Effect of PRC's Open-Door Policy

Number of applications on rise; Chinese seek to improve system, perfect rights

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One of the most dramatic topics highlighted the Coordinative Meeting of Socialist Patent Agencies in Burgas, Bulgaria, October 6-10, 1986, attended by Chinese observers from Patent Agency, CCPIT (China Council for the Promotion of International Trade), was that, in spite of a worldwide decline of patent applications, especially in Eastern European countries, due to a global economic recession, China received so many patent applications within a short span of one and a half years after the enforcement of Chinese Patent Law. Again, at the Sino-Soviet Seminar of Industrial Property Right Protection in Moscow October 19-27, 1986, Soviet representatives expressed strong interest in the subject. I shall explore it here.

Nowadays, the number of patent applications is regarded as one of very important datum measuring the functioning of the patent mechanism. When we say that there is a worldwide decline in the number of patent applications, we do not mean that it cannot go up rapidly in certain countries. Take China, for example. In the period of April 1, 1985 to October 31, 1986, the Chinese Patent Office has received 28,963 patent applications, out of which 20,007 (60.1%) were filed by domestic applicants, and 8,956 (30.9%) came from 47 foreign countries and regions. (*People's Daily*, November 2, 1986) By the end of September, 1986, 6,951 applications were published and 1,912 granted. (*International Business*, October 27, 1986)

It is not without cause that under the unfledged patent system, China has received so many applications. According to Marxist views, the fundamental force that develops the society is none other than the movement of the contradiction between the productive forces and the relations of production in that society. Whenever the relations of production are suitable to the need for the development of the productive forces, the former will push the latter forward. Meanwhile, the rapid development of the latter stimulates the change and development of the former. To some extent, the rapid development of Chinese Patent System is witness to this spiral movement.

Under the leadership of the Chinese Communist Party, Chinese people fought heroically for 28 years to overthrow three mountains over their heads. They initiated a new phase of socialist construction. Socialist relations of production are new relations based on the totally destroyed semi-feudal and semi-colonial relations of production. The establishment of these new relations stimulated the rapid advance of productive forces in China.

Nevertheless, in the course of 100 years of battling foreign oppression, an anti-foreign prejudice developed in the country. Failing to break thoroughly with this traditional ideology, China adopted a closed-door policy toward the rest of the world. It imitated the Soviet pattern rigidly for 30 years after the founding of the People's Republic, thus developing a new contradiction between new relations of production and new productive forces, which had been greatly sharpened during the 10-year Cultural Revolution.

Liberate Forces

How could it manage to liberate the potentially powerful productive forces from the unsuitable relations of production in this socialist country? The Chinese Party and Government resolutely decided in 1979 that the central task for the nation as a whole should be switched to the socialist economic construction. They established the ambitious goal of modernizing agriculture, industry, national defense and science and technology by the end of this century. Under this general principle, China launched economic reform and started economic construction on a large scale.

Scientific and technological advance is considered the engine, and also one of the important symbols, of the development of the productive forces. Hence, changing the existing unreasonable structure of scientific and technological administration is unavoidable. China promulgated its Patent Law to protect patent rights for inventions-creations, to encourage, and foster the spreading and application of inventions-creations, to promote the development of science and technology, and to meet the needs of the construction of socialist modernization. The Patent Law came into force April 1, 1985.

However, the Patent Law is no more than stipulations concerning substantive and procedural rights enjoyed, and obligations undertaken, by inventors, applicants (or patentees), patent examining, approving and administering authorities, as well as judicial departments and other organizations. It is not enough to rely upon these written provisions to guarantee effective enforcement of the law and attract more applications.

In the face of keen competition, the fundamental interest of an applicant is the economic benefit instead of patent, which is none other than a means of defending the applicant himself and attacking his competitors. For this reason, a good economic environment is needed to encour-

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courage application.

A patent system alone is not sufficient for China to encourage foreign investment and acquire advanced technology. The reason is that in this country the patent system itself has come out of an open-door policy and its effective development will rely, to a great extent, upon the same policy. By open-door, we mean both "taking in" and "giving out." In view of the experience gained by Japan and other countries, at the initial stage of open-door practice, we should attach greater importance to "taking in," which is linked to "giving out."

Few would be taken in without an attractive and flexible environment for investment. Establishment of a well-functioning legal system, especially a foreign-related economic legal system, is considered a significant factor to make foreign investors or technology transferors feel comfortable when they plan to come into the Chinese market. Therefore, China pays special attention to legislation of economic laws. Since the promulgation of the Law of the People's Republic of China on Chinese-Foreign Joint Venture on July 8, 1979, it has enacted not a few economic laws and regulations, let alone many foreign-related ones.

Litigation

However perfect the provisions of law, they are no more than written things which cannot make foreign investors and transferors feel easy without being strictly abided by. As reported by *International Business* on November 3, 1986, the Higher People's Court in Tienjing held an oral hearing on October 30, 1986, to try the appeal case of *Niutuo Village vs. a Sino-Japanese Pharmaceutical Joint Venture.* Being not satisfied with the first-instance judgment, Plaintiff Niutuo Village, appealed to Tienjing Higher People's Court. The appeal court confirmed the fact-finding and law application of the lower court. It affirmed the original judgment and rejected the appeal. This important case suggests the socialist legal principle of everybody being equal before the law.

In recent years, China has made great advancements in utilizing foreign capital. Joint ventures and wholly-owned foreign enterprises have sprung up like mushrooms. But making joint venture with capitalist countries is new to socialist countries. Being less experienced, confined by the rigid economic structure, as well as spoiled by inefficient administrative system and red tape, China for a time found it difficult to keep the capital inflow. The seriously polluted investment environment made foreign investors feel the future was unpredictable. It is no wonder that the number of patent applications declined in this period. It shows that contradiction between the relations of production and the productive forces cannot be thoroughly settled by reforming only a part of the relations of production and leaving the remaining part unchanged. It is necessary to effect reformation of the whole relations of production as well as the superstructure (political structure in particular) which is underlain by, and counteracts upon, its economic basis.

To ease or eliminate pollution and clear the investment environment, the Provisions of the State Council of PRC for the Encouragement of Foreign Investment was issued on October 11, 1986. As regulated by the Provisions, when foreigners invest in export enterprises or technologically advanced enterprises, they shall enjoy the following preference or convenience: Lower service fees, lower site use fees, tax reduction or exemption, profit reinvestment preference, external conditions guaranteed (including import or export of materials or products). In addition, enterprises with foreign investment that encounter unreasonable charges may refuse to pay and appeal to local economic committees up to the State Economic Commission.

Local Attitudes

What is more, much preference and convenience have been offered by local governments according to local conditions. For example, in some cities, enterprises with foreign investment can exchange their RMB income into hard currencies through some kind of free markets. It is reported that the local government in Tienjin is planning to concentrate scattered administrative power over foreign investment on a unified Foreign Investment Service Center. This will reduce red tape and improve efficiency. Also, new regulations were issued by authorities in Fuzhou, a provincial capital city in China. Under these regulations, no Chinese are allowed to be employed in enterprises with foreign investment before they go through a training course and pass a strict examination.

To better the investment environment further, China has signed bilateral agreements on avoidance of double taxation with 14 countries, in which various preferential treatment is provided to facilitate investment as well as economic, technological, scientific, and cultural exchange.

There has been powerful reaction to the new regulations and practice among industrial and commercial circles abroad. More foreign firms are confident of investing in China. And the number of foreign patent applications has risen somewhat again during recent months.

Of course, the fluctuation in the number of applications is also affected by such factors as:

1. The patent system itself getting perfected. With Shanghai Sub-Office and five Representative's Office which are under the direct control of the Chinese Patent office, three State-Council-designated foreign-related patent agencies, and 245 domestic patent agencies with 7,000 agents, as well as 62 patent gazette publishing centers, China has so far established a relatively complete patent working system. Also, it has launched a nationwide campaign to popularize patent knowledge while strengthening relations with international organizations for the protection of industrial property rights.

2. Establishment of a judicial system for trying disputes concerning industrial property rights. Attaching great importance to the business, the Supreme People's Court has organized many training courses to teach special judges how to try cases involving industrial property rights. The court invited experts from the U.S.A., FRG, and Japan, for example, to deliver lectures, and it co-sponsored with WIPO two courses for training local judges. There have been definite regulations concerning jurisdiction over industrial property right disputes and the procedure in trying cases.

3. A brisk domestic technology market. Taking the 60th Autumn Guangzhou Fair for example, a special hall for technology dealings was organized. Thirty-seven domestic delegations participated. They offered 340 ready items and documents for 1,249 items involved in industries of space, atomic energy, machinery, electronics, meters, petro-chemistry and pharmaceuticals. Local technology fairs are also booming. For example, the five-day Tienjing Fair in October received a thousand domestic and overseas entrepreneurs with 110 letters of intent and 20 contracts concluded. There were two licensing-out and 10 licensing-in contracts amounting to $5 million. What is more, on September 1, 1986, a system for technology transfer contract registration was initiated to supervise performance of contracts.

4. Accelerated development of science and technology. The scientific cycle from the theoretical breakthrough of picture-taking to the application of camera, took 102 years. It took 65 years for the telephone, 14 years for television, 6 years for the atomic bomb, and now, only one year for certain sophisticated techniques. It reveals that technology develops in a geometrically progressive way. Since the Chinese patent system was born relatively late, it is natural for China to receive applications faster than many other nations.

5. Sharply revaluing the yen and D. mark against U.S. dollar. Since September 1985, the value of the dollar against the yen and D. mark has gone down, touching 150 yen or 2 D. mark at a time. No doubt, the yen or mark holders made a profit when they paid the inelastic prices charged by the foreign-related patent agencies in China. This factor is of special importance to medium or small enterprises.

Problems With Systems

We should not feel smug over our achievements while overlooking the existing problems with the Chinese patent system. When focusing on an analysis on the number of applications, the relative amount, the structure, and the quality should also be considered.

In spite of the rapid increase in the number of applications, which is the 8th in the world, when you consider a billion population — number one in the world — and several millions of enterprises, the relative number of applications is rather low.

The problem becomes salient when analyzing the structure of domestic applications. Out of the total domestic applications, no more than 13% were filed by enterprises (the so-called service intentions). In addition to a small portion from educational or research institutions, the majority of the remaining part were for the so-called nonservice inventions, utility models, or designs filed by individuals. Strange to say, the Chinese Patent Law has been in effect for one and a half years, but the well-known Daqing Oil Administration with 170,000 workers and 10,000 engineers and technicians producing no less than 1,000 scientific and technical innovations every year has so far filed nothing with the Chinese Patent Office. Yet, the Hitachi Company of Japan files as many as 3,000 patent applications every year. This abnormal structure is caused by the following factors:

1. Lacking patent knowledge, most of the enterprise leaders do not realize the significance of patent in market competition. They do not know that, with the rapid development of science and technology the quantity and quality of patents owned by a firm have become important indexes measuring the strength of the firm. Failing to utilize patents to fight competitors in fierce market competition suggests that not a few of our enterprise leaders have none of the talents and boldness of entrepreneurs, and they manage their enterprises in an administrative way.

2. Market competition is too weak to compel enterprises to take up the weapon of patent for defending themselves and attacking others. Inefficiency prevails in not just a few firms. If a state-run enterprise is beaten in keen market competition, how could the State let it go bankrupt without an enterprise bankruptcy law?

3. Up to now, there has not been any law regulating service or nonservice inventions in China. Some individuals took advantage of this situation to make "nonservice" inventions at the cost of their assignments, thus exerting influence upon R&D activities in enterprises.

It must be realized that every firm reproduces two kinds of products at the same time, i.e. tangible product (commodity) and intangible one (technology). In the course of commodity production, the firm itself is the consumer of technology as well as the producer of the same. Supposing a firm consumes technology product while producing nothing in that respect, it must depend on other firms in keen competition and its vigor will be exhausted until being forced out of market. Only those that produce both products are really powerful ones in market competition. The fact that enterprise productivity can hardly be raised in China may be partly attributed to the failure to realize this.

It is admitted that with such an abnormal structure the average quality of domestic applications is relatively low. Individual inventors, they are something of petty producers of technology products. Scattered, isolated and less informed, most of them are producing technology products that are less strategical and hard to squeeze into others' product series. Some of these products may find a prosperous domestic market, but appear to be less competitive when fighting against those by multinationals in the international market. What is worse, not a few inventions for which patent applications have already been filed are no more than conceptions that need much effort to be commercialized.

What is the future of the Chinese patent system? Can patent applications, especially those from abroad, be kept increasing? These may be questions of common interest at home and abroad. The writer believes the Chinese patent system will continue to be consolidated and developed, and domestic (especially enterprise) and foreign applications will continue to increase provided China goes on keeping its door open to the rest of the world and reforming unreasonable political and economic structures domestically. But the trend is to be determines by such factors as follows:

1. Launching an advertising campaign to popularize patent knowledge, especially to inform enterprise managers of such knowledge. It was proposed that patent knowledge be included in the checkup of each manager's qualification. That is a good idea! Nevertheless, the propaganda campaign must be supported by a rewards and penalties system. Those efficiently master-

ing the weaponry of patents should be rewarded spiritually and physically, and those failing to protect their excellent techniques by applying patents, thus causing invisible loss to their factories, should bear the responsibility for the loss. Factory managers should be made more responsible to their duties.

2. Ameliorating the investment environment and energizing the technology market. Most foreign firms have applied patents to protect future investment and technology transfer in China. A country with better investment environment and brisk technology market is more luring to foreign firms.

Ability to Pay

When foreign patentees assign or license-out their patents to Chinese enterprises, more often than not they find difficulty seeking potential assignees or licensees with the ability to pay. In view of this situation, except those aiming only to protect exports to China, the techniques for which patent applications have already been filed, should be those that can enhance the product or technology export capability of the assignees or licensees, or be beneficial to import substitution. Those that are strongly adaptable and easy to produce economic benefit are the most welcome techniques. It would be more fascinating to add some investment in cash or equipment, or to guarantee the export of a certain portion of products of the assignees or licensees, when assigning or licensing-out patented techniques, than simple assignment or licensing.

Two solutions are suggested to help simple assignment or licensing:

First, developing a free-exchange market with dirty floating rate, in which foreign assignors or licensors are allowed to convert their RMB incomes into hard currencies. Thus, when negotiating assigning or licensing transactions, both parties should take this factor of relative high cost into consideration.

Second, allowing Chinese assignees or licensees to barter with commodities that are available in the domestic market and needed by foreign assignors or licensors. Not long ago, DR BABOR GmbH & CO., a famous German cosmetics manufacturer, proposed to us that its licensed know-how and cash or equipment investment be compensated with makeup brushes, T-shirts, mirrors, etc., in case the licensee is not in a position to pay in hard currency.

3. Punishing infringers to guarantee the power of the patent. Although many foreign firms have filed many patent applications in China, they still feel a little uncomfortable with the patent system. Not a few of them are adopting tactics of throwing a stone to test one's way. Now that the stone is thrown, the next step is to wait and see. If the patent right is well-protected in China, more applications would pour into the country. On the contrary, if the patent right becomes more a mere formality than a real right, who would want such protection?

Some people worry that even if a Chinese party (supposed infringer) loses an action, with what does it pay the foreign party (supposed patentee) damages? I strongly suggest that the free exchange market be utilized. The losing party shall manage to raise exchange in the market, and pay damages in lump-sum or in installments. The competent authorities shall look into the matter to see if the managers of the losing factories should bear administrative, economic, or even criminal responsibility. Nothing less will give foreign applicants confidence in the Chinese patent system.