專利特許實施修法諮詢座談會議資料目錄

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智慧局 97.6.26

各國為了鼓勵、保護、利用發明與創作，以促進產業發展，設計有專利制度並賦予專利權人於一定期限內專有排除他人未經其同意而製造、販賣、為販賣之要約、使用或進口專利物品之權利（專利法第 56 條第 1 項參照）。然而，在專利制度上，除賦予專利權人上述權利外，為了避免專利權人的獨占權與排他權範圍過廣，而限制了其他人利用該等技術、影響國家整體經濟利益，與貿易有關之智慧財產權協定（以下簡稱 TRIPS）及各國專利法亦多有強制授權（強制許可，我國專利法稱為特許實施）及限制專利權效力之規定。

我國專利法於 83 年修正時，即參照 TRIPS 第 31 條之規定，於第 78 條（現行法改列第 76 條）中就強制授權之授權要件、申請之程序要件以及廢止撤銷等情況加以規定。特許實施於現行專利法架構下，可因國家緊急情況、增進公益、經合理協商仍不能協議授權、救濟不公平競爭及再發明等情況，由專利專責機關依申請而為特許實施處分。自該條規定增訂迄今，智慧局曾就飛利浦公司之 CD-R 專利及羅氏公司之克流感疫苗專利二件案例，分別以專利法第 76 條第 1 項所定「申請人曾以合理之商業條件在相當期間內仍不能協議授權」以及「因應國家緊急情況」為由，核准國碩公司以及行政院衛生署強制授權之申請。

然而該二案之作成引起國內學界、專利使用需求者以及國內外專利權人團體對於我國特許實施相關規定之熱烈討論，甚至引起歐盟、美國及日本的關切。該二案雖分別因申請人之撤回申請及未提起行政救濟而告平息，惟對於各方就我國法規適用之疑義應仍有釐清之必要。

本局秉持開放的態度，期望學界、權利人及利用人團體一起就該制度之規範，進行全面性的檢視。以下謹就本局所研蒐各界對專利特許實施制度所提出之修正建議以及本局於實務操作上發現須加以改正之事項，臚列如後議題以作為本次會議討論之參考。

議題一：將「特許實施」之用語，修正為「強制授權」是否適宜?請 討論。

（一） 說明：

「特許」的用語，在我國法制上，一般具有以公權力依法授予某種特權之意義。依據 TRIPS 第 31 條之規定，除因「國家緊急危難」或「其他緊急情況」而為處分之情況符合「特許」之概念外，因其餘事由所為之處分，其原意係由公權力強制介入私契約形成，與「特許」之概念尚屬有間。

（二） 智慧局初擬意見：

為使法條用語符合該法律行為之本質，以及法規用語一致性的考量，建議將「特許實施」之用語，修正為「強制授權」。

議題二：現行法將「申請人曾以合理之商業條件在相當期間內仍不能協議授權」作為得特許實施之事由是否適宜?請 討論。

（一） 說明：

我國現行專利法第 76 條第一項將「申請人曾以合理之商業條件在相當期間內仍不能協議授權」作為得特許實施之事由，並曾於國碩公司申請特許實施飛利浦 CD-R 之案件中，以此作為准予強制授權之依據。

惟學者間有認該項規定應為 TRIPS 第 31 條規定作成特許實施之限制條件，而非可據以直接做為作成特許

實施處分之事由。亦有認為該項規定雖符合 TRIPS 第 31 條文字，但失之寬鬆，將使專利權人之排他權利減弱為報酬請求權，提出以關鍵設施理論為本，作為以該要件授予特許實施前提之議。

再參考其他國家之專利法制，如日本、德國及韓國等，則是將該條項之規定作為因「專利未實施或未適當實施」申請特許實施之先決條件。亦即申請人欲以專利權未實施或未適當實施作為申請特許實施之事由者，須於申請前曾以合理之商業條件，在相當期間內與專利權人仍不能協議授權者而言。而在歐盟就該案對我國進行貿易障礙調查的報告中，亦針對 TRIPS 第 31 條之規定分析後認為，該項規定於 TRIPS 第 31 條中應屬程序要件而非實體要件（歐盟調查報告摘譯，如附件 7)。

（二） 智慧局初擬意見：

我國現行專利法有關特許實施之規定，於 83 年修法時，即依 TRIPS 第 31 條規定修正。惟經對照各國規定，我國規定是否失之過寬？或係因實務執行而引發爭議?確有進一步研析之必要。

議題三：刪除現行法所定須經法院判決或行政院公平交易委員會處分「確定」一節，是否適宜?請 討論。

（一） 說明：

專利法於 86 年修正時，將現行條文第 76 條第 2 項修正為「專利權人有不公平競爭之情事經法院判決或行政院公平交易委員會處分確定者，雖無前項之情形，專

利專責機關亦得依申請，特許該申請人實施專利權。」增訂了處分「確定」的文字。立法理由中表示，「因公平交易委員之處分，仍可能經行政爭訟後始確定，為求明確，爰於『行政院公平交易委員會處分』後增列『確定』二字」。

惟學者間有主張 TRIPS 第 31 條第 k 款規定，以特許實施作為救濟不公平競爭之情況，僅須經司法或行政程序認定為違反公平競爭即為已足，無須待處分確定，若須待法院判決或公平會處分確定，可能須費時數年，屆時恐亦已無須以特許實施救濟之必要。學者間並更進一步認為，依我國法制，有關不公平競爭事項，係屬行政院公平交易委員會權責。因此除建議將現行條文「確定」二字刪除外，並建議應予公平交易委員會於作成處分時，得直接以特許實施作為處分之手段，於裁決中給予特許實施之救濟，同時要求為特許實施之法院或公平會，將判決或處分內容通知專利專責機關，俾使專利專責機關在系爭專利的管理上有所依據。另立法委員陳明真亦曾於 95 年 11 月以「特許實施向為專利權人有限制競爭或不公平競爭之情事時，公平交易主管機關得命其為一定行為之救濟手段，若待法院判決或行政院公平交易委員會處分「確定」，將無法達成反競爭救濟效果。」，而提案修正該條。

（二）　智慧局初擬意見：

依據現行專利法，在以特許實施糾正不公平競爭之

處分仍由專利專責機關作成之情況下，若經法院或行政院公平交易委員會認定為違反公平競爭後，即由該等機關移由本局作成特許實施之處分，或透過申請人向本局申請，而不需待該等處分或判決確定，雖得較即時糾正不公平競爭行為的不當，惟於實務運作上易造成程序上的迂迴。若依學者的建議，使特許實施得直接成為法院判決或公平會處分的一部分，應較能符合我國機關權責分配及行政程序經濟之規劃。

議題四：分別規範「因政府使用而特許實施」與「一般特許實施」所適用之程序，是否適宜?請 討論。

（一） 說明：

在「因政府使用而特許實施」之情況，如國家緊急或其他緊急情況，其本質屬類似強制徵收的概念，亦即政府本於公益之緊急及重大的需求，有立即使用該等專利權之必要，否則恐將緩不濟急者。其所歷經之程序應作極為迅速的處理，與一般特許實施的申請程序應有所區別，相關之配套亦為不同。例如在政府使用之情況，於總統發布緊急命令或各主管機關依職權認定有緊急情況時，即應同時為徵收需用專利權之處分並同時核定補償金，而非俟特許實施透過申請後，由專利專責機關認定等。

本局於審議衛生署申請就美商吉李德公司所有之克流感藥物，以「因應國家緊急情況為由」申請特許實施一案時，即面臨是否應予專利權人如一般特許實施申

請案一樣的3個月答辯期間之問題。予專利權人3個月答辯期間之用意，一方面係為使專利權人知悉其所有之專利權被提起特許實施申請，另一方面亦係促使申請人與專利權人間能有再次協商之機會。惟在遇緊急命令或其他國家之緊急情況而有須立即特許實施特定專利權時，若仍需待專利權人3個月答辯期後再行審查，恐已緩不濟急。另針對「緊急情況」是否存在一節，由於專利專責機關對於各該領域之事物並不一定瞭解，且本於機關最適性之考量，對於緊急情況之認定，自宜由各主管機關為之。

學者間亦有建議在以國家緊急等因公益之需求而特許實施時，因於此類案作處理之時效性甚為重要，TRIPS協定第31(b)款尚只要求在合理可行的情形下，儘速通知專利權人，故是否一定要在特許前給予專利權人答辯之機會，似亦未必然，只要最後處分的決定仍受司法或上級行政審查應已足；另外，基於權責明確之考量，智慧局並非公共衛生之權責機關，對公共衛生專責事項應無權進行實質審查，因此建議智慧局未來逕以相關主管機關之認定為準，不須再進行實質審查，以收時效。

（二）　智慧局初擬意見：

我國現行法未區分特許實施之事由而統一適用相同之申請程序確有不妥，易造成實務運作上的困難。建議於因應國家緊急情況或其他緊急情況而特許

實施者，專利專責機關得依緊急命令或需用專利權機關之通知，特許實施所需專利權並儘速通知專利權人。基此，專利專責機關對於緊急情況之認定，悉依主管機關之處分或通知，屬多階段行政處分之後階段；而專利專責機關在情況下所為之強制處分亦應儘速通知專利權人。

議題五：現行專利法關於特許實施補償金採二階段方式之規定，是否適宜?請 討論。

（一） 說明：

依據現行專利法第 76 條第 5 項規定，特許實施實施權人有給與專利權人適當補償金之義務，惟於程序上係採二階段方式。亦即於第一階段係立基於尊重雙方之補償金協議權，因此係採協議先行之方式，若雙方無法達成協議或有爭執時，則進入第二階段，由專利專責機關介入核定。

在比較法上，日、韓等國之立法例中，則均分別明定於作成特許實施之處分時，即應同時核定補償金及補償金不能受領時應提存等相關規定。日本特許法第 86 條規定，特許實施之裁定應付理由，並以書面方式作成，其內容並應確定實施權之範圍、對價額、支付方式及時間。另依特許法第 88 條規定，在應獲對價者拒絕受領或不能受領、對於對價已依特許法第 183 條提起訴訟或該專利已設定質權等情況下，對價給付義務人應提存對價。韓國於專利法第 110 條及第 112 條，同日本特

許法第 86 條及第 88 條之規定。專利法第 113 條並明定，特許實施被授權人未支付補償金或未提存時，特許實施決定自動失效。德國專利法第 24 條第 5 項則規定，特許實施授予時得規定範圍、期間與條件限制，以配合特許實施授予目的之達成；補償金核定時應將該專利之商業價值與授予特許實施之原因背景一併考量。特許實施授予後，如客觀情勢變更，雙方均得聲請調整補償金。

（二）　智慧局初擬意見：

特許實施制度設計之本意即係為衡平公益需求及獎勵發明。因此申請人於獲准特許實施之同時，本即應支付適當之補償金予專利權人，以衡平專利權人因此所受之損失。建議修正為於授予特許實施之同時即考量該專利之商業價值與授予特許實施之原因背景，一併核定適當之補償金。

議題六：現行專利法所定就特許實施後，得依職權或申請廢止之妥適性，以及建立特許實施授予後監督機制之必要性，請 討論。

（一）說明：

依專利法第 76 條第 7 項及第 77 條之規定，對於特許實施授予後之效力，端賴專利權人或專利專責機關主張該特許實施有原因消滅或違反目的之情況，而廢止特許實施之處理。至於特許實施授予後，實施之方式、實際執行之情況等，現行法並未明定監督機制。惟「特許實施之原因消滅」及「違反特許實施之目的」

所指為何?於實務之審查及判斷上易生混淆。

在比較法上，日本專利法於第 89 條明定「未支付或者提存補償金者，特許實施之定裁定失去效力。」第 90 條則規定，特許實施定後，裁定理由消滅，或者因其他原因維持裁定不妥當，或特許實施權人未適當實施該專利發明時，得根據利害關係人之請求或者依職權，廢止（rescind）裁定。

（二）智慧局初擬意見：

現行專利法第 76 條第 7 項及第 77 條有關「特許實施之原因消滅」及「違反特許實施之目的」等之規定較抽象，於適用時仍須透過解釋的方式加以確認而易生混淆。建議參照日本法之規定，明定於作成特許實施之事實發生變更、特許實施實施權人未依授權之內容適當實施，或特許實施實施權人未依核定支付補償金時，專利專責機關得依專利權人之申請或依職權廢止其特許實施。

惟若因需用專利權機關之通知為依據而為特許實施者，若相關機關認為緊急情況已因事後情況之變更而不存在，或因行政救濟而被撤銷或廢止者，特許實施之存廢即應作一致處理。爰建議增列，於特許實施之事實情況變更而無特許實施之必要者，應通知專利專責機關撤銷或廢止該特許實施之處分。

議題七：現行專利法所訂特許實施有關再發明規定之妥適性?請 討論。

（一） 說明：

依據 TRIPS 第 31 條 I 款所定，申請在後之專利權得請求特許實施在前之專利權者，須符合三要件：1.在後之專利於實施時將不可避免侵害在其之前申請之專利;2.在後之專利較在其前申請之專利具相當經濟意義之重要技術內容改良;3.在前之專利權人不同意授權予在後之專利權人。專利法第第 78 條第 1 項明定「再發明，指利用他人發明或新型之主要技術內容所完成之發明」，惟究何謂「主要技術內容」?應如何定義?易引起爭議。

（二） 智慧局初擬意見：

為使再發明之定義明確並避免不必要之爭議，建議將專利法第 78 條第 1 項及第 2 項之規定修正為:「實施發明或新型專利權將不可避免侵害申請在前之發明或新型專利權者，非該專利權人授權，不得實施其專利權。製造方法專利權人依其製造方法製成之物品將不可避免侵害申請在前之專利者，亦同。

前項專利權人不同意授權者，申請在後之發明或新型專利權人或製造方法專利權人得依第七十六條第三項至第六項之規定申請特許實施。但以其發明或新型專利或製造方法發明，較前專利權人之發明或新型專利權具相當經濟意義之重要技術內容改良者為限。」

相關國家強制授權規定簡介

附件一 日本專利法強制授權（特許法§83~§94）簡介

1. 強制授權授予事由：
   (1) 未於國內適當開展：特許法第 83 條規定，發明專利連續三年以上未在日本國內適當實施時，欲實施該發明專利者得向專利權人進行協商，協商不成立時，得請求特許廳長官裁定。
   (2) 再發明：特許法第 92 條規定，發明專利符合第 72 條之規定（再發明）時，前後發明專利權人得向對方進行協商，協商不成立時，得分別請求特許廳長官裁定。
   (3) 公共利益：特許法第 93 條規定，發明專利的實施為公共利益而必要時，欲實施該發明專利者得向專利權人進行協商，協商不成立時，得請求「通產大臣」裁定。
2. 裁定強制授權應具備之要件：特許法第 86 條規定，依特許法第 83 條第 2 項作成之裁定應附理由，並以書面方式作成，其內容並應確定下列事項：
   （1）設定的普通實施權之範圍；
   （2）對價額、支付方式及時間。
3. 對價提存：在下列情況發生時，對價給付義務人應提存對價：（特許法第 88 條）
   （1）應獲得對價者拒絕受領或不能受領；
   （2）對於對價已依特許法第 183 條提起訴訟者；
   （3）該專利已設定質權者。
4. 撤銷：依特許法第 83 條第 2 項作成裁定後，如有裁定理由消滅、因其他原因可認維持原裁定不適當、或已獲得普通實施權者未適當實施時，得依利害關係人請求或依職權撤銷原裁定。（特許法第 90 條）

   撤銷裁定時，普通實施權隨之消滅。(特許法第 91 條)

5. 不服裁定之理由限制：依行政不服審查法對依特許法第 83 條第 2 項作成之裁定為異議申訴時，不得對於裁定所確定之「對價」不服，作為對該裁定不符之理由。（特許法第 91-2 條）

對於裁定所確定之對價不服時，依據特許法第 183 條[1]，應逕向法院提起訴訟。

6. 相關條文（日文版及英文版）：

第八十三条　特許発明の実施が継続して三年以上日本国内において適当にされていないときは、その特許発明の実施をしようとする者は、特許権者又は専用実施権者に対し通常実施権の許諾について協議を求めることができる。ただし、その特許発明に係る特許出願の日から四年を経過していないときは、この限りでない。

２　前項の協議が成立せず、又は協議をすることができないときは、その特許発明の実施をしようとする者は、特許庁長官の裁定を請求することができる。

（答弁書の提出）

第八十四条　特許庁長官は、前条第二項の裁定の請求があつたときは、請求書の副本をその請求に係る特許権者又は専用実施権者その他その特許に関し登録した権利を有する者に送達し、相当の期間を指定して、答弁書を提出する機会を与えなければならない。

（審議会の意見の聴取等）

第八十五条　特許庁長官は、第八十三条第二項の裁定をしようとするときは、審議会等（国家行政組織法（昭和二十三年法律第百二十号）第八条 に規定する機関をいう。）で政令で定めるものの意見を聴かなければならない。

[1] **第 183 条（対価の額についての訴え）** 第 83 条第２項、第 92 条第３項若しくは第４項又は第 93 条第２項の裁定を受けた者は、その裁定で定める対価の額について不服があるときは、訴えを提起してその額の増減を求めることができる。

２　特許庁長官は、その特許発明の実施が適当にされていないことについて正当な理由があるときは、通常実施権を設定すべき旨の裁定をすることができない。

第八十六条　第八十三条第二項の裁定は、文書をもつて行い、かつ、理由を附さなければならない。

２　通常実施権を設定すべき旨の裁定においては、次に掲げる事項を定めなければならない。

一　通常実施権を設定すべき範囲

二　対価の額並びにその支払の方法及び時期

（裁定の謄本の送達）

第八十七条　特許庁長官は、第八十三条第二項の裁定をしたときは、裁定の謄本を当事者及び当事者以外の者であつてその特許に関し登録した権利を有するものに送達しなければならない。

２　当事者に対し前項の規定により通常実施権を設定すべき旨の裁定の謄本の送達があつたときは、裁定で定めるところにより、当事者間に協議が成立したものとみなす。

（対価の供託）

第八十八条　第八十六条第二項第二号の対価を支払うべき者は、次に掲げる場合は、その対価を供託しなければならない。

一　その対価を受けるべき者がその受領を拒んだとき、又はこれを受領することができないとき。

二　その対価について第百八十三条第一項の訴の提起があつたとき。

三　当該特許権又は専用実施権を目的とする質権が設定されているとき。ただし、質権者の承諾を得たときは、この限りでない。

（裁定の失効）

第八十九条　通常実施権の設定を受けようとする者が第八十三条第二項の裁定で定める支払の時期までに対価（対価を定期に又は分割して支払うべきときは、その最初に支払うべき分）の支払又は供託をしないときは、通常実施権を設定すべき旨の裁定は、その効力を失う。

（裁定の取消し）

第九十条　特許庁長官は、第八十三条第二項の規定により通常実施権を設定

すべき旨の裁定をした後に、裁定の理由の消滅その他の事由により当該裁定を維持することが適当でなくなつたとき、又は通常実施権の設定を受けた者が適当にその特許発明の実施をしないときは、利害関係人の請求により又は職権で、裁定を取り消すことができる。

2　第八十四条、第八十五条第一項、第八十六条第一項及び第八十七条第一項の規定は前項の規定による裁定の取消しに、第八十五条第二項の規定は通常実施権の設定を受けた者が適当にその特許発明の実施をしない場合の前項の規定による裁定の取消しに準用する。

第九十一条　前条第一項の規定による裁定の取消があつたときは、通常実施権は、その後消滅する。

（裁定についての不服の理由の制限）

第九十一条の二　第八十三条第二項の規定による裁定についての行政不服審査法（昭和三十七年法律第百六十号）による異議申立てにおいては、その裁定で定める対価についての不服をその裁定についての不服の理由とすることができない。

（自己の特許発明の実施をするための通常実施権の設定の裁定）

第九十二条　特許権者又は専用実施権者は、その特許発明が第七十二条に規定する場合に該当するときは、同条の他人に対しその特許発明の実施をするための通常実施権又は実用新案権若しくは意匠権についての通常実施権の許諾について協議を求めることができる。

2　前項の協議を求められた第七十二条の他人は、その協議を求めた特許権者又は専用実施権者に対し、これらの者がその協議により通常実施権又は実用新案権若しくは意匠権についての通常実施権の許諾を受けて実施をしようとする特許発明の範囲内において、通常実施権の許諾について協議を求めることができる。

3　第一項の協議が成立せず、又は協議をすることができないときは、特許権者又は専用実施権者は、特許庁長官の裁定を請求することができる。

4　第二項の協議が成立せず、又は協議をすることができない場合において、前項の裁定の請求があつたときは、第七十二条の他人は、第七項において準用する第八十四条の規定によりその者が答弁書を提出すべき期間として特許庁長官が指定した期間内に限り、特許庁長官の裁定を請求することができ

る。

5　特許庁長官は、第三項又は前項の場合において、当該通常実施権を設定することが第七十二条の他人又は特許権者若しくは専用実施権者の利益を不当に害することとなるときは、当該通常実施権を設定すべき旨の裁定をすることができない。

6　特許庁長官は、前項に規定する場合のほか、第四項の場合において、第三項の裁定の請求について通常実施権を設定すべき旨の裁定をしないときは、当該通常実施権を設定すべき旨の裁定をすることができない。

7　第八十四条、第八十五条第一項及び第八十六条から前条までの規定は、第三項又は第四項の裁定に準用する。

（公共の利益のための通常実施権の設定の裁定）

第九十三条　特許発明の実施が公共の利益のため特に必要であるときは、その特許発明の実施をしようとする者は、特許権者又は専用実施権者に対し通常実施権の許諾について協議を求めることができる。

2　前項の協議が成立せず、又は協議をすることができないときは、その特許発明の実施をしようとする者は、経済産業大臣の裁定を請求することができる。

3　第八十四条、第八十五条第一項及び第八十六条から第九十一条の二までの規定は、前項の裁定に準用する。

（通常実施権の移転等）

第九十四条　通常実施権は、第八十三条第二項、第九十二条第三項若しくは第四項若しくは前条第二項、実用新案法第二十二条第三項　又は意匠法第三十三条第三項　の裁定による通常実施権を除き、実施の事業とともにする場合、特許権者（専用実施権についての通常実施権にあつては、特許権者及び専用実施権者）の承諾を得た場合及び相続その他の一般承継の場合に限り、移転することができる。

2　通常実施権者は、第八十三条第二項、第九十二条第三項若しくは第四項若しくは前条第二項、実用新案法第二十二条第三項　又は意匠法第三十三条第三項　の裁定による通常実施権を除き、特許権者（専用実施権についての通常実施権にあつては、特許権者及び専用実施権者）の承諾を得た場合に限り、その通常実施権について質権を設定することができる。

3　第八十三条第二項又は前条第二項の裁定による通常実施権は、実施の事業とともにする場合に限り、移転することができる。

4　第九十二条第三項、実用新案法第二十二条第三項 又は意匠法第三十三条第三項 の裁定による通常実施権は、その通常実施権者の当該特許権、実用新案権又は意匠権が実施の事業とともに移転したときはこれらに従つて移転し、その特許権、実用新案権又は意匠権が実施の事業と分離して移転したとき、又は消滅したときは消滅する。

5　第九十二条第四項の裁定による通常実施権は、その通常実施権者の当該特許権、実用新案権又は意匠権に従つて移転し、その特許権、実用新案権又は意匠権が消滅したときは消滅する。

6　第七十三条第一項の規定は、通常実施権に準用する。

英文版（下載自日本特許廳網站）

Article 83 (Award granting non-exclusive license where invention is not worked)

(1) Where a patented invention is not sufficiently and continuously worked for 3 years or longer in Japan, a person intending to work the patented invention may request the patentee or the exclusive licensee to hold consultations to discuss granting a non-exclusive license; provided, however, that this shall not apply unless 4 years have lapsed from the filing date of the patent application in which the patented invention was filed.

2 Where no agreement is reached by consultations or no consultations are able to be held as provided in the preceding paragraph, the person intending to work the patented invention may request the Commissioner of the Patent Office for an award.

Article 84(Submission of a written answer)

Where a request for an award has been filed under Article 83(2), the Commissioner of the Patent Office shall serve a copy of the written request to the patentee or exclusive licensee pertaining to the request, or any other person having a registered right pertaining to the patent, and give such a person an opportunity to submit a written answer, designating an adequate time limit.

Article 85(Hearing of opinions of councils, etc.)

(1) In rendering an award under Article 83(2), the Commissioner of the Patent Office shall hear the opinions of those provided by Cabinet Order, including councils, etc. (refer to organs provided in Article 8 of National Government Organization Act(Act No. 120 of 1948)).

(2) Where there is a reasonable ground for failing to properly work the patented invention, the Commissioner of the Patent Office shall not render an award to the effect that a non-exclusive license is to be granted.

Article 86(Formal requirements for award)

(1) The award under Article 83(2) shall be rendered in writing and state the grounds therefor.

(2) The following matters shall be determined in an award to the effect that a non-exclusive license is to be granted:

(i) the scope of the non-exclusive license to be granted; and

(ii) the amount of consideration, and the method and time of payment thereof.

Article 87(Service of certified copy of award)

(1) The Commissioner of the Patent Office shall, upon rendering an award under Article 83(2), serve a certified copy of the award to the parties and non-parties having registered rights relating to the patent.

(2) Where a certified copy of an award to the effect that a non-exclusive license is to be granted is served to the parties under the preceding paragraph, an agreement as prescribed in the award is deemed to have been reached between the parties.

Article 88(Deposit of consideration)

A person(s) required to pay consideration under Article 86(2)(ii) shall deposit the said consideration in the following cases:

(i) where the person(s) entitled to the consideration refuses or is unable to receive such consideration;

(ii) where an action with respect to the consideration is instituted under Article 183(1); or

(iii) where a right of pledge is established on the patent right or the exclusive license; provided, however, that this shall not apply where the consent of the pledgee is

obtained.

Article 89(Loss of effect of award)

Where a person(s) who desires a non-exclusive license to be granted fails to pay or deposit consideration (or, where such consideration is to be paid periodically or by installments, the first installment thereof) within the time of payment determined in the award under Article 83(2), the award to the effect that a non-exclusive license is to be granted shall lose its effect.

Article 90(Cancellation of award)

(1) After rendering an award to the effect that a non-exclusive license is to be granted under Article 83(2), where the enforcement of the award becomes inappropriate due to specific reason(s) including the case where the grounds for the award have ceased to exist, or where the person to whom the non-exclusive license was granted fails to properly work the patented invention, the Commissioner of the Patent Office may, upon request of an interested person or ex officio, rescind the award.

(2) Articles 84, 85(1), 86(1) and 87(1) shall apply mutatis mutandis to the rescission of awards under the preceding paragraph and Article 85(2) shall apply mutatis mutandis to the rescission of awards under the preceding paragraph where the person to whom a non-exclusive license is granted fails to properly work the patented invention.

Article 91

A non-exclusive license shall lapse after the rescession of the award under Article 90(1).

Article 91-2(Restriction on grounds for objection to award)

No objection under the Administrative Appeal Act(Act No. 160 of 1962)to the award rendered under Article 83(2) may be raised on the ground that the consideration prescribed in the award is unsatisfactory.

Article 92 (Award granting non-exclusive license to work own patented invention)

(1) Where a patented invention falls under any of the cases as provided in Article 72, the patentee or exclusive licensee may request the other person under the said Article to hold consultations to discuss granting a non-exclusive license to work the patented invention or a non-exclusive license on the utility model right or the design right.

(2) The other person under Article 72 who is requested to hold consultations under the preceding paragraph may request the patentee or exclusive licensee requesting such consultations to hold consultations to discuss granting a non-exclusive license to the extent of the patented invention that the said patentee or exclusive licensee intend to workwith a non-exclusive license on the patent right, on the utility model right or on the design right granted through consultations.

(3) Where no agreement is reached by consultations or no consultations are able to be held as provided in paragraph (1), the patentee or the exclusive licensee may request the Commissioner of the Patent Office for an award.

(4) Where no agreement is reached by consultations or no consultations are able to be held as provided in paragraph (2) and where a request for an award is filed under the preceding paragraph, the other person under Article 72 may request the Commissioner of the Patent Office for an award only within the time limit for the submission of a written answer by the said other person designated by the Commissioner of the Patent Office under Article 84 as applied mutatis mutandis under paragraph (7).

(5) In the case of paragraph (3) or (4), the Commissioner of the Patent Office shall not render an award to the effect that a non-exclusive license is to be granted where the granting of the non-exclusive license will be unreasonably prejudicial to interst of the other person under Article 72, the patentee or the exclusive licensee.

(6) In the case of paragraph (4), in addition to the case provided for in the preceding paragraph, the Commissioner of the Patent Office shall not render an award ordering a non-exclusive license to be granted if an award ordering a non-exclusive license to be granted is not rendered with respect to the request for an award under paragraph (3).

(7) Articles 84, 85(1) and 86 through 91-2 shall apply mutatis mutandis to the award under paragraph (3) or (4).

Article 93(Award granting non-exclusive license for public interest)

(1) Where the working of a patented invention is particularly necessary for the public interest, a person(s) intending to work the patented invention may request the patentee or the exclusive licensee to hold consultations to discuss granting a non-exclusive license.

（2） Where no agreement is reached by consultations or no consultations are able to

be held as provided in the preceding paragraph, the person intending to work the patented invention may request the Minister of Economy, Trade and Industry for an award.

(3) Articles 84, 85(1) and 86 through 91-2 shall apply mutatis mutandis to the award under the preceding paragraph.

Article 94(Transfer, etc. of non-exclusive license)

(1) Except for a non-exclusive license granted by an award under Article 83(2), 92 (3), 92(4) or 93(2) of the Patent Act, Article 22(3) of the Utility Model Act or Article 33(3) of the Design Act, a non-exclusive license may be transferred only where the business involving the working of the relevant invention is also transferred, where the consent of the patentee (or, in the case of non-exclusive license on the exclusive license, the patentee and the exclusive licensee) is obtained and where the transfer occurs as a result of general succession including inheritance .

(2) Except for a non-exclusive license granted by an award under Article 83(2), 92(3), 92(4) or 93(2) of the Patent Act, Article 22(3) of the Utility Model Act or Article 33(3) of the Design Act, a non-exclusive licensee may establish a right of pledge on the non-exclusive right only where the consent of the patentee (or, in the case of non-exclusive license on the exclusive license, the patentee and the exclusive licensee) is obtained.

(3) A non-exclusive license granted by an award under Article 83(2) or 93(2) may be transferred only where the business involving the working of the relevant invention is also transferred.

(4) Where a non-exclusive license is granted by an award under Article 92(3) of the Patent Act, Article 22(3) of the Utility Model Act or Article 33(3) of the Design Act, the said non-exclusive license shall be transferred together with the patent right, utility model right or design right of the non-exclusive licensee on which the non-exclusive license is granted and the business involving the working of the relevant invention in the case where each right is transferred together with the said business, and shall be extinguished in the case where each right of the said non-exclusive licensee is extinguished or transferred independently of the said business.

(5) A non-exclusive license granted by an award under Article 92(4) shall be transferred together with the patent right, utility model right or design right of the non-exclusive licensee on which the non-exclusive license is granted, and shall be extinguished in the case where the said patent right, utility model right or design right is extinguished.

(6) Article 73(1) shall apply mutatis mutandis to non-exclusive licenses.

附件二 韓國專利法強制授權（專利法§106~116,§125-1）簡介

韓國專利法對於未經同意之使用規定於專利法§106~116 及§125-1，而韓國專利法無「強制授權」或類似用語，惟相關規定實質內容與強制授權無異，故以下均稱「強制授權」。

1. 徵收：

依據專利法第 106 條，在戰時或類似緊急狀況下，基於國防需要，政府得徵用所需專利。

徵收之補償金應發給專利權人及其專屬及非專屬被授權人，其數額於宣佈徵收之總統令一併頒布。

2. 強制授權

（1） 強制授權授予事由：依據專利法第 107 條，在下列三種情況時，欲實施該發明專利者得向智慧局長（Commissioner of KIPO）申請專利強制授權，惟在狀況 a. b. 時，應先與專利權人協商：

a. 未於國內充分使用：專利連續三年未於韓國實施，或無正當理由，連續三年於韓國之實施未達商業或工業規模，或未能滿足韓國國內需求。

b. 公共利益：為增進公益之非營利使用。

c. 為矯正經司法或行政判斷專利實施為不公平之使用。

（2） 強制授權決定程序：

a. 依據專利法第 108 條，智慧局在受理強制授權申請後，應將副本送至專利權人或專屬被授權人以及任何有登記之利害關係人，並定期命其答辯。

b. 依據專利法第 109 條，智慧局長在作成決定前，應聽取依法設置之智慧財產爭議委員會（IPR dispute committee）之意見。

（3） 強制授權授予條件：

依據專利法第 110 條規定，強制授權決定應付理由，並以書面方式作成，其內容並應確定下列事項：

a. 強制授權之範圍及期間

b. 補償金數額、支付方式及時間

（4） 補償金之提存：依據專利法第 112 條，在下列情況發生時，補償金應予提存：

a. 應獲得對價者拒絕受領或不能受領；

b. 對於對價已依特許法第 190 條提起訴訟者；

c. 該專利已設定質權者。

（5） 未給付補償金之效果：依據專利法第 113 條，強制授權被授權人未支付補償金或未提存時，強制授權決定自動失效。又依據專利法第 125bis 條，強制授權決定中有關補償金部分具有執行力。

（6） 撤銷：依據專利法第 114 條，如強制授權決定後理由消滅或其實施違反強制授權目的時，得依利害關係人請求或依職權撤銷原裁定。

（7） 補償金數額爭議之救濟：依據專利法第 114 條，補償金之數量不得作為行政救濟之標的，應依專利法第 190 條逕向法院提起訴訟。

3. 相關條文（英文版，下載自韓國專利局網站）：

Article 106 Expropriation of Patent Right etc.

(1) If a patented invention is necessary for national defense in time of war, incident or other similar emergency, the Government may expropriate the patent right, work the patented invention or require a person other than the Government to work the patented invention.

(2) Where a patent right is expropriated, the rights to the invention other than the patent right are extinguished.

(3) If the Government expropriates a patent right, or the Government or a person other than the Government works the patented invention under paragraph (1), the Government or that person shall pay reasonable remuneration to the patentee, exclusive licensee or nonexclusive licensee.

(4) Matters necessary for expropriating and working a patent right as well as remuneration for these acts are prescribed by Presidential Decree.

Article 107 Adjudication for the Grant of a Nonexclusive License

(1) Where a patented invention falls under any of the following subparagraphs, a

person who intends to work the patented invention may request the Commissioner of the Korean Intellectual Property Office to adjudicate (referred to as "an adjudication") for the authorization of a nonexclusive license; however, a request for adjudication under the following subparagraphs (i) and (ii) may only be made if consultations with the patentee or exclusive licensee is not possible or no agreement is reached at the consultation:

(i) where the patented invention has not been worked for more than three consecutive years in the Republic of Korea, except for natural disasters, unavoidable circumstances or other justifiable reasons prescribed by Presidential Decree;

(ii) where the patented invention has not continuously been worked commercially or industrially in the Republic of Korea on a substantial scale during a period of three years or more without justification, or where the domestic demand for the patented invention has not been satisfied to an appropriate extent and under reasonable conditions;

(iii) where working the patented invention noncommercially is necessary for the interests of the public; or

(iv) where working the patented invention is necessary to remedy a practice determined to be unfair after the judicial or administrative process.

(2) Paragraph (1)(i) and (ii) of this Article does not apply unless a period of four years has elapsed after the filing date of the application for the patented invention.

(3) In adjudicating the authorization of a nonexclusive license, the Commissioner of the Korean Intellectual Property Office shall consider the necessity of each request.

(4) In adjudicating the authorization of a nonexclusive license, the Commissioner of the Korean Intellectual Property Office shall limit the use of patented inventions through the nonexclusive license predominantly to the supply of the domestic market, unless the authorization is based on a request under subparagraph (1)(iv).

(5) In adjudicating the authorization of a nonexclusive license set forth in subparagraph (1)(i), the Commissioner of the Korean Intellectual Property Office may take into account the need to amend unfair practices in determining the amount of remuneration.

(6) For semiconductor technology, a request for adjudication may be made only in the

cases set forth in subparagraph (1)(iii) and (1)(iv).

Article 108 Submission of Response

Where a request for an adjudication has been made, the Commissioner of the Korean Intellectual Property Office shall transmit a copy of the written request to the patentee or exclusive licensee mentioned in the request and to any other persons with a registered right related to the patent, and shall give them an opportunity to submit a response within a designated period.

Article 109 Solicitation of Opinion from the Intellectual Property Rights Dispute Committee

Before adjudicating, the Commissioner of the Korean Intellectual Property Office shall solicit an opinion from the Intellectual Property Rights Dispute Committee established under Article 29 of the Invention Promotion Act.

Article 110 Formality of Adjudication

(1) An adjudication must be in writing and must state the reasons for the adjudication.

(2) The following matters must be specified in an adjudication under paragraph (1):

(i) the scope and duration of the nonexclusive license; and (ii) the remuneration for the license and the method and time of payment.

Article 111 Transmittal of Certified Copies of Adjudication

(1) Where an adjudication is made, the Commissioner of the Korean Intellectual Property Office shall transmit a certified copy of the adjudication to the parties and to any other persons with a registered right related to the patent.

(2) Where a certified copy of an adjudication has been transmitted to the parties under paragraph (1), a consultation on the terms as specified in the adjudication is deemed to have been held by the parties.

Article 112 Deposit of Remuneration

Under any of the following circumstances, a party obligated to pay remuneration under

Article 110(2)(ii) shall deposit the remuneration:

(i) where the party entitled to receive the remuneration refuses the remuneration or is unable to receive it;

(ii) where an action under Article 190(1) has been brought concerning the

remuneration; or

(iii) where the patent right or exclusive license is the subject of a pledge, unless the pledgee has consented.

Article 113 Lapse of Adjudication

Where a person granted an adjudication on an authorization fails to pay or deposit the remuneration (or the first installment of the payment, if the payment is to be made periodically or by installments) under Article 110(2)(ii) by the time the payment is due, the adjudication loses its effect.

Article 114 Cancellation of an Adjudication

(1) Where a person is granted an adjudication on an authorization under either of the following circumstances, the Commissioner of the Korean Intellectual Property Office may cancel the adjudication ex officio or upon the request of any interested party. However, for subparagraph (ii), such action must protect the lawful interests of the nonexclusive license:

(i) where working the patented invention is not within the purpose of the adjudication; or

(ii) where the grounds for adjudicating the authorization of a nonexclusive license disappear and are considered unlikely to reoccur.

(2) Articles 108, 109, 110(1) and 111(1) apply mutatis mutandis to paragraph (1) of this Article.

(3) A nonexclusive license is extinguished upon cancellation of the ruling under paragraph (1) of this Article.

Article 115 Restriction on Reasons for Objections to an Adjudication

Where a request for an administrative trial has been filed under Article 3(1) of the Administrative Trial Act or a revocation action has been brought under the Administration Litigation Act for an adjudication, the remuneration determined in the adjudication may not be a basis for objection.

Article 116 Cancellation of a Patent Right

(1) Where a patented invention has not been continuously worked in the Republic of Korea for a period of two years or more from the date of an adjudication under Article 107(1)(i), the Commissioner of the Korean Intellectual Property Office may

cancel the patent right, ex officio, or upon the request of any interested party.

(2) Articles 108, 109, 110(1) and 111(1) apply mutatis mutandis to paragraph (1) of this Article.

(3) When a patent right under paragraph (1) of this Article is cancelled, the patent right is extinguished.

Article 125bis The Title of Execution on Amount of Compensation and Remuneration

A final ruling by the Commissioner of the Korean Intellectual Property Office on the amount of the compensation or remuneration to be paid under this Act has the same effect as an enforceable title of execution; an official of the Korean Intellectual Property Office shall give the legal writ, which has the force of execution.

附件三 英國專利法強制授權（§48~§59）簡介

在 1970 年代以前，英國亦為專利強制授權使用頻繁之國家，從 1953 年至 1971 年，總共有 54 件強制授權申請案，其中 20 件獲准強制授權[2]。英國 1949 年專利法第 37 條規定之一般專利強制授權事由有：(1) 未於國內實施或適當實施；(2) 合理自願授權要求被拒絕；(3) 自願授權的條款對於英國境內的工商活動為不公平之歧視。除一般專利強制授權外，1949 年專利法第 40 條並有政府使用，以及第 41 條有關食物及藥品之特別強制授權[3]，其授權事由較一般專利強制授權更為寬鬆。英國在核定補償金時，基本上也是運用成本-利潤做為分析基準（cost- and profit- based approach)，早期的案例依此標準核定出之固定補償金約為 18%，然而，在單價比較低的藥品，通常有較高的補償金。

英國專利法在 1977 年翻修，有關強制授權之事由刪除原 1949 專利法第 41 條有關食物及藥品之特別強制授權，但其他事由大致相同。作為強制授權事由之基礎條文第 48 條配合英國簽署通過烏拉圭回合談判，於 1999 年新增第 48A 條、第 48B 條，將被申請強制授權專利之所有人區分為是否為 WTO 會員之國民，其他結構則大致維持。主要內容為：

1. 未經同意之使用事由：(1) 強制授權；(2)國王（政府）使用(for services of the Crown)
2. 政府使用之事由：(1)國防目的；(2)製藥需要；(3)原子能；(4)緊急情況（在宣布緊急狀態時，政府使用之事由共有 7 款，其中包含促進出口、鼓勵產業發展等各種理由）
3. 政府使用之決定機關：僅規定政府使用不構成侵權事由，有爭議時，得由司法救濟。
4. 政府使用之補償：各使用之政府機關（government

[2] Post-Trips Options for Access to Patentd Medicines in Developing Countries, F.M.Scherer and Jayashree Watal p.18

[3] 依據英國 1949 專利法第 41 條，有關食物及藥品專利強制授權之目標，在考量權利人合理利益之下，確保以**最低價格**充分供應。In settling the terms of licences under this section the comptroller shall endeavour to secure that food, medicines, and surgical and curative devices shall be available to the public at the lowest prices consistent with the patentees' deriving a reasonable advantage from their patent rights.

department）決定

5. 強制授權授予機關：智慧局長(Comptroller)

6. 強制授權授予事由

(1)專利權人為 WTO 會員國國民者，得申請強制授權的理由有：

A.發明專利為產品者，在合理時間內英國國內對該專利產品的需求無法得到滿足；

B.專利權人在合理期間內拒絕授權許可，且該行為導致英國國內的工商業發展受到不公平的妨礙，或者導致與該發明專利相比具有重要技術進步和經濟意義的其他發明專利在英國的實施被禁止或阻礙；

C.專利權人於授權條件上附加不合理限制，導致不受該專利保護的材料的製造、使用或者利用，或者英國國內的工商業的發展受到不公平的妨礙。

(2)專利權人非 WTO 會員國國民者，得申請強制授權的理由有：

A.發明專利能夠在英國進行商業實施，但卻沒被商業實施或者沒被合理充分實施者；

B.產品專利無法滿足英國國內的需求，或者須經由非 WTO 會員的進口才能得到實質性滿金者；

C.發明在英國商業實施因以下原因被禁止或阻礙者，可以對該專利申請強制授權：(a) 在產品發明的情況下，從非 WTO 會員進口該產品；(b) 方法發明者，從該國進口直接依該方法獲得的產品或者該方法適用的產品。

D.專利權人在合理條件下拒絕授權而導致如下結果者，可對該專利申請強制授權：(a) 致使英國製造的專利產品出口市場無法得到供給；或者 (b) 英國國內對技術有實質貢獻的其他專利的實施被禁止或阻礙；或者 (c) 英國工商業活動的設立或發展受到不公平的妨礙。

E.由於專利權人對專利許可施加的條件，或對專利產品、方法的使用和利用施加的條件，致不受該專利保護的材料的製造、使用或者利用，或者英國國內的工商商的設立和發展受到不公平的妨礙者。

7. 授予條件：有關範圍、期間、補償金之規定，基本上與 TRIPS 第 31 條無具體差異。

※相關條文：

Compulsory licences: general

48.-(1) At any time after the expiration of three years, or of such other period as may be prescribed, from the date of the grant of a patent, any person may apply to the comptroller on one or more of the relevant grounds - (a) for a licence under the patent; (b) for an entry to be made in the register to the effect that licences under the patent are to be available as of right; or (c) where the applicant is a government department, for the grant to any person specified in the application of a licence under the patent.

(2) Subject to sections 48A and 48B below, if he is satisfied that any of the relevant grounds are established, the comptroller may - (a) where the application is under subsection (1)(a) above, order the grant of a licence to the applicant on such terms as the comptroller thinks fit; (b) where the application is under subsection (1)(b) above, make such an entry as is there mentioned; (c) where the application is under subsection (1)(c) above, order the grant of a licence to the person specified in the application on such terms as the comptroller thinks fit.

(3) An application may be made under this section in respect of a patent even though the applicant is already the holder of a licence under the patent; and no person shall be estopped or barred from alleging any of the matters specified in the relevant grounds by reason of any admission made by him, whether in such a licence or otherwise, or by reason of his having accepted a licence.

(4) In this section "the relevant grounds" means - (a) in the case of an application made in respect of a patent whose proprietor is a WTO proprietor, the grounds set out in section 48A(1) below; (b) in any other case, the grounds set out in section 48B(1) below.

(5) A proprietor is a WTO proprietor for the purposes of this section and sections 48A,48B, 50 and 52 below if - (a) he is a national of, or is domiciled in, a country which is a member of the World Trade Organisation; or (b) he has a real and effective industrial or commercial establishment in such a country.

(6) A rule prescribing any such other period under subsection (1) above shall not be made unless a draft of the rule has been laid before, and approved by resolution of, each House of Parliament.

Compulsory licences: WTO proprietors

48A.-(1) In the case of an application made under section 48 above in respect of a patent whose proprietor is a WTO proprietor, the relevant grounds are –(a) where the

patented invention is a product, that a demand in the United Kingdom for that product is not being met on reasonable terms;(b) that by reason of the refusal of the proprietor of the patent concerned to grant a licence or licences on reasonable terms -(i) the exploitation in the United Kingdom of any other patented invention which involves an important technical advance of considerable economic significance in relation to the invention for which the patent concerned was granted is prevented or hindered, or (ii) the establishment or development of commercial or industrial activities in the United Kingdom is unfairly prejudiced; (c) that by reason of conditions imposed by the proprietor of the patent concerned on the grant of licences under the patent, or on the disposal or use of the patented product or on the use of the patented process, the manufacture, use or disposal of materials not protected by the patent, or the establishment or development of commercial or industrial activities in the United Kingdom, is unfairly prejudiced.

(2) No order or entry shall be made under section 48 above in respect of a patent whose proprietor is a WTO proprietor unless - (a) the applicant has made efforts to obtain a licence from the proprietor on reasonable commercial terms and conditions; and (b) his efforts have not been successful within a reasonable period.

(3) No order or entry shall be so made if the patented invention is in the field of semi-conductor technology.

(4) No order or entry shall be made under section 48 above in respect of a patent on the ground mentioned in subsection (1)(b)(i) above unless the comptroller is satisfied that the proprietor of the patent for the other invention is able and willing to grant the proprietor of the patent concerned and his licensees a licence under the patent for the other invention on reasonable terms.

(5) A licence granted in pursuance of an order or entry so made shall not be assigned except to a person to whom the patent for the other invention is also assigned.

(6) A licence granted in pursuance of an order or entry made under section 48 above in respect of a patent whose proprietor is a WTO proprietor - (a) shall not be exclusive; (b) shall not be assigned except to a person to whom there is also assigned the part of the enterprise that enjoys the use of the patented invention, or the part of the goodwill that belongs to that part; 35 (c) shall be predominantly for the supply of the market in the United Kingdom; (d) shall include conditions entitling the proprietor of the patent concerned to remuneration adequate in the circumstances of the case, taking into account the economic value of the licence; and (e) shall be limited in scope and in duration to the purpose for which the licence was granted.

Compulsory licences: other cases

48B.-(1) In the case of an application made under section 48 above in respect of a

patent whose proprietor is not a WTO proprietor, the relevant grounds are - (a) where the patented invention is capable of being commercially worked in the United Kingdom, that it is not being so worked or is not being so worked to the fullest extent that is reasonably practicable; (b) where the patented invention is a product, that a demand for the product in the United Kingdom - (i) is not being met on reasonable terms, or (ii) is being met to a substantial extent by importation from a country which is not a member State; (c) where the patented invention is capable of being commercially worked in the United Kingdom, that it is being prevented or hindered from being so worked - (i) where the invention is a product, by the importation of the product from a country which is not a member State, (ii) where the invention is a process, by the importation from such a country of a product obtained directly by means of the process or to which the process has been applied; (d) that by reason of the refusal of the proprietor of the patent to grant a licence or licences on reasonable terms - (i) a market for the export of any patented product made in the United Kingdom is not being supplied, or (ii) the working or efficient working in the United Kingdom of any other patented invention which makes a substantial contribution to the art is prevented or hindered, or (iii) the establishment or development of commercial or industrial activities in the United Kingdom is unfairly prejudiced; (e) that by reason of conditions imposed by the proprietor of the patent on the grant of licences under the patent, or on the disposal or use of the patented product or on the use of the patented process, the manufacture, use or disposal of materials not protected by the patent, or the establishment or development of commercial or industrial activities in the United Kingdom, is unfairly prejudiced.

(2) Where - (a) an application is made on the ground that the patented invention is not being commercially worked in the United Kingdom or is not being so worked to the fullest extent that is reasonably practicable; and (b) it appears to the comptroller that the time which has elapsed since the publication in the journal of a notice of the grant of the patent has for any reason been insufficient to enable the invention to be so worked, he may by order adjourn the application for such period as will in his opinion give sufficient time for the invention to be so worked.

(3) No order or entry shall be made under section 48 above in respect of a patent on the ground mentioned in subsection (1)(a) above if - (a) the patented invention is being commercially worked in a country which is a member State; and (b) demand in the United Kingdom is being met by importation from that country.

(4) No entry shall be made in the register under section 48 above on the ground mentioned in subsection (1)(d)(i) above, and any licence granted under section 48 above on that ground shall contain such provisions as appear to the comptroller to be expedient for restricting the countries in which any product concerned may be

disposed of or used by the licensee.

(5) No order or entry shall be made under section 48 above in respect of a patent on the ground mentioned in subsection (1)(d)(ii) above unless the comptroller is satisfied that the proprietor of the patent for the other invention is able and willing to grant to the proprietor of the patent concerned and his licensees a licence under the patent for the other invention on reasonable terms.

Provisions about licences under section 48

49.-(1) Where the comptroller is satisfied, on an application made under section 48 above in respect of a patent, that the manufacture, use or disposal of materials not protected by the patent is unfairly prejudiced by reason of conditions imposed by the proprietor of the patent on the grant of licences under the patent, or on the disposal or use of the patented product or the use of the patented process, he may (subject to the provisions of that section) order the grant of licences under the patent to such customers of the applicant as he thinks fit as well as to the applicant.

(2) Where an application under section 48 above is made in respect of a patent by a person who holds a licence under the patent, the comptroller - (a) may, if he orders the grant of a licence to the applicant, order the existing licence to be cancelled, or (b) may, instead of ordering the grant of a licence to the applicant, order the existing licence to be amended.

(3) [repealed]

(4) Section 46(4) and (5) above shall apply to a licence granted in pursuance of an order under section 48 above and to a licence granted by virtue of an entry under that section as it applies to a licence granted by virtue of an entry under section 46 above.

Exercise of powers on application under section 48

50.-(1) The powers of the comptroller on an application under section 48 above in respect of a patent whose proprietor is not a WTO proprietor shall be exercised with a view to securing the following general purposes - (a) that inventions which can be worked on a commercial scale in the United Kingdom and which should in the public interest be so worked shall be worked there without undue delay and to the fullest extent that is reasonably practicable; (b) that the inventor or other person beneficially entitled to a patent shall receive reasonable remuneration having regard to the nature of the invention; (c) that the interests of any person for the time being working or developing an invention in the United Kingdom under the protection of a patent shall not be unfairly prejudiced.

(2) Subject to subsection (1) above, the comptroller shall, in determining whether to make an order or entry in pursuance of any application under section 48 above, take account of the following matters, that is to say - (a) the nature of the invention, the

time which has elapsed since the publication in the journal of a notice of the grant of the patent and the measures already taken by the proprietor of the patent or any licensee to make full use of the invention; (b) the ability of any person to whom a licence would be granted under the order concerned to work the invention to the public advantage; and (c) the risks to be undertaken by that person in providing capital and working the invention if the application for an order is granted, but shall not be required to take account of matters subsequent to the making of the application.

Compulsory licences: supplementary provisions

53.- (1) [repealed]

(2) In any proceedings on an application made under section 48 above in respect of a patent, any statement with respect to any activity in relation to the patented invention, or with respect to the grant or refusal of licences under the patent, contained in a report of the Competition Commission laid before Parliament under Part VII of the Fair Trading Act 1973 or section 17 of the Competition Act 1980 or published under Part 3 or 4 of the Enterprise Act 2002 shall be prima facie evidence of the matters stated, and in Scotland shall be sufficient evidence of those matters9.

(3) The comptroller may make an entry in the register under sections 48 to 51 above notwithstanding any contract which would have precluded the entry on the application of the proprietor of the patent under section 46 above.

(4) An entry made in the register under sections 48 to 51 above shall for all purposes have the same effect as an entry made under section 46 above.

(5) No order or entry shall be made in pursuance of an application under sections 48 to 51 above which would be at variance with any treaty or international convention to which the United Kingdom is a party.

Special provisions where patented invention is being worked abroad

54.-(1) Her Majesty may by Order in Council provide that the comptroller may not (otherwise than for purposes of the public interest) make an order or entry in respect of a patent in pursuance of an application under sections 48 to 51 above if the invention concerned is being commercially worked in any relevant country specified in the Order and demand in the United Kingdom for any patented product resulting from that working is being met by importation from that country.

(2) In subsection (1) above "relevant country" means a country other than a member state or a member of the World Trade Organisation whose law in the opinion of Her Majesty in Council incorporates or will incorporate provisions treating the working of an invention in, and importation from, the United Kingdom in a similar way to that in which the Order in Council would (if made) treat the working of an invention in, and importation from, that country. *Use of patented inventions for*

services of the Crown

Use of patented inventions for services of the Crown

55.-(1) Notwithstanding anything in this Act, any government department and any person authorised in writing by a government department may, for the services of the Crown and in accordance with this

9. The reference in this subsection to Part 3 of the Enterprise Act 2002 has effect as if it included a reference to the Enterprise Act 2002

(Protection of Legitimate Interests) Order 2003 (SI 2003/1592). section, do any of the following acts in the United

Kingdom in relation to a patented invention without the consent of the proprietor of the patent, that is to say - (a) where the invention is a product, may - (i) make, use, import or keep the product, or sell or offer to sell it where to do so would be incidental or ancillary to making, using, importing or keeping it; or (ii) in any event, sell or offer to sell it for foreign defence purposes or for the production or supply of specified drugs and medicines, or dispose or offer to dispose of it (otherwise than by selling it) for any purpose whatever; (b) where the invention is a process, may use it or do in relation to any product obtained directly by means of the process anything mentioned in paragraph (a) above; (c) without prejudice to the foregoing, where the invention or any product obtained directly by means of the invention is a specified drug or medicine, may sell or offer to sell the drug or medicine; (d) may supply or offer to supply to any person any of the means, relating to an essential element of the invention, for putting the invention into effect; (e) may dispose or offer to dispose of anything which was made, used, imported or kept in the exercise of the powers conferred by this section and which is no longer required for the purpose for which it was made, used, imported or kept (as the case may be), and anything done by virtue of this subsection shall not amount to an infringement of the patent concerned.

(2) Any act done in relation to an invention by virtue of this section is in the following provisions of this section referred to as use of the invention; and "use", in relation to an invention, in sections 56 to 58 below shall be construed accordingly.

(3) So far as the invention has before its priority date been duly recorded by or tried by or on behalf of a government department or the United Kingdom

Atomic Energy Authority otherwise than in consequence of a relevant communication made in confidence, any use of the invention by virtue of this section may be made free of any royalty or other payment to the proprietor.

(4) So far as the invention has not been so recorded or tried, any use of it made by virtue of this section at any time either - (a) after the publication of the application for the patent for the invention; or (b) without prejudice to paragraph (a) above, in consequence of a relevant communication made after the priority date of the invention

otherwise than in confidence; shall be made on such terms as may be agreed either before or after the use by the government department and the proprietor of the patent with the approval of the Treasury or as may in default of agreement be determined by the court on a reference under section 58 below.

(5) Where an invention is used by virtue of this section at any time after publication of an application for a patent for the invention but before such a patent is granted, and the terms for its use agreed or determined as mentioned in subsection (4) above include terms as to payment for the use, then (notwithstanding anything in those terms) any such payment shall be recoverable only - (a) after such a patent is granted; and (b) if (apart from this section) the use would, if the patent had been granted on the date of the publication of the application, have infringed not only the patent but also the claims (as interpreted by the description and any drawings referred to in the description or claims) in the form in which they were contained in the application immediately before the preparations for its publication were completed by the Patent Office.

(6) The authority of a government department in respect of an invention may be given under this section either before or after the patent is granted and either before or after the use in respect of which the authority is given is made, and may be given to any person whether or not he is authorised directly or indirectly by the proprietor of the patent to do anything in relation to the invention.

(7) Where any use of an invention is made by or with the authority of a government department under this section, then, unless it appears to the department that it would be contrary to the public interest to do so, the department shall notify the proprietor of the patent as soon as practicable after the second of the following events, that is to say, the use is begun and the patent is granted, and furnish him with such information as to the extent of the use as he may from time to time require.

(8) A person acquiring anything disposed of in the exercise of powers conferred by this section, and any person claiming through him, may deal with it in the same manner as if the patent were held on behalf of the Crown.

(9) In this section “relevant communication”, in relation to an invention, means a communication of the invention directly or indirectly by the proprietor of the patent or any person from whom he derives title.

(10) Subsection (4) above is without prejudice to any rule of law relating to the confidentiality of information.

(11) In the application of this section to Northern Ireland, the reference in subsection (4) above to the Treasury shall, where the government department referred to in that subsection is a department of the Government of Northern Ireland, be construed as a reference to the Department of Finance for Northern Ireland.

Interpretation, etc., of provisions about Crown use

56.-(1) Any reference in section 55 above to a patented invention, in relation to any time, is a reference to an invention for which a patent has before that time been, or is subsequently, granted.

(2) In this Act, except so far as the context otherwise requires, "the services of the Crown" includes - (a) the supply of anything for foreign defence purposes; (b) the production or supply of specified drugs and medicines; and (c) such purposes relating to the production or use of atomic energy or research into matters connected therewith as the Secretary of State thinks necessary or expedient; and "use for the services of the Crown" shall be construed accordingly.

(3) In section 55(1)(a) above and subsection (2)(a) above, references to a sale or supply of anything for foreign defence purposes are references to a sale or supply of the thing - (a) to the government of any country outside the United Kingdom, in pursuance of an agreement or arrangement between Her Majesty's Government in the United Kingdom and the government of that country, where the thing is required for the defence of that country or of any other country whose government is party to any agreement or arrangement with Her Majesty's Government in respect of defence matters; or (b) to the United Nations, or to the government of any country belonging to that organisation, in pursuance of an agreement or arrangement between Her Majesty's Government and that organisation or government, where the thing is required for any armed forces operating in pursuance of a resolution of that organisation or any organ of that organisation.

(4) For the purposes of section 55(1)(a) and (c) above and subsection (2)(b) above, specified drugs and medicines are drugs and medicines which are both - (a) required for the provision of - (ai) primary medical services under part 1 of the National Health Service Act 1977, or any corresponding provisions of the law in force in Northern Ireland or the Isle of Man, or (i) pharmaceutical services, general medical services or general dental services under Part II of the National Health Service Act 1977 (in the case of pharmaceutical services and general dental services), Part II of the National

Health Service (Scotland) Act 1978, or the corresponding provisions of the law in force in Northern Ireland or the Isle of Man, or (ii) personal medical services or personal dental services provided in accordance with arrangements made under section 17C of the 1978 Act, or the corresponding provisions of the law in force in Northern Ireland or the Isle of Man, or (iii) local pharmaceutical services provided under a pilot scheme established under section 28 of the Health and Social Care Act 2001 or an LPS scheme established under

Schedule 8A to the National Health Service Act 1977, or under any corresponding

provision of the law in force in the Isle of Man, or (iv) personal dental services provided in accordance with arrangements made under section 28 C of the 1977 Act, and (b) specified for the purposes of this subsection in regulations made by the Secretary of State.

Rights of third parties in respect of Crown use

57.-(1) In relation to - (a) any use made for the services of the Crown of an invention by a government department, or a person authorised by a government department, by virtue of section 55 above, or (b) anything done for the services of the Crown to the order of a government department by the proprietor of a patent in respect of a patented invention or by the proprietor of an application in respect of an invention for which an application for a patent has been filed and is still pending, the provisions of any licence, assignment, assignation or agreement to which this subsection applies shall be of no effect so far as those provisions restrict or regulate the working of the invention, or the use of any model, document or information relating to it, or provide for the making of payments in respect of, or calculated by reference to, such working or use; and the reproduction or publication of any model or document in connection with the said working or use shall not be deemed to be an infringement of any copyright or design right subsisting in the model or document.

(2) Subsection (1) above applies to a licence, assignment, assignation or agreement which is made, whether before or after the appointed day, between (on the one hand) any person who is a proprietor of or an applicant for the patent, or anyone who derives title from any such person or from whom such person derives title, and (on the other hand) any person whatever other than a government department.

(3) Where an exclusive licence granted otherwise than for royalties or other benefits determined by reference to the working of the invention is in force under the patent or application concerned, then - (a) in relation to anything done in respect of the invention which, but for the provisions of this section and section 55 above, would constitute an infringement of the rights of the licensee, subsection (4) of that section shall have effect as if for the reference to the proprietor of the patent there were substituted a reference to the licensee; and (b) in relation to anything done in respect of the invention by virtue of an authority given under that section, that section shall have effect as if the said subsection (4) were omitted.

(4) Subject to the provisions of subsection (3) above, where the patent, or the right to the grant of the patent, has been assigned to the proprietor of the patent or application in consideration of royalties or other benefits determined by reference to the working of the invention, then - (a) in relation to any use of the invention by virtue of section 55 above, subsection (4) of that section shall have effect as if the reference to the proprietor of the patent included a reference to the assignor, and any sum

payable by virtue of that subsection shall be divided between the proprietor of the patent or application and the assignor in such proportion as may be agreed on by them or as may in default of agreement be determined by the court on a reference under section 58 below; and (b) in relation to any act done in respect of the invention for the services of the Crown by the proprietor of the patent or application to the order of a government department, section 55(4) above shall have effect as if that act were use made by virtue of an authority given under that section.

(5) Where section 55(4) above applies to any use of an invention and a person holds an exclusive licence under the patent or application concerned (other than such a licence as is mentioned in subsection (3) above) authorising him to work the invention, then subsections (7) and (8) below shall apply.

(6) In those subsections "the section 55(4)" payment means such payment (if any) as the proprietor of the patent or application and the department agree under section 55 above, or the court determines under section 58 below, should be made by the department to the proprietor in respect of the use of the invention.

(7) The licensee shall be entitled to recover from the proprietor of the patent or application such part (if any) of the section 55(4) payment as may be agreed on by them or as may in default of agreement be determined by the court under section 58 below to be just having regard to any expenditure incurred by the licensee - (a) in developing the invention, or (b) in making payments to the proprietor in consideration of the licence, other than royalties or other payments determined by reference to the use of the invention.

(8) Any agreement by the proprietor of the patent or application and the department under section 55(4) above as to the amount of the section 55(4) payment shall be of no effect unless the licensee consents to the agreement; and any determination by the court under section 55(4) above as to the amount of that payment shall be of no effect unless the licensee has been informed of the reference to the court and is given an opportunity to be heard.

(9) Where any models, documents or information relating to an invention are used in connection with any use of the invention which falls within subsection (1)(a) above, or with anything done in respect of the invention which falls within subsection (1)(b) above, subsection (4) of section 55 above shall (whether or not it applies to any such use of the invention) apply to the use of the models, documents or information as if for the reference in it to the proprietor of the patent there were substituted a reference to the person entitled to the benefit of any provision of an agreement which is rendered inoperative by this section in relation to that use; and in section 58 below the references to terms for the use of an invention shall be construed accordingly.

(10) Nothing in this section shall be construed as authorising the disclosure to a

government department or any other person of any model, document or information to the use of which this section applies in contravention of any such licence, assignment, assignation or agreement as is mentioned in this section.

Special provisions as to Crown use during emergency

59.-(1) During any period of emergency within the meaning of this section the powers exercisable in relation to an invention by a government department or a person authorised by a government department under section 55 above shall include power to use the invention for any purpose which appears to the department necessary or expedient - (a) for the efficient prosecution of any war in which Her Majesty may be engaged; (b) for the maintenance of supplies and services essential to the life of the community; (c) for securing a sufficiency of supplies and services essential to the well-being of the community; (d) for promoting the productivity of industry, commerce and agriculture; (e) for fostering and directing exports and reducing imports, or imports of any classes, from all or any countries and for redressing the balance of trade; (f) generally for ensuring that the whole resources of the community are available for use, and are used, in a manner best calculated to serve the interests of the community; or (g) for assisting the relief of suffering and the restoration and distribution of essential supplies and services in any country or territory outside the United Kingdom which is in grave distress as the result of war; and any reference in this Act to the services of the Crown shall, as respects any period of emergency, include a reference to those purposes.

(2) In this section the use of an invention includes, in addition to any act constituting such use by virtue of section 55 above, any act which would, apart from that section and this section, amount to an infringement of the patent concerned or, as the case may be, give rise to a right under section 69 below to bring proceedings in respect of the application concerned, and any reference in this Act to "use for the services of the Crown" shall, as respects any period of emergency, be construed accordingly.

(3) In this section "period of emergency" means any period beginning with such date as may be declared by Order in Council to be the commencement, and ending with such date as may be so declared to be the termination, of a period of emergency for the purposes of this section.

(4) A draft of an Order under this section shall not be submitted to Her Majesty unless it has been laid before, and approved by resolution of, each House of Parliament.

附件四 德國專利法強制授權（專利法§24）條文

德國專利法對於強制授權僅有一個條文，規定於專利法第24條，其內容詳述如下：

1. 強制授權授予機關：專利法院
2. 強制授權授予原因：依據德國專利法第24條第1項強制授權須為（1）申請人曾以合理、通常之商業條件在合理期間內仍不能與權利人協議授權時；且（2）為公共利益需要時。
3. 再發明：德國專利法第24條第2項規定，如再發明較原發明具相當經濟意義或重要技術改良時，得依第24條第1項規定申請強制授權。
4. 半導體技術強制授權之限制：德國專利法第24條第3項規定，就半導體技術專利申請特許實施者，以經行政或司法確定（festgestellten）之反競爭救濟為限。
5. 未於國內充分使用：德國專利法第24條第4項規定，如專利權人未於或未顯著於德國境內實施，為確保德國國內市場之適當供給，得依第24條第1項規定申請強制授權。但「進口」視為在國內實施之行為。
6. 強制授權授予期間、條件與補償金：德國專利法第24條第5項規定，強制授權授予時得規定範圍、期間與條件限制，以配合強制授權授予目的之達成；補償金核定時應將該專利之商業價值與授予強制授權之原因背景一併考量。強制授權授予後，如客觀情勢變更，雙方均得聲請調整補償金。如強制授權授予之客觀情勢消失，且應無再發生之虞時，專利權人得聲請廢止強制授權。
7. 強制授權轉讓：德國專利法第24條第6項規定，強制授權實施權應與其企業一併移轉，但再發明之強制授權得與再發明專利權一併移轉。
8. 相關條文（德文版及英文版）：

§24

(1) Die nicht ausschließliche Befugnis zur gewerblichen Benutzung einer Erfindung wird durch das Patentgericht im Einzelfall nach Maßgabe der

nachfolgenden Vorschriften erteilt (Zwangslizenz), sofern

1. der Lizenzsucher sich innerhalb eines angemessenen Zeitraumes erfolglos bemüht hat, vom Patentinhaber die Zustimmung zu erhalten, die Erfindung zu angemessenen geschäftsüblichen Bedingungen zu benutzen, und

2. das öffentliche Interesse die Erteilung einer Zwangslizenz gebietet.

(2) Kann der Lizenzsucher eine ihm durch Patent mit jüngerem Zeitrang geschützte Erfindung nicht verwerten, ohne das Patent mit älterem Zeitrang zu verletzen, so hat er gegenüber dem Inhaber des Patents mit dem älteren Zeitrang Anspruch auf Einräumung einer Zwangslizenz, sofern

1. die Voraussetzung des Absatzes 1 Nr. 1 erfüllt ist und

2. seine eigene Erfindung im Vergleich mit derjenigen des Patents mit dem älteren Zeitrang einen wichtigen technischen Fortschritt von erheblicher wirtschaftlicher Bedeutung aufweist. Der Patentinhaber kann verlangen, dass ihm der Lizenzsucher eine Gegenlizenz zu angemessenen Bedingungen für die Benutzung der patentierten Erfindung mit dem jüngeren Zeitrang einräumt.

(3) Absatz 2 gilt entsprechend, wenn ein Pflanzenzüchter ein Sortenschutzrecht nicht erhalten oder verwerten kann, ohne ein früheres Patent zu verletzen.

(4) Für eine patentierte Erfindung auf dem Gebiet der Halbleitertechnologie darf eine Zwangslizenz im Rahmen des Absatzes 1 nur erteilt werden, wenn dies zur Behebung einer in einem Gerichts- oder Verwaltungsverfahren festgestellten wettbewerbswidrigen Praxis des Patentinhabers erforderlich ist.

(5) Übt der Patentinhaber die patentierte Erfindung nicht oder nicht überwiegend im Inland aus, so können Zwangslizenzen im Rahmen des Absatzes 1 erteilt werden, um eine ausreichende Versorgung des Inlandsmarktes mit dem patentierten Erzeugnis sicherzustellen. Die Einfuhr steht insoweit der Ausübung des Patents im Inland gleich.

(6) Die Erteilung einer Zwangslizenz an einem Patent ist erst nach dessen Erteilung zulässig. Sie kann eingeschränkt erteilt und von Bedingungen

abhängig gemacht werden. Umfang und Dauer der Benutzung sind auf den Zweck zu begrenzen, für den sie gestattet worden ist. Der Patentinhaber hat gegen den Inhaber der Zwangslizenz Anspruch auf eine Vergütung, die nach den Umständen des Falles angemessen ist und den wirtschaftlichen Wert der Zwangslizenz in Betracht zieht. Tritt bei den künftig fällig werdenden wiederkehrenden Vergütungsleistungen eine wesentliche Veränderung derjenigen Verhältnisse ein, die für die Bestimmung der Höhe der Vergütung maßgebend waren, so ist jeder Beteiligte berechtigt, eine entsprechende Anpassung zu verlangen. Sind die Umstände, die der Erteilung der Zwangslizenz zugrunde lagen, entfallen und ist ihr Wiedereintritt unwahrscheinlich, so kann der Patentinhaber die Rücknahme der Zwangslizenz verlangen.

(7) Die Zwangslizenz an einem Patent kann nur zusammen mit dem Betrieb übertragen werden, der mit der Auswertung der Erfindung befaßt ist. Die Zwangslizenz an einer Erfindung, die Gegenstand eines Patents mit älterem Zeitrang ist, kann nur zusammen mit dem Patent mit jüngerem Zeitrang übertragen werden.

英文版（下載自日本特許廳網站）
24.

(1) A non-exclusive authorization to commercially exploit an invention shall be granted by the Patent Court in individual cases in accordance with the following provisions (compulsory license) if

1. the applicant for a license has unsuccessfully endeavored during a reasonable period of time to obtain from the patentee consent to exploit the invention under reasonable conditions usual in trade; and
2. public interest commands the grant of a compulsory license.

(2) If the applicant for a license is unable to exploit an invention for which he holds protection under a patent of later date without infringing a patent of earlier date, he shall be entitled within the framework of subsection (1) to request the grant of a compulsory license with respect to the owner of the patent of earlier date if his own invention comprises, in comparison with that under the patent of earlier date, an important technical advance of considerable commercial significance. The patentee may require the applicant for a license to grant him a counter license under reasonable

conditions for the exploitation of the patented invention of later date.

(3) A compulsory license under subsection (1) may be granted for a patented invention in the field of semiconductor technology only if such grant is necessary to remove an anti-competitive practice on the part of the patentee that has been established in judicial or administrative proceedings.

(4) If the patentee does not use the patented invention or does not use it predominantly in Germany, compulsory licenses under subsection (1) may be granted to ensure an adequate supply of the patented product to the domestic market. Importing shall be deemed to constitute use of the patent in Germany in such case.

(5) The grant of a compulsory license in a patent shall be permissible only after the grant of the patent. It may be granted subject to restrictions and made dependent upon conditions. The scope and duration of use shall be restricted to the purpose for which they have been permitted. The patentee shall be entitled to remuneration from the holder of a compulsory license that shall be commensurate with the circumstances and shall take into consideration the commercial value of the compulsory license. In the event of a significant change, with respect to the repeated remuneration that will become due in future, in the circumstances on which the determination of the amount of the remuneration was based, each party shall be entitled to require a corresponding adjustment. If the circumstances on which the grant of a compulsory license was based no longer apply and if it is unlikely that they will reoccur, the patentee may require the withdrawal of the compulsory license.

(6) A compulsory license in a patent may only be transferred together with the enterprise concerned by the exploitation of the invention. A compulsory license in an invention that is the subject matter of a patent of earlier date may only be transferred together with the patent of later date.

附件五 美國專利法非自願授權簡介

一般來說，美國法制相當忽視專利強制授權，美國專利法並未如世界各國對於專利強制授權有所規範。從烏拉圭回合 TRIPS 談判及後續運作的經驗，美國亦給外界基於自由市場經濟而反對專利強制授權制度之印象。然而在實證上則相當複雜，美國是操作「未經權利人授權之其他使用」極為頻繁的國家，其本質上與強制授權並無差異。

1. 政府使用

依據 USC§ 1498，美國政府在符合國家利益及給付合理補償之要件下，有廣泛的專利徵用權。基於政府徵用私有財產之權力(eminent domain)，USC§ 1498 規定：聯邦政府在未取得專利權人授權或同意之情況下，使用或製造專利權人之專利技術或物品者，專利權人得向聯邦法院提起訴訟請求「補償金」，包括所有合理之費用(如律師費、專家證人的費用)；惟此部分費用須符合下列任一情事時，徵用機關使應支付：

（1）前揭訴訟已繫屬於法院達十年，

（2）法院認定聯邦政府之行為「不當」，

（3）給予專利權人該費用應屬合理。

又依此規定，因聯邦政府為強制授權之被授權人，其行為係基於公益，並不構成專利權侵害；是以，專利權人不得要求法院核發禁止命令。[4]

2. 反競爭法之救濟措施

美國在反競爭法之救濟措施所採取的專利強制授權之實證經驗獨步全球[5]，在美國反托拉斯法盛行的年代，自 1950 年代末期起，美國在約 100 件違反反托拉斯案件中，強制授權 4 至 5 萬件專利，其中最著名的案例有 AT&T、IBM、General Electric、Eastman Kodak 等反托拉斯案件。此種反托拉斯專利強制授權在 90 年代，pro-patent 的聲浪逐漸壓倒

[4] 林恆毅「專利權之實施」http://myweb.hinet.net/home13/rdipo/pt1.htm#_ftn17

[5] Antitrust Guidelines for the Licensing of Intellectual Property, US Department of Justice amd the Fderal Trade Commission 全文詳 http://www.usdoj.gov/atr/public/guidelines/0558.htm

pro-competitive 後，逐漸消聲匿跡。然而在 2003 年，微軟公司在經美國司法部調查後，同意以公開聲明調降授權金作為和解條件，可以視為近期最重要的反競爭法之救濟案例，雖然最後並未採取專利強制授權。

3.其他非自願授權

(1) 民用核能法案

依據USC §2183，美國政府可以公共利益為由，強制授權核能相關專利，而依據USC §2187，此種強制授權之補償金應考量：

a. 專利補償委員會之建議（依據USC §2187(a)設置）
b. 在侵權案件中可能被提出的答辯理由
c. 該專利的研發是否受有聯邦補助
d. 該發明的產業利用性、進步性與重要性
e. 權利人為研發該專利之支出

(2) 空氣清淨法

依據USC §7608，在行政部門認為某專利可用於空氣淨化，但未經充分授權以致產生不完全競爭或寡占效果時，得向法院要求強制授權（mandatory licensing）

(3) 拜杜法案

在拜杜法案中（Bayh-Dole Act），允許第三人針對政府補助研發所得之專利，要求合理條件下的授權。(35 U.S.C. 200-212)

(4) 公衛緊急藥物法(草案)

在 911 恐怖攻擊後，為因應炭疽熱病毒恐怖攻擊，眾議員 Sherrod Brown 提出了公衛緊急藥物法草案（Public Health Emergency Medicines Act,HR3235)。該草案雖然最後因權利人與美國政府達成自願授權而未通過，但其中所提供的補償金核定因素相當值得參考：

a. 研發所需之成本及風險
b. 對於公共衛生的重要性及使用效率
c. 研發是否受有公部門補助
d. 對於研發及商品化所提供之誘因
e. 在該專利藥品受健保給付下，公眾所能獲得之利益

f. 反競爭救濟因素

g. 其他公益考量

除上述各種強制授權外，美國法院並得透過專利濫用（patent misuse）的認定，在侵權案件中認定該專利不得執行（non-enforcement）。在 1988 專利濫用修正案中[6]，對於專利濫用有很模糊的界定，事實上，美國法院對於專利濫用的認定也一直在寬嚴間擺盪[7]。

4. 相關規定：

§ 1498. Patent and copyright cases

(a) Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture. Reasonable and entire compensation shall include the owner's reasonable costs, including reasonable fees for expert witnesses and attorneys, in pursuing the action if the owner is an independent inventor, a nonprofit organization, or an entity that had no more than 500 employees at any time during the 5-year period preceding the use or manufacture of the patented invention by or for the United States. Nothwithstanding [1] the preceding sentences, unless the action has been pending for more than 10 years from the time of filing to the time that the owner applies for such costs and fees, reasonable and entire compensation shall not include such costs and fees if the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

The court shall not award compensation under this section if the claim is based on the use or manufacture by or for the United States of any article owned, leased,

[6] Patent Misuse Reform Act, 35 U.S.C. §§271(d)(4)-(5)(1988)

[7] http://www.law.duke.edu/journals/dltr/articles/PDF/2006DLTR0007.pdf

used by, or in the possession of the United States prior to July 1, 1918.

A Government employee shall have the right to bring suit against the Government under this section except where he was in a position to order, influence, or induce use of the invention by the Government. This section shall not confer a right of action on any patentee or any assignee of such patentee with respect to any invention discovered or invented by a person while in the employment or service of the United States, where the invention was related to the official functions of the employee, in cases in which such functions included research and development, or in the making of which Government time, materials or facilities were used.

(b) Hereafter, whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the Government, the exclusive action which may be brought for such infringement shall be an action by the copyright owner against the United States in the Court of Federal Claims for the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages as set forth in section 504 (c) of title 17, United States Code: Provided, That a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the copyrighted work by the Government: Provided, however, That this subsection shall not confer a right of action on any copyright owner or any assignee of such owner with respect to any copyrighted work prepared by a person while in the employment or service of the United States, where the copyrighted work was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: And provided further, That before such action against the United States has been instituted the appropriate corporation owned or controlled by the United States or the head of the appropriate department or agency of the Government, as the case may be, is authorized to enter into an agreement with the copyright owner in full settlement and compromise for the damages accruing to him by reason of such infringement and to settle the claim administratively out of available appropriations.

Except as otherwise provided by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than three years prior to the filing of the complaint or counterclaim for infringement in the

action, except that the period between the date of receipt of a written claim for compensation by the Department or agency of the Government or corporation owned or controlled by the United States, as the case may be, having authority to settle such claim and the date of mailing by the Government of a notice to the claimant that his claim has been denied shall not be counted as a part of the three years, unless suit is brought before the last-mentioned date.

(c) The provisions of this section shall not apply to any claim arising in a foreign country.

(d) Hereafter, whenever a plant variety protected by a certificate of plant variety protection under the laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government, and with the authorization and consent of the Government, the exclusive remedy of the owner of such certificate shall be by action against the United States in the Court of Federal Claims for the recovery of his reasonable and entire compensation as damages for such infringement: Provided, That a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the protected plant variety by the Government: Provided, however, That this subsection shall not confer a right of action on any certificate owner or any assignee of such owner with respect to any protected plant variety made by a person while in the employment or service of the United States, where such variety was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: And provided further, That before such action against the United States has been instituted, the appropriate corporation owned or controlled by the United States or the head of the appropriate agency of the Government, as the case may be, is authorized to enter into an agreement with the certificate owner in full settlement and compromise, for the damages accrued to him by reason of such infringement and to settle the claim administratively out of available appropriations.

(e) Subsections (b) and (c) of this section apply to exclusive rights in mask works under chapter 9 of title 17, and to exclusive rights in designs under chapter 13 of title 17, to the same extent as such subsections apply to copyrights.

U.S. Patent Act
Sect. 271. Infringement of patent

(a) Except as otherwise provided in this title [35 USCS Sects. 1 et seq.], whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent.

(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

(c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following:

(1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent;

(2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent;

(3) sought to enforce his patent rights against infringement or contributory infringement;

(4) refused to license or use any rights to the patent; or

(5) conditioned the license of any rights to the patent or the sale of the patented product on the acquisition of a license to rights in another patent or purchase of a separate product, unless, in view of the circumstances, the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned.

(e)(1) It shall not be an act of infringement to make, use, or sell a patented invention (other than a new animal drug or veterinary biological product (as those terms are used in the Federal Food, Drug, and Cosmetic Act and the Act of March 4, 1913) which is primarily manufactured using recombinant DNA, recombinant RNA, hybridoma technology, or other processes involving site specific genetic manipulation techniques) solely for uses reasonably related to the development and submission of information under a Federal law which regulates the manufacture, use, or sale of drugs or veterinary biological products.

(2) It shall be an act of infringement to submit--

(A) an application under section 505(j) of the Federal Food, Drug, and Cosmetic Act [21 USCS Sect. 355(j)] or described in section 505(b)(2) of such Act [21 USCS Sect. 355(b)(2)] for a drug claimed in a patent or the use of which is claimed in a patent, or

(B) an application under section 512 of such Act [21 USCS Sect. 360b] or under the Act of March 4, 1913 (21 U.S.C. 151-158) for a drug or veterinary biological product which is not primarily manufactured using recombinant DNA, recombinant RNA, hybridoma technology, or other processes involving site specific genetic manipulation techniques and which is claimed in a patent or the use of which is claimed in a patent, if the purpose of such submission is to obtain approval under such Act to engage in the commercial manufacture, use, or sale of a drug or veterinary biological product claimed in a patent or the use of which is claimed in a patent before the expiration of such patent.

(3) In any action for patent infringement brought under this section, no injunctive or other relief may be granted which would prohibit the making, using, or selling of a patented invention under paragraph (1).

(4) For an act of infringement described in paragraph (2)-

(A) the court shall order the effective date of any approval of the drug or veterinary biological product involved in the infringement to be a date which is not earlier than the date of the expiration of the patent which has been infringed,

(B) injunctive relief may be granted against an infringer to prevent the commercial manufacture, use, or sale of an approved drug or veterinary biological product, and

(C) damages or other monetary relief may be awarded against an infringer only if there has been commercial manufacture, use, or sale of an approved drug or veterinary biological product.

The remedies prescribed by subparagraphs (A), (B), and (C) are the only remedies which may be granted by a court for an act of infringement described in paragraph (2), except that a court may award attorney fees under section 285 35 USCS Sect. 285].

(f)(1) Whoever without authority supplies or causes to be supplied in or from the United States all or a substantial portion of the components of a patented invention, where such components are uncombined in whole or in part, in such manner as to actively induce the combination of such components outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.

(2) Whoever without authority supplies or causes to be supplied in or from the United States any component of a patented invention that is especially made or especially adapted for use in the invention and not a staple article or commodity of commerce suitable for substantial noninfringing use, where such component is uncombined in whole or in part, knowing that such component is so made or adapted and intending that such component will be combined outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.

(g) Whoever without authority imports into the United States or sells or uses within the United States a product which is made by a process patented in the United States shall be liable as an infringer, if the importation, sale, or use of the product occurs during the term of such process patent. In an action for infringement of a process patent, no remedy may be granted for infringement on account of the noncommercial use or retail sale of a product unless there is no adequate remedy under this title for infringement on account of the importation or other use or sale of that product. A product which is made by a patented process will, for purposes of this title, not be considered to be so made after--

(1) it is materially changed by subsequent processes; or

(2) it becomes a trivial and nonessential component of another product.

附件六 中華人民共和國專利法修正草案

（黑体字为修改部分）

(2008 年 2 月 28 日修改)

现行专利法	修改稿
第六章　专利实施的强制许可	第六章　专利实施的强制许可
第四十八条　具备实施条件的单位以合理的条件请求发明或者实用新型专利权人许可实施其专利，而未能在合理长的时间内获得这种许可时，国务院专利行政部门根据该单位的申请，可以给予实施该发明专利或者实用新型专利的强制许可。	第**四**十九条　**有下列情形之一的**，国务院专利行政部门根据**具备实施条件的单位**的申请，可以给予实施发明或者实用新型专利的强制许可： **（一）专利权人自专利权被授予之日起满三年，无正当理由未实施或者未充分实施其专利的；** **（二）专利权人行使其专利权的行为经司法程序或者行政程序确定为排除、限制竞争的行为的。**
第四十九条　在国家出现紧急状态或者非常情况时，或者为了公共利益的目的，国务院专利行政部门可以给予实施发明专利或者实用新型专利的强制许可。	第**五十**条　在国家出现紧急状态或者非常情况时，或者为了公共利益的目的，国务院专利行政部门可以**根据国务院有关主管部门的建议**，给予**该部门指定的单位**实施发明专利或者实用新型专利的强制许可。 **为了保护公众健康，国务院专利行政部门可以依照前款规定给予实施发明专利或者实用新型专利的强制许可。**
	第五十一条　治疗流行病或者传染病的药品在中国被授予专利权，不具有制造该药品的能力或者能力不足的发展中国家或者最不发达国家希望从中国进口该药品的，国务院专利行政部门可以给予具备实施条件的单位制

	造该药品并将其出口到前述国家的强制许可。 **国务院专利行政部门依照前款规定给予强制许可的，应当在给予强制许可的决定中明确记载有关要求。**
第五十条　一项取得专利权的发明或者实用新型比前已经取得专利权的发明或者实用新型具有显著经济意义的重大技术进步，其实施又有赖于前一发明或者实用新型的实施的，国务院专利行政部门根据后一专利权人的申请，可以给予实施前一发明或者实用新型的强制许可。 在依照前款规定给予实施强制许可的情形下，国务院专利行政部门根据前一专利权人的申请，也可以给予实施后一发明或者实用新型的强制许可。	第五十**二**条　一项取得专利权的发明或者实用新型比前已经取得专利权的发明或者实用新型具有显著经济意义的重大技术进步，其实施又有赖于前一发明或者实用新型的实施的，国务院专利行政部门根据后一专利权人的申请，可以给予实施前一发明或者实用新型的强制许可。 在依照前款规定给予实施强制许可的情形下，国务院专利行政部门根据前一专利权人的申请，也可以给予实施后一发明或者实用新型的强制许可。
	第五十三条　除依照本法第四十九条第（二）项、第五十一条第一款规定给予的强制许可外，强制许可的实施应当主要是为了供应国内市场的需要。 **强制许可涉及的发明创造是半导体技术的，该强制许可的实施应当仅限于为了公共利益的目的或者为了对行政或者司法程序确定为排除、限制竞争的行为给予救济。**
第五十一条　依照本法规定申请实施强制许可的单位或者个人，应当提出未能以合理条件与专利权人签订实施许可合同的证明。	第五十**四**条　依照本法**第四十九条第（一）项或者第五十二条**规定申请强制许可的单位或者个人，应当提**供以合理的条件与专利权人订立实施其专利的许可合同而未能在合理的时间内获得许可的证明。**
第五十二条　国务院专利行政部门作出的给予实施强制许可的决定，应当及时通知专利权人，并予以登记和公告。	第五十**五**条　国务院专利行政部门作出的给予强制许可的决定，应当及时通知专利权人，并予以登记和公告。

给予实施强制许可的决定，应当根据强制许可的理由规定实施的范围和时间。强制许可的理由消除并不再发生时，国务院专利行政部门应当根据专利权人的请求，经审查后作出终止实施强制许可的决定。	给予强制许可的决定，应当根据强制许可的理由规定实施的范围和时间。强制许可的理由消除并不再发生时，国务院专利行政部门应当根据专利权人的请求，经审查后作出终止强制许可的决定。
第五十三条　取得实施强制许可的单位或者个人不享有独占的实施权，并且无权允许他人实施。	第五十**六**条　取得强制许可的单位或者个人不享有独占的实施权，并且无权允许他人实施。
第五十四条　取得实施强制许可的单位或者个人应当付给专利权人合理的使用费，其数额由双方协商；双方不能达成协议的，由国务院专利行政部门裁决。	第五十**七**条　取得强制许可的单位或者个人应当付给专利权人合理的使用费，其数额由双方协商；双方不能达成协议的，由国务院专利行政部门裁决。
第五十五条　专利权人对国务院专利行政部门关于实施强制许可的决定不服的，专利权人和取得实施强制许可的单位或者个人对国务院专利行政部门关于实施强制许可的使用费的裁决不服的，可以自收到通知之日起三个月内向人民法院起诉。	第五十**八**条　**申请强制许可的单位或者个人对国务院专利行政部门驳回其申请的决定不服，**专利权人对国务院专利行政部门给予强制许可的决定不服的，可以自收到通知之日起三个月内**依照《中华人民共和国行政诉讼法》**向人民法院起诉。 专利权人和取得强制许可的单位或者个人对国务院专利行政部门关于实施强制许可的使用费的裁决不服的，可以自收到通知之日起三个月内**依照《中华人民共和国行政诉讼法》**向人民法院起诉。

附件七 歐盟貿易障礙調查報告摘譯法律分析部分

(參考翻譯)

致貿易障礙調查規則委員會報告

依據歐盟第 3286/94 號規章，針對

台澎金馬個別關稅領域影響可錄式光碟專利保護行為，

造成貿易障礙調查報告書

飛利浦公司控訴案

僅供中華台北主管機關使用版本

非機密版

2008 年 1 月 29 日

【以下僅就該份報告 “法律分析”部分翻譯】

IV. 法律分析

64. 在以下段落，調查官員將就相關措施是否符合 WTO 協定，特別是 TRIPS 協定的規定作一分析。

65. 分析的相關措施包括：

中華民國專利法第 76、77 條

TIPO 於 2004 年 7 月 26 日作成之處分

經濟部訴願會於 2006 年 6 月 16 日作成之訴願決定

TIPO 於 2007 年 5 月 31 日作成之廢止處分

相關義務總覽

66. 被申訴人被討論主要違反之 WTO 義務，係 TRIPS 協定第 28、31 條。TRIPS 第 28 條規範專利保護之相關範圍；TRIPS 第 31 條規範「未經權利人授權之其他使用」，雖然該條並未提及「強制」或「非自願」，但本報告以下均簡稱「未經權利人授權之其他使用」為「強制授權」。

TRIPS 協定第 28 條

67. 主要專利權之賦予規定於 TRIPS 第 28 條中，其內容為：

1. 一項專利係賦予權利人下列專屬權利：

（a）假如專利是一項產品，則其所涉之主要權利為：阻卻第三人在未得到權利人的同意下去從事製造、利用、提供販售或販售該產品、或為該達等目的而進口該產品。

(b) 假如該專利係一種製程，則該專利之主要權利係在阻卻第三人在未獲權利人同意時，不可從事利用該製程、及不可使用、提供販售、販售或為達該等目的而進口直接以該製程所製之產品。

專利權人可將其權利讓與或移轉予繼承人，且其可中止授權契約。

68. 根據全球專利體制，專利係一項賦予專利權人在某一特定時間之獨佔權。其阻卻任何其他人在未經專利權人之同意下使用受專利保護之發明；獨占的專利本身並無商業價值，其價值係源於其所涉發明成果之商業價值。通常一項發明成果之商業價值會受其他因素所影響（以光碟言，其崛起係受到 1990 年代中後期個人電腦在讀光碟技術的成熟有關），但在發明成果價值顯現前，其所涉之專利就已被申請註冊了（本案光碟的技術研發就是這種情形）。

69. 賦予專利係著眼於鼓勵研發，給予那些從事研究發展的人在某一特定時間的排他權的一種獎勵；若未就某項創意賦予專利，其係因考量該創意任何人皆可易於學到或做到，因此不足以構成創新的程度。此外，某些研發成果獲得專利並能轉變為商業利益，則該獲得專利的商業價值的回饋即能涵蓋將那些獲得專利但無商業價值及那些未能獲得專利的研究發展的投資成本。因此，此某項專利的回饋

獎勵不可被單獨認為係僅與該項獲得專利的研發有關，而應就整體所投入的努力研發觀之。

70.專利權人有權就是否自行使用該專利技術或進行授權等，安排該如何利用其所屬之排他權；權利人可以依照自己的自由意願拒絕授權，否則，該排他權將全然受到損害。不過，運用專利排他權並不可牴觸競爭法規，但在競爭法規阻礙專利權的行使則屬例外。

71.以排他權來獎勵對創新及推進科學的努力是很多國家用法律規範來反映的社會抉擇，其亦反映在 TRIPS 中，尤其是其中的第 28 條；由於認知到附屬在該創新之成果將為專利權人帶來的價值，因此該條文清楚地賦予專利權人數項排他權，其要旨在 TRIPS 序文中已加以明示，其提到“對智慧財產需提供有效及足夠的保護”，並確認“智慧財產權是私權”

72.專家小組（在加拿大藥品專利保護案件中）曾認為：
專利權人正如其他智慧財產權人一樣，其在實務上使用專利所採行的常態方式是，排除所有可能會減損其在專利授權專屬市場上可期待的經濟收益的競爭形態；個別的專利使用形式並非一陳不變，基於技術的發展及市場的變革，有效率的使用專利權必須因應不斷變化的競爭形態而改變。保護所有正常使用專利權是所有專利法的主要政策原則；為誘導創新，專利法謹慎地訂出市場排他權的特定期間，但除非專利權人被允許有效的利用該所定誘因，否則該法令之政策目的通常無法達成。

73. 如前述，TRIPS 第 28 條賦予專利權排他效力，因此專利強制授權侵害本條規定是相當簡明的事實。尤其強制授權允許第三人在未獲專利權人同意的情況下，去使用、為銷售的要約、銷售使用此等發明專利權所製造之產品。

74. 台灣在調查過程中，從未爭議專利強制授權違反 TRIPS 第 28 條。惟台灣主張此種侵害是符合 TRIPS 第 31 條，並因此被允許有正當性的。因此，台灣對於

其是否符合 TRIPS 第 31 條具有舉證責任。

75. 調查官員同意 TRIPS 第 28 條並未包括例外規定，因此任何 WTO 會員在主張第 28 條之例外時，必須提出 TRIPS 的其他條文依據，例如 TRIPS 第 30 條。而 TRIPS 第 31 條（的例外性質）則較不明確：「其他使用(other use)」的用語，暗示本條是 TRIPS 第 28 條的例外，而調查官員認同此種解釋。

76.依據上述，調查官員轉而去分析強制授權的實質背景是否包括不同意「合理的商業期間及條件」，假如不包括，則中華台北的專利法及本強制授權就與其應履行 WTO 規定之義務有所違背。

「合理商業條件」作為授予強制授權之實質要件

1. 引言

77. 「申請人曾以合理之商業條件在相當期間內仍不能協議授權時」是中華民國專利法第 76 條賦予強制授權的一個理由。在申請案被審查時，符合該要件被認為足以授予強制授權。若專利法第 76 條此一事由違反 TRIPS 協定，則依據本條所授予的所有強制授權處分均違反 TRIPS 協定。

78. 申訴人並未明確主張專利法第 76 條違反 TRIPS 協定，然而其主張在授予強制授權的「實體要件（substantive grounds）」與「程序要件（procedural requirements)」之間,應有清楚的界線。因此申訴人主張台灣對於 TRIPS 第 31(b)條的解釋，製造了專利權人必須「提供合理商業條件與潛在被授權人協商」之義務。因此，申訴人主張專利法第 76 條違反 TRIPS 協定。

79.調查官員參照專利法的立法說明及原告所主張貿易障礙的聲明與敘述，並於調查期間以書面向中華台北當局提出此等問題。

2. 分析

80. 針對「合理之商業條件協商」至少係一程序要件，並無爭議，唯其是否同時

為實體要件，則為一爭議問題。

81.「合理之商業條件協商」是否可作為強制授權之實體要件，有重大影響。如因專利權利人拒絕以合理商業條件授權使用其專利（報告以下簡稱拒絕授權「refusals to deal」），即可作為強制授權之事由，將造成專利權行使時巨大的影響（far-reaching effects）。

82. 調查官員基於下列二理由，認為將「拒絕授權」解釋為強制授權之實體要件是違反 TRIPS 協定的：(1) 以拒絕授權作為強制授權之事由，損及 TRIPS 所提供專利之核心保護（eviscerate）；(2) 若將 TRIPS 第 31 條中的「合理商業條件」用語解釋為實體要件，明顯違反（clearly runs counter to）TRIPS 第 31 條。

83. 在 TRIPS 協定中並未規定強制授權的詳細原因；但在杜哈部長級 TRIPS Agreement and Public Health 宣言中曾聲明（該段聲明在 2001 年 11 月 14 日之 WTO 杜哈部長級會議中曾被引用），基於遵守 TRIPS 的承諾，我們認為這些具有彈性的原則含有：

--每個會員有權進行強制授權及有權決定強制授權的原因。

84. 依據杜哈部長宣言，WTO 各會員固然有自行認定強制授權事由的權利，但如將「拒絕授權」作為強制授權事由，TRIPS 第 28 條所提供大部分的實質價值將被空洞化，因為其權利的排他特質將僅因拒絕授權而被剝奪。

85. 第 28 條 1(a) 及 2 係最直接有關者；其規定為：

1. 一項專利賦予權利人下列專屬權：

（a）假如專利是一項產品，則其所涉之主要權利為：阻卻第三人在未得到權利人的同意下去從事製造、利用、提供販售或販售該產品、或為該達等目的而進口該產品。

2. 專利權人可將其權利讓與或移轉繼承人，且其可中止授權契約。

86. 依據 TRIPS 第 28.2 條,「專利權人有權依據繼承或授權,讓與、移轉其專利」,明示依契約授權專利使用係專利權人之權利而非義務。在調查過程中,台灣確實也承認,強迫專利權人去與不可靠或無意建立商業關係的相對人,建立商業關係是不合理的。

87.第 31 條的前言不可解讀為無需適用該結論,只憑拒絕協商之一項因素就進行強制授權是違反第 28 條之規定的。第 31 條前言所提到“一會員的法令允許其他使用”(例如強制授權),其意旨若解讀均不需遵行第 28 條之規範,而允許進行強制授權,則將導致 TRIPS 對專利的保護全然無效。

88.有關此議題在文獻上很少被論及。其中對於 TRIPS 專利體制分析論述最為詳細之一者,其結論為:
--可能成為被授權者無法自專利權人處獲得自發式的授權的事實並不是強制授權的充分理由,同樣的,專利權人無法提出堅強的商業理由致不同意授權予其競爭者的事實亦不可當作強制授權的充分理由;事實上,並沒有任何較拒絕與競爭者進行協商更為可行合適的商業處理模式的。因此,縱然權利人在已被給予合理的期間考量後仍決定不同意專利授權,其並不當然就應變成強制授權的自動發生,除了拒絕授權之外,對於授權必須有公共利益為利基方為正當;僅因拒絕授權即進行強制授權是有失其正當性的,另如上所述,壓制專利權利人說「不」將違反 28.1 條之規定,縱未未違反該條,亦是有損 TRIPS 所賦給專利權人的利益。

89. Correa 對於「拒絕授權」提議可以採行強制授權,但詳細檢視他對這問題的論述,顯示他提到某些國家在實施強制授權時除了「拒絕授權」外,尚須具有某些狀況因素的存在,這些因素包括違反競爭法、妨礙研發(例如,在順勢市場中進行專利槓桿操作)及不正當地阻礙產業的建立。調查官員可確定的是,沒有任何例子所引證的理由與台灣專利法第 76 條的規定相當。

90. 有利此論點的第 2 種理由可從 31(b)中有關「合理之商業條件協商」一詞顯然是係一種程序要件而非實體要件。

91.被認為是強制授權的實體要件在 TRIPS 第 31 條內已被敘明的有：

--國家緊急狀況(31(b));

--其他危急情況（與國家緊急狀況不同）(31(b));

--公共非商業的利用(31(b));

--為救濟違反競爭作為(31(k));

--有必要允許第二專利的利用(31(l)).

92.然而條文對於有關協商獲得「合理商業條件」的要件亦有所區分，因此，當要件係有關國家緊急危難、其他緊急情況，或基於非營利之公益使用時，「該項規定〔即尋求合理商業條件」則可豁免」。同樣地，當使用強制授權作為不公平競爭行為之救濟時，「會員得不受(b)項之拘束」。最後，為使用第二專利，必須符合第 31(l)條規定之「各項額外要件」。

93.第 31(b)條條文其他要素亦明訂「合理商業條件」及特許強制授權的實質要件之間的差異。例如，第 31(c)條規定適用的範圍及期間應「限於所特許的目的」，之後舉出「非營利之公益使用」及不公平競爭行為之救濟等二項屬前述「目的」。正如前面曾指出的，第 31(b)條第二句將「非營利之公益使用」與「合理商業條件」之規定清楚區分。

94.再者，第 31(g)條規定之特許，在以下情況時得終止：

若原因消滅且回復可能性不高時，專利主管機關依申請，應複查原因是否繼續存在。

95.該項規定明確考量強制授權的目的，與特定事實原因繼續存在間的關聯性。條文預先設定特許強制授權(例如基於國家緊急危難)的具體與明確的原因。無法在合理期間協商出合理商業條件的概念是一種情況，是可能消滅或可能回復的情況，與前述特許的標準是無法調和的，此種現象可在特殊時點被察覺。尤其涉及極力協商合理商業條件之案件，當雙方經合理期間仍無法協商成功時，應僅能啟

動可能的特許。沒有人能知道啟動強制授權的因素是否永遠消滅或可能回復。

96.正如前面已指出，若無法協商出「合理商業條件」本身已足以合理解釋特許強制授權，則相當於將責任課予專利權人。此一結果亦難與第 31 條其他規定相配合，例如，假設係因拒絕協商而特許強制授權，即沒有理由援引作為不公平競爭救濟，而特許強制授權的具體規定，因為所有的制度中，並不是擁有專利就是濫用競爭法，只有若干情況之使用專利，方被視為不公平競爭。

97.有一類似的情況，第 31(1)條有關「第二專利」部分，規定「額外要件」應指：
第一專利權人應有權在合理條件下以交互授權之方式，使用第二專利權。

98.假設第 31(b)條之「合理商業條件」係特許強制授權之獨立要件，則前述規定就不須要了，因為第一專利權人在已經提供「合理商業條件」後，就處於隨時得使用第二專利權的情況。

(b)補充資料
99.為確認其意義，或由於第 31 條相關規定之意義仍有模糊之處，可藉由補充資料，如準備文件及決議當時之情況等，加以說明。

100. 依據 TRIPS 的協商過程（1990 七月版第 5A 條）也可以補充證明，TRIPS 第 31 條中的「合理商業條件」並不認為是強制授權的實體要件。將於 1990.7 間討論之文件與最後協定文件相較就能清楚得知。1990.7 的文件可分為二部分，第一是有關可授予強制授權清況之規定，另一則為程序要件。文件內容如下。

5. 強制授權/權利授權/政府目的之使用

5A.1 強制授權包括權利授權以及政府在未經專利權人授權下所為之使用。會員應減少強制授權才不致減損對於專利權人的合理保護。

5A.2 強制授權僅能於下列情況下被授予

5A.2.1 作為經宣判為侵害公平競爭法之救濟手段

5A.2.2a 作為（被宣稱）國家緊急狀況存在時的處理方式

5A.2.2b 在發生與國家安全有關之公共利益或將危害全體公眾生命等情況

5A.2.2c 發明專利權的利用為公共利益、政府或其他被授權之第三人所需求

5A.2.3 在後申請之發明於利用時將不可避免的侵害申請在前之發明者，若在後申請者係涉及對在在前之發明之重大技術改良或為全然不同之目的者，可以授予強制授權之方式以避免專利侵權之發生。

5A.2.4 對於已申請專利之發明不實施或其製造、銷售等情況不能滿足國內市場的基本需求時，自其專利申請日起四年或被授予專利三年之日起，以在後者之日為準，除國家法規另有規定或其他商業實務存在者外，得被強制授權。

5A.3 當會員授予強制授權時，需以對於交易侵害最小的方式為之，並遵守下列規定：

5A.3.1 除了顯然屬於國家緊急情況之案件外，強制授權僅能於申請者以通常的商業模式向專利人交涉自願授權而不可得時，才能被授予。

5A.3.2 若權利人可以證明其不實施或未適當實施是因為該領域中的法律、科技或商業等原因所造成者，就不得以權利人在領域內不實施或未適當實施而強制授權。

5A.3.3 強制授權之實施範圍須限於依其被授予目的之清楚範圍。

5A.3.4 強制授權是非專屬授權。且除與利用強制授權之企業或商譽一併轉讓者外，其亦不得轉讓。

5A.3.5 強制授權僅得被允許製造供應國內市場。

5A.3.6 強制授權僅得依個案性質考量。

5A.3.7 強制授權不得要求移轉與被利用之發明有關之專門技術。

5A.3.8 基於對專利擁有者及其他被授權人合法權利的適當保護，當授予強制授權的情況已不再存在或不可能再發生時，該強制授權應當被廢止。這些情況是否繼續存在應依權利人之請求而被重新檢視。

5A.3.9 除因被宣判違反公平交易法而授予強制授權外，強制授權實施人應被要求支付權利人相當於該專利授權之補償金。

5A.3.10 任何有關授予、繼續授予強制授權以及補償金之決定應經司法機關或直接上級機關之審查。

101. 第 31 條明訂授予時所應遵守之特定條件,但並未列舉或定義何種案件被允許(半導體科技除外)。參與諮商者權衡後傾向將得強制授權之案件類型開放,惟建立嚴格之防護措施。

102. 這傾向確認嘗試協商被視為程序上要件,並非允許強制授權之實質條件。

103. 這樣的結論於 WTO 協議中可再度被確認。具體化 WTO 協議,絕大多數的國家的審判權均肯認專利擁有者有拒絕授權的權利,只有在專利權人具有市場地位且與濫用其市場地位相連結時,才會被認定為是違法的。在 1998 年歐盟法院就 Volvo v Veng 的案件中,有將此一原則作完整的闡述。該判決認為:設計專利權人可以禁止第三人未經其同意而製造、販賣及進口之行為,而將該設計具體化的產品是構成其專屬權利的主要事項。因此,就算設計專利權人有合理之權利金作為授權之回饋,將其設計具體化之授權將導致其專屬權之實質部分被剝。所以在此情況下,拒絕這樣的授權的本身應不得被認為係濫用獨占地位。

104.這樣的見解在最近的 IMS Health 及 Microsoft 判決中亦被肯認。在美國相同的原則亦被認同。美國專利法(35 U.S.C. §271(d)(4))規定:
“侵害專利權,或幫助侵害之事情發生時,有權行使侵權救濟之專利權人,不得因有下列各款情事之一而否定其行使救濟之權益,或被視為專利權之濫用或不法之權利擴張:
(d)拒絕授權他人實施或使用其專利權者”

105. 該法規與若干司法處分一致,相同原則亦適用於中華台北。依照民法之契約自由原則,一方可決定是否與他方進行交易此係民法之基本原則,且依照司法解釋除受限於憲法第 23 條所列舉之事由,契約自由亦為憲法上之權利。

106.因此,在達成 WTO 協議及中華台北加入時,拒絕授權是被普遍接受的民事法律原則,且事實上 WTO 會員亦未急於改變其專利體制明定權利人有締約義務之規定,如此更足以肯認第 31 條 B 款所定致力取得協議授權之規定不得被認定為是

取得強制授權的要件。

3.結論

107. 調查官員認為，中華民國專利法第 76 條違反 TRIPS 第 28 條，因為該條僅在「申請人曾以合理之商業條件在相當期間內仍不能協議授權時」的情況下，即可提供強制授權，而該要件無法符合 TRIPS 第 31 條。

108. 基於上述結論，由於中華民國專利法第 76 條違反 TRIPS 第 28 條，故依據本條所作成之強制授權處分及後續的訴願決定均違反 TRIPS。

違反 TRIPS 協定第 31 條之程序要件

1.「合理商業條件」的定義

109. 縱使中華民國專利法第 76 條不被認為違反 TRIPS，申訴人仍提出台灣當局數項違誤（110~113，即 TIPO 處分及訴願決定對於「合理商業條件」的定義）。

110. 智慧財產局的強制授權處分論及：按「合理商業條件」乃屬一不確定之法律概念，而難有一固定之定義，尤其商業條件包括的範圍甚廣，舉凡授權之範圍、區域、授權時間之長短、技術獲利能力、技術品牌知名度、同業競爭之狀況等等，均可為商業條件，因此所謂合理之商業條件，應綜合考量專利年限、專利產品的市場前景以及社會公共效益等因素，且應當是請求特許實施之申請人可以承受，並可以現實支付的條件。

111. 經濟部訴願決定指出，「合理商業條件」乃屬一不確定之法律概念，而難有一固定之定義，尤其商業條件包括的範圍甚廣，舉凡授權之範圍、區域、授權時間之長短、技術獲利能力、技術品牌知名度、同業競爭之狀況等等，均可為商業條件，因此所謂合理之商業條件，應綜合考量專利年限、專利產品的市場前景以及社會公共效益等因素，且應當是請求特許實施之參加人可以承受，並可以現實支付的條件以創造雙贏。

112. 台灣智慧財產局對於「合理商業條件」設下了一個抽象的標準（general standards），而且進一步的基於這些抽象標準，認定申訴人所提出的授權金為「不合理商業條件」。

113. 台灣經濟部維持該決定，僅基於些微不同之立場：a.當 CD-R 單價下滑時卻要求固定權利金比率不合理 b.駁回原告所要求之相當於美國法院核准可能之專利侵權的擔保 c. 僅依據某美國大學論文稱太陽誘電在聯合授權契約條款中原僅要求 2%權利金但其後實際以 3%或日幣 10 元計算，證明原告可以接受 2%之權利金比率。

114. 在所有的處分、決定中，均未分析 CD-R 的市場授權價格（不論是在台灣或其他市場），亦未分析系爭專利的價值以及其對於申訴人的合理報酬率。

115.以下議題將被依序檢視，首先調查官員將檢視標準「合理的商業約定或條件」之正確解讀，其次調查官員將依序檢視相關係爭行為，如與其他 CD-R 廠商契約內容及原告之論述，最後檢視被台灣用來決定原告報價不合理之要件。調查官員認為在此特別的案件中，對於標準的解釋及原告的論述，與 TRIPS 第 31（b）條不符。

116. 主要翻譯上的問題是「合理的商業約定或條件」之定義，其中"reasonable"（形容詞）表示 1.公平、合理 2.公道的 3.尚佳的

117."commercial"（形容詞）意指 1.從事或與商業行為有關的 2.營利或意圖營利

118."Terms"表示約定或同意規定或條件

119."conditions"（名詞）可表示 1.狀況 2.局勢 3.條件 4.病情

120. 「合理的」條件及狀態必須是一項公平及適當的因素，「合理的」一詞受制於「商業的」一詞，這意味著公平和適當的條件及狀態必須是基於經營者致力於營利事業。換言之，合理的商業條件及狀態係指合於商業關係。因此該條件及狀態最主要的參考依據是市況，供給和需求的交互作用會調整至一適當的點，使所有的商業經營者均得持續其營運(反競爭活動所造成的扭曲規定在第 31 條 k 項)。

121. 此一觀點係有條文可支持的。例如 TRIPS 協定第 37 條第 1 項提供與積體電路佈局有關的活動並不需要權利人的授權，此條文的相關部分：
會員應規定該行為人於被充分告知電路佈局係不法複製後，仍可處理其擁有之存貨及被告知前之訂單，惟必須支付權利人相當於在自由協議該電路佈局授權之情形下所應支付之合理權利金。

122. 該條文清楚指出等同於「合理的授權金」係經「自由協議」後所許可的授權金金額。許可的自由協議係基於正常商業行為，但假如協議一方係以反競爭方法為之則不屬於「自由」協議。

123. 其他的 WTO 協定亦有商業條件狀態或價值與市場間關係之定義，最著名的例子係「補貼及平衡措施協定」，其條文敘及：
(b)政府的貸款不應被視為給予補助，否則公司由政府取得的貸款將會與公司實際上可由市場上取得的相似商業貸款有所不同。

124. 這意味著商業處理係由市場機制所造成，相同的結論亦出現在 TRIPS 協定的第 31 條 h 項，該條文指出：
在考慮各個專利的經濟價值下，針對個別情況給付相當報酬與權利人。

125. 該條文與合理的商業條件及狀態條文有清楚的關係，邏輯上第 31 條 h 項的補償金不能高於合理商業條件及狀態的經濟價值。再者，在補貼及平衡措施協定主張的合理補償定義為「普遍的商業條件」。第 14 條 d 項提到：

政府提供貨品或勞務或購買貨品，除係以低於適當之報酬提供，或以高於適當之報酬購買者外，不應視之為授與利益。報酬之適當性，應以系爭貨品或勞務在提供國或採購國之現行市場行情（包括價格、品質、供應情況、銷售情況、運輸及其它有關買賣之條件）認定之。

126. 應用到相類似的 TRIPS 協定第 31 條 h 項，假設「合理商業條件及狀態」的經濟價值不低於補償金，得臆測「合理的商業條件及狀態」至少必須是在一般市場可尋求到的。因此有強烈的理由，視「合理的商業條件及狀態」首先係由市場所決定。

127. 此觀點在文獻中被確認，例如 Gervais 表示：
合理在此未被定義。其取決於科技的性質，特別是 WTO 會員欲授予強制授權於那些尚未發展的科技領域(在正常的合約基礎上)，不僅是該 WTO 會員相關的實行，且至少依據相關鄰國的實行，及相關科技的使用係在更符合全球規模的情況下。

128. 這清楚的暗示，在已發展的科技領域，WTO 會員欲給予授權，則該實行會是相關的。調查官員亦將基於本段的意義，調查第 31 條的諮商歷史。

129. 其他相關因素可能導因於結論的情形。從由美國所主導的專利侵權案件 *Georgia pacific* 那時起，該案件關切由美國法律所要求的「合理授權金」，並從那時起至少在美國成為要求的標準表達方式。該案件值得注意的是擴大引用所謂的「智慧財產權研討會研究報告」，該報告係工業局和工業技術研究院宣稱授權金過高，但沒有任何台灣政府當局就 *Georgia Pacific* 案件作出判斷。

130. 該案件可能有也可能沒有與結論的情況有關，並且當然不能作為對「合理的商業條件與狀態」解釋的決定因素。但該案件是長久以來為美國所接受者，並經常為學術文獻所參考，是一個如何解釋「合理的商業條件與狀態」的有用指引。在他對本案件的意見，美國紐約南區地方法院的 Tenny 法官認為：
一般而言，對相關的證據事實的理解，來決定所授予專利的合理的授權金，其可

能係出自於著名案件的過程，以下是數個作了適當修正似乎較貼切此主體者：

1. 權利人由授予訴訟中、證明中或注意中的專利所獲得之授權金，來確認授權金額。

2. 被授予者所付給與系爭專利相類似之專利的費用比率。

3. 許可的性質與範圍，如專屬或非專屬等；有無限制實施區域或產品銷售對象。

4. 許可者建立政策及市場計劃以不售予其他人專利維持其專利的獨占或設計特殊條件來確保其獨占。

5. 許可者與被授予者間的商業關係，如他們是否為同一商業領域的競爭者，或他們為發明者與推動者。

6. 被授權人販售專利產品來促銷其他產品；許可者的專利價值係建立於販售其非專利之產品；上述銷售的程度範圍。

7. 專利期間及許可條件。

8. 該專利產品已建立的利益；它成功的商品化及造成流行。

9. 專利財產的使用與利益涵蓋舊的模式或方案，假如曾被用於產生類似結果。

10. 專利發明之性質；許可者擁有及商業化生產；那些使用該發明獲利者。

11. 侵權者使用發明的程度；任何證明使用價值的證據。

12. 習慣性的特定營業或類似營業由使用該發明或類似發明的利潤或售價部分。

13. 可實現的利潤必須考量非專利因素、生產過程、營業風險及侵權人所增加的特別特徵或改良。

14. 合格專家的意見聲明。

15. 許可者(如專利擁有者)與被授予者(如侵權者)合意之金額係基於(在侵權行為開始時)假設雙方已經合理與自願的去嘗試達成協定；被授予者希望藉由營業提議來具體化專利發明以獲取許可生產及銷售特別產品，有意願付授權金然尚未能有合理利潤，此一金額將被有意願給予專利的專利擁有者接受。

131. 該法院認為以美國高等法院案例的觀點，只有當第 1 步驟不可得時(即確認授權金不可行時)才考慮其他有關步驟。

132. 由以上所述可得知調查官員在確認「合理的商業條件與狀態」時首先應以

市場機制作為參考。就此一措詞本身的了解，其上下文及 TRIPS 協定的結論情形。其有可能是市場價值不可行的案件，或許可考量其他因素。調查官員的業務將不包括。然而，那並無必要進一步分析該議題基於調查的目的。

c). 本案的事實

133. 智慧局已經前曾將「合理的商業條件與狀態」一詞定義為：

決定「合理的商業條件與狀態」，應綜觀專利的授予期間、專利產品的市場展望、社會及公益價值，此些條件應納入強制授權申請者可負擔之考量……。有關光碟片授權金的爭端，合理的一詞需被考量是否有提供……。由申請人所提出的合理條件並不明顯脫離目前相關科技領域公正第三者的見解，假如雙方所關心之遠景仍舊可進一步諮商。

134. 此一作法不符 TRIPS 協定第 31（b）條，最初的焦點應是市場上其他業者所接受的條件，只有當這樣的授權金比率是無法達成，或僅在部分領域被接受而不是全球性，該條件才能不以該基準點為可行性之評估。在本案中，並沒有台灣其他業者因授權金費率而不得簽約的情形。不以市場機制來作為決定授權金的基準，執委會認為智慧局的作法有違 TRIPS 協定第 31（b）條規定。

135. 經濟部的訴願決定亦有類似的不合宜處：

我們相信合理的商業條件，係指客觀第三人及整體產業發展考量，並不與相關的技術市場有衝突；可以被強制授權人所接受；可以實際由被授權人所支付；創造雙贏的局勢。

136. 因此，擴大爭論的行動造成台灣未來行動之先例(事實上智慧局宣稱尊重其本身及更高當局經濟部所擁有之先例)已清楚的違反了 TRIPS 協定第 31 條 b 項。當法院亦認同該看法時並視為先例，則以後台灣甚至將更多類似的行動。

137. 在調查過程中智慧局稱，原告並未提供其在台灣與其他光碟片製造商所簽的合約，因此而未分析市場條件，此種辯護並未出現在相關的判決。無論該資料

是否被提供，執委會認為台灣當局應要求提供這樣的文件是無關的。臺灣當局已了解原告已與台灣其他光碟片製造成簽署合約之事實，無論如何其已超出該爭論。原告的論點係指智慧局的裁判，這標準合約提供：

7.最惠待遇

依授權條款第 2 條所定，授予飛利浦光碟片專利給在類似狀態下的第三人，但授權金優於被授權人依本協定可給付之比率，被授權人應給予與第三人相同授權金，永遠提供被授權人權利交叉授權或其他協定基於非專屬之立場來支付授權金，進一步的提供被授權人的權利不須適用於其他建立於法院裁決之安排，或飛利浦與第三人間之爭端解決，不管爭端之性質、法院裁決之條件、或解決之條件。

138. 依據該條約定之性質，及原告之認知已經完成與許多在中華台北的光碟片製造商(皆揭露於智慧局的裁決)之授權協定，智慧局不能假裝不了解合約條件之性質，特別這些已經達成協議的授權金比率。再者，台灣專利法第 59 條就授權協定的登記有所規定：

發明專利權利人給與他人之簽署、信任或許可來實行該發明，或專利權人之專利保證不應主張對抗第三人，除非他已經向專利當局(智慧局)登記。

139. 當許可協定的登記是非必需的它造成相當高的誘因來支持這樣的登記。的確，執委會已報告一般實務上登記授權協定及被告登記所有的許可協定。執委會業已提供原告該登記之證據並通知智慧局承認該登記。

140. 假如這樣尚有不足，原告亦提供許多該議題參考資料給執委會作為智慧局及經濟部作處置之考量。原告也提供其授權機制於公開網站至少從 1999 年起，包括標準合約及操作者身分已揭露於授權協議中。智慧局向執委會主張被告曾拒絕提供許可書明顯是不符的。實際上，原告在許多各別專利侵權訴訟中提供給智慧局此類合約。再者，原告亦自動提供此類合約供執委會審視。

141. 國碩在訴訟程序中主張原告並沒有提供相同條件給所有的被授權人。此一主張係基於實務上原告與許多從事光碟片銷售公司的交叉授權協定。執委會小心

的求證國碩的控訴，但所得到的結論係此交叉授權與決定合理的商業條件並無關聯。這樣的協定曾在原告與 Sony、Imation 及 Hitachi 間訂定。這一般提供了例如原告可使用 Sony 的專利，而 Sony 有權利使用原告之專利，這樣的協定可能被限制於特定領域(如視覺媒體)且部分案件可能亦須付權利金。該種協定主要條款係准許：

製作、曾製作、為其他事務而製作、使用、租賃、配銷、經銷、銷售、進口或儲存這些定義的產品或……

142. 此條款意味當交叉授權涉及光碟片的生產製造者毋需直接支付每一單位產品授權金，經由交叉授權協定原告仍舊收取授權金(一般按種類分)，然而，交叉授權係專屬於兩個專利擁有者間，其他如光碟片製造商並無法從中得利，光碟片製造商僅有選擇與原告交叉授權的部分得不付授權金。再者，並未有人提出交互授權是違反任何競爭法的情況。因此，執委會了解 CD-R 廠商交互授權的協議並不會影響對於 “合理商業條件”的認定，亦不會被認為強制授權是一個適當的方式去處理交互授權的議題。

143.調查官員認為，依據上述的分析已足以認定第 31（b）條之規定並非如中華台北主管機關在授予強制授權時所認定，即便國碩公司所獲得之授權條件被認定是不合理的。

144 除此之外，調查官員亦關切該強制授權決定中的其他要件。其中之一是申請者能否承擔授權的能力被認為是強制授權須考量的因素，但卻未考量專利權人之專利之價值。雖然在市場價格可獲得的情況下這通常是不相關的，但僅考量申請人支付的能力而不考量專利權的價值，顯然是與第 31 條之規定不符。而在調查期間，中華台北主管機關之代表甚至表達申訴者應對於中華台北的 CD-R 製造商對於該市場之貢獻分享利潤之看法。強制授權的機制顯然與這樣的目的是不符的。

145. 調查官員認為，中華民國專利法第 76 條已經認定違反 TRIPS，且基於上述

理由，台灣在本案中的作為也違反 TRIPS 第 31 條。

2.「範圍及期間」應限於符合強制授權之目的

146. 申訴人主張台灣同時違反 TRIPS 第 31(c)條「強制授權的範圍及期間應限於符合強制授權的目的」。

147.申訴人主張台灣由於未設定任何限制而玩反此項規定。應注意的是，本規定僅於符合 TRIPS 第條 28、31(b)條時適用，而調查官員前已作成相反的結論。

148. 第 31(c)條主要在建立 2 項要件比例原則。首先在確認是否符合強制授權之目的，其次是符合強制授權目的之範圍及期限。

149. 調查官員在認定本案「強制授權之目的」時面臨難題：在詢及台灣當局強制授權的目的時，台灣當局答以強制授權的普遍目的（general purpose）；在詢及強制授權的範圍及期間時，則答非所問。

150. 調查期間，台灣主管機關建議強制授權之目的可帶來合理之商業條件，卻無法規定很清楚的時間線。當專利生命周期將屆時應適當終止強制授權。限制之要件僅對既已存在之強制授權。例如授權僅對存續之相關專利有效，同時依照 TRIPS 第 31(f)條，特許實施應以供應會員國內市場需要為主。

151. 依據該強制授權處分書，並不能確認該強制授權之目的，當然因此也不能做出於符合強制授權的目的之強制授權的範圍及期間。

152. 此一論點亦可由 TIPO 於 2007 年 5 月 31 日作成之廢止處分獲得證實。(同時參見 153)

153. 依據 2007 年 5 月 31 日作成之廢止處分，因國碩公司移轉其生產至第三國，

是終止強制授權的事實及理由，此與當時授予強制授權的正當性完全相違。

154. 基於上術理由可認定，該強制授權處分為反 TRIPS 第 31(c)條。

3. 「主要供國內市場所需」

155. 台灣同意，依據 TRIPS 第 31(f)條，該強制授權應主要供國內市場所需。

156. 且專利法第 76 條清楚指出，【為因應國家緊急情況或增進公益之非營利使用或申請人曾以合理之商業條件在相當期間內仍不能協議授權時，專利專責機關得依申請，特許該申請人實施專利權；其實施應以供應國內市場需要為主。但就半導體技術專利申請特許實施者，以增進公益之非營利使用為限】。

157. 本報告檢驗了數項與 TRIPS 第 31(f)條有關的議題：(1) 是否台灣顯然為了促進外銷而授予強制授權；(2) 是否台灣在授予強制授權後，並未監測(monitoring)強制授權被授權人的行動，因此違反 TRIPS 規定；(3) 是否 TRIPS 第 31(f)條在一定期間內有被執行及遵守。

158. 第 31(f)條敘述：特許實施應以供應會員國內市場需要為主。

159. 本條之規範非常清楚。大量強制授權之商品不能用於出口。「特許實施」之字義需要商品之主要部分用於供應國內市場。至少是 51% 之商品用於供應國內市場所需，雖然或許會有更高比例達到供應國內市場。台灣主管機關不就第 31(f)條所稱 51% 為最低限度之指標是否適當爭論。因此本份報告亦不需去決定是否應符合超過高於 51% 之要求。「供應會員國內市場需要」之字句亦清楚涉及國內市場之消費。銷售國內商人再出口已非「供應會員國內市場」。

第 31(f)條能預防強制授權之被授權人係知情出口商？

160. 申訴人宣稱本案強制授權不曾允許出口。台灣主管機關回應表示，強制授權是否用於出口與是否准予強制授權並無關連，而是與准予授權之條件有關。

161. 本調查主要在一個已有出口之製造商是否應准予強制授權。然而，值得注意是本案並非正常提起。乃因製造商並無立場生產具專利之商品(無論出口與否)，除非其有自願授權或有專利侵權(專利仍有效)。如有自願授權則無需再准予強制授權(因在合理商業條件，現有授權對被授權人適用)，倘智慧財產法規範齊全，自然不會有專利侵權。

162 第 31(f)條默示過去的出口行為並不阻礙授予特許實施，即這並非禁止特許實施的實質理由，從第 31(f)條條文規定看是屬授權後的行為而非授權前的行為，符合 TRIPS 第 31 條確定程序性義務過程的整體解釋；特許實施申請人於取得特許實施權後可變更其企業行為，為以供應國內市場為主。

163. 因此調查官員不認為台灣未以先前國碩的出口行為禁止特許實施並無不妥。此部分並無違反 TRIPS 第 31（f）條之規定。在特許實施的處分中有提到中華台北 CD-R 製造者出口的情況以及國碩公司出口的情況。如該處分書中所載：「依台灣經濟研究院統計資料:民國九十一年我國 CD-R 光碟片全球產量為 70.92 億片，國內產量為 55.57 億片；九十二年全球為 78.22 億片，國內產量為 62.35 億片，我國產品在全球市場之占有率高達八成左右，居世界第一位，並為我國出口值之大宗。在全球十大廠商中，除第三名為日商太陽誘電公司、第四名為印度 MBI 公司外，餘均為我國廠商，包括本件特許實施申請人在內，足見光碟產業對我國產業之發展扮演重要角色。」

164. 若清楚瞭解中華台北 CD-R 產業及國碩公司係出口導向，那就可期望中華台北當局注意考慮特許實施是否符合第 31(f)條所定以供應國內市場為主之規定。然而中華台北並無評估國內市場的討論（實則 2003 年至 2007 年間國內市規模衰減 50% ）。結合中華台北明知 CD-R 產業及國碩公司出口的特性及欠缺考慮對國內市場的實質考慮，雖然過去的出口行為不能禁止授予特許實施，但是應密

切注意仔細檢驗確保特許實施被授權人產品供應國內市場，這就是第 31(f)條之義務。

3). WTO 會員第 31(f)條之義務

165. 如前段所述，中華台北當局是清楚第 31(f)條可能未被尊重，仍無視這事實，中華台北並未採取特別措施以確保特許實施時供應國內市場需要為主，爭辯他們無權處理，並認為國碩會尊重這要件，迫使控方依公開的資訊對國碩提起撤銷之訴，因欠缺有利控方之證據以致該撤銷之訴被駁回。下一節執委會將檢視國碩行為的特性，本節執委會檢視中華台北確實尊重第 31(f)條之義務。

166. 第 31(f)條明文授予特許實施是以供應國內市場需要為主，因此，WTO 會員授予特許實施審定書首先要指明授予特許實施之後應以供應國內市場需要為主，第 31(f)條之「授權」不只是行為時，更是持續授權所依靠的條件。

167.參考 WTO 理事會 2003.8.30「執行杜哈宣言第 6 段公共衛生」的決議，該決議規定，容許必要的出口行為，此項解釋經 2005 年 12 月理事會確認，這個要素明白跟隨維也納公約，給 WTO 會員解釋第 31(f)條的基準。

168. TRIPS 第 1 條第 1 句說：會員應實施本協定之規定，明顯地若會員未依第 31(f)條監視授予特許實施的運作，就不能說是實施。

169.許多專家小組的報告，談及 TRIPS 第 1 條的意義，在美國 V. 哈瓦納俱樂部的案例中專家小組表示：「我們了解許多潛在性的濫用是由於國內法任意規定智慧財產權歸屬的結果。然而，在 TRIPS 的規定中並非無防止潛在性濫的的防衛機制。依據 TRIPS 第 1.1 條之規定，“會員應賦予本協定中的規定一定的效力。”我們認為這樣的規定是指會員對於 TRIPS 協定中所規定的權利及義務應使其具有一定的效力，且不能採行使該等權利及義務無效的措施。除此之外，協定第 3 及第 4 條要求會員應對於其他會員適用國民待遇及最惠國待遇原則。另外，協定

第 7 條亦明定 “該協定的目標係為使智慧財產權的保護及執行與權利及義務達成一個平衡的狀態。” 我們認為這是誠信原則之規定。上訴機構在美國-小蝦的案子中亦提及由國家主導權利運作的原則。而此原則之一即係廣為週知的禁止濫用原則以及當所主張的權利侵害到協定所規定的義務時，必需是基於合理的權利主張。會員濫用其權利將會導致對其他會員權利的侵害，以及協定義務的違反。」因此，會員應依據 TRIPS 第 7 條定的誠信原則去實行 TRIPS 條文中的規範。

170. 另一個爭端解決小組的報告說：「大部分 WTO 協定的規定是在防止會員採行危害貿易的手段，特別著重於會員現存的規定會要求會員去採行不符合 WTO 協定義務的措施。因此，若會員的立法授權其行政機關去採行這樣的措施，即使該立法尚未被施行，亦是違反會員義務。TRIPS 協定與其他協定不同者，在於它要求會員去採行積極、正向的規定。在本案中就是要求依第 70.9 條的規定授了市場專屬權。在會員應給予正面規定的情況，若未為如此的規定即形成對於該協定的違反，因為主管機關未授予專屬權是不符合 WTO 會員義務的。」

171. 綜關事實，第 31 條是屬例外規定，就會員的舉證責任而言，調查官員的觀點是會員授予特許實施者應依第 31(f)條監視授予特許實施的運作，這是會員的義務。執委會也認為中華台北未盡此義務。