards: "Serious infringement" which usually refers to one of the following: considerable sum of production and distribution, considerable sum of illegal earning, considerable loss to the right owner, considerable amount of production, comparatively frequent counterfeiting, and long infringing history. Competent court has discretion based on the relevant facts of the case.

Punishment: If the infringement is grievous, the culprit shall be sentenced to a set term of imprisonment of not more than three years or criminal detention, and concurrently or independently be sentenced to a fine. If the infringement is outrageous, the culprit shall be sentenced to a set term of imprisonment of not less than three years and not more than seven years, and concurrently be sentenced to a fine.

(ii) Crimes of selling goods bearing counterfeited registered trademarks (Article 214)

Manifestation of the acts: Knowingly selling goods bearing counterfeited registered trademarks. "Knowingly" means knowing or ought to know.

Conviction standards: Considerable big sum of sale. The court normally refers to the conviction standards as provided in Article 140 of Criminal Law of the People's Republic of China for the crime of producing and selling fake products, that is, the sum obtained through sale amounts to not less than RMB 50,000.

Punishment: In case the sum from sale is relatively high, the culprit shall be sentenced to a set term of imprisonment of not more than three years or criminal detention, and concurrently or independently be sentenced to a fine. If the sum from sale is high, the culprit shall be sentenced to a set term of imprisonment of not less than three years and not more than seven years, and concurrently be sentenced to a fine.

(iii) Crime of producing and selling representations of registered trademarks without authorization from trademark owner (Article 215)

Manifestation of the acts: Forging or making without authorization representations of registered trademarks of another person or selling representations of registered trademarks which are forged or made without authorization. "Forging" hereof, means counterfeiting another person's registered trademark without permission from the owner of the registered trademark through copy, protracting, reprography, shooting, scan and the combination of the above methods. "Making without authorization" means printing the registered trademark without permission from the owner of the registered trademark. For example, keep on processing after the expiry of the consignment processing contract signed with the owner of the registered trademark.

Conviction standards: Serious circumstances. If the sum of the distribution is large, the amount of illegal gains is relatively huge, the loss caused by the offence of another person who enjoys the rights is heavy, the counterfeiting is comparatively frequent, and the time of the infringement act is long, the circumstance is serious. Competent court has discretion based on the relevant facts of the case.

Punishment: If the circumstances are grievous, the culprit shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention or public surveillance, and concurrently or independently be sentenced to a fine. If the circumstances are especially serious, the offender shall be sentenced to fixed-term imprisonment of not less than three years and not more than seven years, and concurrently be sentenced to a fine.

(iv) Crime of forging another person's patent (Article 216)

Manifestation of the acts: Forging another person's patent. According to Article 84 of the Implementing Regulations of the Patent Law of the People's Republic of China, any of the following categories of statuses shall be regarded as "forging another person's patent":

- (1) Labelling another person's patent number on the product and the package of the product which is made or distributed by himself without the permission;
- (2) Using another person's patent number in his own advertisement or the other public materials without permission and make other person mistake the concerned technology for another person's patent technology;
- (3) Using another person's patent number in the contract and make other person mistake the concerned technology for another person's patent technology;
- (4) Counterfeiting or fabricating another person's patent certificate, patent document of patent application document.

Conviction standards: Serious circumstances. If the sum of the distribution is large, the amount of illegal gains is relatively huge, the loss caused by the offence of another person who enjoys the rights is heavy, the counterfeiting is comparatively frequent, and the time of the infringement act is long, the circumstance is serious. Competent court has discretion based on the relevant facts of the case.

Punishment: If the circumstances are serious, the culprit shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention, and concurrently or independently be sentenced to a fine.

(v) Crime of infringing upon copyright (Article 217)

Manifestation of the acts: Any of the following actions who infringes upon copyright for the purpose of reaping profits:

- (1) Reproducing and distributing, without the permission of the copyright owner, his written works, musical works, cinematic works, television works, video works, computer software and other works;
- (2) Publishing a book of which another person has the exclusive publishing right;
- (3) Reproducing and distributing, without the permission of the phonogram or videogram producer, the phonogram or videogram produced by him;
- (4) Producing and selling a work of art bearing the forged signature of another person.

Conviction standards: The amount of illegal gains is relatively huge or there are other serious circumstances. Pursuant to the provisions in Article 2 of Interpretation of the Supreme People's Court Regarding the Detailed Application of Laws for Hearing Illegal Publication

Criminal Cases, "the illegal gains is relatively huge" means the amount of illegal gains of an individual is more than RMB 50,000, or the amount of illegal gains of a unit is more than RMB 200,000. Serious circumstances means (a) committing the copyright infringement acts listed in Article 217 of Criminal Law of the People's Republic of China within a period of two years from being held administrative liability or civil liability more than twice for infringement of copyright, or (b) the amount of illegal gains of an individual is more than RMB 200,000, or the amount of illegal gains of a unit is more than RMB 1,000,000, or (c) other acts which cause especially serious results.

Punishment: If the amount of illegal gains is relatively huge or other serious circumstances exist, the culprit shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention, and concurrently or independently be sentenced to a fine. If the amount of illegal gains is huge or other especially serious circumstances exist, the culprit shall be sentenced to a fixed-term imprisonment of not less than three years and not more than seven years, and concurrently be sentenced to a fine. Pursuant to the provisions in Article 2 of Interpretation of the Supreme People's Court Regarding the Detailed Application of Laws for Hearing Illegal Publication Criminal Cases, if the amount of illegal gains of an individual is more than RMB 200,000, and the amount of illegal gains of a unit is more than RMB 1,000,000, then "the illegal gains is huge". Other especially serious circumstances include (a) the amount of illegal gains of an individual is more than RMB 1,000,000, or the amount of illegal gains of a unit is more than RMB 5,000,000, or (b) other especially serious results exist.

(vi) Crime of selling infringing reproductions (Article 218)

Manifestation of the acts: Selling for the purpose of reaping profits reproductions which he well knows are infringing reproductions specified in Article 217 of the Criminal Law of the People's Republic of China. "Well knows" hereby means knowing or ought to know.

Conviction standards: The amount of illegal gains is huge. Pursuant to the provisions in Article 4 of the Interpretation of the Supreme People's Court Regarding the Detailed Application of Laws for Hearing Illegal Publication Criminal Cases, if the amount of illegal gains of an individual is more than RMB 100,000, and the amount of illegal gains of a unit is more than RMB 500,000, then "the illegal gains is huge".

Punishment: The culprit shall be sentenced to a fixed-term imprisonment of not more than three years or criminal detention, and a fine concurrently or independently.

(vii) Crime of infringing upon commercial secrets (Article 219)

Manifestation of the acts: Acquiring commercial secrets of another person who enjoys the rights by stealing, lure, force or other improper means; revealing, using or permitting other persons to use the commercial secrets of another person who enjoys the rights of the secrets by means specified in the preceding paragraph; or revealing, using or permitting other persons to use another person's commercial secrets which are held by him contrary to his promise or to the demands by the person who enjoys the rights involving protection of the commercial secrets. "Commercial secrets" mentioned in this Article refers to the practical technical information and management information which is unknown by the public and can bring economic profits to the person who enjoys the rights, and the person who enjoys the rights has taken measures to keep it secret. "The person who enjoys the rights" mentioned in this Article refers to the owner of a commercial secret or user of a commercial secret who is permitted by the owner of the commercial secret.

Conviction standards: Causes heavy losses to another person who enjoys the rights of the commercial secrets.

Punishment: If the offence causes another person who enjoys the rights of the commercial secrets to suffer heavy losses, the culprit shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention, and concurrently or independently be sentenced to a fine. If the offence causes especially serious consequences, the offender shall be sentenced to fixed-term imprisonment of not less than three years and not more than seven years, and concurrently be sentenced to a fine.

According to the provisions of Chinese laws and judicial interpretations, if any intellectual infringement crime mentioned above has violated other accusation, which requires more serious punishment in manners, methods or results, the culprit should be punished under more serious accusation. Therefore, some of the intellectual infringement crimes are not punished in accordance with the conviction standards for "intellectual infringement crimes" set from Articles 213 to 220 of the Criminal Law of the People's Republic of China, but are punished pursuant to the conviction standards for "producing, distributing forge commodity" set from Articles 140 to 150 of the Criminal Law of the People's Republic of China or the conviction standards for "carrying out illegal business activities" in Article 225 of the same law.

For example, in case a person produces and sells fake medicine with counterfeit trademark of another person's registered trademark on it, and this kind of fake medicine incurs a patient's death and the defendant does not have licence for medicine management, the act of the person hereinbefore has constructed the crime of counterfeiting registered trademark, the crime of producing, distributing fake medicine, and the crime of carrying out illegal business activities. Competent court usually handles this kind of crime pursuant to the principle of punishment under more serious accusation. According to provisions set in Article 141 of the Criminal Law of the People's Republic of China, if the offence causes death of person or any other especially serious harm to human health, the offender shall be sentenced to fixed-term imprisonment of not less than ten years, life imprisonment or death, and concurrently be sentenced to a fine of not less than half of the sum obtained through sale and not more than twice of that or confiscation of property. Pursuant to the provisions in Article 213 of the Criminal Law of the People's Republic of China, whoever uses a trademark identical with another person's registered trademark on the same kind of goods without permission from the owner of the registered trademark shall, if the circumstances are especially serious, be sentenced to fixed-term imprisonment of not less than three years and not more than seven years, and concurrently be sentenced to a fine. According to the provisions set in Article 225 of the Criminal Law of the People's Republic of China, any of the following categories of persons who, in violation of the state's stipulations, engages in illegal business activities and disturbs the market order shall, if the circumstances are especially serious, be sentenced to fixed-term imprisonment of not less than five years, and concurrently be sentenced to a fine of not less than the amount of illegal gains and not more than five times of the sum or confiscation of property. Obviously, since the punishment for the crime of producing and distributing fake medicine is more serious, the court convicts the defendant of the crime hereinbefore in order to follow the principle of suiting punishment to crime.

In addition, to the repeated intellectual property infringement acts that have not been dealt with, the amount of the sale of or the value of the goods of each infringing act should be accumulated.

In conclusion, with regard to China's protection of intellectual property, it is fully in compliance with the requirements set forth in Article 61 of the TRIPS Agreement in respect of

criminal law and criminal punishment. According to our knowledge, the degree of China's criminal punishment is one of the most serious in the world.

26. Please cite administrative organizations related enforcement and explain the function of each organization. (Please discuss if such system is unnecessarily complicated in Article 41.2 of the TRIPS Agreement.)

At present, different government bodies are in charge of enforcement of different IPR-related laws and administrative regulations. The State Intellectual Property Office is in charge of the protection of patent right and exclusive right to layout-designs of integrated circuits. The State Administration for Industry and Commerce and its Trademark Office are in charge of the protection of exclusive right to use registered trademark. The National Copyright Administration is in charge of copyright protection. The State Drug Administration is in charge of the administrative protection of medicines (pharmacy). The State Economic and Trade Commission is in charge of the administrative protection of agriculture-related chemicals. The Ministry of Agriculture and the State Forestry Administration are in charge of the protection of new varieties of plants. The General Administration of Customs is in charge of the border protection of intellectual property rights. The State Administration for Industry and Commerce is in charge of the enforcement of the laws against unfair competition, including the protection of trade secret. The General Administration for Quality Supervision, Inspection and Quarantine and the State Administration for Industry and Commerce are in charge of striking counterfeit. Other government bodies, such as the State Press and Publication Administration and the Ministry of Public Security, also participate in the administrative protection of intellectual property rights. Specific duties of these government bodies have been stipulated by relevant IPR-related legislation. Such arrangements of the functions of different bodies are in line with the social and economic development level of China. The functions of each relevant body are definite and clear, and have met the requirements of the TRIPS Agreement.

27. Please explain how legislation and relevant provisions of your country implements border measures in Articles 51 to 60 of the TRIPS Agreement.

The following legislations in China is related to the implementation of Articles 51 to 60 of the TRIPS Agreement:

- (1) Customs Law of the People's Republic of China (Articles 44 and 91);
- (2) Regulations Governing Customs Protection of Intellectual Property Rights;
- (3) Copyright Law of the People's Republic of China;
- (4) Patent Law of the People's Republic of China;
- (5) Trademark Law of the People's Republic of China;
- (6) Regulations of Protection of Olympic Signs.

28. (i) Against the act of intellectual property infringement, Article 41.1 of the TRIPS Agreement provides for effective remedies including those "constitute a deterrent to further infringements." Also, Article 61 of the same Agreement stipulates that "Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent...". The amounts of monetary fines and compensation for the damage caused by the infringement set up in Articles 58 and 60 of the Chinese Patent Law, Article 56 of the Chinese Trademark Law, and

Article 48 of the Chinese Copyright Law of your country cannot be considered as very high. Can these amounts serve as an effective remedy to deter further infringements?

Article 58 of the Patent Law of the People's Republic of China set up the amount of monetary fine for counterfeiting a patent. Article 59 of the same Law set up the amount of monetary fine for passing any non-patented product (process) off as patented product (process). Article 60 of the same Law stipulated how to calculate the compensation amount for the damage caused by patent infringement. Article 56 of the Trademark Law of the People's Republic of China stipulates how to calculate the compensation amount for the damage caused by trademark infringement. Rule 42 of the Implementing Regulations of the Trademark Law of the People's Republic of China specifically stipulated the amount of monetary fine that would be imposed according to Articles 45, 47 and 48 of the Trademark Law of the People's Republic of China. Rule 52 of the same Implementing Regulations stipulated the monetary fine for infringing the exclusive use rights of registered trademarks. Article 48 of the Copyright Law of the People's Republic of China stipulated how to calculate the compensation amount for infringing copyright and other relevant rights. Rule 36 of the Implementing Regulations of the Copyright Law of the People's Republic of China stipulated the monetary fine for infringing copyrights and relevant rights. In addition, the Criminal Law of the People's Republic of China also stipulated the criminal penalties for infringement of intellectual property rights.

The above-listed monetary fine and other punishment against the infringement of intellectual property rights as stipulated in the IPR-related legislations of China are sufficient to deter further infringement.

(ii) Please explain the criteria and the way of calculation to decide the amount of the damages which judicial authorities order to the infringer to pay the right holder, regarding Article 45 of the TRIPS Agreement. And please explain the reason why relevant provisions of the Patent Law (Article 60), Copyright Law (Article 48) and Trademark Law (Article 56) are different.

Regarding the criteria and the way of calculation to decide the amount of the damages, Article 60 of the Patent Law of the People's Republic of China, Article 56 of the Trademark Law of the People's Republic of China, and Article 48 of the Copyright Law of the People's Republic of China have already laid down principles.

The differences among the compensation amount in Article 60 of the Patent Law, Article 56 of the Trademark Law and Article 48 of the Copyright Law are determined by the social and economic development level of China. Such differences also exist in the legislation of other Members (including Japan).

29. In accordance with Article 41.1 of the TRIPS Agreement, Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit "effective action" against any act of infringement of intellectual property right. But we heard there are a lot of people who recommit offences which infringe intellectual property rights. Please give us an explanation about what measures are incorporated in your countries' law to tackle these situations.

To deter acts of infringement of intellectual property rights, including repeated infringement, the IPR-related legislations in China have provided procedures of filing lawsuit and applying for provisional measures with the people's court, relief proceeding of reporting various infringements to administrations, and liability of compensation, confiscation, monetary fine, and fixed-term imprisonment, etc. According to the IPR-related legislations in China and also the relevant provisions

of the Criminal Law of the People's Republic of China, repeating infringement would be deemed as serious conditions and would be imposed a heavier punishment within the scope stipulated by these legislations.

30. (i) Localism can be listed as one of the factors that impede quick and accurate intellectual property right enforcement in your country. In other words, it seems that some local governmental agencies have a recognition that production of counterfeit goods and other intellectual property right infringement acts would help develop local economy. As a result, this attitude of the agencies has lead to the current flood of counterfeit goods. Please explain whether the activities of local enforcement administrative and judicial authorities as above are consistent with Article 41.1 and 41.3 of the TRIPS Agreement.

Localism is not in compliance with Article 41.1 and 41.3 of the TRIPS Agreement and the Chinese government has persistently opposed to localism. In order to prevent localism, the State Council published the Provisions on Prohibiting Local Blockade in Market Economy Activities, which strictly prohibits local protection in various forms.

(ii) Where attitude towards infringements allows discriminatory treatment against foreigners/foreign legal entities, such treatment can also be considered as being inconsistent with Article 3.1 of the TRIPS Agreement, which stipulates that "Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property..." Please explain consistency of current situation with Article 3.1 of the TRIPS Agreement.

National treatment is a main principle of the TRIPS Agreement and is also an important content of China's amendments to IPR-related legislations for implementing the TRIPS Agreement. In this aspect, China's IPR-related legislations have met the requirements of the TRIPS Agreement.

31. Regarding Articles 43, 46 etc. of the TRIPS Agreement and Chapter 7 of your Patent Law, please explain the following:

- (1) Is there any right like the claim for the infringement goods destroyed?**
- (2) Production order to the party in law suit against alleged infringement on patent right and what kind of measures are taken in case that undisclosed information is contained in the document?**

This question involves two issues, one relates to whether, at the request of the parties concerned, the infringing goods could be destroyed. The other is whether the judicial authorities have the authority to order the defendant of the patent infringement to provide the relevant evidence, and what kind of protection are available for the confidential information involved in the evidence.

As for the first issue, the Patent Law of the People's Republic of China does not explicitly empower the people's courts to order the infringing goods to be destroyed.

As for the second issue, there are various laws and regulations which guarantee that evidences are collected and confidential information are properly protected. For example, Article 64 of the Civil Procedure Law of the People's Republic of China stipulated that "If, for objective reasons, a party and his agent are unable to collect the evidence by themselves or if the people's court considers the evidence necessary for the trial of the case, the people's court shall investigate and collect it". And Article 66 of the same Law provided that evidence relating to State secrets, trade secrets and personal

privacy shall be kept confidential, and if it needs to be presented before a court, such evidence shall not be presented in an open court session.

32-56. These questions were the same as the questions in the Checklist of Issues of Enforcement (IP/C/5) because answers to the Checklist were not yet available.

China submitted to the TRIPS Council responses to the Checklist of Issues on Enforcement in mid-July 2002 (document IP/N/6/CHN/1). Please refer to China's responses for answers to questions 32-56.

Additional question 13: It can be considered that administrative procedures are most effective ones concerning the enforcement of intellectual property rights. However, in order to initiate the procedure, right holders must produce identities of infringers, location of factories producing pirated goods, and the amount of damage. Moreover, proving these issues are not only difficult but also costly. Please explain the reason why such situations are consistent with Article 41.2 of the TRIPS Agreement that "procedures concerning the enforcement of intellectual property rights shall not be unnecessarily complicated or costly".

Article 11.4 of the Copyright Law provides: "the citizen, legal entity or other body whose name is mentioned in connection with a work shall, in the absence of proof to the contrary, be deemed to be author of the work". That means, if there is no proof to the contrary, the name of a right owner that is mentioned in connection with a work may prove his ownership in instituting proceeding in a people's court. In case of inconsistency between the Copyright Law and the relevant regulations or measures, the provisions of the Copyright Law will prevail.

Additional question 14: According to Supreme People's Court's Notification of 17 December 1998 which concerns copyright infringement, the scope of criminal punishment stipulated in Article 217 of the Criminal Law is extremely limited. Please explain the consistency between this notification and Article 61 of the TRIPS Agreement that "Members shall provide for criminal procedures and penalties to be applied at least in cases of copyright piracy on a commercial scale"?

Article 217 of the Criminal Code of China is in compliance with the Article 61 of the TRIPS Agreement.

Additional question 15: Please explain the meaning of "where the act also prejudices the public interests" in Article 47 of the Copyright Law. Who are entitled to determine and what criteria would be used? Does this procedure require the injured person's application? According to Article 47 of the Copyright Law, "the act which constitutes a crime" will be prosecuted. Please explain in detail what kind of acts "constitutes a crime" which is referred to Article 47 of the Copyright Law. Which provisions in Criminal Law would be applied to such acts? Are there any detailed criteria to decide whether the police handles the case? Please explain the consistency between Article 47 of the Copyright law of China and Article 41.2 of the TRIPS Agreement stipulating "Procedures concerning the enforcement of intellectual property rights shall be fair and equitable"?

The provision of "Where the act also prejudices the public interests" in Article 47 of the Copyright Law means the activities in Article 47 should be administrative punished, if such activities prejudice the public interests, for example, the remedy of the property interests of the others, the destruction of the social economy system. The copyright administration departments and people's courts are entitled to determine what kind of activities are "prejudices the public interests". This procedure does not require the injured person's application.

The criminal liabilities in accordance with the law of the Article 47 means that the criminal liability shall be investigated according to the Criminal Code but not to the Copyright Law. Anyone who commits an infringing act provided for in Article 47 is subject to civil liabilities. In addition, he may be investigated and punished by the copyright administration department if his infringing act also prejudices the public interests. Nevertheless, he will not be investigated unless his act constitutes a crime.

G. PROTECTION OF NEW VARIETIES OF PLANTS

57. Article 9 of the Regulations of your country on Protection of New Varieties of Plants stipulated that "If a Chinese unit or individual is to assign to a foreigner the application right or the variety rights with respect to a new variety of plant bred by it or him in China, it shall be approved by the examining and approving organs." Please explain whether applying this Article to the case where a foreigner is concerned does not conflict with the principle of national treatment in Article 3 of the TRIPS Agreement.

According to Article 3 and footnote 3 of the TRIPS Agreement, national treatment applies with regard to the "protection of intellectual property", and "protection" include matters affecting the "availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement". Therefore to our understanding, national treatment stipulated in the TRIPS Agreement does not apply to Article 9 of China's Regulations on Protection of New Varieties of Plants, which is relating to technique transference. Furthermore, according to paragraph 3 of Article 9 of China's Regulations on Protection of New Varieties of Plants, examination and approval are also required with regard to Chinese units. So Article 9 of Regulations on Protection of New Varieties of Plants does not contradict with national treatment requirement of the TRIPS Agreement.

H. OTHERS

58. (i) Relaxation of licensing regulations: Please explain whether Articles 24.3, 25, 28 and 29 of Technology Import/Export Control Regulations of your country are consistent with Article 3 of the TRIPS Agreement.

(ii) Where a licensee used a technology licensed by a licensor based on a technology import contract between the two parties and where a legitimate interest of a third party was infringed as a result of use of that technology by the licensee, the licensor is to be held responsible under Technology Import/Export Control Regulations. Thus, these licensors are required to go under a condition much stricter than that set up in Article 353 of the Contract Law. This can be considered as being inconsistent with Article 3.1 of the TRIPS Agreement, which stipulates provisions concerning National Treatment provided that such Regulations solely apply to the licensors who are foreigners or foreign entities. Please give us an explanation regarding this matter.

The articles of Technology Import/Export Control Regulations mentioned by Japan (Articles 24.3, 25, 28 and 29) do not discriminate foreigners and are necessary to balance the interests of licensor and licensee. Moreover, Article 24.3 of the said Regulations imposes liability on the licensor on the condition that third party infringement happens when the licensee uses the licensed technology in accordance with the licensing agreement. Furthermore, Articles 24.3, 25, 28 and 29 of the Regulations are relating to liabilities of the parties of a technology import/export contract, which are not covered by the TRIPS Agreement. Therefore China does not have any obligation under the TRIPS Agreement in that regard.

59. Generally, the burden of proof of infringement rests with the right holder. In the most cases of infringements of intellectual property, however, it is often more difficult to prove that an act of infringement took place as compared with other tort claims. Under Article 64 of the Code of Civil Procedure of your country, a right holder is required to submit evidence for a claim he/she made and there are no provisions to reduce the burden of proof on right holders. Thus, this might place an inordinate burden on right holders if they are required to prove that an act of intellectual property right infringement occurred. Article 41 of the TRIPS Agreement stipulates that "Procedures concerning the enforcement of intellectual property rights" "shall not be unnecessarily complicated or costly..." Such possible inordinate burden as mentioned above can be considered as falling under the conditions mentioned in this Article. Please give us an explanation about what measures your country has taken to secure consistency with Article 41 of the TRIPS Agreement.

"Those who claim bear the burden of proof" is a general principle in civil procedure, which we believe is also the case in Japan. In order to protect the interests of intellectual property right holders, China has endorsed measures regarding investigation and preservation of evidence and reversed burden of proof in its legislation. (Please also refer to the answer to question 39 from the European Communities and their member States).

VI. REPLIES TO QUESTIONS POSED BY KOREA

A. TRADEMARKS

1. Article 10 of the Trademark Law stipulates that foreign geographical names that are well-known to the public shall not be used as trademarks but may be used exclusively as certification marks. Does this indicate that geographical names registered as certification marks have distinctiveness? Also, do certification marks give the kind of protection to geographical indications as stipulated in Article 22.1 of the TRIPS Agreement?

[No response received yet]

2. How does the Chinese Trademark Law implement Article 23.2 of the TRIPS Agreement?

Under the new Trademark Law, Articles 16 and 28 provide that the Trademark Office, i.e. the trademark registration authority in China, shall, ex officio, refuse a trademark application if it contains a geographical indication. The requirement in paragraph 2 of Article 23 of the TRIPS Agreement has been fully met in Chinese trademark legislation in that the Law permits both the Trademark Office to act ex officio and the interested parties to request the Trademark Office to act under Article 30 or 41.

3. Concerning Article 13 of the Trademark Law, how do the terms "liable to create confusion" and "misleading the public" differ from each other? How is this provision implemented in practice?

[No response received yet]

4. With regard to the conditions for the recognition of well-known marks stipulated in Article 14 of the Trademark Law, is it required that trademarks be known both to consumers and in the relevant sectors? Or would it be sufficient for a trademark to be known only in the relevant sectors?

[No response received yet]

5. Article 44 of the Trademark Law stipulates that a trademark's registration will be cancelled if the trademark is not used for three consecutive years. Does China recognize any circumstances that may arise independently of the will of the trademark owner, that may constitute an obstacle to the use of the trademark? Could such circumstances provide valid reasons for non-use, as stipulated in Article 19 of the TRIPS Agreement? And under what situations would the use of a trademark by another person be considered by China as meeting the requirements of the use of the trademark for the purpose of maintaining the registration?

[No response received yet]

B. PATENTS

6. Please explain in detail the meaning of the term "practical applicability" in Article 22 of the Patent Law. How does this differ from "industrial applicability"?

Article 22 of the Chinese Patent Law stipulates that "Practical applicability means that the invention or utility model can be made or used and can produce effective results". The Guidelines of Examination promulgated by the State Intellectual Property Office of China further provide that "Practical applicability means that the invention or utility model can be made or used in the industries, and can produce effective results", "The industries include the agriculture, forestry, aquaculture, stockbreeding, transportation, as well as the industries related to culture and sports, consumer goods, and medical instruments, and so on ". Therefore, the term "Practical applicability" in Article 22 of the Chinese Patent Law is identical in substance with "industrial applicability".

7. Does China grant patent protection for inventions in all fields of technology? If there are exceptions, please describe the exceptions and explain how these exceptions comply with Article 27 of the TRIPS Agreement.

Please see the answer to question 1 from Switzerland.

8. Please explain the protection of micro-organisms under the Patent Law.

The Chinese Patent Law and its Implementing Regulations do not exclude micro-organisms from patent protection. Therefore, any micro-organism involved inventions, can be the subject of patent protection, so long as they comply with the requirements provided for in the Chinese Patent Law and its Implementing Regulations.

9. Please explain the detailed conditions for permitting compulsory licences in China.

(1) The following provisions in the Patent Law of the People's Republic of China and its Implementing Regulations are relevant to the compliance with Article 31(b) of the TRIPS Agreement:

Article 48 of the Patent Law stipulates that "Where any entity which is qualified to exploit the invention or utility model has made requests for authorization from the patentee of an invention or utility model to exploit its or his patent on reasonable terms and conditions and such efforts have not been successful within a reasonable period of time, the patent administration department under the State Council may, upon the request of that entity, grant a compulsory licence to exploit the patent for invention or utility model".

Article 49 of the Patent Law provides that "Where a national emergency or any extraordinary state of affairs occurs, or where the public interest so requires, the patent administration department under the State Council may grant a compulsory licence to exploit the patent for invention or utility model".

Paragraph 2 of Rule 72 of the Implementing Regulations of the Patent Law prescribes that "Any entity requesting a compulsory licence shall submit to the patent administration department under the State Council a request for compulsory licence, state the reasons therefore, and attach relevant certifying documents each in two copies".

Paragraph 3 of Rule 72 of the Implementing Regulations of the Patent Law prescribes that "The patent administration department under the State Council shall send a copy of the request for compulsory licence to the patentee, who shall make his or its observations within the time limit specified by the patent administration department under the State Council. Where no response is made within the time limit, the patent administration department under the State Council will not be affected in making a decision concerning a compulsory licence".

Paragraph 1 of Article 52 of the Patent Law provides that "The decision made by the patent administration department under the State Council granting a compulsory licence for exploitation shall be notified promptly to the patentee concerned, and shall be registered and announced".

- (2) The following provisions in the Patent Law and its Implementing Regulations are relevant to the compliance with Article 31(c) and (f) of the TRIPS Agreement:

Paragraph 4 of Rule 72 of the Implementing Regulations of the Patent Law provides that "The decision of the patent administration department under the State Council granting a compulsory licence for exploitation shall limit the exploitation of the compulsory licence to be predominately for the supply of the domestic market. Where the invention-creation involved in the compulsory licence relates to the semi-conductor technology, the exploitation of the compulsory licence shall be limited only for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive".

- (3) The following provisions in the Patent Law and its Implementing Regulations are relevant to the compliance with Article 31(h) of the TRIPS Agreement:

Article 54 of the Patent Law provides that "The entity or individual that is granted a compulsory licence for exploitation shall pay to the patentee a reasonable exploitation fee, the amount of which shall be fixed by both parties in consultations. Where the parties fail to reach an agreement, the patent administration department under the State Council shall adjudicate".

10. Please explain how Article 63 of the Patent Law complies with Article 30 of the TRIPS Agreement.

Exceptions to the exclusive rights conferred by a patent are provided for in Article 63 of the Chinese Patent Law. These provisions undoubtedly comply with Article 30 of the TRIPS Agreement. The content of subparagraph (1) of Article 63 of the Chinese Patent Law is relevant to the doctrine of exhaustion of patent right. This is generally accepted by all countries; the provisions of subparagraph (2) refers to the right of prior use, which is also generally accepted by most of the countries; the provision of subparagraph (3) is an exception to patent right based on Article 5ter of the Paris Convention; the provision of subparagraph (4) complies with the generally accepted

practice that the non-commercial use of a patented invention is not an infringement to the right of the patentee. These exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, and completely in accordance with Article 30 of the TRIPS Agreement.

As far as we know, the limitations on patent right provided for in Article 96 of the Patent Act of the Republic of Korea, which was latest amended on 3 February, 2001, are substantively identical with the exceptions provided for in Article 63 of the Chinese Patent Law.

11. Please explain how China implements Article 34 of the TRIPS Agreement, concerning the burden of proof.

Paragraph 2 of Article 57 of the Chinese Patent Law provides that "where any infringement dispute relates to a patent for invention for a process for the manufacture of a new product, any entity or individual manufacturing the identical product shall furnish proof to show that the process used in the manufacture of its or his product is different from the patented process". This provision is consistent with Article 34 of the TRIPS Agreement.

C. PROTECTION OF UNDISCLOSED INFORMATION AND UNFAIR COMPETITION

12. Does Chinese legislation grant a defined period of time for the protection of undisclosed information? If so, please specify the period of protection.

With regard to the undisclosed information provided under Article 39.3, according to Article 35 of the Implementation Provisions of the Drug Administration Law of the People's Republic of China, within six years from the date on which a manufacturer or distributor was granted marketing approval of a pharmaceutical product utilised new chemical entities, if any second applicant applies for market authorization using the said undisclosed data without the permission of the prior applicant, the competent authority for drug administration shall not grant the market authorization, except for that the second applicant submits his own data.

In regard of the undisclosed information provided under Article 39.2, the Law on Anti-unfair Competition of People's Republic of China and Provisions on the Prohibition of Infringement of Trade Secrets, there is no time limitation on the protection of trade secrets.

13. Please explain how China protects data submitted for marketing approval against disclosure and unfair commercial use, as required by Article 39.3 of the TRIPS Agreement.

Currently, the concept of "undisclosed information" is difficult to define not only in China. In general, protection of undisclosed data under Article 39.3 of the TRIPS Agreement may include two steps. First, before the approval of marketing authorization, all undisclosed data submitted to the drug administration authorities in China shall not be disclosed. Second, after the approval of marketing authorization of a pharmaceutical product utilising new chemical entities, all undisclosed data shall not be disclosed, except for the product specifications for quality control and the insert sheet for patients and doctors. For more details, please refer to Article 35 of the Implementation Provisions of the Drug Administration Law of the People's Republic of China.

Article 35 of the Implementation Provisions of the Drug Administration Law of the People's Republic of China provides that the Government shall provide protection to undisclosed test and other data, which was gathered and submitted by the manufacturer or distributor as required in support of applications for marketing approval of pharmaceutical products which utilised new chemical entities, against unfair commercial use. Within six years from the date on which a manufacturer or distributor

was granted marketing approval of a pharmaceutical product utilised new chemical entities, if any second applicant applies for market authorization using the said undisclosed data without the permission of the prior applicant, the competent authority for drug administration shall not grant the market authorization, except for that the second applicant submits his own data. The competent authority for drug administration shall not disclose the said data, except where (a) the disclosure of such data was necessary to protect the public, or (b) steps were taken to ensure that the data are protected against unfair commercial use.

14. Please explain how the meaning of "practicality" (in Article 10 of the Unfair Competition Prevention Act) compares with that of "commercial value" (as stipulated in Article 39.2 of the TRIPS Agreement).

[No response received yet]

D. LAYOUT-DESIGNS (TOPOGRAPHIES) OF INTEGRATED CIRCUITS

15. Regarding the protection of IC layout-designs, please specify the organizations in charge of these matters.

The State Intellectual Property Office of China is responsible for the registration of the layout-designs.

16. How many layout-designs have been registered up to now in China under the "Regulations on the Protection of Layout-Designs of Integrated Circuits"?

Up to now, 113 layout-designs have been registered in China under the Regulations on the Protection of Layout-Designs of Integrated Circuits.

E. ENFORCEMENT

17. Please explain in detail the contents of the "Regulations of the People's Supreme Court regarding the Evidence in Civil Procedure" promulgated on 1 April 2002.

[No response received yet]

18. Is it possible to seek injunction under Article 44 of the TRIPS Agreement against a person responsible for IPR infringement case, even if that person is able to prove that he or she did not have knowledge of the relevant infringement?

[No response received yet]

19. Please clarify whether, by way of investigating and collecting evidence, the People's Court has the authority to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.

[No response received yet]

20. What is the approximate rate of the provisional measure filings that are affirmed by the People's Courts?

[No response received yet]

21. Has Paragraph 2, Article 53 of the TRIPS Agreement been accommodated in the domestic regulations?

[No response received yet]

22. Please describe in detail, the types of IPR infringement cases and possible criminal punishment as stipulated in the relevant laws.

[No response received yet]

23. China's response to question 15 of the Checklist of Issues on Enforcement⁵ states that the Customs authorities suspend the release of counterfeit trademark or pirated copyright goods and right holders can apply to the Customs for suspension of any export and import of goods infringing trademark and copyright. In the case of the suspension of release due to suspicion of trademark and copyright infringement, who is eligible on behalf of the right holders to lodge an application for the suspension of release?

[No response received yet]

24. Item (5) of China's response to question 16 of the Checklist of Issues on Enforcement⁵ regarding the indemnification of the importer and the goods owner, states that "where the court or other competent administrative authorities find no infringement, Customs shall, at the requirements of the court or the competent authority, submit the security deposited by the right holder to the court to compensate for the losses of the relevant party arising from the improper application." In such cases, what is the coverage of compensation payment for damages resulting from the deposited security and wrongful detention or detention of goods in accordance with Article 55 of the TRIPS Agreement?

[No response received yet]

VII. REPLIES TO QUESTIONS POSED BY SWITZERLAND

A. PATENTS

1. Does your legislation grant patent protection for inventions relating to products and processes in all fields of technology? Are there any exceptions? If so, please explain what these exceptions are and how they comply with Article 27 of the TRIPS Agreement.

According to the Patent Law of the People's Republic of China, except for few exceptions, inventions in all fields of technology are eligible for patent protection, provided that they are new, involve an inventive step and are capable of industrial application. The few exceptions are provided for in Articles 25 and 5 of the Patent Law. Article 25 reads as follows:

For any of the following, no patent right shall be granted:

- (1) scientific discoveries;
- (2) rules and methods for mental activities;

⁵ Document IP/N/6/CHN/1.

- (3) methods for the diagnosis or for the treatment of diseases;
- (4) animal and plant varieties;
- (5) substances obtained by means of nuclear transformation.

For processes used in producing products referred to in item (4) of the preceding paragraph, patent right may be granted in accordance with the provisions of this Law.

These provisions are in compliance with provisions of Article 27.1 of the TRIPS Agreement.

According to Article 5 of the Patent Law:

"No patent right shall be granted for any invention-creation that is contrary to the laws of the State or social morality or that is detrimental to public interest".

In Rule 9 of the Implementing Regulations of the Patent Law, further explanation as to invention-creation that is contrary to the laws of the State is given.

These provisions are in compliance with provisions of Article 27.2 and 27.3 of the TRIPS Agreement.

2. Does your legislation, in accordance with Article 27.1 in combination with Article 31 of the TRIPS Agreement, consider importation as "working" a patent (and therefore exclude compulsory licensing of a product which is being imported)?

According to Article 11 of the Patent Law, the meaning of "exploit the patent" includes importation of patented products or products directly obtained by patented processes for business purposes. Therefore, importation of patented products is considered as "working" a patent under the Patent Law.

The fact that products are being imported shall not influence whether a compulsory licence shall be granted. A compulsory licence shall be granted according to the prescriptions of the Patent Law.

3. Does your legislation make the granting of a compulsory licence subject to all the conditions enumerated in Article 31 of the TRIPS Agreement? Please cite the relevant provisions of law.

Yes, there are detailed provisions on the grant of compulsory license in the Patent Law and its Implementing Regulations, which are fully in accordance with the requirements of Article 31 of the TRIPS Agreement.

Article 48 of the Patent Law prescribes that

"Where any entity which is qualified to exploit the invention or utility model has made requests for authorization from the patentee of an invention or utility model to exploit its or his patent on reasonable terms and conditions and such efforts have not been successful within a reasonable period of time, the patent administration department under the State Council may, upon the request of that entity, grant a compulsory license to exploit the patent for invention or utility model."

It is in compliance with Article 31(a) and (b) of the TRIPS Agreement.

Article 49 of the Patent Law prescribes that:

"Where a national emergency or any extraordinary state of affairs occurs, or where the public interest so requires, the Patent administration department under the State Council may grant a compulsory license to exploit the patent for invention or utility model."

It is in compliance with Article 31(b) of the TRIPS Agreement.

Article 50 of the Patent Law prescribes that:

"Where the invention or utility model for which the patent right has been granted involves important technical advance of considerable economic significance in relation to another invention or utility model for which a patent right has been granted earlier and the exploitation of the later invention or utility model depends on the exploitation of the earlier invention or utility model, the patent administration department under the State Council may, upon the request of the later patentee, grant a compulsory license to exploit the earlier invention or utility model";

"Where, according to the preceding paragraph, a compulsory license is granted, the patent administration department under the State Council may, upon the request of the earlier patentee, also grant a compulsory license to exploit the later invention or utility model."

It is in compliance with Article 31(l) of the TRIPS Agreement.

Article 51 of the Patent Law prescribes that:

"The entity or individual requesting, in accordance with the provisions of this Law, a compulsory license for exploitation shall furnish proof that it or he has not been able to conclude with the patentee a license contract for exploitation on reasonable terms and conditions."

It is in compliance with Article 31(b) of the TRIPS Agreement.

Article 52 of the Patent Law prescribes that:

"The decision made by the patent administration department under the State Council granting a compulsory license for exploitation shall be notified promptly to the patentee concerned, and shall be registered and announced";

"In the decision granting the compulsory license for exploitation, the scope and duration of the exploitation shall be specified on the basis of the reasons justifying the grant. If and when the circumstances which led to such compulsory license cease to exist and are unlikely to recur, the patent administration department under the State Council may, after review upon the request of the patentee, terminate the compulsory license."

It is in compliance with Article 31(b) and (g) of the TRIPS Agreement.

Article 53 of the Patent Law prescribes that:

"Any entity or individual that is granted a compulsory license for exploitation shall not have an exclusive right to exploit and shall not have the right to authorize exploitation by any others."

It is in compliance with Article 31(d) and (e) of the TRIPS Agreement.

Article 54 of the Patent Law prescribes that:

"The entity or individual that is granted a compulsory license for exploitation shall pay to the patentee a reasonable exploitation fee, the amount of which shall be fixed by both parties in consultations. Where the parties fail to reach an agreement, the patent administration department under the State Council shall adjudicate."

It is in compliance with Article 31(h) of the TRIPS Agreement.

Article 55 of the Patent Law prescribes that:

"Where the patentee is not satisfied with the decision of the patent administration department under the State Council granting a compulsory license for exploitation, or where the patentee or the entity or individual that is granted the compulsory license for exploitation is not satisfied with the ruling made by the patent administration department under the State Council regarding the fee payable for exploitation, it or he may, within three months from the date of the receipt of notification, institute legal proceedings in the people's court."

It is in compliance with Article 31(i) and (j) of the TRIPS Agreement.

Rule 72 of the Implementing Regulations of the Patent Law of the People's Republic of China prescribes that:

"The decision of the patent administration department under the State Council granting a compulsory license for exploitation shall limit the exploitation of the compulsory license to be predominately for the supply of the domestic market. Where the invention-creation involved in the compulsory license relates to the semiconductor technology, the exploitation of the compulsory license shall be limited only for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive."

It is in compliance with Article 31(c) and (f) of the TRIPS Agreement.

4. Does your legislation provide for the principle of the reversal of burden of proof in a process patent litigation? Please cite the relevant provisions of law.

Yes. Paragraph 2 of Article 57 of the Patent Law prescribes that:

"Where any infringement dispute relates to a patent for invention for a process for the manufacture of a new product, any entity or individual manufacturing the identical product shall furnish proof to show that the process used in the manufacture of its or his product is different from the patented process."

This provision is in accordance with Article 34.1 of the TRIPS Agreement.

B. PROTECTION OF UNDISCLOSED INFORMATION

5. Please explain in detail if your legislation ensures that undisclosed test or other data submitted by an applicant to the responsible State agency in the procedure for market authorisation of a pharmaceutical or of an agricultural chemical product is protected against disclosure and against unfair commercial use by a competitor, for example by prohibiting a second applicant from relying on, or from referring to the original data of the first applicant, when applying subsequently for market authorisation for a similar product. Does your legislation provide for exceptions to this? If yes, under what conditions would such exceptions apply? Does your legislation set a specific term of protection for undisclosed test or other data of the first applicant?

Please refer to the answer to question 22 from the United States.

C. ENFORCEMENT

6. Please describe how the Chinese legislation meets the requirements of Article 41 of the TRIPS Agreement. Please cite the relevant provisions of law.

Based on the undertaking made by China for entry into the WTO, China has amended the Patent Law, Trademark Law, Copyright Law and has enacted Regulations for the Protection of Layout-Designs of Integrated Circuits and Regulations for the Protection of New Varieties of Plants. These intellectual property related laws and regulations, together with Criminal Law, General Principle of Civil Law, Anti-Unfair Competition Law and relevant provisions in Criminal Procedure Law, Civil Procedure Law and Administrative Procedure Law, have constructed a complete system to ensure enforcement procedures provided in Part III of the TRIPS Agreement. Therefore the enforcement procedures established by the TRIPS Agreement can be applied effectively in China based on domestic laws and regulations. Key points of the enforcement procedures in intellectual property related laws and regulations include:

(i) Criminal procedure

A infringer whose activities constitute the violation of intellectual property right may be prosecuted either by a people's procuratorate or by the owner of the intellectual property right, pursuant to the provisions set from Articles 213 to 220 of the Criminal Law.

According to the provisions set in Article 83 of the Criminal Procedure Law:

"The public security organs or people's procuratorates shall, upon discovering criminal facts or criminal suspect, file a case and conduct investigation according to their respective jurisdiction."

According to the provisions set in Article 141 of the Criminal Procedure Law:

"When a people's procuratorate considers that the facts of a criminal suspect's crime have been ascertained, that the evidence is reliable and sufficient and that criminal responsibility should be investigated according to law, it shall make a decision to initiate prosecution and shall, in accordance with the provisions for trial jurisdiction, initiate a public prosecution in a people's court."

According to the provisions set in Article 170 of the Criminal Procedure Law:

"Private prosecution includes the following cases: (a) cases to be handled only upon complaints; (b) cases involving minor crimes evidenced by the victim; (c) cases where the victim has evidence to prove that the act done by the accused has infringed upon the persona land property rights of the victim and that it shall be investigated for criminal responsibility according to law by the public security organ or the people's procuratorate but has not been investigated for criminal responsibility."

Article 77(1) of Criminal Law provides that:

"If a victim has suffered material losses as a result of the criminal act of the accused, he/she shall have the right to file an incidental civil action during the course of the criminal proceeding."

That is to say, the owner of intellectual property right may not only prosecute the infringer through criminal procedure, but also acquire compensation for losses through filing an incidental civil action during the course of the criminal proceeding.

(ii) *Civil procedure, including injunction of infringement and preservation of proof and property prior to and during the proceeding*

To the act of infringement of intellectual property, a people's court may adjudicate that the infringer should bear the civil liability by the way of cessation of infringements, extension of apology, elimination of ill effects and compensation for losses. The infringer bears the liability of compensation of losses on the basis of the principle of complete compensation for the losses of the owner of the right.

When hearing the intellectual infringement case, a people's court may serve admonitions, order the offenders to sign a pledge of repentance, and confiscate the property used in carrying out illegal activities and the illegal income obtained therefrom. (For more detailed information, please refer to the answer to question 7.)

(iii) *Administrative procedure*

To the act of intellectual property infringement, an administrative organ may handle it on the basis of relevant legal provisions.

The party can file an administrative suit against the administrative authority's decision on granting of an intellectual property and administrative decision on the infringement of intellectual property in a people's court according to Patent Law, Trademark Law and Administrative Procedure Law.

The people's court will make out their judgment on criminal litigation, civil litigation or administrative litigation, in paper, state the reasons for the judgment and send it to the parties on time. All the legal documents should also be sent to the parties within the time limit provided in relevant laws.

The procedures stated above as contained in relevant laws are fair and equitable. They grantee the effectiveness of the intellectual property related laws and regulations in protecting intellectual property rights and also prevents the parties from abusing the procedures. These procedures are not complicated or costly, nor do they entail unreasonable time limits or unwarranted delays.

7. Please describe in detail the civil judicial procedures and civil remedies available to right holders according to your legislation in the different fields of intellectual property covered by Part II of the TRIPS Agreement, allowing for effective action against acts of counterfeiting and piracy. Please cite the relevant provisions of your legislation providing for those civil procedures and remedies.

In domestic laws of China, there are two kinds of civil procedures and remedies available to the owner of intellectual property to fight against the counterfeit and piracy actions. One is civil procedures and remedies generally applicable to all kinds of intellectual property rights. The other is civil procedures and remedies applicable to specific intellectual property protection.

(i) Civil procedures and remedies generally applicable to all intellectual property rights

These procedures and remedies are mainly prescribed in Civil Procedure Law and General Principle of Civil Law.

Key points in the civil procedures provided in Civil Procedure Law include:

- (a) Article 92 and Article 97 of Civil Procedure Law, and also Article 107 of the Judicial Interpretation of the Supreme People's Court on the Application of Civil Procedure Law, according to which the party to the suit may, at the time of filing suit or during law suit, apply to the people's court for preservation of property or advance execution.
- (b) Article 93 of Civil Procedure Law, according to which any interested party whose lawful rights and interests would, due to urgent circumstances, suffer irretrievable damage without immediately applying for property preservation may, before filing a lawsuit, apply to the people's court for the adoption of property preservation measures. The applicant must provide security; if he fails to do so, his application shall be rejected. After receiving an application, the people's court must make an order within 48 hours; if the court orders the adoption of property preservation measures, the execution thereof shall begin immediately. If the applicant fails to bring an action within 15 days after the people's court has adopted the preservation measures, the people's court shall cancel the property preservation.
- (c) Article 74 of Civil Procedure Law, according to which, under circumstances where there is likelihood that evidence may be destroyed or lost, or difficult to obtain later, the participants in the proceedings may apply to the people's court for preservation of the evidence. The people's court may also on its own initiative take measures to preserve such evidence.

In Article 134 of the General Principle of Civil Law, the main methods of bearing civil liability shall be cessation of infringements; removal of obstacles; elimination of dangers; return of property; restoration of original condition; compensation for losses; elimination of ill effects and rehabilitation of reputation; and extension of apology. The above methods of bearing civil liability may be applied exclusively or concurrently. When hearing civil cases, a people's court may confiscate the property used in carrying out illegal activities and the illegal income obtained therefrom.

(ii) *Civil procedures and remedies applicable to specific intellectual property protection*

- (a) Injunction prior to the proceeding: Article 61 of the Patent Law, Article 57 of the Trademark Law, Article 49 of the Copyright Law, Article 32 of the Regulation for the Protection of Layout-Designs of Integrated Circuits prescribe that the owner of patent right, the owner of trademark right, the owner of copyright, the owner of the right of layout-designs of integrated circuits and any interested party who have evidence to prove that his or her lawful rights and interests would suffer irretrievable damage without immediately prevention of infringing acts, may, before filing a lawsuit, apply to the people's court for stopping relevant infringing activities.
- (b) Measures of preservation of proof prior to the proceeding: Article 58 of the Trademark Law, Article 50 of the Copyright Law, and also Article 16(1) of the Judicial Interpretation of the Supreme People's Court on the Application of Law on Stopping Infringing Patent Right Prior to Lawsuit prescribe that, under circumstances where there is likelihood that evidence may be destroyed or lost, or difficult to obtain later, the owner of patent right, the owner of trademark right, the owner of copyright, the owner the right of layout-designs of integrated circuits and any interested party may apply to the people's court for preservation of the evidence prior to lawsuit.
- (c) Pursuant to the provisions in Article 51 of the Copyright Law, for the infringement acts which violate Copyright Law or rights pertaining to copyright, when hearing cases, a people's court may confiscate the property used in carrying out illegal activities and the illegal income obtained therefrom.

8. Please describe in detail the criminal actions and remedies that are available in your legislation to combat counterfeiting and piracy. Please cite the relevant provisions of your legislation.

Please refer to the answer to question 25 from Japan.

9. Please indicate the scale of damages provided by your legislation to compensate for the injury a right holder has suffered because of an infringement of that person's intellectual property right by an act of counterfeiting or piracy.

In China, Article 60 of the Patent Law, Article 56 of the Trademark Law, Article 48 of the Copyright Law, Article 30 of the Regulation for the Protection of Layout-Designs of Integrated Circuits, Article 20 of the Anti-Unfair Competition Law (applicable to cases involving trade secret and geography marks) prescribe in similar terms that the infringer shall compensate the losses incurred by the right holder as a result of infringing action. Damages can be calculated by the profits derived from infringing action by the infringer. Moreover, the damages shall also cover the reasonable expense paid by the infringed in order to stop such infringement.

The Patent Law specifically prescribes that if the losses of the right holder or the profits gained by the infringer are difficult to estimate, damages shall be computed in unison with the multiplied license fee. Copyright Law and Trademark Law specifically prescribe that if the losses of the right holder or the profits gained by the infringement are difficult to estimate, the people's court shall award damages not exceeding RMB 500,000 in accordance with the seriousness of the case

10. Please describe the provisional measures provided for in your legislation, in particular those useful to combat counterfeiting and piracy. Please describe the procedures that must be followed, and cite the relevant provisions of law.

There are two types of provisional measures in Chinese legislation: preliminary interim measures and interim measures taken during the proceeding.

Pursuant to Trademark Law, Copyright Law, Patent Law, Regulation for the Protection of Layout-Designs of Integrated Circuits and relevant judicial interpretations issued by the Supreme People's Court, Articles 93 through 99 of the Civil Procedure Law shall apply to all kinds of preliminary interim measures. Articles 92, 94 and 99 shall apply to the interim measures taken during the proceeding. Please also refer to the answer to question 7 for more details.

11. Please indicate the authorities responsible for the application of the measures provided by your legislation to combat counterfeiting and piracy. Please explain whether the competent authorities are empowered to act ex officio and, if so, please indicate the enforcement actions that may be taken.

Please refer to the answer to question 26 from Japan.

12. Please describe any new initiatives that are planned to improve the enforcement of intellectual property rights in your country, particularly initiatives to combat counterfeiting and piracy. Is there a particular action plan in place?

The Chinese Government has always attached great importance to increasing public awareness of intellectual property protection and improving the enforcement of intellectual property rights in the country. Amendments and revisions of the intellectual property related laws and regulations have been repeatedly brought to the attention of the general public and enforcement forces at various levels are also being trained to improve the protection of the intellectual property rights. Taking into account of the size, population and current social and economic development level of the country, it is a long-term task as has been taken by the Chinese Government and efforts in this regard will continue relentlessly.

VIII. REPLIES TO QUESTIONS POSED BY THE UNITED STATES

A. GENERAL COMMENTS AND QUESTIONS

1. The United States recognizes and appreciates the hard work done by China's legislators, administrative officials, judicial officials, and others in reviewing, enacting and drafting new intellectual property laws and regulations as part of implementing China's WTO commitments and in strengthening China's legal regime for the protection and enforcement of intellectual property. We recognize that in addition to revision to key laws, such as the patent, trademark and copyright law, conducted over the past two years, China has had to enact, revise or annul many central government laws, regulations and other measures as well as sub-central measures dealing with intellectual property.

2. In addition to the obligations contained in the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), these comments and questions are based on the Report of the Working Party on the Accession of China (WT/MIN(01)/3) (the "Working Party Report"). In paragraph 305 of the Working Party Report, China agreed to fully apply the provisions of the TRIPS Agreement upon its accession to the WTO. China became a Member of the WTO on 11 December 2001.

3. The United States considers transparency in making laws, regulations, rules and other measures including the opportunity to provide comments on such provisions as set forth Section 2, paragraph 2(C) of China's protocol of accession and in paragraphs 324 through 336

of the Working Party Report to be a key aspect of China's WTO commitments. In particular, China has committed to publish its laws, regulations and other measures in an official journal and provide a reasonable period for comment to the appropriate authorities before such measures are implemented. Moreover, China has agreed that to make these laws, regulations and other measures available to WTO Members upon request before they are implemented or enforced. The Law on Legislation authorizes officials to provide the opportunity to receive comments and requires publication of laws, regulations and other measures. We strongly urge China to provide this opportunity in all cases.

4. The United States looks forward to cooperating with China on revisions to its trademark and copyright implementing regulations as well as assisting China in its efforts to harmonize its laws with new treaties to which it may wish accede, such as the WIPO Copyright Treaty and WIPO Performance and Phonograms Treaty.

China takes note of the comments and will provide opportunities for receiving comments in the legislative process.

5. Please provide a report on the laws that have been nullified or repealed, amended, or enacted to bring China's IPR regime into conformity with TRIPS consistency, as well as plans for any further nullifications, repeals or amendments that are currently scheduled or that are planned to be scheduled by China's various law, regulation, and rule making bodies on either a national or local level, as well as efforts to receive comments from foreign and other IPR owners in drafting and issuing these measures and facilitating technical assistance.

The Regulations on Protection of Layout-Design of Integrated Circuit have been drafted and published.

The Patent Law, the Implementing Rules of the Patent Law, the Trademark Law, the Implementing Regulations of the Trademark Law, the Copyright Law, the Implementing Regulations of the Copyright Law, and the Regulations on the Protection of Computer Software have been amended.

With regard to other IPR-related administrative regulations, the Regulations on Administration of Pesticide, the Regulations on Administration of Veterinary Medicine, the Regulations on Administration of Feed and Feed Additive, the Implementing Regulations of the Medicine Administration Law have also been amended.

Thus, together with the existing Anti-Unfair Competition Law, the Regulations on Protection of New Varieties of Plants, the Regulations Governing Customs Protection of Intellectual Property Rights, China has completed the IPR-related legislation to implement the TRIPS Agreement.

B. NATIONAL TREATMENT

6. China's Working Party Report set forth certain commitments regarding national treatment (para. 255). In Particular, the following matters were identified as raising national treatment concerns:

- (a) the Rules on Banning the Infringement of Business Secrets (23 November 1995), which only protected business secrets of citizens or enterprises of China.**

- (b) **Enforcement action in copyright matters which required clearance by the National Copyright Administration in China when a foreign rights holder was involved; and**
- (c) **Protection of well known trademarks and requirements for use of certain trademark agents.**

We would appreciate an update on efforts to provide national treatment with respect to these issues.

- (a) In practice, the mentioned Rules applies equally to Chinese and foreign citizens and enterprises.
- (b) The revised Implementing Regulations of the Copyright Law of the People's Republic of China has deleted the provision which designated the copyright administration department under the State Council (the National Copyright Administration of China) to investigate and deal with infringing acts involving foreign right owners taking place in the territory of China. After the revised Implementing Regulations enters into force, each local copyright administration department may investigate and deal with all infringing acts (including those involving foreign right owners) taking place in its own administrative area, without the necessity of requiring clearance by the copyright administration department under the State Council.
- (c) Please refer to the answers to questions 8 and 9.

C. COPYRIGHT

7. We have a number of questions regarding specific provisions of China's amended Copyright Law, its implementation, and its consistency with relevant TRIPS provisions. In particular:

- (a) **Does the compulsory licence for textbooks in Article 23 of China's Copyright Law apply to works of foreign authors? If so, please explain the scope of this provision and its application. Does it apply to higher education, e.g., digital forms and multimedia? Please explain how this provision is consistent with the standards in Article 13 of the TRIPS Agreement.**
- (b) **What are the limitations on the scope of the recompilation exception in Article 17 of the Computer Software Regulations? Please explain how this provision is consistent with the standards in Article 13 of the TRIPS Agreement.**
- (c) **Does the right of reproduction in Article 10 of China's Copyright Law include temporary copies, such as those made in the random access memory (RAM) of a computer, as required by Article 9 of the Berne Convention, as incorporated into Article 9 of the TRIPS Agreement? Is there any statement in your law, regulations or other measures that indicates that such temporary copies involve the reproduction right? If so, please provide the citation.**
- (a) The statutory license system for textbooks provided for in Article 23 of the Copyright Law is also applicable to works of foreign authors. The prerequisite of applying this Article is that the author has not declared in advance that such use is not permitted. The scope of the said provisions is confined to compiling and publishing textbooks

for the nine-year compulsory education or for the national educational planning. This Article is only applicable to passages from a work, a short written work or musical work, or a single work of art or photographic work that have been published, without excluding such works as multimedia ones or expressed in digital forms. These provisions are consistent with the standard of "three steps test" provided for in Articles 9 and 13 of the TRIPS Agreement.

- (b) The recompilation exception is not provided for in Article 17 of the Regulations on the Protection of Computer Software. Article 17 is consistent with Article 13 of the TRIPS Agreement.
- (c) According to our understanding, there is not such a term as "temporary reproduction" in Article 9 of the Berne Convention and in Article 9 of the TRIPS Agreement.

Additional question 1: Does the unauthorized creation of a copy of a copyrighted work in the temporary memory of a computer in China infringe the reproduction right provided for in Article 10(5) of China's Copyright Law?

There is neither such a term as "temporary memory" in Article 10(5) of China's Copyright Law, nor in the Berne Convention or the TRIPS Agreement.

Additional question 2: How does the activity permitted without the permission of the right-holder by Article 17 of China's Regulations for Computer Software Protection comply with Article 13 of the TRIPS Agreement?

The activities permitted by Article 17 of China's Regulation for Computer Software Protection (1) are a special case; (2) do not conflict with a normal exploitation of the work; (3) do not unreasonably prejudice the legitimate interests of the right holder. Therefore, this Article is in compliance with Article 13 of the TRIPS Agreement.

Additional question 3: Please provide a copy of the State Council's request to the Supreme People's Court to lower the thresholds for criminal copyright violations, and any response of the Supreme People's Court to that request.

According to the Article 305 of China's Working Party Report the Chinese Government has already given the recommendation to revise the judicial interpretation for criminal copyright violations to the Supreme People's Court.

Additional question 4: With respect to your response to the above question, please advise what steps the State Council will now take to lower the criminal threshold for copyright cases, such as:

- (a) requesting an interpretation from the National People's Congress;
- (b) revising prior guidance on criminal prosecution;
- (c) requesting that the Supreme People's Procuratorate, Ministry of Public Security and SPC issue a new revised interpretation regarding criminal thresholds with the support of NCAC.

Please see the response to additional question 3 above.

Additional question 5: Please provide a copy of any other interpretations of the copyright provisions of China's criminal code promulgated by other agencies, such as the Ministry of Public Security, National Copyright Administration of China, and the Supreme People's Procuratorate.

Please see the response to additional question 3 above.

Additional question 6: Regarding the compulsory licence for textbooks in Article 23 of China's Copyright Law:

- (a) Does Article 23 apply to works created before the provision became effective? If not, what was the effective date of Article 23?
 - (b) What procedure must a right holder follow in order to make the necessary advance declaration that uses otherwise allowed under Article 23 are not permitted? How is this procedure consistent with Article 5 of the Berne Convention, as incorporated in Article 9 of the TRIPS Agreement, which requires that the exercise and enjoyment of rights not be subject to any formality?
 - (c) If Article 23 applies to works created before the date the provision became effective, how is it possible for a right holder to make an advance declaration that uses otherwise allowed under Article 23 are not permitted? How is this procedure consistent with Article 5 of the Berne Convention, as incorporated in Article 9 of the TRIPS Agreement, which requires that the exercise and enjoyment, rights not be subject to any formality?
 - (d) Are there any limits to the size or substantiality of the portions of works that may be used pursuant to Article 23? If so, what standards will be applied in determining whether a particular use has exceeded those limits?
- (a) Article 23 is also applied to works created before the provision became effective, if the term of the works is not at the expiry.
- (b) A right-holder only needs to make his declaration public, if he or she does not allow such a use. Article 23 is a limitation to copyright, the so called "statutory licence". Normally the right-holder does not enjoy any prohibition right under the statutory licence provisions. But China's Copyright Law still gives the right-holder a prohibition right. Therefore this Article is not in conflict with Article 5 of the Berne Convention, as incorporated in Article 9 of the TRIPS Agreement, which requires that the exercise and enjoyment of rights not be subject to any formality.
- (c) Please see the response to (b).
- (d) There are some limits to the size or substantiality of the portions of works that may be used pursuant to Article 23, for example, Article 23 states: only passages from a work, a short written work or musical work, or a single work of art or photographic work could be applied. Otherwise Article 21 of the newly revised Implementing Regulations to the Copyright Law of China imported the so called three-step test principle from Article 13 of the TRIPS Agreement. That means if the use is exceeded, it should be in conflict with Article 23 of the Copyright Law.

D. TRADEMARKS

8. As noted in paragraph 6, we have continuing concerns about receipt of national treatment under China's trademark law. We note the requirement to use a designated trademark agent, as set forth in the original implementing rules of the Trademark Law, Article 3, which provides that:

when a foreigner or foreign enterprise is to apply for trademark registration in China or to deal with other trademark matters in China, the application or other matters shall be handled by an agency designated by the State Administration for Industry and Commerce.

Not only may a Chinese enterprise file for a registration directly without an agent, foreign enterprises have been restricted to use of only certain agents. While Article 3 of the TRIPS Agreement provides a limited exception with regarding to national treatment for "the appointment of an agent within the jurisdiction of a Member", this exception applies only where "it is necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade".

We note the following discriminatory aspects of China's requirement:

- (a) The restrictions only apply to foreigners applying for trademarks in China, irrespective of whether they have a place of business in China.
- (b) Only some trademark agents can be used by foreign enterprises.
- (c) This rule only applies to trademarks. No similar rule applies to patents. China's patent law has a less restrictive provision: "where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China applies for a patent, or has other patent matters to attend to, in China, he or it shall appoint a patent agency designated by the patent administrative organ under the State Council to act as his or its agent".
- (d) Foreigners making applications pursuant to the Madrid Protocol do not require use of Chinese agent. Implementing Rules for Madrid International Registrations (Sec. 2).
- (e) Points (c) and (d) indicate that use of a trademark agent is not necessary to secure enforcement of China's trademark laws and is a unjustified restriction on trade.

As regards the requirement for foreigners to use a designated trademark agency, firstly, this practice is an exception to national treatment specified in paragraph 3 of Article 2 of the Paris Convention and Article 3 of the TRIPS Agreement. The requirement for foreigners to use a designated trademark agency is an international practice rather than something that is unique in China, and such practice is in full compliance with the requirement of the international treaties. Secondly, in the newly revised Trademark Law and its Implementing Regulations, China has taken into consideration of the national treatment in trademark field and its compliance with that in patent application. In the new Implementing Regulations, a "foreigner or foreign enterprise" is further defined as "those who are not domiciled or who do not have real and effective industrial or commercial establishments in the People's Republic of China". Thirdly, the problem of "only some

trademark agents can be used by foreign enterprise" no longer exists. From 1 January 2001, all trademark agencies legally established are allowed to deal with foreign business on trademarks.

9. The Working Party Report noted that while China had provided protection to "well-known trademarks" owned by nationals, such protection had, as yet, not been extended to the well-known trademarks of foreigners (paragraph 262). This issue has become especially acute, as lower thresholds are available for initiating criminal investigations and penalties for counterfeiting well-known marks, i.e., enhanced enforcement may exist for marks owned by Chinese entities when compared to foreign marks.

Since China became a WTO Member, China's Trademark Office has established a website listing well-known marks. Approximately 150 marks are listed, none of which is a foreign mark. Another website run by a provincial organization lists 196 well-known marks, but none of these marks are foreign marks: <http://www.zmsb.com/info.asp?page=0&count=196>) Please inform us as to the steps that China's government is undertaking to ensure protection of well-known marks on the basis of national treatment and the need for effective enforcement of all marks. We are concerned that the failure to include foreign well known marks on such lists could unfairly prejudice foreign rights holders seeking administrative, civil or criminal enforcement, i.e., deny national treatment.

According to the Trademark Law and its Implementing Regulations, China has established the legal protection to well-known marks, which applies equally to the domestic and foreign right holders. Articles 13 and 14 of the Trademark Law and Articles 5, 45 and 53 of its newly revised Implementing Regulations are relevant provisions for the protection of well-known marks.

It should be noted that in the practice of our administrative enforcement in the past years, China has provided a very high level of protection for foreign well-known trademarks, such as IBM, ADIDAS, NIKE, etc. After the revision of the Trademark Law and its Implementing Regulations, the Interim Rules on the Determination and Administration of Well-known Marks made in 1998 is also under revision now. This will further improve the procedures of protection of well-known trademarks.

The information of the list of well-known trademarks and the website mentioned in the question are not accurate. Currently, Trademark Office does not have an official website.

10. We recognize that China's courts have recognized the well-known status of certain marks, e.g., in Beijing Cinet Information Co.Ltd v. E.I. Dupont De Nemous and Company, Case Number 2002, Beijing Higher People's Court, Intellectual Property Tribunal, Final Decision, No. 47 (Nov. 2001). Judicial recognition also raises risks of inconsistencies. The 1998 regulations noted above, for example, imposes fines on companies that state their mark is well known which have not been approved by the China Trademark Office (Article 12). Thus, even companies with marks that courts recognize as well-known could face penalties. Again, we emphasize the need for national treatment and effective enforcement.

As said in answer to question 9, after the revision of Trademark Law and its Implementing Regulations, this problem has been solved. Besides, the Interim Rules on the Determination and Administration of Well-known Marks made in 1998 are under revision now.

Additional question 7: In light of revisions to the Trademark Law, how will China ensure fair and non-discriminatory treatment of foreign well-known marks, during:

- (a) the trademark registration process;

- (b) **administrative enforcement by the Chinese Trademark Office as well as other agencies, such as AQSIQ (Administration for Quality Supervision Import and Quarantine); and**
- (c) **criminal enforcement, including referrals by administrative agencies to criminal enforcement?**

China will, in line with the principles of the national treatment under the Paris Convention, provide equal protections for both domestic and foreign well-known marks in the procedure of trademark registration, trademark review and adjudication, administrative enforcement and criminal referrals by administrative agencies to criminal enforcement.

Additional question 8: What regulations [fagui], ministerial rules [guizhang] by the Chinese Trademark Office or other agencies will be revised as a result of China's intention to provide national treatment to foreign well-known marks?

Since the protection of well-known marks is specifically provided in the newly revised Trademark Law and its Implementing Regulations, the Provisional Rules on the Administration and Determination of Well-Known Marks, enacted and issued by the State Administration for Industry and Commerce (guizhang) in 1996, is being revised correspondingly.

Additional question 9: With respect of the question above, will China revise the April 2001 guidance on criminal enforcement, which lowered thresholds for foreign well-known marks, to recognize that such thresholds should be lowered for all well-known marks, or will well-known marks be divided into different categories?

On lowering the threshold, the Chinese government has sent relative comments and suggestions in writing to the judicial authorities, which are processing this issue. What can be sure is that the new provisions on the threshold will be in full compliance with the principle of national treatment.

Additional question 10: Please provide a list of the well-known marks that are given enhanced enforcement by national provincial and local administrative and criminal enforcement agencies.

The compilation of a list of well-known marks will require the collaboration among local trademark administrative and judicial agencies, and related governmental bodies at national level. It is understood that no comprehensive statistics have ever been assembled on a cross-region and cross-department scale by any of these parties so far. Therefore, the list referred to in the question is not yet available. It's our knowledge, however, that the Trademark Office of State Administration for Industry and Commerce has a plan in place to gather the information in this regard.

E. GEOGRAPHICAL INDICATIONS

11. Does China's law relating to the protection of geographical indications include any of the exceptions to protection contained in Article 24 of the TRIPS Agreement? If so, please describe the way in which the exception is applied, indicating the relevant provisions of law.

In China, at the level of law adopted by the People's Congress and the regulations promulgated by the State Council, geographical indications are mainly protected under the Trademark Law and Anti-unfair Competition Law. Relevant provisions under the Trademark Law cover, to some extent, the exceptions to protection contained in Article 24 of the TRIPS Agreement. For example,

Article 16 of the Trademark Law provides for exception in a situation where the registration shall remain valid when it is obtained in goodwill.

12. Please explain the procedure(s) by which nationals of WTO Members may obtain protection for their geographical indications.

According to the Trademark Law and its Implementing Regulation, nationals of WTO Members may apply for the registration of certification or collective marks to seek protection of their geographical indications in China, and they can also enjoy protection under Anti-Unfair Competition Law.

13. Please explain how owners of trademarks might object to protection of third-party geographical indications.

Owner of a trademark may make use of the trademark opposition procedure, cancellation, review and adjudication procedure, judicial procedure and etc. to object to protection of third-party geographical indications registered as certificate trademark.

14. Are any geographical indications currently protected in China? If so, please identify some domestic and foreign geographical indications that are protected in China. How did these geographic indications become protected? What is the scope/nature of their protection?

Currently, there are some geographical indications being protected under the system of geographical origin certification marks, such as China's "Kuerle Xiang Li", "Shaoxing Huang Jiu"; American "A Product of the Florida Sunshine Tree", etc. All of them obtained protection in China by their owners' application filing with the Trademark Office for the registration of geographical origin certification marks. Provisions and measures concerning the protection of registered trademarks or geographical indications specified in the Trademark Law and other relevant laws can be used to protect these geographical indications. If a geographical indication is protected under the Trademark Law, the scope of its protection is limited to the mark that has been approved for registration and to the goods in respect of which the use of the trademark has been approved. This kind of protection for geographical indications is identical with that for registered trademarks.

15. Are the procedures for obtaining protection for a foreign geographic indication the same as those that are used to obtain protection of a domestic geographic indication or when the applicant is a national of China?

According to provisions under the Trademark Law and its Implementing Regulations, the procedure through which owners of foreign geographical indications apply for the registration of collective and certification marks in China is the same as a Chinese national does, except that a foreigner or a foreign enterprise shall entrust any one of such trademark agencies legally established to handle matters concerning the registration of a mark.

F. PATENTS

16. China indicated in the Working Party Report that it would provide in the Implementing Rules of the Patent Law a provision ensuring that Article 5 of the Patent Law complies with Article 27.2 of the TRIPS Agreement. Has this been done and, if so, please describe and explain the provision.

Please refer to the answer to question 30 from Japan.

17. Please indicate the provisions in the Implementing Rules of the Patent Law that implement Article 31(b), (c), (h) and (f) of the TRIPS Agreement relating to the grant of compulsory licenses.

- (1) The following provisions in the Patent Law of the People's Republic of China and its Implementing Regulations are relevant to the compliance with Article 31(b) of the TRIPS Agreement:

Article 48 of the Patent Law stipulates that "Where any entity which is qualified to exploit the invention or utility model has made requests for authorization from the patentee of an invention or utility model to exploit its or his patent on reasonable terms and conditions and such efforts have not been successful within a reasonable period of time, the patent administration department under the State Council may, upon the request of that entity, grant a compulsory license to exploit the patent for invention or utility model".

Article 49 of the Patent Law provides that "Where a national emergency or any extraordinary state of affairs occurs, or where the public interest so requires, the patent administration department under the State Council may grant a compulsory licence to exploit the patent for invention or utility model".

Paragraph 2 of Rule 72 of the Implementing Regulations of the Patent Law prescribes that "Any entity requesting a compulsory licence shall submit to the patent administration department under the State Council a request for compulsory licence, state the reasons therefore, and attach relevant certifying documents each in two copies".

Paragraph 3 of Rule 72 of the Implementing Regulations of the Patent Law prescribes that "The patent administration department under the State Council shall send a copy of the request for compulsory licence to the patentee, who shall make his or its observations within the time limit specified by the patent administration department under the State Council. Where no response is made within the time limit, the patent administration department under the State Council will not be affected in making a decision concerning a compulsory licence".

Paragraph 1 of Article 52 of the Patent Law provides that "The decision made by the patent administration department under the State Council granting a compulsory licence for exploitation shall be notified promptly to the patentee concerned, and shall be registered and announced".

- (2) The following provisions in the Patent Law and its Implementing Regulations are relevant to the compliance with Article 31(c) and (f) of the TRIPS Agreement:

Paragraph 4 of Rule 72 of the Implementing Regulations of the Patent Law provides that "The decision of the patent administration department under the State Council granting a compulsory licence for exploitation shall limit the exploitation of the compulsory licence to be predominately for the supply of the domestic market. Where the invention-creation involved in the compulsory licence relates to the semi-conductor technology, the exploitation of the compulsory licence shall be limited only for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive".

- (3) The following provisions in the Patent Law and its Implementing Regulations are relevant to the compliance with Article 31(h) of the TRIPS Agreement:

Article 54 of the Patent Law provides that "The entity or individual that is granted a compulsory licence for exploitation shall pay to the patentee a reasonable exploitation fee, the amount

of which shall be fixed by both parties in consultations. Where the parties fail to reach an agreement, the patent administration department under the State Council shall adjudicate".

18. Please indicate the term of protection for patents granted prior to 1992. Where is this term stated in your laws, regulations or implementing rules?

According to Notice No. 80 of the State Intellectual Property Office of China issued on 11 December 2001, for patents for inventions whose dates of filing fall before 31 December 1992 (including 31 December 1992) and that are still in force by 11 December 2001, the term of protection shall be extended to 20 years counted from the filing date. With the extension of the patent term, China has fulfilled its obligation under the commitment made in its accession to the WTO.

19. Please inform us as to whether or not process inventions that facilitate the conduct of business are eligible to be patented if they are otherwise novel, involve an inventive step and are industrially applicable.

According to the Patent Law, subject matters that fall within the provisions of Articles 5 and 25 of the Patent Law shall not be patentable. Since business methods are not clearly included in the provisions, any invention relating to business method that falls within the definition of invention as provided for in Rule 2 of the Implementing Regulations of the Patent Law, possesses of novelty, inventiveness and practical applicability as prescribed in Article 22 of the Patent Law and meets other requirements for the granting of patent right, is eligible for being granted patent right in China.

G. LAYOUT-DESIGNS (TOPOGRAPHIES) OF INTEGRATED CIRCUITS

20. With respect to the protection of layout-designs of integrated circuits (Working Party Report, paragraph 280), we would appreciate being advised what protections are afforded to discrete as part of semiconductor layout-design protection.

First of all, the provisions of the Regulations on the Protection of Layout-Designs of Integrated Circuits are fully in conformity with the provisions in Section 6 Part II of the TRIPS Agreement.

With respect to discrete mentioned in the question in particular, if it complies with provisions of Articles 2 and 4 of the Regulations on the Protection of Layout-Designs of Integrated Circuits, it can be protected through applying for registration of layout-design. Where the discrete does not meet the requirements of the Regulations, and thus can not be protected by registration of layout-design, it is still possible to be protected as trade secrets under the Anti-Unfair Competition Law. In addition, if the technology involved in the discrete meets the requirements for applying for patent as provided for in the Patent Law, it may seek patent protection through applying for a patent.

H. PROTECTION OF UNDISCLOSED INFORMATION

21. In the Working Part Report, China identified its Anti-Unfair Competition Law as the principal basis for the civil protection of trade secrets, and Article 219 of the Criminal Law providing criminal remedies (Working Party Report, paragraph 283). In addition to the laws identified in the Working Party Report regarding the protection of trade secrets, the following laws and regulations have existed in China:

- (a) Notice of Ministry of Labor on Several Issues Involved in Enterprise Worker Mobility (No. 355, 1996) (Article 2).

- (b) **Law for Promotion of Science of the P.R.C. (1 October 1993) (Article 60).**
- (c) **Rules on Banning the Infringement of Business Secrets (23 November 1995)**
- (d) **Guangdong Provincial Regulations**
- (e) **Regulations of the Protection of Technical Secrets of Enterprises in the Shenzhen Special Economic Zone (1 January, 1996)**
- (f) **Zhuhai Municipal Regulations**
- (g) **Company Law**
- (h) **Software Protection Measures**

We would appreciate being advised:

- (a) **whether these laws continue to be in full force and effect,**
- (b) **the scope of "reasonable compensation" that is required of an employee in order for a binding confidentiality agreement to exist between the employer and the employee, in light of inconsistent provisions in d, e and f, above,**
- (c) **whether the definition of Trade Secret as set forth in paragraph 283 of the Working Party Report is the same as those in the above items, and**
- (d) **whether those regulations that remain in effect equally apply to foreign and domestic enterprises and individuals.**
- (e) **will the protection accorded under any of these laws apply to protection of test and other data submitted to obtain marketing approval for a pharmaceutical or agricultural chemical? If so, please explain which provisions would apply and how.**

Our following reply does not involve (d) Guangdong Provincial Regulations and (h) Software Protection Measures listed in the questions, because we are not sure what these two regulations are.

- (a) Except for the Guangdong Provincial Regulations and the Software Protection Measures, relevant provisions in other above-listed laws, regulations and local legislations are specific implementing measures which are in line with the Anti-Unfair Competition Law and the Criminal Law. These laws, regulations and local legislations are legitimate and still effective. However, their legal effects and applicability are different.
- (b) The Regulations of the Protection of Technical Secrets of Enterprises in the Shenzhen Special Economic Zone, which was adopted by the Standing Committee of the Shenzhen People's Congress on 3 November 1995, and the Regulations of the Protection of Technical Secrets of Enterprises in Zhuhai, which was adopted by the Standing Committee of the Zhuhai People's Congress on 10 July 1997, stipulated the protection system of technical secrets of enterprises, which are respectively applicable to the legitimate owner of trade secrets within the administration area that the two regulations defined.

- (c) The concept of trade secret, which was mentioned in the laws, regulations and local legislations listed in the questions (except for the unknown Guangdong Provincial Regulations and Software Protection Measures), is identical with the definition of trade secret as set forth in the Working Party Report, paragraph 283.
- (d) These laws, regulations and local legislations listed in the questions are equally applicable to domestic and foreign enterprises and individuals.
- (e) As long as it falls in the protection range of any of the above-listed laws or regulations, the test and other data submitted to obtain marketing approval for a pharmaceutical or agricultural chemical would be protected under the corresponding laws or regulations. In addition, the amended Regulations on Administration of Pesticide, Regulations on Administration of Veterinary Medicine, Regulations on Administration of Feed and Feed Additive, and Implementing Regulations of Drug Administration Law all stipulated the protection of undisclosed information.

22. In the Working Party Report, China confirmed that it would "in compliance with Article 39.3 of the TRIPS Agreement, provide effective protection against unfair commercial use of undisclosed test or other data submitted to authorities in China as required in support of application for marketing approval of pharmaceutical or of agricultural chemical products which utilized new chemical entities" (paragraph 284). The United States understands that such regulations have been issued with respect to agricultural chemicals and that work is proceeding on pharmaceutical regulations.

We understand that for imported pharmaceuticals that are new to China's market the owner must submit non-disclosed data to obtain a certificate that permits both importation and marketing (an import permit). Please confirm that undisclosed data submitted to obtain an import permit will also receive protection against unfair commercial use.

According to Article 35 of the Implementing Regulations of Drug Administration Law of the People's Republic of China (4 August 2002, State Council Promulgation No. 360), the government shall provide protection to the undisclosed test and other data, which was gathered and submitted by the manufacturer or distributor as required in support of applications for marketing approval of pharmaceutical products which utilised new chemical entities, against unfair commercial use. Within 6 years from the date on which a manufacturer or distributor was granted marketing approval of a pharmaceutical product utilised new chemical entities, if any second applicant apply for market authorization using the said undisclosed data without the permission of the prior applicant, the competent authority for drug administration shall not grant the market authorization, except for that the second applicant submits his own data. The competent authority for drug administration shall not disclose the said data, except where (a) the disclosure of such data was necessary to protect the public, or (b) steps were taken to ensure that the data are protected against unfair commercial use.

23. Articles 13 and 14 of the Regulations for Protection of Chinese Pharmaceuticals (14 October 1992, State Council Promulgation No.106) provides for protection of the composition and methods of manufacturing of traditional Chinese medicines, including restrictions against disclosure by Chinese government officials, and establishment of confidentiality procedures according to national regulations. The level of protection extended to these products lasts from 10 to 30 years. The United States would appreciate being advised of the following with respect to these regulations:

- (a) Are these regulations still in effect?

- (b) **What are the State Council regulations that protect against such disclosure?**
- (c) **Do these regulations also relate to protection of clinical and other data submitted to obtain marketing approval? If so, to what extent?**
- (d) **What protections, if any, also exist against improper use of proprietary information disclosed to China's government with respect to a domestically produced pharmaceutical**
- (e) **Are any of these foregoing regulations being applied to foreign or Western pharmaceutical clinical data as well?**

The protection of the Traditional Chinese Medicine (TCM) products is based on the Provisions for Protection of Traditional Chinese Medicine Products, which is still in force. The main aim of the Provisions is to protect TCM and regulate the TCM market. The Provisions are generally not related to the TRIPS Agreement.

According to the current Provisions for Protection of Traditional Chinese Medicine Products, the confidentiality status is given only to Class I TCM for its composition and manufacturing process. Organizations and persons concerned are responsible for protecting clinical data and other data from disclosure for the purpose of anti- unfair commercial use.

I. RIGHT OF APPEAL

24. Within the framework of the rights to appeal decisions regarding patent and trademark rights, we would appreciate being advised whether (a) final decisions of the patent and trademark offices are appealed to an administrative tribunal or a specialized intellectual property tribunal within China's judicial system; (b) if China's intellectual property courts can entertain both validity and infringement issues in the course of an infringement action; (c) if the criminal panels of China's courts are authorized to hear criminal intellectual property cases or if such matters are heard by the civil intellectual property panels.

We suggest that China consider providing its specialized intellectual property courts with jurisdiction over trials and appeals of these cases, because the judges have developed greater expertise on the relevant issues.

Regarding question (a): For cases where any party in a civil dispute which has been filed to China Patent Office or China Trademark Office for deciding the effectiveness of the involved right is not satisfied with the decision of the Patent Office or the Trademark Office, the intellectual property tribunal of a people's court will take charge of the judicial review of these cases raised. For other cases where the party concerned is not satisfied with the decision of the Patent Office or the Trademark Office, the administrative tribunal of a people's court will take charge of the judicial review.

Regarding question (b): An intellectual property tribunal of a people's court does not directly deal with the effectiveness of a right during infringement litigation.

Regarding question (c): Intellectual property related criminal cases are mainly taken charge of by the criminal tribunal of a people's court. However, few local people's courts assign all intellectual property related cases, including criminal, civil and administrative, to the intellectual property tribunal.

J. ENFORCEMENT

25. Civil Actions: Article 41 of the TRIPS Agreement requires that enforcement procedures permit effective action against any act of infringement.

- (a) Taking note of recent amendments to the patent, trademark and copyright law that provide for provisional relief in those matters, as well as interpretations of the Supreme People's Court to provide provisional relief in trademark and patent matters, we would appreciate being advised of the status of implementing rules providing detailed guidance related to provisional relief for copyright infringements.
- (b) In the light of Berne Conventions prohibition on formalities, we would also appreciate being advised how China intends to permit plaintiffs to prove subsistence of copyright. In particular, we would appreciate an explanation of how the requirements suggested in a National Copyright Administration of China letter (25 December 2001) requesting notarized and certified registration certificates complies with Berne Convention and TRIPS Agreement obligations.
- (a) The Supreme People's Court now is drafting a judicial interpretation concerning implementation of provisional measures under the Copyright Law. In the current practice, the judicial interpretation about the provisional measures in patent and trademark cases would be referred when implementing the provisional measures in copyright cases.
- (b) Article 11.4 of the Copyright Law provides that "The citizen, legal entity or other body whose name is mentioned in connection with a work shall, in the absence of proof to the contrary, be deemed to be the author of the work."

According to this provision, if there is no proof to the contrary, the name of a right owner that is mentioned in connection with a work may prove his ownership in instituting proceedings in a people's court. In case of inconsistency between the Copyright Law and relevant regulations or measures, the provisions of the Copyright Law will prevail.

The above-mentioned provisions are consistent with Article 15.1 of the Berne Convention and the TRIPS Agreement.

26. Administrative Enforcement: Enforcement Actions at the Border: Please advise us of the status of proposed revisions to the 5 July 1995 State Council regulations on border measures for the protection of intellectual property rights.

The 5 July 1995 State Council regulations is now under revision, and the General Administration of Customs is receiving comments in this regard. The process is not finalized yet.

27. Criminal Enforcement: Article 61 of the TRIPS Agreement requires the application of criminal fines and imprisonment at levels sufficient to provide a deterrent in cases of willful piracy or counterfeiting on a commercial scale. In its Working Party Report, China agreed that repeat offenders and wilful piracy and counterfeiting cases would be referred to relevant authorities for prosecution (paragraph 298) and agreed to recommend to the judicial authorities that they lower the thresholds for initiating criminal investigations (paragraph 304).

- (a) **Please provide a copy of the recommendation to China's judicial authorities that they lower the thresholds for initiating and prosecuting criminal cases against those who infringe intellectual property rights. In addition, please provide copies of references to any recommendations from the judicial authorities to make necessary adjustments to lower the criminal thresholds for piracy and counterfeiting, as well as any actions by these authorities to lower the thresholds.**
 - (b) **We would appreciate statistical or other information on the following issues:**
 - (i) **the number of cases involving copyright piracy and trademark counterfeiting that were prosecuted through administrative penalties in China;**
 - (ii) **the number of such cases transferred from administrative proceedings to criminal prosecutions;**
 - (iii) **the number of criminal investigations initiated for copyright infringement and trademark piracy;**
 - (iv) **the number of criminal convictions have been obtained this year;**
 - (v) **the level of criminal fines assessed this year;**
 - (vi) **the number and length of jails terms imposed this year; and**
 - (vii) **the final disposition of seized goods, materials, and implements in criminal prosecutions.**
 - (c) **With regard to copyright cases in particular, the United States would appreciate knowing of criminal copyright prosecutions and convictions by China under other provisions of Chinese law, such as illegal business operations (feifa jingying).**
- (a) Recommendations have been made by relevant administrative authorities to the judicial authorities to lower the thresholds for initiating criminal investigations.
 - (b) Relevant statistics in enforcement of IPR laws and regulations in year 2001 are as follows:

Regarding copyright, the number of claims accepted by the administrative authorities of copyright is 4416, the number of cases finalized is 4302, among which 3607 cases resulted in administrative penalties, and the number of cases transferred to criminal procedures is 66.

Regarding trademark, in year 2001, totally 41,163 trademark cases were dealt with by the administrative authorities, amount which 22,813 cases involved infringement and counterfeiter, and 18,350 cases involved other offences. 250,000,000 pieces of marks and 14,004 pieces of instruments used for infringing purpose were confiscated, and the total amount of fines is RMB 210,000,000. The total amount of compensation ordered by the administrative authorities is RMB 3,343,400, and 86 cases were transferred to criminal procedures. As to criminal procedures, from January to November 2001 the number of cases heard by the courts is 299, and 265 cases were finalized. From January to May 2002, the number of cases heard by the courts is 186, among which 136 were finalized.

- (c) There is no specific calculation of statistics in such a way as mentioned in the question. Please also refer to the answer to question 25 from Japan.

28. We note that prior to WTO accession, China's authorities enacted certain regulations or rules, including the Provisions on the Transfer of Susceptible Criminal Cases by Administrative Organs for Law Enforcement (9 July 2001) and Regulation of the Supreme People's Court and Ministry of Public Security Concerning Standards for Initiating Cases In Economic Crimes (18 April 2001), and that revisions to the trademark and copyright laws change various aspects of the administrative enforcement systems, and in particular cases mandate referral to criminal prosecution in appropriate cases.

We would appreciate being advised of legislative and enforcement efforts to coordinate administrative, civil and criminal enforcement, including new regulations or initiatives have been undertaken to (a) preserve evidence from administrative investigations for use in criminal investigations and prosecutions; (b) insuring that appropriate copyright and trademark matters are referred to criminal investigation; (c) ability of a rights holder to participate in administrative or criminal proceedings; (d) providing for coordination or cooperation among various enforcement authorities on complex cases; (e) providing for expeditious transfer from administrative enforcement to criminal prosecution; and (f) treatment of recidivist violators of administrative regulations, e.g., have they been subject to criminal prosecution.

The legal bases for transfer of cases by administrative agencies include the Criminal Procedure Law, Provisions on the Transfer of Susceptible Criminal Cases by Administrative Law Enforcement Bodies, and relevant provisions of the Trademark Law and the Copyright Law and the Implementing Regulations thereof. The Provisions on the Transfer of Susceptible Criminal Cases by Administrative Law Enforcement Bodies provides comprehensively the obligations of administrative organs and the public security authorities on transference of susceptible criminal cases and the procedure requirement thereof. Article 4 of the Provisions provides that the administrative organs shall preserve appropriately the evidence collected in the course of investigation of actions violating administrative regulations. According to Article 15, 16 and 17 of the Provisions, administrative or public security authorities violating the Provisions will be punished.
