U.S. CHAMBER OF COMMERCE

中美知识产权学者对话纪要

U.S.-China IP Cooperation Dialogue

2014-2015

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较之 2013 年，2014 年度的中美知识产权学者对话，参与方更多元，内容更广泛，讨论更深入，问题更务实、坦诚、公开。对话揭示了最大发达国家和正在迅速崛起的最大发展中国家之间在知识产权领域的差距与差异。如何正视和解决这两类问题，将是对两国知识产权界智慧的长期考验。

—— 刘春田，中美知识产权学者对话联席主席

中美知识产权学者对话是一个具有独特价值和实质内容的对话，对中国的复杂现状和知识产权制度进行了坦率且有建设性的对话。通过中美专家长时间的交流，我们在明确和解释与挑战和改善相关的推动力，以及提供进一步完善中国知识产权制度的建议方面获得了全新的突破。

——大卫 卡波斯，中美知识产权学者对话联席主席

2014年至2015年，中美两国知识产权学者基于2013年对话所取得的建设性成果，分别在美国首都华盛顿、中国首都北京、海南省三亚市就事关两国知识产权关系发展的重要问题进一步展开了深入坦率的对话与交流，并本着求同存异、聚同化异的原则，达成了多项新的共识。本年度对话继续得到了中国立法、司法以及政府各有关部门的大力支持，还获得了美国政府的支持。

对话背景

2013年1月至5月，中国人民大学知识产权学院与美国全国商会分别在北京和华盛顿共同举办了2013年度中美知识产权学者对话。中美双方共10位专家围绕知识产权的司法保护、刑事保护、中国著作权法的修改以及商标、专利、商业秘密保护体系的完善等专题，从知识产权保护制度和实际运行两个方面，开展了议题全面、内容丰富并且卓有成效的对话。在对话总结过程中，中方先后将对话成果呈报给了中国总理办公

室、最高人民法院、商务部、教育部、国家知识产权局、中国法学会等各有关部门，获得了积极的反馈。美方也在华盛顿专门召开了对话成果发布会，向美国政府呈递了对话成果报告，引起了良好的反响。

鉴于知识产权在中美关系中的重要性以及中美知识产权关系的丰富性和复杂性，中美知识产权专家基于上一轮的对话成果，在本年度继续就双方感兴趣的相关议题展开了深入交流。“凡论者，贵其有辨合，有符验，故坐而言之，起而可设，张而可施行。”（《荀子·性恶》）专家们真诚希望，通过双方的专业对话、坦诚相待、深度交流，能够为中美关系的健康、美好未来添砖加瓦。

在本年度的对话中，双方专家选择了知识产权与创新（技术领域）、知识产权与创新（医药领域）、司法保护、商业秘密、著作权五个专题进行讨论。中美专家一致认为，一套真正公平高效的知识产权体系应当以创新为基、以法治为本、以市场为要，它涵盖并辐射知识产权的创造、运用、保护、管理的各个环节。它既有益于中国，也有益于美国，更有益于世界。双方专家在对话中提出了一系列见解，其中既有共识，也有不同意见。与此同时，双方还探讨了需要进一步调研或者专题研究的领域。

纪要摘要

本报告采纳了以下建议：

- 把专利申请的质量而非数量作为衡量创新发展的指标。
- 探讨一种可能性，即通过出台司法解释以确保在实用新型专利的有效性得到实质审查前，使涉嫌侵权行为人免于面临保全申请的威胁。
- 采用一种更为平衡的、市场化的激励方式，以推动企业、发明人和大学的创新。
- 以《专利法》、《药品管理法》的修订为契机，完善专利链接制度并对新化学实体的临床数据提供有效保护。
- 适时启动单一统一知识产权上诉法院的专项研究，以实现中国知识产权司法审判标准的统一。
- 对指导性案例的审查、筛选和发布程序进行完善，以更好地吸收案例法信息。
- 建议研究制定一部单行的、统一的《商业秘密法》的可能性，以便有效的维护公平的市场竞争环境。
- 关注新技术与新的商业模式为著作权保护带来的新问题，通过法律与市场的互动为创新提供良好的生态环境，在打击盗版的同时为著作权人提供更多的市场机会。

双方认为亟待进一步研究的问题和开拓的领域

专家们一致认为还有许多领域需要进一步的深入研究与合作，如知

识产权司法裁决的评价、知识产权案例数据库的建设、知识产权上诉法院的设立、专家证人制度与“法庭之友”制度的比较等。专家们赞同在适当的时机，就相关问题开展学术、调研、教育、培训、咨询等活动，用以支撑实现本报告当中的建议。

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1. 知识产权与创新 – 技术领域

中美专家认识到，市场驱动创新是在技术领域建立健康、有活力的生态系统的必由之路。鉴于中国《专利法》已经实施 30 周年，需要审视创新在中国的历史和现状，并以此为基础展望中国创新发展的未来。美方专家提出了中国建立市场驱动创新模式需要遵循的三条建议：（1）把专利申请的质量而非数量作为衡量创新发展的指标；（2）对实用新型专利启动实质审查，同时不把未经实质审查授予的专利作为企业认证或其他政府激励项目的依据；（3）以市场作为鼓励员工申请专利的决策条件，以期在高新技术领域创造成功的商业投资。

1.1 以专利申请的质量衡量创新

中美专家认为，只强调或过分强调以专利申请的数量作为衡量创新的指标值得商榷。美方专家尤其担心数量庞大的实用新型专利。目前，实用新型专利的申请已经放缓，但尚不清楚这种趋势是短期还是长期的。《国家知识产权战略行动计划》表明，在原定目标基础上，中国专利申请数量将增加三到四倍。有鉴于此，这些申请的专利是否代表真正的创新将至关重要。

美方专家注意到，包括对高新技术企业项目在内的政府补贴会刺激实用新型专利申请的数量增长，也认可政府补贴的减少与近期实用新型

专利申请减少之间存在对应关系。美方专家还注意到，存在着地方政府为企业申请实用新型专利补贴费用等现象。中美专家建议有必要减少政府干预，并强调市场导向措施才应是创新指标，而非可能因补贴或其他激励措施而虚高的专利申请数量。

1.2 改革实用新型专利审查制度

中美专家并不建议立刻取消实用新型或外观设计专利，专家们承认没有足够的资源对所有类型的专利进行实质审查。美方专家就减轻实用新型专利制度的滥用提出了一些建议：

- 在基于实用新型专利的司法行为生效前，对该实用新型专利进行实质审查。在法院或其他执法机关决定是否接受针对涉嫌实用新型专利侵权的保全申请之前，国家知识产权局对该实用新型专利进行全面完整的实质审查。中美专家认可，对未经实质审查的实用新型专利适用保全可能引发消极后果，将削弱中国在提高创新成果方面做出的实质努力，也可能有损中国知识产权制度的公信力。中美专家认为，可以通过出台司法解释以确保在实用新型专利得到实质审查前，使涉嫌侵权行为人免于面临保全申请的威胁。
- 专家讨论了实践中恶意申请实用新型专利的情况。中国目前尚未规定恶意申请人的法律责任。美方专家介绍了美国的经验：在美国，专利申请人必须承诺其实用新型专利的原创性，否则将面临伪证罪

的处罚，这项规定强有力地阻止了不实申请。美方专家建议中国司法机关通过司法解释设立类似机制。

- 目前，实用新型专利和发明专利适用的是同样的损害赔偿分析计算方法。但实用新型专利的标准更低，保护的是较低水平的创新，执行中一般应给予较低估值。为公平起见，美方专家建议中国参考类似 eBay 案件中不下达禁令时考量的相关因素。

1.3 使政府激励项目回归市场

美方专家提出，中国现有以及提议的激励创新的政府项目（包括职务发明奖励条例、高新技术企业所得税减免机制和基于专利申请数量而非质量的其他激励项目）与市场驱动模式存在冲突，建议慎重考虑。

美方专家建议暂停职务发明奖励报酬制度的设立，认为该制度可能破坏中国的创新生态系统。美方专家认为，发明人奖励制度应该基于市场规则由员工和用人单位协商确定，由国家规定并由政府管理私营企业的创新奖励制度有违市场规则。

美方专家注意到，除《专利法》、《专利法实施细则》以及《促进科技成果转化法》中有关职务发明的既有规则外，中国国家知识产权局在考虑就职务发明制定新的规定。国家知识产权局、科技部等部门视职务发明奖励报酬制度为激励中国创新的重要制度。1993 年，国家科技委员会曾指出职务发明报酬制度并非一项好政策。直至今日，仍有一些法官

和学者对该制度的实施持保留意见。

中美专家倡导一种更为平衡的处理方法，以推动企业、发明人和大学的创新。激励创新的最好方式应由市场来选择。美方专家注意到，中共十八届三中全会强调市场在资源配置中起决定性作用。这一政策转变支持中美商界长期以来的共识——创新生态系统必须由市场创造，而不宜由政府主导。

中美专家指出,《职务发明条例(征求意见稿)》(“《征求意见稿》”)可能引发员工与用人机构之间无意义且无必要的矛盾。专家们还讨论了德国的相关制度，认为该制度产生于完全不同的社会制度和时代背景下，却被中国当作制订《征求意见稿》的范本。在当下德国，该制度颇受诟病。此外，职务发明奖励报酬制度有可能干涉合同自由，并削弱用人机构与员工之间协议的约束力。司法实践中的解释则可能会使情况更为复杂。

美方专家强调，技术秘密（商业秘密）并不属于政府机构审查或登记管理的范围，试图将其纳入职务发明奖励报酬范围的努力会引发不必要的担忧。德国、日本和韩国的职务发明奖励报酬制度，都不包括技术秘密。将职务发明奖励报酬制度适用于技术秘密极易导致用人机构与员工之间的冲突，这种冲突将超出该制度所创造的价值。在 2015 年 4 月国务院法制办公室发布的《征求意见稿》中，技术秘密被从第 4 条对“发

明”的定义中删除，而被纳入第 24 条项下。

美方专家认为，确定某项发明的经济收益以及个人对该项发明的贡献不具有可行性。此外，要求用人单位将发明的经济收益告知员工也会成为用人机构的行政负担，并在用人机构和员工之间制造更多的矛盾。美方专家确定，世界其他国家都没有规定与中国正在考虑的条件相类似的要求，希望中国慎重对待。

专家们讨论了逐步终结高新技术企业项目的可能性。高新技术企业项目发展于上个世纪八十年代，当时中国并没有其目前拥有的专业技术。对中国高新技术企业的调查（基于 2010 年数据）显示，高新技术企业提交的专利中只有 25%是发明专利，其他的都是外观设计或实用新型专利。高新技术企业在实用新型专利申请方面处于领先水平，但实用新型专利在衡量创新方面的作用相对有限，并且申请的实用新型专利很少得到维持。这些数据表明针对高新技术企业的激励和要求制度并未产生高质量的创新成果。

美方专家还对高新技术企业项目中的一些具体问题表示了关注。例如，“拥有核心知识产权”或“本土知识产权”等概念存在一定的误导倾向，可能歪曲高科技创新与现有知识产权相互依存的事实。专家建议中国拓宽许可条件以包括非独占许可，并将公司递交申请时必须提交的敏感信息限制在真正必要的范围，且对信息提供保护。此外，高新技术

企业项目与专利申请量天然较低的产业有冲突。该项目偏向于申请大量专利的信息技术产业，但冷落了包括生物科技和医药行业在内的较少申请专利的产业，也冷落了商业秘密。考虑到高新技术企业项目的上述障碍以及中国已不需要该制度的事实，美方专家建议终止高新技术企业制度，或替代以研发税收抵免政策或其他激励中国研发活动的类似激励项目。

2. 知识产权与创新– 医药领域

中美专家认识到两国医药领域的科学家在开发新药以应对 21 世纪的医疗保健挑战方面有很多成功合作。尽管目前为止中国更多地是提供合同研究服务，但随着中国医药知识产权保护体系的改善（包括《专利法》、《专利审查指南》、《药品管理法》和《药品注册管理办法》在内），中国的潜力将得到释放并成为一个医药创新领先国家。美方专家建议以正在进行中的《专利法》、《药品管理法》的修订为改革契机，对专利链接制度进行完善并对新化学实体的临床数据提供有效的保护，同时还建议就医药发明协调中国国家知识产权局与其他 IP5 专利局（即美国专利商标局、欧洲专利局、日本特许厅、韩国特许厅）的专利审查标准。

2.1 中国成为医药创新领导者的历史机遇

中美专家观察到，医药创新中心在过去三十年中由欧洲转移至美国。

在此期间，中国持续输出了大量高端科技人才去美国深造，尤其是在生命科学领域。这些来自中国的生命科学人才很大一部分就职于美国的学术研究实验室和医药公司，在美国的医药创新成功故事中扮演了重要角色。如今他们构成了一个强大的引领医药创新的世界级研发和管理领军人才库。

这些留学科学家的一部分成员已经回到中国，领导着学术机构和药品企业的研发。很多还在美国工作的科学家也与中国的医药研究机构展开了合作。在过去十几年中，以“药明康德”为代表的新药研发外包服务行业在上海、北京和其他城市蓬勃发展。对于世界医药行业而言，“药明康德”和上海张江高科技园区已成为高品质新药研发外包服务的代名词，是全球新药开发链中的一个重要环节。

2.2 中国的潜力受制于医药知识产权保护体系

尽管中国新药研发外包服务行业为全球药物开发行业作出了卓越贡献，但是来自中国本土医药公司的新药却依然偏少。中国在“十二五规划”中提出的研发 30 个新化学实体（NCE）的目标尚未实现。

中国充沛的新药开发人才库和远大目标与低产的医药创新现状形成了比较鲜明地反差。美方专家注意到中国在如下几个方面与其他国家或地区的医药创新知识产权保护体系存在差异：

- 尚未建立药物专利链接制度。该体系的建立，将允许药物原研厂家

和专利权人在国家食品药品监督管理总局颁发仿制药上市许可之前寻求侵权救济。目前，原研厂家只有当仿制药已在中国生产或销售后才能提起侵权诉讼。这一缺陷可能阻碍对新药开发的投资，且增加了仿制药厂家的风险，因其在产品生产前无法确定其产品是否侵犯原研厂家的专利。

- 缺乏有效的药物监管数据保护制度。该制度可以在一定期间内阻止仿制药厂依赖原研厂家获得的临床试验数据，帮助原研厂家对在临床试验方面的高额投资得到回报。由于目前缺乏有效的临床数据保护，仿制药厂可以在短时期内对原研厂家耗时昂贵的临床试验坐收便利。相应地，中国药企会缺乏投资新药临床研究的动力。

美方专家认为，中国法律法规在过去十年的修改调整过程中似乎更加倾向于保护国产制药尽早上市，从而损害原研厂家的创新利益。

中国医药领域的知识产权环境打击了中国药企老总和投资基金的积极性：

- 新药开发耗时长、风险大，且在中国的知识产权保护较弱；
- 最佳策略是在新药专利过期前强仿成功，从原研厂家手中抢占市场。

由此引发的后果是，大部分中国药企已经远离新药研究，而另一部药企则将开发的重点从新药转移到仿制药上。

2.3 如何激励中国制药企业的创新

中美专家高度认同强有力的知识产权保护是实现创新型国家目标的关键因素，且有能力使中国和全世界从中获益。世界领先的知识产权保护体系，会激励中国的新药研发，并产生全球领先的医药公司。

中美专家认为正在进行的《药品管理法》修订是完善中国药物知识产权保护的重大契机。为此，美方专家提出了以下建议：

- 对美国的专利链接制度进行研究并适当调整中国的相关规定；
- 在相关法律中对新化学实体临床数据提供保护。

此外，美方专家还建议中国国家知识产权局研究美国、欧洲、日本和韩国专利局的经验，以便更好地允许新药发明申请人补充数据。中方专家指出，中国商务部在 2014 年 1 月 2 日发布的《第 24 届中美商贸联委会中方成果清单》中已经重申了中国的立场，即“中国《专利审查指南》允许申请人在提交专利申请后补交额外数据，指南适用《中华人民共和国立法法》第 84 条，以确保药品发明获得专利保护。”中方确认，上述解读已在专利的审查、复审和法院陈述中生效。美方专家仍然强调，中国应当在行政和司法实践中贯彻上述立场。

3.司法保护

根据中共第十八届三中全会和四中全会精神，中国司法改革正处于快速发展阶段。对于全面推进依法治国而言，增加司法实体层面和程序层面的透明度至关重要。开放的机制才是可信任的机制。为支持法治建设工作，中美专家着重讨论了目前中国法院的结构、法院的中立性与司法透明度、案例指导制度和司法独立等问题，并认为这些领域已经成为中国司法制度进一步改革的重点领域。

3.1 法院的结构

中国有知识产权案件管辖权的法院数量在不断增加（目前共 420 个法院有权审理知识产权案件），这是中国知识产权司法程序演变的有机组成。中国正在积极采取措施以保证法律实施的统一性和可预期性，例如，最高法院及时颁布新的司法解释；在北京、上海和广州设立知识产权法院等。它们同时也是中国整体司法改革的内容。中美专家支持现有知识产权司法改革中的多项努力，十分期待知识产权法院的试点能够进一步促进中国知识产权司法保护水平的提高，并就此问题提出了如下三点建议：

- 在中国知识产权法学研究会内部设立一个知识产权法院专业委员会。该委员会可以为三个知识产权法院的连结交流提供平台，并定期研

究知识产权法院所面临的全国知识产权司法政策与审判标准的统一问题。

- 在北京、上海、广州知识产权法院试点的过程中，对其试点的效果（经验与不足）进行年度总结评价，以便为中国知识产权司法系统的提质增效奠定基础。建议引入社会评价体系，由第三方独立完成评价，以增加评价结果的客观性和真实性。
- 适时启动单一统一知识产权上诉法院的专项研究，以减少地方影响，实现中国知识产权司法审判标准的统一。

3.2 法院的中立性与司法透明度

中国实行的是成文法，各地各级法院适用同一部法律时，其结果也理应一致。应当由法律而不是案件当事人的属性来主导案件结果。美方专家指出，近年来有中外企业对某些法院的中立性表示质疑，并认为地方保护主义是中国知识产权保护和可持续创新发展所面临的重要挑战。中方专家认为，这一现象会随着司法改革的进一步深化逐步好转。

与中立性有关的另一个关键点是司法透明度问题。中方专家认为，近年来中国法院在公开审理、利用互联网转播庭审过程、公布判决书等方面已有了较大改善，有的法院，尤其是知识产权法院，将个案审理的全过程在互联网上公开的做法令美国专家都非常惊讶。但美方专家认为，在中国获取司法判决的各种数据仍然较为困难，尤其是关于中外当事人

胜诉率的信息。在通过互联网能够轻松获取信息的时代，司法判决在法院网站上进行定期、完整的公开已不是难事。美方专家指出，CIELA[1]（自2006年起）提供的信息显示，外国当事人在中国法院的诉讼中境况不佳，获得的赔偿额显著较少（仅是国内当事人所得赔偿额平均数的一半）。但中方专家指出，其掌握的数据显示，在中国法院审理的案件中外国当事人的胜诉率相对更高。赔偿低不应被认为是具有一般性的普遍现象。赔偿数额的高低，不应一概而论，应当具体案件具体分析。中美专家一致认为，公众希望了解的不仅是审判过程，更希望看到案件结果的决策过程，完整公布司法审判意见并使其方便检索是必要的。

中美专家都认可更广泛的透明度，包括以便于检索的形式更活跃的公布所有法院案件以及完整数据，对评价法院中立性和司法透明度的重要性。当然，法院如何在当事人收到审理结果的同时在网站上公布判决，还需要参加操作方面的培训。由于中国法官每年都有很高的案件量，发布判决的方式以简易便捷为宜，三所知识产权法院在这一点上应当成为其他中国法院的楷模。相关政策到位后，法院向公众公开案件的审判及决策细节应逐渐成为一项原则，而不公开则仅为例外。专家们具体提出了三点建议：

- 鉴于客观地审查评价法院审结的案件对公众而言非常重要，中美专家有意继续就此进行交流，并且定期发布法院判决的评价报告，以

[1] CIELA 是对中国知识产权案件进行数据分析的独特且高度创新的工具。

引起对有关重点问题的关注，并对法院中立性提出建议。

- 专家支持在中国建立知识产权案件数据库和来自私人领域的翻译文本，认为私立的第三方服务提供机构或者大学可能最适合收集并建立综合性可检索的数据库。
- 法官应当在法律文书中将适用法律的理由阐述清楚，尽量减少在判决书中简单阐述而在其他场合另行说明的情形，例如，由办案法官进行的案后释明、案例点评或者评述、案例说明会等。

3.3 案例指导制度

案例指导制度值得建立。最高人民法院所公布的典型和指导性案件，可以有效地为司法机关和公众提供指引。然而，这些案件是如何挑选出来的目前尚不清楚。此外，由于这些案件具有全国性和国际性影响力，受判决影响的各方是否参与了选择决策过程尚不清楚。被选出的案例应当被完整公布，包括涉及事实或法律疑难问题的部分。中美专家认为，除最高人民法院之外的各地方法院每年所公布的各类十大案件、精品案件、创新案件等指导作用有限。它们不应当成为指导性案例。

专家讨论了法院在审理案件中如何参考第三方意见的问题。中国法院已经开始在重大案件中听取外部意见，但是这并不被作为案件正式记录的一部分。“法庭之友”制度源于罗马法，为现代法律所接受。美方专家基于美国“法庭之友”制度在强化法治方面的优势作出了如下解

释：该项制度是第三方公开透明地对案件提交意见，且这些意见被记载在官方记录中的制度。该制度使法院能够参考广泛的观点，为法院考虑社会影响、民众扩大参与提供了途径。此外，将外部意见纳入案件记录中，有利于双方当事人和其他知情公众对这些观点进行评价。这一公开系统将有助于对错误信息进行纠正，为重大案件提供充足的依据。如案件判决旨在取得更广泛的社会影响，保证案件的利害关系方有机会进行评价，“法庭之友”制度则尤为重要。中方专家认为，“法庭之友”制度具有悠久的历史渊源，一些有益的经验值得研究。美方专家也提供了一份关于美国“法庭之友”制度基础的详细阐述，以供中方专家及中国司法机关研究时参考。（见**附件一**）专家们的意见归纳如下：

- 提供指导性案件挑选评议的相关途径，允许公众在最终发布指导案件之前进行评论和参与。允许公众评论的案例指导制度可以帮助司法机关防范意外后果。中美专家愿意为最高人民法院知识产权庭和/或知识产权法院提供知识产权案件的简要评价报告。
- 美方专家建议中国法院对美国“法庭之友”制度进行研究，并结合中国实际适当吸收类似制度的有益经验，以提高透明度和公众对专家意见的接触程度。中方专家观察到，法院在一些重大疑难案件的审判中可以适当听取专家学者的意见。对法庭之友制度可以研究探讨，但是否要移植到中国则需认真研究、仔细斟酌。
- 法院应将参考或引用的相关专家意见纳入案件的正式档案，并允许

公众公开查阅，以透明方式了解法官在案件审理中以及利害关系方适用法律的思路。

3.4 司法队伍建设

中方专家认为，一支稳定的法官队伍对知识产权保护是重要的。因此，专家讨论了一系列能够吸引并留住高质量法官的措施。目前，在美国联邦巡回上诉法院中，法官的年龄从 46 岁至 87 岁不等。美国还持续地对法官工资进行适当调整。联邦巡回上诉法院法官目前的工资是美国家庭平均收入的 3.5 倍。中国从事知识产权审判的法官普遍较年轻。中美专家注意到，中国正在研究提高法官工资福利待遇和退休年龄等问题。

- 由于中国新设立的三所知识产权法院聘任了许多新法官，专家建议为这些法官提供科技、法律方面的培训。专家还建议中国司法机关就国际司法惯例及其发展动态从世界知识产权组织和其他渠道获得培训。

4.商业秘密

在全球范围内，商业秘密保护获得了很多关注和讨论。商业秘密保护对知识产权密集型产业至关重要，并随着科技发展、劳动力流转以及全球范围内的科技和产品流动变得愈发重要。美国正在对其商业秘密立法框架进行改革，而加快商业秘密改革步伐也同样会使中国受益，因为

商业秘密在中国获得的保护与专利、著作权和商标的保护及执法水平尚有差距。

4.1 商业秘密的重要性

全球政府都应全面地认识到商业秘密的重要性。近年来，中国法院每年仅受理 200 至 300 件商业秘密民事案件；但实际上，商业秘密受侵害的情形要多得多。因此，应当鼓励政府机构为保护商业秘密付出努力。美方专家提出了如下建议：

- “技术秘密”纠纷虽已被纳入知识产权法院的管辖范围，但国内法律中尚没有对“技术秘密”进行界定。
- 应当修订《反不正当竞争法》。在准备本报告期间，美方专家获悉《反不正当竞争法》的修订稿已由国家工商总局提交国务院法制办公室审阅。该草案近期应会被公布，征求公众意见。

同时，建议采取措施以便于权利人适用《民事诉讼法》规定的临时禁令、证据财产保全等方式，包括近期公布的《最高人民法院关于审查知识产权与竞争纠纷行为保全案件适用法律若干问题的解释（征求意见稿）》（2015 年 2 月 26 日），确保行政措施保护企业的利益。此外，当民事救济足以弥补损害时，可不再常规性地使用刑事手段。公众对商业秘密保护意识的觉醒，以及技术秘密（保密信息）许可方式的进步，都将有助于商业秘密实现商业化。考虑到将职务发明奖励制度适用于商业秘

密，可能引发一些潜在问题，建议慎重对待。

4.2 商业秘密信息的保护

专家讨论了中国行政许可程序中商业秘密信息的披露问题。在相关程序中仅披露必要的商业秘密信息对防止商业秘密泄露非常重要。将商业秘密的获取限制在必要范围内也非常重要，向无权知悉的主体披露商业秘密的行为应受到处罚，并保证政府机关之间在非必要情况下不得披露商业秘密。

一套完整有效的法律制度应包括提供震慑性的救济手段、防止信息扩散的相关程序以及禁止未授权的秘密信息披露行为。在秘密信息已经发生泄露的情况下，应为受害人提供救济。此外，商业秘密的所有人应当能够使用标准化的程序对商业秘密进行鉴定，并阻止其继续泄漏，除非法律要求必须披露。

目前已有相应的程序确保商业秘密不会被裁判文书所公开。但这通常意味着法院不会公开任何商业秘密案件，因为商业秘密案件总会涉及秘密信息。应当建立程序对秘密信息进行改写，确保掌握秘密信息的法院和诉讼当事人对他人的商业秘密给予充分保护。

美方专家提供了一个案例研究，比较了美国、中国和其他司法辖区的保护体系，提出了在中国商业机密信息保护面临的挑战。（见**附件二**）

4.3 商业秘密的司法与执法

专家认为，近期已经具备针对商业秘密制定司法解释的时机，其内容可以包含商业秘密保护与《劳动法》的衔接、刑事处罚门槛、证据保全以及管辖权等问题。根据最高人民法院和地方法院的数据发现，商业秘密案件的胜诉率较低、赔偿额较少、当事人的诉讼时间成本很高。当事人宁愿选择承受损失而放弃到法院解决争议。此外，一些地区商业秘密刑事案件的比例偏高（例如深圳），从而引发了对缺乏透明度或者存在地方保护主义的关注。最高人民检察院检察长曹建明在 2005 年曾表示，商业秘密司法对法院来讲是“最有难度的”。

采用刑事、民事和行政措施对商业秘密进行保护各有其优缺点。民事程序目前看来不够有效，取证过于困难。刑事措施又过于严重。由于相关机构没有明确的标准供当事人参照，有些案件中当事人会在缺乏理由的情况下被逮捕。但是收集证据相对有效，刑罚也更有威慑。寻求行政救济措施对商业秘密持有人而言可以节省费用，不过可能不是最有效的。上述问题导致商业秘密司法与执法措施的效果不佳。

短期来看，起草司法解释有利于澄清商业秘密司法中的相关问题。例如，关于管辖权的规定《民事诉讼法》和《劳动法》应当保持一致。目前商业秘密管辖地非常有限，法律依据不够公平。商业秘密法律规定中的其他待澄清的概念还包括不可避免披露原则、证据开示以及《反不

正当竞争法》中“经营者”的范围等。《反不正当竞争法》中对“实用性”的限制应当进一步被明确，以确保对失败试验的保护。应当改善相关诉讼程序，拓宽《反不正当竞争法》第 10 条中规定的保护范围。

4.4 商业秘密立法改革

中美专家认为，探讨制定更为系统、详细、单行的《商业秘密法》或许更有利于中国对商业秘密的保护，更有助于中国的经济发展。在过去二三十年中，商业秘密保护机制建设的进展过于缓慢。由于民事和行政救济的效果较弱，经营者往往依赖刑事程序追究竞争者或前雇员盗窃商业秘密的法律责任，并利用刑事程序冻结对方资产。此种行为可能严重破坏竞争秩序，不公平地限制技术人员和劳动力流转。

专家注意到，除《反不正当竞争法》（该法是 1993 年实施以来唯一一部未经修订的知识产权法律）规定了商业秘密之外，《劳动法》与《合同法》中竞业禁止协议的相关规定也与《公司法》、《国家秘密法》、《职务发明条例》（草案）等法律法规之间有着密切的联系，而在诸多法律、法规、司法解释和规范性文件中，还存在许多不一致的地方。商业秘密的规定亟待统一。

- 专家建议明确商业秘密的核心要素及其价值，确定有待立法改革的问题，以便为立法者提供指导。 一个可行的选择是在中国政府的领导下，组织专家起草法律，以协助推进立法改革。最高人民法院或

其他相关机构可以加入和指导上述过程，协助出台符合时代潮流的法律法规。

5.著作权

专家们认为，在著作权领域，美国和中国的利益高度一致。有益于美国创作者的政策同样有益于中国的创作者。中国的著作权执法已经取得了很大的进步，特别是网络环境中的著作权执法。然而，盗版仍然是中国创意产业增长的最大阻碍。要改变这种状况，不仅要加强执法，减少盗版产生的机会，还应注重市场与法律的互动，增加著作权人的市场准入机会和投资机会，完善创作环境。

专家们重点讨论了与新技术和新兴商业模式相关的四个问题：多媒体盒子对著作权的影响、云服务环境下的软件著作权保护、体育赛事节目直播的保护依据、网络环境下的音乐著作权保护。

5.1 多媒体盒子技术和视频游戏机对著作权的影响

多媒体盒子是一项颇有前途的新技术，在为消费者按需提供高质量内容以及为创作者提供稳定收入来源上拥有巨大的潜力。然而，这一技术也存在损害著作权的潜在风险。尽管多媒体盒子中可能并不包含预加载内容，但是多媒体盒子往往被设计为能够对未经许可的流媒体服务进行访问。有的通过多媒体盒子未经授权对加密付费电视节目进行解码，

为未经许可的音乐、电影及电视内容的在线访问提供方便，并且允许用户对这些内容进行存储。

积极的一面是，越来越多关于多媒体盒子的内容许可交易正在达成。这是发展出使创作者、技术提供者和消费者共同受益的合法化市场的绝好机会。而盗版则会影响这一产业的健康发展。

禁止多媒体盒子访问侵权内容，在技术层面上是可行的，诸如苹果公司和亚马逊公司在美国和其他地方销售的多媒体盒子便只能访问经过授权的流媒体服务提供商。

专家们认为，如果多媒体盒子的生产商和零售商共同促成对著作权的损害或者构成共同侵权，应当承担侵害著作权的法律责任。

专家们认为，市场准入和更好的内容审查机制与减少侵权内容密切相关。与此相关，专家们高度肯定最近出台的允许在中国销售视频游戏机，并鼓励本土视频游戏内容的规定，这将有助于减少该领域的盗版问题。

5.2 云服务环境下的软件著作权保护

软件公司的盈利模式正越来越多地从正版软件销售转移至基于订阅访问模式的云服务提供。随着商业模式的转变，出现了一种新的盗版形式：向使用者兜售不经付费即可使用服务的欺骗性访问码。美方专家

提出，中国《著作权法》禁止“故意避开或者破坏权利人为其作品……采取的保护著作权的技术措施”，但未明确是否包括禁止销售或者交易欺骗性访问码。中方专家认为，软件访问码属于保护著作权的技术措施，在现有的立法框架下可以规制非法销售软件访问码的行为。

专家们认同，在解释中国《著作权法》时，应关注新兴盗版形态，并对商业模式的演变及时作出回应。

5.3 体育赛事节目的著作权保护

体育赛事节目直播行业已经成为一个投资规模与经济利益巨大的产业。体育赛事节目的广播权和和通过网络、无线和其他媒介传播的权利已经成为大部分体育组织的最主要收入来源。

在中国现行《著作权法》的框架下，体育赛事节目直播主体保护其权益存在一些障碍。首先，与大多数国家的著作权法一样，中国《著作权法》要求受到保护的作品具有“独创性”。然而，与大多数国家不同的是，在中国，对体育赛事节目是否具有“独创性”存在争议。其次，中国现行《著作权法实施条例》对视听作品的定义要求其“摄制在一定介质上”，使赛事直播难以符合视听作品的定义。

专家们认为，判断独创性问题必须根据个案情况予以确定。事实上，专业制作的体育赛事节目通常包含相当复杂的美学选择、取舍与别具匠心的安排，如果以是否具备独创性为准认定作品性，体育赛事节目无疑

可以受到著作权法的保护。

专家们一致肯定,《著作权法》修订送审稿修正了视听作品的定义，去除了“摄制在一定介质上”的限定，这是立法的进步，使得视听作品的定义可以涵盖体育赛事节目。

由于《著作权法》修正案的通过尚有时日，专家们建议中国司法机关可以通过合理的法律解释，在现有法律框架下对体育赛事节目给予有效的法律保护。在北京市朝阳区人民法院于 2015 年 6 月 30 日作出的（2014）朝民（知）初字第 40334 号判决中，法官认可了在现有法律体系下，体育赛事直播节目可作为原创性作品受著作权保护。此判决对后续判决或司法解释具有重要参考价值。

5.4 音乐产业的著作权保护

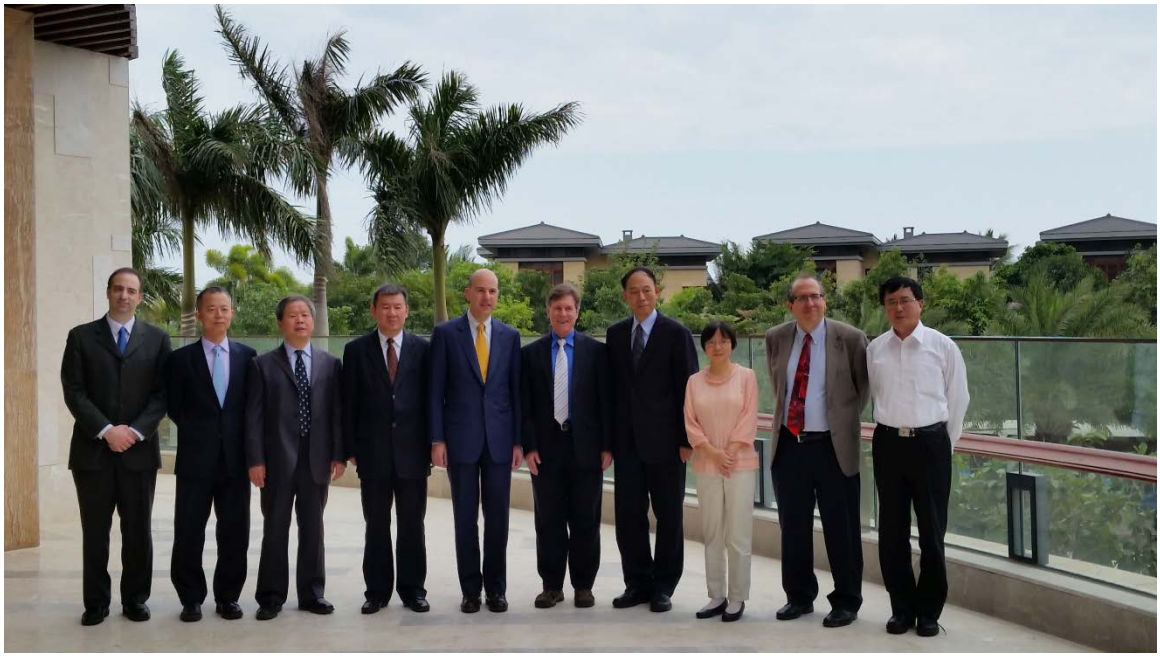
中国互联网用户的在线音乐欣赏达到了前所未有的水平,有接近 80%的互联网用户进行在线音乐消费。然而，只有很小一部分收入流向了著作权人。类似地，在中国，音乐彩铃的收入大部分归于移动通信公司，著作权人的收入所占比重极少。相比之下，美国、欧洲的著作权人能够通过各种各样的媒体和平台取得内容许可收入。在美国，苹果公司的 iTunes，通常将数字音乐收入的 70%支付给著作权人。这种现象的改善有赖于法律和市场的良性互动。

通过著作权执法——特别是网络环境中的执法，消除市场上的非法

音乐产品，将鼓励在线分销商提供合法内容，从而有助于增加著作权人的收入，减少他们对垄断性中间机构的依赖，并且确保他们有资本投入到新的创作中。专家们高度肯定国家版权局近期重点改善音乐产业的著作权环境。除加强执法外，改善著作权商业化环境对支持音乐产业蓬勃发展来说至关重要。

有效控制盗版并改善创作者的市场准入，将维持市场激励机制并有益于创作者，改变创作者与媒体中介机构利益失衡的现状，构建一个鼓励创新的良好生态。

（2014 年 9 月 24 日至 25 日，“中美知识产权学者对话”在华盛顿举行）



（2015 年 1 月 8 日至 9 日，“中美知识产权交流与合作座谈会”在海南举行）

附件一：“法庭之友”制度简介

“法庭之友”制度简介

一、“法庭之友”制度的含义与背景

20 世纪以来，“法庭之友”制度已经成为美国联邦和地区法院诉讼程序中的一个亮点。不过“法庭之友”制度在英美法中的历史源头不是在 20 世纪，而可以一直追溯到 14 世纪，乃至罗马法中。

术语“法庭之友”是一个古老的拉丁词汇，意为“法庭的朋友”，传统意义上是指就法院产生疑问或误解的事项提出法律意见，从而为法院提供协助的主体

“法庭之友”不是诉讼当事人，但当某未决的诉讼牵扯到该主体的利益，该主体可以通过“法庭之友”程序向法庭提出支持或反对某一诉讼当事人的意见。在很多情形下，“法庭之友”会努力将法庭的注意力吸引到诉讼当事人未曾提到的主张上来，例如法庭的裁决可能在何种程度上影响第三方的利益。

一般来讲，“法庭之友”会向法庭提交一份简要意见表达其观点。该意见一般是向上诉法院递交，但也有向初审法院递交的情形。正常情况下“法庭之友”递交意见之前必须得到法院的批准，除非诉讼当事人一致同意其递交。向美国最高法院递交“法庭之友”意见应遵循《美国最高法院规则》第 37 条，向联邦上诉法院递交“法庭之友”意见应遵循《美国联邦上诉规则程序》第 29 条。“法庭之友”不是诉讼当事人，因此“法庭之友”不需要诉由就能提出意见，但与此同时，

“法庭之友”也不享有诉讼当事人的权利，如参与证据开示等。

该制度最典型的应用是在案件涉及公共利益之时，弥补诉讼当事人律师意见的不足，向法院提出遗漏的意见。值得注意的是，“法庭之友”的意见可以有倾向性。

二、“法庭之友”制度的具体内容

1、递交“法庭之友”意见的适格主体

想要递交“法庭之友”意见的主体必须属于下列情形之一：（1）获得所有诉讼当事人的口头或书面同意；或者（2）获得了法院的许可。但美国国家政府机构及其官员和代理机构、州政府、任何美国联邦的成员或领土、哥伦比亚特区政府不需上述同意或许可即可递交“法庭之友”意见。

如某“法庭之友”意见的递交获得了所有诉讼当事人的同意，在意见书上注明即可，不需要单独提交各方同意的声明。

而经法院许可而递交“法庭之友”意见时则必须附有该拟定提交的“法庭之友”意见，并注明下列内容：（1）请求人的相关利益；（2）该“法庭之友”意见的必要性，以及其与本案相关的原因。

是否许可“法庭之友”意见由法院经过仔细考虑后作出决定。传统意义上“法庭之友”意见的作用是帮助法院查明法律中的难点，而不是有倾向性地对事实发表意见。但近年来一些法院开始认可“法庭

之友”意见不需要完全无倾向性，其可以对法庭对抗中的争议事项发表有限度的支持意见。

2、内容与格式

每一份“法庭之友”意见必须符合《美国联邦上诉规则程序》第32 条要求的格式。在“法庭之友”意见的封面上必须注明其支持诉讼主体中的哪一方，并注明其支持维持还是推翻判决结果。

若某一“法庭之友”是一个公司，其递交的意见中必须包含一个声明，注明其所有的母公司，如果是上市公司，则注明其持有 10%以上股份股东的身份信息。

“法庭之友”意见无需符合《美国联邦上诉规则程序》第 28 条的要求，该规则是针对诉讼当事人递交意见的要求。但“法庭之友”意见应当符合下列格式要求：

（1）关于内容的列表，标明页码索引；

（2）关于引用来源的表格；

（3）关于“法庭之友”身份的简要声明，注明与案件的利益关系，以及其为何符合递交“法庭之友”意见的条件；

（4）除非“法庭之友”意见是由美国官方机构提出，否则需提交声明注明以下内容:（a）是否有某一诉讼当事人的律师参与了该“法庭之友”意见的撰写；（b）是否有某一诉讼当事人或其律师为该“法庭之友”意见的递交提供了资金支持；（c）是否存

在“法庭之友”及其成员和律师之外的其他人为该“法庭之友”意见的递交提供了资金支持，如有，则需要披露该主体的身份。

（5）可以附上以摘要形式提供的论据；

（6）若意见超过了 15 页，需要提交其超过篇幅限制的合理理由。

3、 长度

除非法庭额外批准，一份“法庭之友”意见不得超过《美国联邦上诉规则程序》对当事人陈述意见规定的最长篇幅的一半。若法院许可诉讼当事人延长其意见的篇幅，“法庭之友”意见的篇幅限制并不因该许可而自动延长。

4、 递交时间

若某份“法庭之友”意见支持一方诉讼当事人的意见，则在该当事人递交意见的七天内应递交该“法庭之友”意见。若某份“法庭之友”意见并不偏向任何一方，则应该在上诉方或原告方提交意见之后的七天内递交该“法庭之友”意见。上述两种情形中，七天的起算点是相关方的意见实际递交到法院的时间，而非投送邮递的时间。

法院可以依据合理的理由，批准延期提交，并注明其他主体可以提交反对意见的期限。

5、 递交“法庭之友”意见之后的程序

（1）除非法庭同意，“法庭之友”不能再提交针对其他意见的回应

（2）除非法庭同意，“法庭之友”不能针对意见进行口头辩论

“法庭之友”只有在得到法庭同意的情况下才可以参与口头辩论，通常情况下只有某一诉讼参与人自愿将自己的一部分口头辩论时间分给“法庭之友”，法院才会批准；在其他情形下，只有证明存在特殊理由，法院才可能批准。例如在诉讼参与人放弃坚持某一重要立场时，法院可能会认为这属于特殊情形，从而允许“法庭之友”参与口头辩论。

附件二：在华外商独资企业许可和项目审批流程中的商业秘密披露要求

在华外商独资企业许可和项目审批流程中的商业秘密披露要求

概要

对公司的业务、技术、经营活动、产品以及服务信息进行收集是中国政府机关履行保护公民和环境健康安全监管职责的一部分。这些信息在不同种类的政府审批流程中都有要求，包括投资项目审批、产品注册，环境影响评估以及业务许可。要求披露的信息包括公司结构和运营、员工信息及雇佣政策、工作安全规程、生产技术及工艺、排放数据、产品细节以及测试结果。信息披露要求的程度和重点并不总是与权力机关履行监管职责的需求相关联。

要求披露的信息经常包含公司精心保护的商业秘密和专有信息，这些信息是保持公司竞争力和财务健康的核心所在。中国之外的很多地区已经将对公司提交给国家政府机关的商业秘密和专有信息进行保护的必要措施标准化，但这在中国一直没有得到贯彻实施。很多机关通过专家小组对公司提交的信息进行评估，但不允许项目申请人对专家小组的人员构成提出意见。基于这种信息披露要求的性质，信息可能会被传播到国企、设计机构、私营公司、大学甚至是竞争对手。由这些单位掌握商业秘密和专有信息，极有可能导致公司面临严重财政问题和竞争危害。

一些行政程序给企业商业秘密带来风险的例子：

- 专家小组的成员经常是国企、国有机构以及大学的员工，这

些员工作为专家参与其中并可能通过接触其他公司的商业秘密而获取经济利益。

- 由专家小组成员带来的许可申请上的问题，以及后续调查常常会超出其他地区常见的规范标准，而这些规范标准对于在许可或审批问题上做出准确、透彻的决定而言至关重要。
- 没有将专家小组成员的保密义务，以及小组成员滥用职权或泄露信息的任何惩罚后果细节化，也没有向公众提供任何应对措施。
- 许可和审批程序结束后，并没有要求销毁书面记录或其他申请人商业秘密的证明。相反，要求参与许可程序的单位，如研究院，必须永久保留最终报告的副本（如环境影响评估）。这提高了未来申请人的商业秘密被泄露的风险。

目前，中国并没有商业秘密的例外规定。一种可以缓解诸多问题的机制是落实一种透明化的程序，申请人能够通过这种透明化程序针对要求提交的某些信息的保密性提出合法要求，这是欧洲、加拿大和美国的通常做法。这将使公司在遵守中国有关要求的同时对他们的商业秘密进行保护，从而向投资者提供保证并激励新技术引入中国

专家小组审查程序的相关问题

很多许可程序，如环境影响评估、安全评估以及项目申请报告，都要求召开专家小组会议审查申请材料。小组指定的专家拥有范围无限的充分权力，可以询问广泛的问题并且要求公司提交补充材料，其

结果往往是强制披露商业秘密。在很多案件中，这些问题和要求并没有事实、商业经验或充分科学证据作为依据。此外，申请者并不具备质疑这些要求的能力，不予回应或拒绝提供信息可能会导致不能取得准许或许可。

在一个例子中，环境影响评估专家小组的一名专家在该环境影响评估已经被批准一年多之后仍然进行了复查。地方当局建议申请人遵守要求，因为如果不这样做可能会对申请人未来进行的项目产生负面影响。而申请人的争议技术已经在美国取得许可，并且在商业上取得了巨大成功，但环境影响评估专家却质疑其性能，声称申请人设计的工艺流程不可行，并建议申请人安装一个更为复杂的、未被证实的、投资更高的系统。为了最终解决该名专家提出的这个毫无根据的问题，申请人被迫提供其在美国境内产生的商业秘密、设计细节以及机密性的操作历史。

这个例子显示了专家小组审查制度是如何导致至关重要的商业秘密被不必要地泄露。商业秘密信息的逐渐泄露削弱了投资者的信心，并且不利于中国实现成为吸引一流技术、更具创新力的经济体的目标。

环境影响评估

中国环境影响评估形式以及相关的审查程序造成商业秘密的不必要泄露。与美国州和联邦层面以及欧盟等其他地区的环境许可程序不同，大部分要求提供的信息都不与环境影响直接相关。环境影响评估程序的重点应放在确保通过效果最好、最具成本效益的技术实现有

效减排，并向公众保证这一目标正在实现。有些要求的信息是与一家企业的机密性商业信息有关的交易和技术数据。因此，为了满足专家组成员和审批部门的切身利益，对什么是真正要求披露的与什么是不必要披露的展开谈判是一个旷日持久的过程，而这一结果是环境影响评估程序导致的。专家小组审查是环境影响评估审批的官方要求。然而在实际操作中，会提前进行一次环境影响评估专家小组审查，每次专家小组审查之后再进行多次后续审查。禁止申请人提出异议而任命的专家通常来自国企和与国企有密切联系的大学，很多人都可能是申请人的竞争对手或与竞争对手有关联。

批准授予前，申请人必须在网上完全公开环境影响评估报告。公司可能会对被视为保密的信息进行编辑，然而，公司必须向有关机关提交编辑列表并给出编辑的正当理由。由于环境影响评估中要求披露的信息具有高度技术性，网上公开并不有助于公众对项目的环境风险进行评估。相反，详细技术披露使申请人的竞争者从中获益。

欧盟第 2003/04/EC 号指令 对信息接触规定了明确的权利和义务，包括提供信息的期限以及拒绝公共机构接触某些类型信息的依据。尽管考虑到信息披露所涉及的公共利益，拒绝信息接触请求的依据必须以严格的方式进行解释，但是尊重商业和产业信息以及知识产权的保密性可以作为拒绝依据。

环境审批程序中，如下商业秘密被中国视为环境影响评估的组成部分，被要求进行披露，但是在其他地区通常不被要求披露：

- 车间的投资总量
- 车间产能
- 总体物料平衡显示出的生产预期产品所需的不用原料数量和产生的垃圾废料数量
- 显示单元操作流程图
- 效能要求
- 记录有尺寸特殊细节的主要设备清单
- 在相关技术上，与既有的其他公司设施的原料和能源要求以及申请人知晓的其他人的要求的比较
- 水平衡

中国之外的国家和地区通常并不要求披露商业秘密信息中的下述细节，但中国却要求进行这种披露，并作为环境影响评估的一部分，包括：

- 环境控制设备单元操作流程中的物料平衡（量和组成）

条例还要求环境影响评估的准备工作由有关政府部门许可并批准的环保机构进行。政府和环境影响评估咨询企业之间的密切关系产生了利益冲突，因为环境影响评估咨询企业需要与有关部门和专家组成员保持良好的工作关系。因此，环境影响评估企业往往会默许可能导致商业信息泄露的信息要求并且可能不支持申请人为保护商业秘密而进行最少化披露的努力。

新引进技术

这种针对新引进技术设置的相对较新的审批步骤并不符合中国鼓励最新、最先进技术部署的愿望。新技术审查的加强导致商业秘密信息的披露。大多数地区都不要求进行这种审批。少数要求进行这种审批的地区要求的信息也比中国少得多，并且将这种要求纳入到安全评估和职业健康评估中。例如，中国的有关机关要求申请人提交详细流程危害分析，包括流程的危害和可操作性研究　摘要。这些信息全部都是商业秘密，并且在审批过程中通常是不向监管机构和其他人披露这些细节的。

节能评估

这种详尽的节能评估审查程序要求专家小组对相关的当地委员会在批准提交给权力机关之前的审查工作进行审查。

被中国作为节能评估组成部分要求披露，而通常不应要求披露的商业秘密信息包括：

- 项目经济效益
    - 计算出的项目执行情况
    - 车间收入
    - 车间成本
    - 车间的投资情况
- 车间产能

- 能量集成的说明及流程框图
- 记录有尺寸特殊细节的主要设备清单
    - 热交换器的功效要求
    - 压缩机和主力泵的马力要求
    - 泵的首要条件
- 操作温度和压力的流程说明
    - 每个蒸馏柱分离的披露要求
- 总体物料平衡显示出的生产预期产品所需的原料数量和产生的垃圾废料数量，需要披露的高度保密的产量信息在其他任何地区都不做要求。
- 显示主要单元操作的块流程图
    - 效能要求
- 项目审批（项目申请报告）

大部分经济体都不要求这种审查。要求项目申请报告的地区也达不到中国当局所要求的详细程度。项目申请报告包括环境影响评估和节能评估部分。要求专家小组进行审查，并且要求审查当地投资机关的审批。

被中国作为项目申请报告组成部分要求披露，而通常不应要求披露的商业秘密信息包括：

- 财务计划
- 组织结构和劳动力需求

- 项目经济规模
    - 计算出的项目执行情况
    - 车间收入
    - 车间成本
    - 车间的投资情况
- 车间产能
- 记录有尺寸特殊细节的主要设备清单
    - 热交换器的功效要求
    - 压缩机和主力泵的马力要求
    - 泵的首要条件
- 总体物料平衡显示出的生产预期产品所需的原料数量和产生的垃圾废料数量，需要披露的高度保密的产量信息在其他任何地区都不做要求。
- 显示主要单元操作的块流程图
- 效能要求
- 安全评估

安全评估及其审查过程要求披露与工艺流程和设备储备有关的商业秘密，而其他地区通常并不要求披露这些商业秘密。安全评估程序要求专家小组进行审查，并且要求对审查地方机关的审批。对工艺设备的详细信息提出要求，这在中国以外的地区并不常见。

职业健康评估

除商业秘密披露要求外，中国的职业健康评估及其审查流程要求与其他地区的监管审查更为一致；但是，如果职业健康评估被审查，那么在该审批过程中必须提供安全评估和信息。这增加了职业健康评估过程中商业秘密的泄露风险。要求专家小组进行审查，并且要求审查当地机关的审批。

概念设计方案

概念设计方案必须经由多个部门审查，这增加了申请人商业秘密泄露的机会。申请人必须披露记录有设备位置的建筑等角图，这种等角图就是商业秘密。此外，概念设计方案将之前提交的文件中披露的所有信息汇集成一个整体，这是对申请人商业秘密的汇编，不同部门之间的流转使申请人的商业秘密处于高风险。

总体设计方案

提交给当地设计机构“检查”的详细设计图纸中包含有商业秘密，设计机构取得商业秘密特别容易给申请人造成损害，因为中国法律规定设计机构为国有实体。

进口设备检查

一种保护嵌入专用设备设计中的商业秘密信息的方法是使用在中国以外组装的设备。进口设备的文件和检查要求可能使这种保护方

式存在风险。文件要求是主观的，并且可能包含设备的照片（外部和内部）、图纸等。如果文件“不足”，设备可能会被海关人员拆装并进行详细地检查。

U.S.-China IP Cooperation Dialogue
2014 - 2015

U.S.-China IP Cooperation Dialogue
2014-2015

"Compared to the dialogue of 2013, the dialogue of 2014 engages with a more diversified group of people, has a more extensive coverage and leads to deeper discussions; the issues as focused are more practical and participants are honest and open. The dialogue has identified gaps and differences in the IP field between the largest developed country and the largest rapidly rising developing country in the world. How to confront and tackle the gaps and differences would be a long-term test of the wisdom of IP communities in both nations."

Liu Chuntian, Co-chair of the U.S.-China IP Cooperation Dialogue

"The Dialogue provides a uniquely valuable, all-substance forum. Through many hours of exchange, we have broken new ground in identifying root causes for challenges to and providing constructive improvements for China's complex and evolving IP system."

David Kappos, Co-chair of the U.S.-China IP Cooperation Dialogue

In 2014-2015, based on constructive achievements from the 2013 Dialogue, the Intellectual Property experts from the United States and China further engaged in in-depth and open conversations on key issues concerning IP development between the United States and China in Washington D.C., Beijing and Sanya, China, and achieved new consensus on multiple issues under the principle of "seeking common grounds and reserving differences". This year's Dialogue continued to be substantially supported by the Chinese legislative, judiciary and various government departments and also gained support from the U.S. Government.

Background

From January to May, 2013, the Intellectual Property Institute of Renmin University of China and the U.S. Chamber of Commerce jointly hosted the 2013 U.S.-China IP Dialogue in Beijing and Washington, DC respectively. The ten experts conducted comprehensive, informative and productive conversations from two perspectives: IP protection and the practical functioning of the system, centering on IP judicial protection and criminal protection, amendments to the Chinese copyright law and improvement of trademark, patent and trade secret protection systems. While summarizing this Dialogue, the Chinese party has reported and presented the Dialogue achievements to the Premier's Office, the Supreme People's Court, Ministry of Commerce, Ministry of Education, State Intellectual Property Office and China Law Society among others. The U.S. party has also hosted a press release in Washington D.C. circulated the report within the U.S. government and generated positive feedback.

Taking into consideration the importance of intellectual property in U.S. - China relationship, and the complexity of such relationship, experts from China and the United States continued to exchange opinions on topics of interest to both parties on the basis of the Dialogue achievements of last year. "The value of discussion lies in the analysis and summary, and the theory from the discussion should be able to be verified in reality. In that way, the discussion between scholars is valuable, which can be published and practiced." Xunzi, The Evils of Human Nature. The experts sincerely hope that, through professional, honest and thorough discussion, bricks can be added to the architecture of a healthy and promising future between China and the United States.

In this year's Dialogue, the experts chose five topics for discussion: IP and innovation -technical sector, IP and innovation- pharmaceutical sector, judicial protection, trade secrets and copyright. The U.S. and Chinese experts agreed that a truly impartial and effective IP system should be based on innovation, founded on the rule of law, and guided by the market. It should include and expand to every segment of IP creation, application, protection and management. It benefits China, the United States and the world as a whole. The experts provided a series of insights, which included areas of both consensus and differing opinions. In addition, the experts also discussed areas that require further research and study.

Executive Summary

The report adopted the following ideas:

- Use quality instead of quantity as the measure of innovation.
- Explore the possibility that a judicial interpretation be issued to ensure no injunctive threat is available until utility model patents have been substantively examined for validity.
- Adopt a more balanced and market-driven approach to promote innovation by entrepreneurs, inventors and universities.
- Improve the patent linkage system, and provide effective protection for clinical data of new chemical entities by using the ongoing effort to amend the Patent Law and the Drug Administration Law as an opportunity for change.
- Initiate a special study on establishing a single IP appellate court to unify China's judicial adjudication of IP.
- Improve the guiding case system with respect to procedures for reviewing, selecting and releasing cases and support better adoption of case law information.
- Recommend research on the possibility to have a stand-alone and uniform trade secret law, in order to effectively maintain a fair market competition environment.
- Address new problems created by changing technology and business models; develop a good ecosystem for innovation by the interaction of law and the marketplace; and provide more market opportunities for copyright holders while dealing with piracy.

Areas of Further Research & Capacity Building

The experts agree many areas require further research and collaboration, such as the evaluation of IP court decisions, the establishment of an IP case database, the establishment of an IP Court of Appeal, and the comparison of the expert witness system and the amicus brief system. The experts agree to undertake further academic, research, education, training and consulting activities on related issues over the next year, in order to realize recommendations made in this report.

Co-Chairs

Professor Liu Chuntian, Renmin University of China, Chairman of China IP Law Association

David Kappos, Former Director of the U.S. PTO and Partner at Cravath, Swaine & Moore LLP

Experts

Director Cheng Yongshun, Beijing Intellectual Property Institute, Former Deputy Chief IP Judge of Beijing Higher People's Court

Professor Li Chen, Intellectual Property Academy, Renmin University of China

Professor Yin Xintian, Director General of the Intellectual Property Rights Center in Beijing

Director Ma Yide, Director of Zhongguancun Intellectual Property Research Institute, a member and the deputy director of Science and Technology Committee of Beijing People's Political Consultative Conference.

Judge Randall Rader (ret.), former Chief Judge for the Court of Appeals for the Federal Circuit

Professor Mark Cohen, Fordham University School of Law, USPTO Senior Counsel

Anthony Chen, Partner, Jones Day, Shanghai

Professor Eric Priest, University of Oregon School of Law

1. IP AND INNOVATION – Technology Sector

Both the United States and China recognize market-driven innovation is the path towards building a healthy and vibrant ecosystem for the technology sector. This year, China celebrates the 30th anniversary of its patent law and examines the history, current status of innovation in China, and looks into the future of innovation in China on this basis. Given this, the U.S. experts offer three key principles to institute a market-driven innovation model for China: (1) the quality of patents not quantity of patents filings is a true measure of innovation; (2) substantive review of utility model patents should be initiated and unexamined patent filings should not be the basis of enterprise certification or other government incentive programs; and (3) employee incentives for patent filings should be a decision based on market conditions in order to create successful commercial undertakings in the high tech sector.

1.1 Quality of Patent Filings is a Measure of Innovation

Experts from the United States and China note that emphasizing only or primarily the number of patents filed as a measure of innovation is a problem to be discussed. The U.S. experts are particularly concerned about the large quantity of utility model patents (UMPs). There is a current slowdown in the rate of UMP filings, but it remains unclear whether this is a long term or short term trend. China's National IP Strategy suggests that China will increase patent filings by three to four times based on the previous goal. Given this push, it is critical that these filings represent real innovation.

The U.S. experts note the role of government subsidies including High and New Technology Enterprises (HNTE) in greatly stimulating the increase of UMP filings, and the correlation between decreasing government subsidies and the recent decreases in UMP filings. In addition, the U.S. experts note the phenomenon of local governments' applications for UMP subsidies and costs for the benefit of enterprises. Experts from the United States and China highlight the need to reduce government intervention, and emphasize that market based measures rather than patent application that may be inflated through subsidies or other incentives are not an indicator of innovation.

1.2 Reform of Utility Model Patent System

Experts from the United States and China are not suggesting the elimination of UMPs or design patents, and acknowledge that there are not enough resources to substantively examine all types of patents. The U.S. experts offer a number of recommendations that can mitigate the abuse of the UMP System:

- Before any judicial action based on a UMP comes into effect, such UMP should be substantively examined. The State Intellectual Property Office (SIPO) should conduct a full and complete substantive examination on the UMP before any consideration is given by a court or other enforcement authority regarding a potential injunction involving alleged infringement of a UMP. The experts agree that imposition of an injunction based on an unexamined UMP may incur negative consequences, damage China's substantive efforts to improve innovation outcomes and jeopardize the credibility of China's IP system overall. The experts note that China's judiciary could ensure no injunctive threat is available until UMPs have been substantively examined by drafting a judicial interpretation.
- The experts discussed the practice of bad faith UMP filings. The Chinese legal system currently does not provide the basis for liability for bad faith filers. The U.S. experts introduced the U.S. experience: U.S. patent applicants must declare originality under penalty of perjury, a requirement that strongly discourages fraudulent filings. The U.S. experts recommend that China's judiciary could create a similar mechanism to the same effect through a judicial interpretation.
- Currently, the same damages analysis and calculations apply to both UMPs and invention patents. But UMPs have lower standards, protect lower levels of innovation and should be given generally lower valuation in enforcement. The U.S. experts recommend that China refers to factors considered in the eBay case regarding non-issuance of an injunction so as to ensure equity.

1.3 Return of Government Incentive Programs

The U.S. experts note that the current and proposed government programs to incentivize innovation in China (including the Service Invention Remuneration regulations, the High and New Technology Enterprise income tax incentives and incentives based on the quantity of patent filings with no regard to quality) run counter to a market-driven approach and recommend that serious considerations be given to these programs.

The U.S. experts suggest that the Service Invention Remuneration (SIR) system should not be enacted, as it may be detrimental to China's innovation ecosystem. The U.S. experts note

that award systems for inventors should be governed by the market and determined by consultation between employees and employers. A state-dictated and bureaucratically managed award system for private sector innovation runs counter to the market-driven approach.

The U.S. experts note that SIPO has been considering new regulations on service inventions to add to the existing rules outlined in the Patent Law and its Implementing Regulations as well as the Law of Promoting Transformation of Technological Achievements. SIPO, the Ministry of Science and Technology and such other departments have looked at the SIR system as a way to incentivize innovation in China. Back in 1993, the Commission on Science and Technology decided the SIR system was not a good policy. Still today, some judges and scholars reserve their opinions opposed to implementation of the SIR system.

Experts from the United States and China recommend a more balanced approach to promoting innovation by entrepreneurs, inventors and universities. The market should govern the best way to incentivize innovation. The U.S. experts note that, at the 18th Party Congress, China issued its 3rd Plenum where it stated that the market must have a decisive role in resource allocation. This shift in policy supports what the Chinese and U.S. business communities have known for a long time – an innovation ecosystem must be created by the market, not dictated by the government.

Experts from the United States and China note that the draft SIRs for public comment ("the Draft") could cause unproductive and needless conflict between employers and employees. The experts also discussed the relevant German system, which was created under an entirely different social system and historical background, but is now being used as a model for the Draft in China. Currently in Germany, the system has been heavily criticized. Further, the SIRs may interfere with the freedom of contract and undercut the binding effects of agreements between employers and their employees. And the downstream interpretations required by courts may add further complexity to the problem.

The U.S. experts emphasize that technical secrets (trade secrets) are not examined by or registered with any government agency, and to have them covered under the SIRs may create unnecessary concerns. Germany, Japan and Korea all have some form of SIRs, but none of them include technical secrets. It is highly likely that application of SIRs to technical secrets would result in much conflict between employers and employees, far beyond any value created by such a regulation. In the Draft released by SCLAO in April of 2015, technical secrets was deleted from the definition of "invention" of Article 4 but included in Article 24.

The U.S. experts note that determining the economic benefit of an invention as well as an individual's contribution to an invention is infeasible. Moreover, the requirement to inform employees of the economic benefits regarding their inventions will create yet another administrative burden for employers and will also create more strife between employers and employees. The U.S. experts were able to identify no other country in the world imposing requirements like those under consideration by China and recommended that China should consider them with caution.

The experts discussed the possibility of winding down the HNTE program. It was developed in the 1980's when China did not have the technical expertise that it enjoys today. Research on China's HNTEs (based on 2010 data) shows only 25% of the patents filed by HNTEs were invention patents; the rest were designs or UMPs. HNTEs are leading with regard to UMP filings which have a relatively limited role in measuring innovation and the UMPs filed are rarely maintained. All of these data point to an HNTE system of subsidies and requirements that is not producing significant innovation.

The U.S. experts also expressed concerns on some specific issues in the HNTE program. For example, the concept of "own core IP" or "indigenous IP" is misleading to some extent and may distort the fact that today's high technology innovation are interdependent with existing IP. The experts suggest China should expand licensing criteria to include non-exclusive license rights and reduce the amount of sensitive information companies are required to submit in their applications to what is truly necessary, and provide assurance it will be protected. In addition, HNTE works against industry sectors that inherently file fewer patents. It favors the IT sector due to the numerous patents filed there, but disfavors other sectors such as biotech that file fewer patents, such as the life sciences/pharmaceutical sectors. It also disfavors trade secrets. Given all the dysfunctions within the HNTE system, and the fact that China has outgrown any need for such a system, the U.S. experts recommend the HNTE system simply be discontinued, and perhaps replaced with an R&D tax credit or similar incentives to encourage R&D in China.

2. IP and Innovation – Pharmaceutical Sector

Experts from the United States and China recognize the pharmaceutical sector as one in which scientists from both countries are collaborating successfully in discovering new drugs to meet healthcare challenges of the 21st century. While China has largely played the role of contract research service provider so far, improvements in the pharmaceutical IP protection system in China, including the Patent Law and the Patent Examination Guidelines of SIPO, and the Drug Administration Law and the Drug Registration Regulation of CFDA, could unleash China's potential and help realize China's ambition of becoming a pharmaceutical innovation country. The experts from the US advice improving patent linkage system, providing effective protection for clinical data of new chemical entities and harmonizing SIPO's examination standard for pharmaceutical inventions with other IP5 patent offices (USPTO, EPO, JPO, KPO), using the current amendments of the Patent Law and the Drug Administration Law as an opportunity to reform.

2.1 China Has a Historic Opportunity to Become a Pharmaceutical Innovation Leader

Experts from the United States and China observe that the center of pharmaceutical innovations migrated from Europe to the United States over the last three decades. In this same time period,

China consistently sent top notch scientific talent to the United States to study, especially the life science field. A majority of the Chinese life science talent has stayed in the United States in academic research laboratories and the pharmaceutical industry and they have played a significant role in this innovation success story in the United States. They now constitute a world-class R&D and management talent pool to drive pharmaceutical innovation.
Today some of these U.S. educated Chinese scientists have returned to China to lead pharmaceutical research in academic institutions and in the industry. Many still staying in the United States are engaged in collaborations with Chinese pharmaceutical research institutions.
In a process that largely unfolded over the last decade, a booming pharmaceutical contract research industry, with Wuxi Apptec as a representative, has been firmly established in Shanghai, Beijing, and other cities in China. To the world's pharmaceutical industry, Wuxi Apptec and Shanghai Zhangjiang Hightech Park are now synonymous with high quality pharmaceutical contract research and become an important part of global pharmaceutical research.

2.2 China's Potential is Hampered by the Pharmaceutical IP Protection Regimes

While China-based contract service providers are making significant contribution to the global drug discovery industry, very few new drugs are coming from Chinese pharmaceutical companies. China's Twelfth Five-Year Plan calls for 30 New Chemical Entities to reach market. However, this goal is not being met by the Chinese pharmaceutical industry.

There is a disconcerting contrast between China's rich talent pool and goals for new drug discovery and its low productivity in pharmaceutical innovation. Experts from the United States noted that there are several differences between China and other countries or regions in IP protection system for pharmaceutical innovation in the following areas:

- There is no drug patent linkage system in China that allows pharmaceutical innovators and patent holders to request judicial adjudication of IP infringement before CFDA gives market approval to generic drugs. Currently innovators are not entitled to bring patent infringement lawsuits until manufacturing or sales of generic drugs have initiated in China. This shortcoming likely discourages investment in new drug discovery and increases the risks for generic manufacturers which cannot determine in advance of product introduction if their product infringes an innovator's patent.
- There is no effective pharmaceutical regulatory data protection regime in China that prevents generic drug companies from relying on the clinical trial testing data generated by the pharmaceutical innovators for a period of time to allow innovators to recoup investment in costly clinical trials. Because of this weakness in regulatory data protection, generic drug companies can immediately benefit from the investment made by the innovators in conducting lengthy and expensive clinical trials. Consequently, Chinese pharmaceutical companies lack incentive to invest in new drug clinical studies.

The U.S. experts note that China's laws and regulations have been adjusted over the last decade to promote early entries of generic drugs to the detriment of innovators.
The IP environment in the pharmaceutical sector has led Chinese pharmaceutical executives and venture capital investors to conclude that "Picking fruits beats cultivating orchards":

- New drug discovery takes a long time, is highly risky, and suffers weak IP protection in China.

- It's more lucrative to launch fast following generic drugs and seize market share from the innovators, preferably before patent expiration.

Consequently, most Chinese pharmaceutical companies have stayed away from new drug research and some have shifted focus from new drugs to generic drugs.

2.3 How to Fulfill China's Long Awaited Innovation Dream

There is a high degree of consensus among the experts from the United States and China that providing strong IP protection is critically important for achieving the goal of becoming an innovative country which has the capacity to benefit both China and the world. A world-leading IP protection system will encourage new drug research and have world-leading pharmaceutical companies in China.

Experts from the United States and China note that the ongoing amendment of the Drug Administration Law (DAL) offers a breakthrough opportunity to improve pharmaceutical IP protection in China. Therefore, the U.S. experts suggest China consider the following additions to the DAL:

- Researching patent linkage system of the US and adjust relevant laws and regulations in China where appropriate;
- Providing an effective and meaningful regulatory protection for clinical data of new chemical entities.

Furthermore, the U.S. experts suggest that SIPO learn from the experience of patent offices of the U.S., Europe, Japan and Korea, and accept post-filing supplemental data from new drug invention applicants. Experts from China point out that the statement of China's Ministry of Commerce on January 2, 2014, in the 24th US-China JCCT Achievement List of China, reaffirms that "the Chinese Patent Examination Guidelines permit patent applicants to file additional data after filing their patent applications, and that the Patent Examination Guidelines are subject to Article 84 of the Legislation Act to ensure that pharmaceutical inventions receive patent protection. China confirmed that interpretation above has been effective in the patent examination, reexamination and the court statement." The U.S. experts emphasize that China should follow the above mentioned statement in principle and practice.

3. Judicial Protection

China is currently undergoing a period of accelerating judicial reforms as directed in the Third and Fourth Plenums. To strengthen China's rule of law, transparency is paramount at both the substantive level and at the procedural level. An open institution is a trusted institution. To support these ongoing efforts, the experts examined court structures, neutrality, judicial transparency, guiding cases system and judicial independence as focus areas to further reform.

3.1 Court Structure

The growth of courts (currently 420 that are entitled to handle IP cases) is an organic part of an evolutionary cycle in China's IP judicial processes. Already China has taken a step to bring more

uniformity and predictability to its laws. For example, prompt judicial interpretations issued by the Supreme Peoples' Court, the three new IP courts created in Beijing, Shanghai and Guangzhou etc. are a part of China's judicial reform. Experts from the United States and China support many of the current efforts at IP judicial reform and look forward further improvement in judicial protection of IP in China brought by the pilot program of the IP courts, and make the following three recommendations:

- Creating an IP Court Specialized Committee by the China Intellectual Property Law Association to provide a communication platform for the heads of the three IP courts. The committee would research on the judicial policy and adjudication uniform issues encountered by IP courts on regular basis.
- Summarizing and evaluating the results (experience and inexperience) of the pilot program of IP courts in Beijing, Shanghai and Guangzhou every year, in order to lay the foundation of China's future plan of establishing an efficient IP enforcement system. Social evaluation system shall be introduced, and independent third party shall be involved in such evaluation to increase objectiveness and authenticity of the evaluation.
- Initiating a special study on establishing a single IP appellate court to minimize local influence and unify standards of China's IP judicial adjudication.

3.2 Court Neutrality and Judicial Transparency

China applies statute law, and the application results of law at all levels of courts should be consistent. The results should be governed by the law, not by the nature of the parties. The U.S. experts point out that, in recent years, some foreign and Chinese companies complain about neutrality of some Chinese courts and consider local protectionism as an enemy of a consistent and reliable future for China's IP and innovation. The Chinese experts hold the opinion that this situation will improve with the development of judicial reform.

Another key to neutrality is transparency. The Chinese experts note, Chinese courts have made substantial improvements in public hearing, online broadcasting hearing and publish verdict in recent years. Indeed in this connection, the U.S. experts were very impressed with the openness of some courts, especially the new IP courts, where they learned that entire judicial proceedings of one case are made available on the internet. But, the U.S. experts noted, in China, data of all kinds about judicial decisions is still difficult to access, particularly information about win rates between foreign and domestic litigants. In an era of easy internet access to information, judicial decisions can be routinely and completely reported on all court websites easily. The U.S. experts pointed to data available from the CIELA.cn (starting from '06) which shows that foreigners do less well on appeals and receive significantly less damage awards (their average damage awards are half the average domestic award). But the Chinese experts pointed to a higher win rate for foreigners in China's courts from their data. Less damage awards are not a common situation. The amount of damage award shall be decided on a case by case basis. The experts agree that the public want to know not only the judicial proceedings but also the decision making procedure, thus it is necessary to publish full judicial opinions and to make those opinions easily searchable.

Both Chinese and U.S. experts highlighted the need for evaluating court neutrality and judicial transparency through more extensive transparency, including more robust publication of cases in searchable format and the availability of comprehensive data on all cases from courts. Of course, some training would be necessary to teach each court the ease of a process to post decisions on the court website at the same time that the parties receive the results. Because Chinese judges

have heavy caseloads each year, the process for posting the cases needs to be easy and automatic. The IP courts seem to be a model for other Chinese courts on this point. With that policy in place, the court disclosures trial and decision making details to the public will become the rule and non-disclosure only an exception. The experts made three recommendations in this regard:

- The experts saw the wisdom of reviewing and commenting on cases that have been finally adjudicated. The Chinese and U.S. experts intend to communicate and occasionally issue an evaluation report on court decisions to draw attention to areas that need improvement and make recommendations relating to court neutrality.
- The experts support efforts to develop an IP case database and translation of cases which will come from private sector sources. A private third party service provider or a university may be best placed to collect and make available a comprehensive and searchable database.
- Judges should detail the court's reasoning in legal instruments, and reduce the practice of providing a rudimentary explanation in the judgment but making detailed explanation on other occasions, such as interpretation by the judge of the case after the trial, case comments or reviews and case explanation meetings.

3.3 A System of Guiding Cases

The guiding cases system is worth building upon. Cases highlighted by the Supreme People's Court can be effective in providing guidance to the judiciary and to the public. However, it is not clear how the cases are chosen at present. Moreover with these cases having a national and international reach, it is not clear that parties affected by the decisions have any way to participate in the decisional process. Cases that are selected should be published in their full form, including aspects involving facts or law that were difficult to resolve. Furthermore, the experts note that, except for the Supreme People's Court, local courts also publish all sorts of Top Ten Cases, Classic Cases and Innovation Cases, but with very limited guiding effect. They should not be guiding cases.

The experts discussed how courts use third party opinions in court cases. Chinese courts already accept outside opinions for high stake cases; however this is not generally made a part of the formal record for the case. The amicus brief system originates from the Roman law, and is accepted by modern law. The U.S. experts offer the following observations on the benefits of the amicus brief system in strengthening the rule of law. The system is a transparent, publically available submission system where a third party submits his opinions to a case, and those opinions become part of the official record of the case. It offers the courts the ability to consider widespread views and provides a way to consider the social impact and for societies to contribute. Moreover the inclusion of the outside views on the record allows both parties and other members of the informed public to comment on those additional views. This open system facilitates a check on erroneous information and ensures a strong foundation for important decisions. An amicus brief system is particularly important if case decisions are intended to have wider social impact to ensure that those with an interest in the decision have an opportunity to comment. The Chinese experts note, the amicus brief system has a long history and provides some beneficial experience worth studying.

The U.S. experts also offer a detailed statement of the fundamentals of the U.S. amicus brief system for consideration by the Chinese experts and China's judiciary in their research. Opinions of the experts can be summarized as follows:

- A curated approach to guiding cases and the establishment of a system that permits public comments and participation on the record as part of the docketed case in advance of final publication are recommended. Establishing a guiding case system that allows for public comments, can assist the judiciary to guard against unintended consequences. The experts agree to provide an evaluation report on IP cases to the Supreme People's Court IP Division and/or the specialized IP Courts.
- The U.S. experts recommend that the Chinese judiciary should review the U.S. and other amicus brief systems and adopt, on the basis of China's current situation, a suitable system to provide transparency as well as increased access to expert opinions. The Chinese experts observe that the courts already can take opinions from experts in some significant and complex cases. Research and study on the amicus brief system can be undertaken, but whether or not such a system shall be transplanted in China requires more consideration.
- The experts recommend that the amicus briefs become part of the official record of a case and be made publically available for review so as to allow the public to understand the judges' thoughts and the thoughts of interested parties in applying the law in a transparent manner.

3.4 Capacity Building within Courts

The Chinese experts note a stable judicial team is important for IP protection. Therefore, the experts discussed a number of changes that would help attract and retain high quality judges. Currently, in the United States Court of Appeals for the Federal Circuit, the active circuit judges range from 46 to 87 years old. The United States also continually reviews the proper salary for U.S. judges. A federal circuit court of appeal judge is currently paid three and half times the average household income in the United States.

Chinese IP judges are generally young. The experts note China is currently studying issues such as increase in the salary and benefits for judges, and a raise in the retirement age for China's judiciary etc.

With many new IP judges in the three new IP courts, training for judges in technology and law is recommended. The experts recommend that the Chinese judiciary should reach out to WIPO and other sources of training on international judicial practices and latest developments to benefit China's judiciary.

4. Trade Secrets

There has been much discussion and attention around trade secret protection globally. Trade Secret protections are key to IP-intensive industries and have become more important with the technology development, labor mobility and global technology and product flows. The United States is reforming its trade secret legislative framework. China will also benefit from increasing the pace of reform for trade secrets in China as it has not kept up with the improvements made for the protection and enforcement of patents, copyrights and trademarks.

4.1 Importance of Trade Secrets

Governments around the world need to give full recognition of the importance of trade secrets. In recent years, the Chinese courts accept only 200-300 civil trade secret cases every year; however, in reality the loss of trade secrets is much more frequent. Therefore, government agencies should be encouraged to make efforts to protect trade secrets. The U.S. experts made the following recommendations:

- Although disputes involving "technical trade secrets" have been incorporated into the jurisdiction of the new specialized IP courts, the term "technical trade secrets" is not defined by national laws.
- The Anti Unfair Competition (AUCL) law should be revised. During the period of preparation of this report, the U.S. experts became aware that a draft of the AUCL was submitted to the SCLAO for review by SAIC. This draft should be released for public comment in the near term.

In the meantime, steps can be taken to assist right holders to apply preliminary injunctions, evidence and asset preservation measures under the Civil Procedure Law, including a recently announced draft Judicial Interpretation on Reviewing of Act Preservation Cases in IP and Competition Law Matters (February 26th, 2015); ensure that administrative actions also serve to protect companies' interests; and that criminal enforcement may be no longer routinely used where civil remedies might otherwise be adequate. Public awareness of trade secret protection and improved measures for licensing technical secrets (confidential information) can help in commercializing trade secrets. Given that applying the SIR measures to trade secrets may incur potential issues, it is recommended that it be treated with caution.

4.2 Protection of Confidential Business Information (CBI)

The experts discussed the disclosure of CBI in administrative licensing proceedings in China. Disclosure of only necessary CBI in relevant procedures is crucial to avoid loss of trade secrets. Also critical to meaningful protection for CBI is limiting access to the information only to those who need to know; using penalties for those who share with unauthorized parties; and non-disclosure of CBI between government agencies unless necessary.

Providing deterrent remedies, procedures for withholding information and prohibiting unauthorized disclosure of information are all part of a complete and effective system. If there is a leakage of information, it should provide a remedy for the victim. In addition, trade secret holders should be able to use standardized procedures to identify confidential information and block further disclosure, except if the disclosure is required by law.

There is a process in trade secret cases whereby confidential business information in case decisions is not published by the courts. However, this often means that courts will not publish any trade secret cases as almost any trade secret case involves confidential information. Instead, procedures need to be established to redact confidential information, and to ensure that courts and litigants handling confidential information protect the confidential information of others.

The U.S. experts provide a case study that discusses comparative systems in the United States, China and other relevant jurisdictions and provides the challenges that CBI protection faces in China. (See Attachment)

4.3 Judicial Protection and Enforcement of Trade Secrets

The experts noted that the time is ripe for a judicial interpretation concerning trade secrets. The content may include its relationship with Labor Law, criminal thresholds, evidence preservation and jurisdictional issues among others. According to the data collected from Supreme People's Court and local courts, trade secret cases have a relatively low win rate, low damages awards and it takes too much time to litigate. Parties would rather suffer losses than go to court. There are also a high proportion of criminal cases in certain geographic areas, such as Shenzhen, which has led to concerns over lack of clarity within the system or local protectionism. Indeed, Supreme People's Court Chief Procurator Cao Jianming (曹建明) noted in 2005 that trade secret enforcement was the area with the "greatest difficulties" for the courts.
Criminal, civil and administrative procedures for trade secrets protection have both positive and negative features. Civil enforcement to date has been weak and it is too hard to collect evidence, while criminal penalties are too extreme. Because agencies do not have standard criteria to follow, there are also instances where people are arrested for nothing. However, evidence collection is more effective and penalties are more deterrent. Seeking administrative enforcement which is often cost saving for the trade secret holder may not be the most effective enforcement tool. All this has made enforcement very ineffective.

A judicial interpretation could be the vehicle in the short term for such clarifications of issues of current concern in enforcing trade secrets. For example, civil procedure law and labor law should be in conformity on jurisdictions. Trade secret jurisdiction is limited because it is based on an unfair act. Additional and specific aspects of trade secret law should be clarified such as the issue of inevitable disclosure, discovery, and concept of "business operator" in the AUCL among others. Further clarification of the limitation of the "practicable applicability" requirements in the AUCL to insure that it provides protection for failed experiments should be provided. Improved litigation procedures and expansion of the protection range currently embodied in Article 10 of AUCL are needed.

4.4 Legislative Reform for Trade Secrets

The Dialogue experts agree that it would benefit China and its economic development to have a more systemic, detailed and stand-alone trade secret law. During the last twenty to thirty years, there has been too little progress in construction of a trade secret protection system. Due to weaknesses in the civil and administrative systems, criminal procedures have become a way for competitors to deal with each other by freezing assets of a company that is accused of stealing a trade secret or pursuing ex-employees. This may seriously destroy competition and unfairly restrict technician and labor mobility.

The experts note that in addition to the provisions of trade secrets in the AUCL (the only major IP legislation that has not been updated since enacted in 1993), there is also a crucial relationship between Labor Law and provisions in non-compete agreements under the Contract Law, Company Law, State Secret Law, proposed Service Invention Regulations and other national and local laws and regulations. There are many inconsistencies amongst these various laws,

regulations, judicial interpretations and other normative documents. There is a need for uniformity in trade secrets law.

The Dialogue experts suggest defining the core elements of trade secrets and its value and determining legislative reform issues to provide guidance for legislators. One option is to have an experts group under direction of the leaders of China's government to draft this important legislation to assist to get the reform moving along. Supreme People's Court and other relevant agencies could join and guide such process to help enact modern laws and regulations.

5. Copyright

The experts agreed that in the copyright space, U.S. and Chinese interests are well aligned. Policies and developments that help American creators help Chinese creators as well. The experts agreed that copyright enforcement in China has seen great progress, particularly with regard to online copyright enforcement. Nevertheless, piracy still remains one of the greatest hindrances to growth of the creative industries in China. The situation could be much improved not only by reinforcing enforcement and reducing the opportunities for piracy, but also by focusing on the interaction between the market and the law, increasing market access and investment opportunities for copyright owners and improving the creative environment.

The experts primarily discussed four issues relating to new technologies and emerging business models: the impact of media boxes on copyright, software copyright protection in the context of cloud services, the basis for protection of live sports broadcasts, and copyright protection of music in the Internet context.

5.1 The Impact of Media Boxes and Video Game Consoles on Copyright

Media boxes are a promising new technology that has tremendous potential to provide consumers with high-quality, on-demand content and creators with a robust new revenue stream. However, the technology also has the potential to enable copyright infringement. While the boxes may not contain pre-loaded content, they are frequently designed to enable access to unlicensed streaming services. Some may use these boxes to decrypt without authorization encrypted pay television programming, facilitate online access to unlicensed music, movies, and television, and to store such content.

On a positive note, an increasing number of content licensing deals are being struck in relation to media boxes, which is a golden opportunity to develop a legitimate market that benefits creators, technology providers and consumers. Nonetheless, piracy will influence the healthy development of this emerging sector.

It is technologically feasible to prohibit media boxes from accessing infringing content: media boxes sold in the United States and elsewhere by companies such as Apple and Amazon provide access only to licensed streaming providers. The experts note that where both the manufacturer and retailer of media boxes contribute to copyright infringement or their acts constitute joint infringement, both should be liable for infringement.

The experts noted that market access and improved content review mechanisms are closely related to reducing the availability of infringing content. In this connection, the experts applaud the recent decision to permit the sale of video game consoles in China and encouraging the development of local video game content, which should help reduce problems of piracy in that area.

5.2 Software Copyright Protection in the Cloud Service Context

The profit model of software companies is increasingly moving from the sale of licensed software to the provision of cloud-based services with a subscription access model. As this business model shifts, a new form of piracy has emerged: the offering for sale of fraudulent access codes that allow users to access services without payment. The U.S. experts noted that the Chinese Copyright Act prohibits "intentionally circumventing or sabotaging the technological measures, adopted by [the copyright owner] on his works... to protect the copyright," but it is unclear whether this language includes the act of selling or trafficking in fraudulent access codes. The Chinese experts noted that software access codes constitute a technical measure employed for copyright protection and the illegal sales of software access codes can be regulated under the existing legislative framework.

The experts agreed that Chinese copyright law should be interpreted to address emerging forms of piracy and be responsive to the challenges posed by evolving business models and respond promptly.

5.3 Copyright Protection of Live Sports Broadcasts

Live sports broadcasting has become a business of sizable investments and great economic value. Broadcasting rights and the rights to transmit sports programs over the Internet, wireless, and other media constitute are largest source of revenue for most sports organizations. Under the existing Chinese copyright law framework, there are some hurdles to the protection of live sports broadcasts. First, the Chinese copyright law, like copyright law in most countries, requires that works be "original" to be eligible for protection. Unlike in most countries, however, in China there is a debate about whether broadcasts of sporting events are "original". Second, the current implementing regulations of Chinese copyright law requires that audiovisual works to be "fixed on a certain medium", making it difficult for sport broadcasts to fit into the definition of audiovisual works.

The experts noted that the issue of originality is fact-dependent. In fact, however, professionally produced live sports broadcasts usually involve quite complex aesthetic choices, directorial decisions, and unique arrangements, which would be undoubtedly copyrightable if originality threshold is employed in determining constitution of a work.

The experts recognized that the latest draft for examination of the Copyright Law amendments has modified the definition of audiovisual works and deleted the requirement that they be "fixed on a certain medium". This amendment signals legislative progress and ensures the definition of audiovisual works includes live sports broadcasts to be covered by audiovisual works.

Because passing the copyright law amendments can take some time, the experts recommend that China's judiciary may provide valid legal protection for live sports broadcasts. In a recent case decided on June 30, 2015, in Beijing Chaoyang District People's Court, the Judge recognized the copyrightability of live sports broadcasts as original works under the existing legal framework. (2014) Chaoyang Civil (IP) First Instance No.40334. This case could serve as a leading case for 2015 and serve as the basis for a judicial interpretation.

5.4 Copyright Protection of the Music Industry

Chinese Internet users listen to online music at unprecedented levels. Nearly 80% of Internet users consume music online. However, little of that money goes to copyright owners. Likewise, China's mobile companies keep most of the ringtone revenue; copyright owners receive a tiny share of the billions of dollars that ringtones generate. By contrast, in the United States and Europe, music copyright owners are able to monetize their content through a wide array of media and platforms. In the United States, Apple's iTunes typically pays copyright owners 70 percent of digital music revenues. Improving this situation requires constructive and healthy interaction between the market and the law.

Elimination of illegal music productions through copyright enforcement, particularly enforcement in the Internet context, will incentivize online distributors to provide legal content, thereby increasing copyright owners' revenue, reducing their reliance on monopolistic intermediaries, and enabling them to invest in new creations. The experts applaud the recent focus by the National Copyright Administration on improving the copyright environment for the music industry. In addition to increased enforcement, an improved environment for copyright monetization is critical to supporting a flourishing music industry.

Effectively controlling piracy and improving market access for creators will sustain market-based incentives and support creators, change the current imbalance between creators and media intermediaries, and promote a healthy ecosystem in which to incentivize innovation.

On September 24 and 25, 2014, the U.S.-China IP Cooperation Dialogue took place in Washington, DC.

On January 8 and 9, 2015，the U.S.-China IP Cooperation Dialogue took place in Hainan, China.

ANNEX I
Amicus Curiae Introduction

Amicus Curiae Introduction

The appearance of the amicus curiae in US state and federal courts has become a standard feature of litigation during the twentieth century. Unlike several other aspects of US federal judicial system, the genesis of the amicus device did not occur within this century. To the contrary, the amicus curiae has a long lineage extending from Anglo-American common law, from as far back as the 14th century, and Roman law.
The term "amicus curiae" is old Latin that means a "friend of the court," and it has traditionally been used to describe one who, for the benefit and assistance of the court, informs it on some matter of law with regard to which the court may be doubtful or mistaken.

A non-party with an interest in the outcome of a pending lawsuit who argues (or presents information) in support of, or against, one of the parties to the lawsuit. In many instances, the amicus curiae attempts to draw the court's attention to arguments or information that may not have been presented by the parties, such as the effects of a particular court ruling on the interests of certain third parties.

The arguments or information advanced by the amicus curiae are usually presented to the court in the form of a brief. Amicus briefs are typically filed at the appellate level, although they may also be filed in lawsuits pending at the trial court level. Generally, an amicus curiae must get the court's permission before filing its brief, unless all of the parties consent to the amicus filing. The procedure for filing amicus briefs in the US Supreme Court is governed by Supreme Court Rule 37. The procedure for filing amicus briefs in federal circuit courts of appeals is governed by Rule 29 of the Federal Rules of Appellate Procedure. Amici curiae are not parties to the lawsuit, unless they formally intervene. As a result, an amicus curiae does not need to have standing to bring suit. Further, as a non-party, an amicus curiae normally does not have the rights that parties in a lawsuit have, such as the right to obtain discovery from the other parties.

The classic role of an amicus curiae is to assist in a case of general public interest, to supplement the efforts of counsel, and to draw the court's attention to law that might otherwise escape consideration. This does not mean, however, that an amicus must be completely impartial concerning the outcome of the case.

Brief of an Amicus Curiae.

(a) Who May File Amicus-Curiae Brief
A person seeking to file an amicus curiae brief generally must obtain either (1) the oral or written consent of all the parties, or (1) leave of the circuit court. However, the United States, its officers and agents, a state, any U.S. commonwealth or territory, or the District of Columbia may file such a brief, without obtaining consent or leave.

If a brief is filed with the consent of all parties, it is sufficient to state in the brief that all parties have consented to the filing of the brief. It is not necessary to obtain or file written consents.

A motion for leave to file an amicus-curiae brief must be accompanied by the proposed brief and must state the following:
(1) the movant's interest; and
(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

Permission to file a brief as an amicus is within the sound discretion of the circuit court. Traditionally, amicus status is granted to a nonparty whose function is to aid the court in resolving doubtful issues of law rather than present a partisan view of the facts. However, some courts have recognized that an amicus need not be completely impartial and may lend some limited adversary support on given issues.

(b) Contents and Form.
An amicus-curiae brief must comply with the format standards imposed by Appellate Rule 32. In addition, the cover of the amicus-curiae brief must identify the party or parties supported and indicate whether the brief supports affirmance or reversal.

If the amicus curiae is a corporation, the brief must include a statement disclosing all of its parent corporations and listing any publicly held company that owns 10 percent or more of the amicus's stock.

An amicus-curiae brief need not comply with the requirements of Appellate Rule 28, which prescribes the contents of the parties' briefs. However, the amicus-curiae brief must include the following:
(1) A table of contents, with page references;
(2) A table of authorities (cases alphabetically arranged, statutes, and other authorities) with references to the pages of the brief where they are cited;
(3) A concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file the brief. The source of the amicus's authority to file is sufficiently identified by a statement either that all parties have consented, that the amicus is a governmental entity entitled to file without consent or leave, or that a motion for leave to file accompanies the brief.
(4) Unless the amicus curiae is the United States, a U.S. officer or agency, a state, a U.S. commonwealth or territory, a statement that indicates (A) whether a party's counsel authored the brief in whole or in part; (B) whether a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) whether a person--other than the amicus curiae, its members, or its counsel--contributed money that was intended to fund preparing or submitting the

brief and, if so, the identity of each such person;

(5) An argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(6) A certificate of compliance with the type-volume limitations on the length of the brief, if the brief exceeds 15 pages in length.

(c) Length.

Except by the court's permission, an amicus-curiae brief may be no more than half the maximum length authorized by the Appellate Rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus-curiae brief

(d) Time for Filing.

An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. In either case, the 7-day period is measured from the date that the relevant party's brief is actually filed, rather than from the date the party mails.

The circuit court may, for good cause shown, grant leave for later filing, specifying the time within which an opposing party may answer.

(e) Participation of Amicus Curiae After Filing of Brief

a) No Reply Brief Except by Permission of Court.

Except by the court's permission, an amicus curiae may not file a reply brief.

b) No Oral Argument Except by Permission of Court.

An amicus curiae may participate in oral argument only with the court's permission. Such permission is often granted when a party is willing to share its argument time with an amicus; in other instances a court might require a showing of extraordinary circumstances before permitting an amicus to argue. For example, the refusal of the parties to defend an important position constitutes an extraordinary circumstance under which the circuit court may allow an amicus curiae to participate in oral argument.

ANNEX II
Trade Secrets Experience with Disclosure Requirements during the Permitting and Project Approval Process for Wholly Owned Foreign Enterprises in China

Trade Secrets Experience with Disclosure Requirements during the Permitting and Project Approval Process for Wholly Owned Foreign Enterprises in China

Summary

As a part of its regulatory responsibilities to protect the health and safety of its citizens and the environment, Chinese government agencies collect information from companies about their business, technologies, operational practices, products, and services. Such information can be requested during a variety of government approval processes, including investment approvals, product registrations, environmental impact assessments, and business permitting. Requests can include information about company structure and operations, employee information and hiring practices, work safety procedures, manufacturing technologies and processes, emissions data, product details, and testing results. The level and focus of requested disclosures is not always connected with the requirements associated with the authority's regulatory responsibilities.

Frequently the information that is requested encompasses carefully protected trade secrets and proprietary information that are core to a company's competitiveness and financial health. The necessary measures to protect a company's trade secrets and proprietary information submitted to agencies that are standard in many jurisdictions outside of China, such as the EU and Canada, have not been implemented. Many agencies use expert panels to assess a company's submissions, but the project applicant is not allowed to provide input on panel make-up. Depending on the nature of the request, the information may be disseminated to state-owned entities, design institutes, private companies, universities, or even competitors. Trade secrets and proprietary information in the hands of these entities put the company at a high risk of experiencing substantial financial and competitive harm.

Some examples of administrative processes that put corporate trade secrets at risk:

- Members of expert panels are frequently employees of state-owned entities, institutes, and universities who may benefit financially from participating as an expert and having access to another company's trade secrets.
- Questions in permit applications, from expert panelists, and follow-on inspections often go beyond the scope of what is typical in other jurisdictions and what is necessary to make an accurate, well-informed determination about the permit or approval in question.
- Measures detailing confidentiality obligations of panelists, and any resulting penalties on the panelists for misuse or disclosure, are not available to the public.
- There are no requirements to destroy written records or other manifestations of the applicant's trade secrets after the conclusion of the permitting and approval process. Rather, entities that are required to participate in the permitting process, such as a design institute, must keep a copy of the final reports (for example the EIA) in perpetuity. This heightens the risk of further disclosure of the applicant's trade secrets.

There is currently no exemption in China for confidential business information. One mechanism that would mitigate many of these issues is to implement a transparent process by which permit applicants can make a legitimate claim of confidentiality for certain information required for

submission, as is customary in the EU, Canada and the U.S. This would enable companies to comply with Chinese requirements while protecting their confidential business information at the same time, which creates assurances for investors and provides incentive to bring new technology to China.

These examples are discussed in greater detail below.

Concerns Associated with Expert Panel Review Process

Many permitting processes, such as the Environmental Impact Assessment, the Safety Assessment, and the Project Application Report, require the convening of an expert panel to review the application materials. Experts appointed to panels have broad authority with unlimited scope to ask wide ranging questions and require the company to submit additional material, which often results in the forced disclosure of trade secrets. In many cases, these questions and requirements are not supported by fact, commercial experience, or sound science. Moreover, applicants have little ability to challenge the requests as failure to respond or provide information may result in a loss of a permit or license.

In one example, an expert from the Environmental Impact Assessment (EIA) expert panel opened a review even though the EIA had been approved for more than a year. Local authorities advised the applicant to comply with the request because failure to do so could negatively impact future projects that the applicant was considering for this province. The technology in question had been permitted and used commercially by the applicant in the United States with great success. The expert challenged the performance of the commercially demonstrated best available technology (per the US EPA) outlined in the EIA, asserted that the process would not work as designed, and advised that the applicant would need to install a much more complicated, unproven, higher investment system. To finally address this unwarranted concern from the expert, the applicant was forced to provide trade secret design details along with confidential operating history from its US plants.

This example demonstrates how vital trade secret information can be unnecessarily disclosed through the expert panel review system. The gradual leakage of trade secret information diminishes investor confidence and does not contribute toward China achieving its goals of becoming a more innovative economy that attracts first-class technology.

Environmental Impact Assessment (EIA)

The Chinese EIA format and the related review processes result in the unnecessary disclosure of trade secret information. Unlike the environmental permitting process in other jurisdictions, such as the state and federal level in the U.S., as well as the EU, much of the requested information is not directly related to environmental impacts. The focus of the EIA process should be to ensure that effective emissions reductions by the most effective, cost effective technology is accomplished and assuring the public that this goal is being accomplished. Some of the requested information is business and technical data that is related to the confidential business information of a plant. Therefore the process results in a time-consuming negotiation over what is truly required to be disclosed versus unnecessary disclosures to satisfy the personal

interests of expert panelists and approval authorities. One expert panel review is officially required for EIA approval. However, in actual practice, a pre-EIA expert panel review is typically held and multiple follow-up reviews are held after each expert panel review. The experts are appointed without input from the applicant and are typically from state-owned entities and universities that are often closely associated with state-owned entities, many of which may be an applicant's competitors or have links to competitors.

Applicants must publish their full EIA report online before approval can be granted. Companies may redact information deemed confidential; however, they must submit a list of redactions and justification for those redactions to relevant authorities. Due to the highly technical nature of the information required to be disclosed in the EIA, the online publication does not assist the public in evaluating the environmental risks of the project. Rather, the detailed technical disclosures benefit the competitors of the applicant.

In the EU, Directive 2003/04/EC[1] establishes precise rights and duties regarding access to information, including deadlines for providing information and the grounds on which public authorities may refuse access to certain types of information. Requests may be refused on the grounds of respect for the confidentiality of commercial and industrial information and IP rights, though all these grounds for refusal must be interpreted in a restrictive way, taking into account the public interest served by disclosure of the information.

Trade secret information typically required to be disclosed as part of an EIA in China and not normally required to be disclosed during environmental approval processes outside of China includes:

- Amount of investment for the plant
- Plant capacity
- An overall material balance showing the quantity of various feedstocks required to produce the desired products along with the waste streams
- A block flow diagram of the process showing the major unit operations
- Utility and energy requirements
- A list of major equipment with some detail on sizing
- Comparison of the feedstock and energy requirements with other existing company facilities as well as the applicant's understanding of others' requirements for related technologies
- Water balance

Trade secret information not normally disclosed in such detail outside of China but that was required to be disclosed as part of the EIA included:

- Material balance (volume and composition) from the process by unit operation to the environmental control facilities

[1] http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1415876424269&uri=CELEX:32003L0004

The regulations also require an environmental institute licensed and approved by relevant government authorities to prepare the EIA. The close relationship between the government and the EIA consulting firm creates a conflict of interest because the firm is incentivized to maintain good working relationships with the relevant authorities and members of expert panels. Consequently, the EIA consulting firm will tend to acquiesce to information requests that could disclose trade secrets and may not support the applicant's efforts to minimize disclosures in order to protect its trade secrets.

Newly Introduced Technology

This relatively new approval step for newly introduced technologies appears at odds with China's desire to encourage the deployment of the latest, most advanced technologies. This heightened review of new technologies results in the disclosure of trade secret information. Most jurisdictions do not require this approval. The few that do require it request much less information than China does and incorporate these requests in the Safety Assessment and Occupational Health Assessment. For example, Chinese authorities require applicants to submit the detailed process hazards analysis (PHA) including the HAZOP[2] summary for the process. All of this information is a trade secret and not typically disclosed in this detail to regulators or others during the permitting process.

Energy Conservation Assessment (ECA)

This detailed ECA review process requires an expert panel review and a review by the relevant local administrative committee before submission for approval to the authorities.

Trade secret information required to be disclosed as part of an ECA in China and not normally required to be disclosed includes:

- Project economics
    - Calculated project performance
    - Plant revenues
    - Plant costs
    - Investment for the plant
- Plant capacity
- Description and block flow diagram of energy integration
- A list of major equipment with particular detail on sizing
    - Duty requirements for heat exchangers
    - Compressor and major pump horsepower requirements

[2] A hazard and operability study (HAZOP) is a structured and systematic examination of a planned or existing process or operation in order to identify and evaluate problems that may represent risks to personnel or equipment, or prevent efficient operation; it is carried out by a suitably experienced multi-disciplinary team intimate with the process using the international standard. It can then be decided whether existing, designed safeguards are sufficient, or whether additional actions are necessary to reduce risk to an acceptable level.

    - Head requirements for pumps
- A process description with operating temperatures and pressures
    - Required disclosure of separations performed by each distillation column
- An overall material balance showing the quantity of various feedstocks required to produce the desired products along with the waste streams, necessitating disclosure of highly confidential yield information that is not disclosed in any other jurisdiction.
- A block flow diagram of the process showing the major unit operations
- Utility and energy requirements

Project Approval (Project Application Report or PAR)

Most economies do not require this review. The jurisdictions that do require the PAR do not request the level of detail that Chinese authorities request. The PAR includes parts of the EIA and ECA. One expert panel review and a review for approval with the local investment authority are required.

Trade secret information required to be disclosed as part of a PAR in China and not normally required to be disclosed includes:

- Financing plan
- Organization structure and labor requirements
- Project economics
    - Calculated project performance
    - Plant revenues
    - Plant costs
    - Investment for the plant
- Plant capacity
- A list of major equipment with particular detail on sizing
    - Duty requirements for heat exchangers
    - Compressor and major pump horsepower requirements
    - Head requirements for pumps
- An overall material balance showing the quantity of various feedstocks required to produce the desired products along with the waste streams, necessitating disclosure of highly confidential yield information that is not disclosed in any other jurisdiction.
- A block flow diagram of the process showing the major unit operations
- Utility and energy requirements

Safety Assessment (SA)

The SA and its review process require disclosure of trade secret relating to process and storage equipment that is not normally required in jurisdictions outside of China. The SA process requires one expert panel review and a review for approval with the provincial authorities. Detailed information on process equipment is required, which is atypical outside China.

Occupational Health Assessment (OHA)

The OHA and its review process requirements are more consistent with regulatory reviews outside of China as far as the requirements for trade secret disclosures; however, the SA and information provided during that approval must be provided with the OHA as it is reviewed. This combination increases the risk of trade secret disclosure during the OHA. One expert panel review and a review for approval with the provincial authorities are required.

Conceptual Design Package (CDP)

The CDP must be reviewed by multiple agencies, increasing the chances of the disclosure of an applicant's trade secrets. Applicants must disclose isometric drawings of the buildings with equipment placement, which is a trade secret. In addition, the CDP aggregates all the information disclosures from prior submissions into one integrated package, thus creating a compilation of the applicant's trade secrets that is at heightened risk when circulated among multiple agencies.

General Design Package (GDP)

The GDP is not required elsewhere. The GDP also goes to multiple agencies for review, increasing the chances of trade secrets disclosure. The detailed design drawings that embody trade secrets are submitted to a local design institute to be "checked"; trade secrets are particularly vulnerable with design institutes, which are required to be Chinese state-owned entities by law.

Inspections for Imported Equipment

One means of protecting trade secret information embedded in specialized equipment designs is to have the equipment fabricated outside of China. Documentation and inspections required for imported equipment can put this protection measure at risk. Documentation requirements are subjective and can include photographs of the equipment (external and internal), drawings, etc. If the documentation is "insufficient", the equipment can be unpackaged and inspected in detail by customs officials.