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Kung-chung LIU
Singapore Management University, kcliu@smu.edu.sg

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PROFESSOR KUNG-CHUNG LIU*

I. Historical Context

In an effort to become an industrialized country, Taiwan, the Republic of China (ROC) has relied heavily on technology transfers and investment from abroad. The Taiwanese government adopted a heavy-handed policy of regulating investments made by foreigners and overseas Chinese in 1954. These policies include the Foreigner Investment Act (FIA) and the Overseas Chinese Investment Act (OCIA), which require all foreigners and overseas Chinese to obtain the Ministry of Economic Affairs (MOEA) approval prior to making any investments.[1] Such investments may also be in the form of patents, trademarks, copyright, know-how, and other intellectual property (IP).[2] In 1962, the Technology Cooperation Law (TCL) was enacted to regulate those investments that provided patents and know-how in return for royalties instead of capital stock.[3] The TCL marked the commencement of an era in which state-directed intervention was used to control the direction and results of technology transfer from a strategic viewpoint of national development and the optimal use of scarce foreign exchange reserves. The TCL was complemented with a network of laws providing a variety of incentives.

The TCL prescribed that technology cooperation contracts would need to be approved by the Investment Commission, MOEA, before they could actually come into effect. This control mechanism left room for the MOEA to balance domestic and foreign interests.[4] If a contract that came under the jurisdiction of the TCL had not been approved, then the payment of royalties could not be deducted for taxation purposes and the royalties could not be remitted abroad. Presumably, the court's incompetence in handling cases involving

*Ph.D. of Law, 1991, Munich University. Research Fellow, Head of Legal Division, Institute of Social Sciences and Philosophy, Academia Sinica, Taipei, Taiwan.

1. Foreigner Investment Act, art. 8 (1997) (ROC); Overseas Chinese Investment Act, art. 8 (1997) (ROC).
2. *Id.* art. 6(3).
3. Technology Cooperation Law, art. 3(1) (1962) (ROC).
4. *Id.* art. 7 (The article provides that: "Technology cooperation contracts should include 1. Names, specifications and quantity of the products or the services that were the objects of technology cooperation; 2. Contents of patents and know-how, the usage plan and benefits of technology recipients; 3. Royalties and ways of payment.").

foreign parties led to article 8 of the TCL, which mandated that disputes with foreign elements be solved by way of arbitration. Article 8 might also have presented a handy way for foreign parties to avoid the courts and their lengthy procedures. Nonetheless, the courts were thereby deprived of the chance to learn by doing. Consequently, no case law developed and guidance with regard to cross-border technology transfer or license is not readily available.

The TCL was amended only once in 1964 and abolished in 1995. Yet the FIA, OCIA, and the incentive mechanisms continue to survive the test of time. In recent years, government regulation focuses more on outward technology transfers, especially to Mainland China.

No statistics on the total number of technology cooperation contracts are available, however, a study from 1983 shows that there were 1,616 technology cooperation contracts with foreigners, among them, 67 percent were with the Japanese, 21 percent with the Americans, and the remaining 12 percent with the Europeans.[5] To a great extent this ratio still holds true. The TLC's overall effect on technology development in Taiwan is hard to estimate. However, it did function as a kind of buffer for domestic companies who needed a helping hand from the government to cut a better deal with foreign counterparts.

II. Government Regulation on Technology Transfer

A. On Inward Investments and Technology Cooperation

The Taiwanese government frequently uses incentive mechanisms to promote and encourage inward investments. Tax exemption and reduction are the instruments most often deployed. As a general rule, the Income Tax Law (ITL) exempts from income taxes the following two types of royalties paid by domestic undertakings to foreign businesses: (1) royalties paid under special government permission for the use of patents, trademarks, and other franchises to introduce new production technology or products, to improve the quality of products, or to reduce production costs; and (2) royalties approved by the government and paid by the "important manufacturing undertakings" for the purpose of building factories.[6] In specific areas, tax offset and reduction regime is also being provided. The Investment Stimulation Law (ISL), which passed in 1960 and expired on December 31, 1990, stipulated that undertakings that invested outward and acquired government approval to transfer technology domestically, could apply for tax exemption according to article 6.[7] Furthermore, such undertakings could postpone the beginning of their tax exemption period for one to four years according to article 7, ***mutatis mutandis***.[8] Two days before the ISL expired, the Legislative Yuan, namely the Congress, enacted the Industries-Upgrading Facilitation Law, which maintains the extensive tax immunity and reduction for another nineteen years, to the end of 2009. The provisions pertaining to technology transfer are as follows.

5. Mao Rong Huang, The TCL Amendment Draft (in Chinese) art. 1–9 (1993).
6. Income Tax Law, art. 4, (21) (2001) (ROC). (However, the term "important manufacturing undertakings" is not defined by the ITL).
7. Investment Stimulation Law, art. 8 (1960) (ROC).
8. *Id.*

1. *Offsetting Investment Expenditures*

Five to 20 percent of the expenditure on investments in the following technologies may be used to offset business income taxes for that year or, when the former exceeds the latter, over the following four years. The technologies include automation technology, resource recycling technology, anti-pollution technology, new or clean energy utilizing technology, energy conserving technology, technology that recycles water used by the industry, green house emission reducing technology, and energy efficiency enhancing technology, hard and software, and technology for enhancing the digital information capacity of the businesses in the areas of Internet, TV function, business resource planning, communications and telecom products, electronic and TV conference facilities, and digital contents.[9]

As for the expenditure spent on research and development (R&D) and personnel training, a more generous exemption is provided for: 5 to 35 percent can offset the business income taxes for that year. If that expenditure exceeds the average expenditure for the last two years, up to 50 percent of the exceeding amount can be offset against the business income taxes for that year, or when the exceeding amount cannot be entirely offset, the following four years.[10] However, the amount that is to be offset may not exceed 50 percent of the business income taxes for that year, unless it is the last year in which it can be offset.[11]

2. *Certain Royalties Tax-Free*

Fifty percent of the royalties collected by the citizens of the ROC for licensing or the sale of their patents on undertakings based in the ROC is immune from income tax.[12] Article 24 of the Enforcement Rules of the Industries-Upgrading Facilitation Law further prescribes three criteria for the tax exemption: (1) contents of the patents must pertain to the activity items listed on the commercial certificate of the licensees or buyers of the patents; (2) the licensees or buyers of the patents may only use the patents for manufacture, R&D, providing services, or production carried out by other undertakings for the licensees or buyers; (3) the royalties or the sales price for patents must conform with the objective and fair market value information.

In decision number 2786 of 1998 the Supreme Administrative Court adjudicated that no tax exemption is available for agreements where the assignee's duty to pay royalties is contingent upon approval of the tax exemption. The assignee was allowed to use the utility models of the assignor to manufacture and sell products, free of charge, before the utility models were assigned to the assignee, and where the variation of royalties was not based on profits but motivated by the fact that the taxation authority had already rejected another application for tax exemption filed by the spouse of the licensor.[13] In order to encourage the establishment of operation headquarters in Taiwan, the Industries-Upgrading Facilitation Law exempts operation headquarters from paying the following business income taxes:

1. Incomes derived from the provision of management services or R&D to foreign related businesses,

9. Industries-Upgrading Facilitation Law, art. 6(1) (2002) (ROC).
10. *Id.* art. 6(2).
11. *Id.* art. 6(3).
12. *Id.* art. 11.
13. Decision 2786 (1998) of the Supreme Administrative Court, *available at* http://www.judicial.gov.tw (last visited Aug. 18, 2002).

2. Royalties received from foreign related businesses, and
3. Revenues generated from the investments on foreign related businesses.[14]

The requirements and procedures for qualifying as an operation headquarters are determined by the Executive Yuan.[15]

Another source of preferential taxation can be found in the Law Aims to Encourage Private Businesses to Undertake Transportation Construction, effective since December 5, 1994. It contains several provisions that are related to technology transfer:

1. The stimulation measurements apply only to the construction and management of the following major transportation projects: railroads, highways, mass transportation systems, airports, harbors, parking facilities, important leisure facilities, bridges, and tunnels.[16]
2. A maximum period of five years of business income tax exemption is available, beginning from the year in which the transportation projects bear taxable revenues.[17]
3. From 5 to 20 percent of the expenditure on investments in construction and management technology, on the acquisition of anti-pollution technology, and R&D may offset the business income tax of that year, and when necessary, over the following four years.

B. On Outward Investments and Technology Cooperation

Transformed gradually from an importer of investments and technologies to an exporter, Taiwanese businesses have made 6,817 outward investments with a total value of U.S.$26 billion and seventy-five technology cooperation contracts in the years from 1952 to 2000.[18] In 1996, the MOEA decided to extend its regulatory arm to outward investments and technology cooperation made by indigenous entities. It promulgated, without any statutory authorization, the Rules on the Review of Outward Investments and Technology Cooperation. Article 6 of the Rules requires that outward investments and technology cooperation must in principle be submitted to the Investment Commission, MOEA, for approval.

The tension and even military confrontation between Taiwan and Mainland China has existed since 1949, as both sides claimed to be the sole legitimate representative of China and sought reunification. While Mainland China opened up over the last twenty-four years and has accomplished remarkable economic success, Taiwan, on the other hand, has made a further transition to a full democracy. For the Taiwanese, reunification is no longer a matter of ideology, but one of the options that people can democratically choose. But for Mainland China, that concept is incomprehensible and even betrayal. As a result, in 1996 Mainland China launched two blank missiles at the seas around Taiwan, and twice tried fruitlessly to influence the outcome of presidential elections. In response, the Taiwanese government, under the Cross Straits People's Relation Act, not only established the need

14. Industries-Upgrading Facilitation Law, art. 70(1) (2002) (ROC).
15. *Id.* art. 70b.
16. Law Aims to Encourage Private Businesses to Undertake Transportation Construction, art. 5 (1994) (ROC).
17. *Id.* art. 28.
18. This is by far underestimated. Ministry of Economic Affairs R.O.C., Statistics of Economic and Trade, *available at* http://www.moeaic.gov.tw (last visited Aug. 18, 2002).

for prior approval for any investment and technology transfers with Mainland China, but also declared a so-called Less Haste, More Endurance policy. Accordingly, citizens, legal persons, groups, and other institutions of Taiwan first have to acquire approval from the MOEA before conducting any investments, technology cooperation, and business activities in the Mainland area. The stringency of this Act is partially mitigated by the Enforcement Rules of the Cross Straits People's Relation Act, which defines "business activities" as those announced by the competent central authorities as subject to permission or as prohibited.[19]

The MOEA put two other regulations into force regarding investments and technology cooperation in the Mainland area: Rules on the Application for Approval of Investments and Technology Cooperation in the Mainland Area and the Principles for Reviewing Investments and Technology Cooperation in the Mainland Area. The former stipulates that technology cooperation in the Mainland area must be via a third region,[20] and classifies investments and technology cooperation into three categories: (1) permissible, (2) prohibitive, and (3) case-by-case approval.[21]

The overly restrictive regulation and policy towards Mainland China did not serve the actual needs of most Taiwanese enterprises because it hampered their survival in an environment of comparative advantages, as most can be found abundantly in Mainland China. Moreover, it hampered the realization of Taiwan's development goal to become a regional operation center. At the end of August of 2001, the Less Haste, More Endurance policy was replaced by the Actively Open, Effectively Control policy. The new policy was pushed through mainly by non-government members of the Economic Development Council, an organization summoned and chaired by President Chen Shui-bian himself, who came into power in 2000 by winning the presidential election.

However, one year thereafter, the Government has shown much reluctance in actively opening up and zeal for high-handed control over investment in Mainland China by introducing investment ceiling for certain industry, such as silicon foundry, and restricting the movement of certain high tech professionals. The "One China" policy to which the Government has adhered or at least paid lip service until 2000 has been replaced by the "Taiwan First" policy, if not by the "One Side, One Country" slogan.

III. Contract Law on the Technology Transfer or Licensing Agreements

A. The Legal Nature of Technology Transfer or Licensing Agreements

The Taiwanese Civil Code (CC) has its origin in the continental European legal system most notably in the German and Swiss Civil Code (BGB). Similar to the German law of contracts, first priority for the Taiwanese lawyer is to determine and qualify the nature of the contract concerned and apply the corresponding statutes accordingly—irrespective of the terms and language used by the parties. The Taiwanese CC does not provide any specific rules on technology transfer or licensing. Nor does it make any distinction between different types of technology transfer or licenses. However, the IP law does recognize some kind of

19. Enforcement Rules of the Cross Straits People's Relation Act, art. 34(1) (1996) (ROC).

20. Rules on the Application for Approval of Investments and Technology Cooperation in the Mainland Area, art. 5(2) (1996) (ROC).

21. *Id.* art. 7.

compulsory licenses.[22] Among the twenty-six types of contracts that are dealt with in the second part of the CC, the contract for work (Werkvertrag) is the most relevant and most often used by courts.

The contract for work aims to accomplish a specific task,[23] and differs from the contract for services (Dienstvertrag) in that while the provision of services is the direct purpose of the latter,[24] the provision of services alone does not suffice for the specific work required for the former. The contract for work distinguishes itself further from the contract for mandate by the fact that the latter demands only that management be directed in a certain direction, whereas the former requires the accomplishment of a specified task.

The requirement to accomplish a specified task has consequences for the risk distribution that may arise during the execution of a contract. In essence, the contractor for work bears all the risks regarding performance and remuneration until the work is accepted and should provide warranties against defects, regardless of negligence.[25] This, however, is not in conformity with common practice of technology transfer or licensing, which foresees that royalties be paid once the transfer takes place and later at regular intervals. Therefore, it is suggested that parties exclude by contract the application of CC provisions that rest the risk of payment with the contractor for work.

Parties of the contract must agree upon the amount of royalties. In case no agreement is reached, article 491(2) of the CC stipulates that, "if the remuneration for the work was not agreed upon, it shall be determined by the tariffs. When no tariffs are available, it shall be determined according to customs."[26] In decision number 1023 (2000), the Supreme Court expressed its opinion on this issue in a case involving an American engineering consulting company providing a technology transfer program to a local state-owned company.

> Although the remuneration for professional technicians is not comparable to that of the services provided by average people, it is nevertheless not boundless. The numerous tariffs set up by the government for various professional technicians speak for themselves. . . .While the first remuneration quotation made by the transferor was NT$27,978,000 which covered three projects, the second was NT$29,500,000 and it covered only two projects. As such the transferee deemed the remuneration as excessive and it is not without reason.[27]

However, it is dangerous for the Supreme Court to occupy itself with matters of fact and professional remuneration instead of the law.

Finally, article 127(7) of the CC provides a two-year term in which the contractor for work must request his compensation, in contrast to the normal term of fifteen years. This could be problematic when consecutive consulting services have been provided in cases for contesting governmental contracts, as can be observed in decision number 2010 (1998) by the Supreme Court. It is advisable that the contractor for work exercises his right speedily and regularly.

22. *See infra* IV. B.

23. The Civil Code, art. 490(1) (2002) (ROC).

24. *Id.* art. 482.

25. *Id.* arts. 492, 493, 505. Their counterparts in the German Civil Code are §§ 644, 633, BGB. *See* Hanns Ullrich, *Zum Werkerfolgsrisiko beim Forschungs-und Entwicklungsvertrag*, *in* FESTSCHRIFT FÜR WOLFGANG FIKENTSCHER, 301 (1998).

26. The Civil Code, art. 491(2) (2002) (ROC).

27. Decision No. 1023 (2000) Supreme Court, *available at* http://www.judicial.gov.tw (last visited Aug. 18, 2002).

B. Possible Conflicts Between Parties

A focal point of conflict lies in determining whether the technology has been transferred. The Supreme Court has said in decision number 93 (1998):

> Although the transferor of the technology transfer agreement was of the opinion that it had fulfilled its obligation to transfer technology by delivering a 23-page paper document. Yet the expert opinion on the 23-page document given by the Industrial Technology Research Institute showed that it could not necessarily produce the product, which should contain 36 % chlorine. Therefore, it cannot be concluded the licensor has fulfilled its contractual obligation to transfer technology. . . .[28]

The fact that the licensor owns the patent cannot lead to the conclusion that it has provided the transferee with the agreed technology.

As the Supreme Court further elaborated in decision number 501 (1999), if the technology transferor agrees that "it has the ability to produce plank of certain specifications utilizing the existing facilities of the transferee, with no extra R&D required,"[29] then it cannot argue that the failure to produce the plank was due to the fact that the transferee did not use the facilities appointed by it.

IV. IP Rules on Technology Transfer and Licensing Agreements

A. Overview of IP System

The Taiwanese IP system[30] has gone through tremendous reform in the last decade due to two decisive factors: (1) pressure from the United States,[31] and (2) Taiwan's determination to acquire WTO membership. That is to say, Taiwanese IP law is not a self-grown product cultivated consciously by judicial authority. This development only leads to an inventory of laws and regulations, which at times appear to be excessive[32] yet often inadequate in the eyes of businessmen who require certainty.

As a result, Taiwanese IP law is constantly under revision, which worsens both the judiciary and the general public's ability to understand and apply the law. Like a road that is continually under construction, no vehicle can run safely and speedily on it. A well-developed IP system, however, can affect the transfer of technology in several ways, most notably through the registration of assignment and licenses, regulation of parallel imports, compulsory licenses, and prohibition of IP abuse.

B. Compulsory Licenses

Licensing agreements can be reached on a contractual basis or through legal compulsion. A compulsory license is a legal instrument that balances the interests of IP right holders on

28. Decision No. 93 (1998) Supreme Court, *available at* http://www.judicial.gov.tw (last visited Aug. 18, 2002).

29. Decision No. 501 (1999) Supreme Court, *available at* http://www.judicial.gov.tw (last visited Aug. 18, 2002).

30. The Taiwanese IP system includes the Copyright Act, Patent Act, Trademark Act, Trade Secret Protection Act, Integrated Circuit Layout Protection Act, and Plant Seed Act.

31. *See generally* Michael Skrehot, Comment, *Taiwan's Changing Patent Law: The Cost of Doing Business with the World*, 30 Int'l Law. 621, 627–31 (1996).

32. Twenty-two articles in the Copyright Act deal with fair use, and criminal punishment is common.

the one hand, and the academic, cultural, and educational needs of the nation on the other. The Taiwanese Copyright Act and Patent Act both recognize the compulsory license, yet it is seldom, if ever, applied in practice. In contrast to the Copyright Act, the scope of compulsory licenses according to the Patent Act is wider. Article 78(1)(2) of the Patent Act prescribes:

(1) In cases of national emergency, the non-profit use of a patent for the enhancement of public benefit, or when a person was unable to reach a licensing agreement with the patentee concerned under reasonable commercial terms within a considerable period of time, the authority in charge of patent matters may, upon request, grant a license to put the patented invention into practice, provided that such a practice shall be restricted to the purpose of satisfying the domestic market. The request for compulsory license is limited to non-profit use to enhance public welfare with respect to semi-conductor technology.
(2) In the absence of such situations as set forth in the preceding Paragraph, the authority in charge of patent matters still has the discretion to grant a license to practice the patented invention upon request if the patentee has conducted unfair competition and was definitely punished by the judiciary or by the Fair Trade Commission of the Executive Yuan.[33]

According to articles 60, 105, and 122 of the Patent Act, patent assignment and license agreements that contain one of the following clauses and lead to unfair competition, are void: "(1) prohibiting or constraining the assignee to use certain articles or methods not provided by the assignor or licensor, or (2) requiring the assignee to purchase from the assignor products or materials not protected by the patent."[34] These provisions clearly resemble article 19(6) of the Taiwanese Fair Trade Act (FTA).[35] The Integrated Circuit Layout Protection Act (ICLPA) also has a provision regarding compulsory licenses[36] similar to that of the Patent Act. Likewise, it is hardly practiced.

Since the Copyright Act in 1998 reduced the categories of compulsory licenses to only one, namely the sound recording of a musical work,[37] it can no longer be used to compel technology transfer and licensing. Initially, the Copyright Act required that copyright

33. The Executive Yuan is equivalent to the Cabinet.
34. Patent Act, arts. 60, 105, 122 (2001) (ROC).
35. Article 19 of the FTA that is dealt with by this paper reads:

No enterprise shall have any of the following acts which is likely to lessen competition or to impede fair competition:

1. causing another enterprise to discontinue supply, purchase or other business transactions with a particular enterprise for the purpose of injuring such particular enterprise;
2. treating another enterprise discriminatively without justification;
3. causing the trading counterpart(s) of its competitors to transact business with itself; by coercion, inducement with interest, or with improper means.
6. limiting its trading counterparts' business activity improperly by means of the requirements of business engagement. (2000) (ROC).

Article 25(1) of the Enforcement Rules of the FTA further defines the "limiting" as "tying arrangements, exclusive dealing, restrictions on territory, customers or use, and other restrictions on business activities"; Enforcement Rules, *available at* http:www.ftc.gov.tw (last visited Aug. 18, 2002).

36. The Integrated Circuit Layout Protection Act, art. 24 (1995) (ROC).
37. The Copyright Act, art. 69 (2001) (ROC).

protection would only be accorded upon the registration of work. This regulation also applied to the transfer and license of copyright. After 1985, the Copyright Act ceased to demand the registration of work as a precondition of copyright protection. Yet articles 74 through 78 still provided that the then-competent authority, the Copyright Committee of the Ministry of Internal Affairs, register people who wanted to keep records of their copyright transactions. The registration mechanism of the Copyright Act resulted in serious misunderstandings of copyright ownership (presumption of copyright according to registration). It also consumed 70 percent of the manpower of the Copyright Committee. Registration was therefore abandoned in 1998. Today in the copyright area there is no registration requirement with regard to license agreements. This development, however, does not exclude the possibility that private institutions, such as collecting societies, may provide registration services as a means for securing evidence proving the ownership of a particular copyright.

C. Registration

Registering IP assignments and licenses could generally increase the legal certainty that is crucial to IP transactions. Hence, registration is commonly required in Taiwanese IP law. Articles 59 and 105 of the Patent Act attach a *locus standi* effect to registering assignments and license agreements involving invention patents and utility model patents. As a consequence, such agreement cannot be invoked against any bona fide third party unless registered with the Intellectual Property Office (IPO) under MOEA—the authority in charge of patent affairs. However, assigning and licensing a design patent requires no registration.

The Taiwanese Trademark Act is somewhat old-fashioned in that it puts more emphasis on the protection of consumers than on the trademark right holders. Article 26 of the Trademark Act demands registration of the licensing agreement:

(1) Trademark right holders may license other persons to use their trademarks on all or part of the designated goods.
(2) The licensing needs to be registered with the competent authority in charge of trademark matters; unregistered licensing may not be held against bona fide third parties. The same applies where the licensee sublicenses, with the permission of the trademark right holder, the use of the trademark.
(3) The licensed user of a trademark shall indicate on his goods, packages or containers thereof the licensing relationship.[38]

Article 28(1) requires, with similar wording, that the assignment of trademark rights also be registered. A related issue concerns the assignment of rights derived from the application for trademark registration. Article 38 of the Trademark Act allows such assignment, but urges the assignee to apply to substitute his name for that of the original applicant; otherwise the assignment cannot be invoked against any bona fide third party. Article 22 of the Integrated Circuit Layout Protection Act (ICLPA) also provides that assigning or licensing rights on integrated circuit layouts cannot be asserted against bona fide third parties if unregistered.

38. Trademark Act, art. 26 (2002) (ROC).

D. Parallel Imports and Territorial Protection

In considering whether to give IP right holders the exclusive right to import goods produced with their permission, one needs to balance the interests of the IP right holders to maximize their profits against consumer welfare. However, given the facts that Taiwanese citizens do not have many IP rights in foreign countries and that Taiwan is an import country for IP rights, the introduction of this exclusive right of importation is at odds with Taiwan's interests as a whole. The right to parallel import IP-righted products affects free competition and the free flow of goods, both of which are vital to the market economy. As the Supreme Court adequately puts it in decision number 5380 (1993): "the parallel import of genuine goods may prevent the market from being monopolized, facilitate intra-brand price competition, and allow consumers to enjoy the benefit of reasonable prices."[39] However, due to trade pressure from the United States, the Taiwanese IP system is bent towards the interests of IP right holders, and is gradually closing its doors to parallel imports.

Since January 21, 1994, the Taiwanese Patent Act has recognized in articles 56(1), (2) and 117(1) that the patentee of an invention or design patent (but not a utility model patent)[40] has the exclusive right to manufacture, sell, use, or import the patented matter or products that were derived directly from the patented method. This means that any parallel import will be disallowed, without the consent of the patentee of an invention or design patent. Notably, this right to import did not become effective until January 1, 2002, the day on which Taiwan became a member of the WTO. Pursuant to articles 57(2) and 118(2) of the Patent Act and article 35 of its Implementation Rules, the area in which the right of importation exhausts is not mandated by law but can be agreed upon contractually by private parties, whether locally, regionally, or globally.[41]

In 1993, the Trademark Act followed the decisions of the Supreme Court and adopted the "exhaustion theory." Paragraph 3 was added to article 23: "Where the goods bearing a trademark are being traded on the market by the owner of the trademark, or by any person authorized by him, the owner of the trademark may not exercise his exclusive right over the goods, except for the prevention of deterioration or damage of the goods or for any other justifiable reason."[42]

Accordingly, the parallel import of goods that have been legally traded is principally allowed. Only in exceptional cases can the trademark right holder exercise his right to stop the flow of goods that might be deteriorating, damaged, and the like. However, it leaves

39. Decision No. 5380 (1993) Supreme Court, *available at* http://www.judicial.gov.tw (last visited Aug. 18, 2002).

40. According to the Annual Report of the IPO, in 2000 there were altogether 61,231 applications for patents filed before the IPO, and 42,421 patents were granted. Local inventors took up 59.40 percent and 61.11 percent respectively. However, taking a closer look at the types of patents that were granted to them shows that only 4,223 of those were "invention patents" (with a higher technical level and a protection period of twenty years), while 16,874 were utility models (with a protection period of twelve years). Hence, a bulk of the Taiwanese R&D achievement was comprised of utility model patents. In addition, 4,715 "design patents" (with a protection period of ten years) were issued to Taiwanese applicants.

41. Patent Act, articles 57(2) and 118(2) read: "The area in which sale is permissible is to be determined by courts according to facts." Article 35, Implementation Rules of the Patent Act reads: "The area in which the sale is permissible according to the last sentence of Articles 57(2) and 118(2), is to be determined by provisions of contracts; in the cases when contracts are silent or unclear, the area is to be determined by the genuine intention of the parties, trading customs or other objective facts of trade." (1994) (ROC).

42. Trademark Act, art. 23(3) (2002) (ROC).

room for doubt. If it is for the preservation of quality of goods, then it is an issue that should be and is better dealt with by the Consumers Protection Act. Even if it is for the preservation of the good will of trademark right holders, it is not justifiable to grant trademark right holders a superior position over the property right of owners of the goods. If it is meant to protect trademark right holders against an intentional damage of the goods by their owners in order to diminish reputation of the former, then it can be sufficiently handled by the FTA (either article 22 or 24).[43] Furthermore, it is dubious how trademark right holders can enforce their right over the goods owned by others—to prohibit the continued sale or use of the trademarked goods and sue the continued sale or use of the goods for infringement of trademark right?

The Copyright Act is the forerunner in banning parallel imports. In 1993, articles 87 and 87a were introduced into the Copyright Act. According to article 87, the import of reproductions of copyrighted works that were produced without the consent of the copyright holders, or the import of originals or reproductions of works without the consent of copyright holders, is deemed to be an act in violation of the Copyright Act, indirectly granting copyright holders the exclusive right to import copyrighted goods.[44] Article 87a provides several narrowly defined exceptions to the right to import.[45] Combined with the decree promulgated by the competent authority, one can, for example, parallel import five copies of works for non-profit educational or archival purposes, but only one copy when it comes to audiovisual works; moreover, one can parallel import only one copy of work for personal use and bring only one piece of work as personal luggage back from abroad. The violation of the right of importation is subject to two years imprisonment and/or a monetary

43. Article 22 of the FTCA provides: "No enterprise shall, for the purpose of competition, make or disseminate any falsehood that is able to damage the business reputation of another." Section 24 of the Fair Trade Act reads: "In addition to what is provided for in this Law, no enterprise shall otherwise have any deceptive or obviously unfair conduct that is likely to affect trading order."

44. Note that such a right is not positively listed as copyright.

45. The Copyright Act, article 87a reads:

> The provisions of subparagraph 4 of the preceding article do not apply to any of the following circumstances:
>
> 1. To import the original or copies of a work for the use of central or local government agencies; provided, this does not apply to importation for use in schools or other educational institutions, or importation of any audiovisual work for purposes other than archival use.
> 2. To import the original or a specified number of copies of any audiovisual works in order to supply such works to nonprofit scholarly, educational or religious organizations for archival purposes, and to import an original or specified number of copies of works other than audiovisual works for library lending or archival purposes where the use of such copies conforms with the provisions of Article 48.
> 3. To import the original or a specified number of copies of a work, where such copy is for the private use of the importer, not for distribution, or where the import is by a person arriving from outside the territory, the copy forms a part of such person's personal baggage.
> 4. To import the original or copies of a work incorporated into any legally imported goods, machinery, or equipment; such original or copies of the work cannot be reproduced during the use or operation of the goods, machinery or equipment.
> 5. To import an instructional or operational manual accompanying any legally imported goods, machinery, or equipment; provided, this does not apply where the instructional or operational manual are the principal objects of the importation.

The "specified number" set forth in subparagraphs 2 and 3 of the proceeding paragraph shall be prescribed by the competent authority. (2001) (ROC).

punishment in the maximum amount of NT$100,000.[46] The ICLPA also provides right holders with the exclusive right to prohibit the import and distribution of layouts or integrated circuits incorporating layouts for commercial purposes.[47]

V. Anti-trust Rules

A. General Remarks

The inherent tension between IP rights and antitrust is also visible in Taiwan. As article 40(1) of the TRIPS Agreement puts it, some licensing practices or conditions pertaining to IP rights that restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.[48] To mitigate, article 45 of the FTA provides a general rule: "No provision of this law shall apply to any proper conduct in connection with the exercise of rights pursuant to the provisions of the Copyright, Trademark, or Patent Acts."[49] How is "proper conduct" to be understood? Generally speaking, any activity that aims to serve the purpose of IP rights, such as the provision of sufficient rewards for the achievements made by the IP holders, and without the intention of disrupting the function of competition and its results, is likely to fall into the category of "proper conduct."

In the United States, the 1970s pattern of weak patent laws and strong antitrust laws reversed in the 1990s with a pattern of strong patent laws and weak antitrust laws.[50] Taiwan, on the other hand, is equipped with weak patent laws and finds itself at the stage where antitrust laws are becoming stronger. It took the Taiwanese Fair Trade Commission (FTC) nearly ten years to accomplish its capacity building process to deal with IP misuse issues caused by foreign IP holders. In 1993, Cyrix, AMD, and the Business Association of the Computer Manufacturing Industry Taipei County, while licensing its patents, accused Intel of violating the FTA. Allegedly, Intel engaged in the following activities: price manipulation, restricting PC manufacturers from using central processing units made by its competitors, tying in products, compelling Taiwanese manufacturers to sign patent licensing agreements, bringing law suits against competitors systematically and continuously, and price discrimination. The case ended with an administrative settlement between the FTC and Intel in 1996. In 1995, RCA was accused of engaging in anti-competitive activities, discriminating in royalties, charging improper royalties, collecting royalties retroactively, and using section 337 of the U.S. Customs Act as a negotiation threat. Again, the parties reached an administrative settlement.[51] These two administrative settlements were not publicized in the FTC Gazette; hence their contents remain unknown to the general public.

Of late, a student movement called "Anti-anti piracy" accusing Microsoft of misusing its monopolistic power in Taiwan to charge excessive prices has caught the attention of the general public and led the FTC to look into the case. After five months investigation, it is reported that the FTC is ready to settle with Microsoft.[52]

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46. *Id.* art. 93(3).
47. The Integrated Circuit Layout Protection Act, art. 27(2) (1995) (ROC).
48. TRIPS Agreement, art. 40(1) (1994).
49. Fair Trade Act, art. 45 (2000) (ROC).
50. John H. Barton, *Patents and Antitrust: A Rethinking in Light of Patent Breadth and Sequential Innovation*, 65 Antitrust L.J. 449 (1997).
51. Kung-Chung Liu, *On the Practice and Theory of Administrative Settlement by the FTC*, 235 Taipei Bar J. 68, 70 (1999) (in Chinese).
52. *See* http://www.ftc.gov.tw/showframenew.asp?menu = CONTENTTB&DisplayKey.

B. Guideline on the Review of Patent and Know-How Licensing Agreements

Following the U.S., European, and Japanese rules on technology licensing, the FTC promulgated the Review of Technology Licensing Agreements Guideline on January 20, 2001. Up to now, the Guideline has not been put to use by the FTC or the courts. It covers patents and know-how licenses.[53] The FTC does not presume that the licensor possesses market power simply because he owns a patent or know-how.[54]

1. *Analytical Steps*

Point 4 of the Guideline delineates the analytical steps that the FTC will follow.

(1) The Patent Act Does Not Exclude the Application of the FTA.
When dealing with technology licensing agreements, the FTC will begin the review with article 45 of the FTA. Apparently proper conduct in exercising a right according to the Patent Act, which in reality exceeds its boundary of proper conduct and violates the legislative intention of this Law to protect inventions, will be handled by the FTA in accordance to this Guideline.

(2) Impact on Relevant Markets:
When reviewing technology licensing agreements, the FTC will not be bound by the forms or language used. Instead, they will concentrate on the possible or actual restraint of competition or unfair competition in the following relevant markets:
   i. Goods markets, where the goods produced or provided for through the use of the licensed technology;
   ii. Technology markets which are defined by the substitutability for the technology at issue; and
   iii. Innovation markets which are defined by the scope of possible product R&D.

(3) Factors to Be Considered
When reviewing technology licensing agreements, the FTC will not only take into account reasonableness of the relevant clauses, but will also consider the following factors:
   i. The market power of the licensor over the licensed technology;
   ii. The market standing of parties to the licensing agreements and the market situation;
   iii. The impact of the licensing agreements on the possibility of using the technology at issue and the exclusion of competition;
   iv. The difficulty or ease of market entry;
   v. The limiting period of the licensing agreements; and
   vi. The international or industrial practices on the relevant technology licensing markets.

2. *White Clauses*

The Guideline contains the so-called black, white, and gray clauses and gives examples thereof, illustratively but not exhaustively.[55] Point 5 of the Guideline stipulates that provisions of the licensing agreements with regard to the following do not violate the FTA:

53. FTC, Review of Technology Licensing Agreements Guideline, point 2(2) (2001) [hereinafter Guideline].
54. *Id.* at point 3.
55. *Id.* heading of points 5, 6, and 7.

i. Restricting clauses that determine the scope in which licensees may practice be limited to manufacture, use or sell.
ii. Restricting clauses that within the term of the patents limit the period of the licensing agreements; or restricting clauses that limit the period of the licensing agreements before the secrecy of the licensed know-how was lost due to reason not attributable to the licensees.
iii. Royalty agreements that for the sake of easy calculation determine the amount of royalties in accordance with: (a) the amount of manufactured or sold final products using the licensed technology, in cases where the licensed technology is part of the manufacturing process; or (b) the amount of raw materials or components used to manufacture the licensed technological products in cases where the licensed technology exists in the components.
iv. Royalty agreements that prescribe for licensees to pay royalties even after the expiration of patents for the licensed technology, in cases where it was agreed that the royalties to be paid in installments or not to be paid until the technology was practiced; royalty agreements prescribing that in cases where the know-how was publicized due to reasons not attributable to the licensors, their licensees still have to pay royalties for the period based on the agreed upon method until the licensing agreements have become ineffective or terminated.
v. Agreements that prescribe for the licensees grant back on a non-exclusive basis, improvements or new methods of applying the licensed technology to the licensors.
vi. Agreements that demand the licensees make the best effort to manufacture, and sell the licensed products.
vii. Agreements that demand the licensees, over the duration of licensing agreements or after their expiration, to keep the confidentiality of know-how that is still secret.
viii. Agreements that stipulate the minimum amount of products that should utilize the licensed technology or that dictate the minimum amount of products to be sold, in order to insure the minimum amount of royalty is received by the licensors.
ix. Agreements that stipulate the licensees maintain a certain quality of products, raw materials, or components of the licensed technology to the extent necessary for the licensed technology to produce a certain utility and the licensed products to maintain certain quality.
x. Agreements that prohibit transferring or sub-licensing of the licensed technology by the licensees.
xi. Agreements that exclude the licensees from practicing the licensed technology beyond the expiry date of the licensing agreements where the licensed patents are still valid or the licensed know-how continues to remain secret.[56]

However, the Guideline does not exclude the possibility that after taking Points 3 and 4 into consideration, the lawfulness of the above clauses will be denied.

3. *Black Clauses*

Point 6 of the Guideline lists some provisions as *per se* illegal:

i. A violation of article 14 of the FTA occurs when the parties to the technology licensing agreement, that are also in a competitive relationship with one another by means of

56. *Id.* at point 5.

contract, agreement, or any other form of mutual understanding, jointly determine the price of the licensed product, limit the quantity, trading counterparts, trading territory, and R&D area, or restrict the business activities of each other and may in doing so influence the function of the market.

ii. Technology licensing agreements that contain one of the following situations and that impose a danger to restrain competition or impede fair competition of a specific market, violate article 19(6) of the FTA:
   a) Restricting parties to the technology licensing agreement or their related enterprises from competing in the R&D, manufacture, usage or sale of competing products.
   b) Prescribing the marketing method for the licensees, restricting the scope in which the licensees can use the technology, or restricting their trading counterparts in order to segment customers.
   c) Compelling the licensees to buy, accept or use the technology or know-how that they don't need.
   d) Compelling licensees to grant back exclusively, any improvements they have made on the licensed technology or know-how.
   e) Restricting the freedom of the licensees to use patents or know-how that has expired or has been publicized due to reasons not attributable to the licensees or asking the licensees to continue to pay royalties for them.
   f) Restricting licensees from manufacturing, using or selling competing products or from adopting a competing technology after the technology licensing agreement expires.
   g) Restricting the price at which licensees may sell the licensed products that they have manufactured or produced to third parties.
   h) Restricting licensees from challenging the effectiveness of the technology in question.
   i) The refusal by the licensors to provide the licensees with the contents, scope and terms of their patents.

4. *Grey Clauses*

According to Point 7 of the Guideline, the following provisions of technology licensing agreements, if imposing a danger to restrain competition or impede fair competition of a relevant market, may violate article 19(6) of the FTA:

i. Segmenting within the term of patents the licensing territories within Taiwan, segmenting the licensing territories within Taiwan before the secrecy of know-how was lost due to reasons not attributable to the licensors.
ii. Restricting the sales territory or counterparts of the licensees, whereas the scope of restriction has nothing to do with its area of application. Restricting the area and scope of application where licensees can practice the licensed technology.
iii. Imposing an upper limit for licensees to manufacture or sell products, or limiting the number that the licensees can practice the patents or know-how.
iv. Requesting that the licensees sell through licensors or through person designated by the licensors.
v. Demanding licensees to pay royalties according to the amount of products manufac-

tured or sold by licensees, irrespective of whether the licensed technology was practiced.[57]

The restriction demanded by the licensors of the licensing agreements that the licensees procure from the licensors, or parties designated by them, materials or components that are not within a reasonable and necessary scope for the licensed technology to reach a specific performance, or to maintain the reputation of the trademarks or the secrecy of know-how, and that may lead to likelihood of constraining competition or impeding fair competition, may violate article 19(1) or (6). The discrimination imposed by the technology licensing agreements without proper reason against the licensees with regard to trading conditions, royalties and the like, that may lead to likelihood of constraining competition or impeding fair competition, may violate article 19(2).

C. Horizontal Restraints and Patent Pools

1. *Horizontal Restraints*

A common instrument that IP right holders can use to restrain horizontal competition is to issue warning letters to intimidate potential counterparts of competitors. This tool is highly effective, as most would rather avoid trouble and accept the asserted infringement at face value. With no judicial precedent and comparable foreign experiences available, the FTC has, out of its own creativity, conceived and promulgated the Guideline on the Review of Warning Letters Alleging the Infringement of a Copyright, Trademark or Patent Right. According to Point 3 of this Guideline, the issuance of warning letters is an absolutely proper conduct to exercise one's right accorded by the Copyright, Trademark, and Patent Act after the completion of one of the following procedures:

i. A determination by a court of first instance that infringement of a copyright, trademark or patent right took place.
ii. An expert opinion confirming the infringement has been made by an institution, which was jointly appointed by the Judicial Yuan and the Executive Yuan; and the manufacturer, importer or agent who may have committed the infringement has been notified by the right holders to cease the infringement.

In cases where due diligence of care has been taken or in situations where notification is objectively impossible, the aforementioned notification requirement becomes non-binding.[58]

However, according to Point 4 of the Guideline, the issuance of warning letters after the completion of one of the following procedures is itself a proper conduct for exercising one's right accorded by the Copyright, Trademark, and Patent Acts, provided that Points 6–9 have not been violated:

i. An expert opinion confirming an institution, which was not jointly appointed by the Judicial Yuan and the Executive Yuan; and the manufacturer, importer or agent who may have committed the infringement, has made the infringement has been notified by the right holders in advance to eliminate the infringement.

57. *Id.* at point 7.
58. *Id.* at point 3.

ii. The warning letter has stated the specific contents and scope of the copyright, trademark or patent in question and the concrete infringing activity, so that the receiving party can make a reasonable judgment; and the manufacturer, importer or agent that may have committed the infringement has been notified by the right holders in advance to eliminate the infringement.[59]

In cases where due diligence of care has been taken or notification is objectively impossible, the aforementioned notification requirement becomes non-binding.

Following Point 4 procedure does not exempt issuance of warning letters from the articles 19(1) and (3), 21 (misleading presentations) and 22 (trade libel) of the FTA,[60] if the requirement of the respective article has been met. Nor does it exclude the application of article 24 when:

i. No legal copyright, trademark, or patent exists;
ii. The scope of the copyright, trademark, or patent has been exaggerated;
iii. It has been falsely stated or implied that its competitors or in general other competitors on the market are illegally infringing its copyright, trademark, or patent; or
iv. A deceptive or obviously unfair statement was made,

and the trading order is likely to be affected.[61]

The direct issuance of warning letters without following Point 3 or 4 procedures may violate article 24 of the FTA, if the trading order is likely to be affected.[62] The Guideline is effectively enforced by the FTC and has cured the abusive practice of issuing warning letters.

2. *Patent Pool*

Unlike the United States, which has a legal history of 100 years of dealing with patent pools,[63] the antitrust issue of patent pools is just emerging in Taiwan. The Guideline on the Review of Technology Licensing Agreements promulgated by the FTC does not address this issue at all. The pro-competitive effects of patent pools are obvious, and include reducing transaction and litigation costs, clearing blocking patents, and facilitating the rapid development of technology.[64] It is also indisputable that the "ubiquity of patent pools on the industrial landscape demonstrates that this is an institutional mechanism capable of simplifying transactions in a wide variety of industries. As more and more IPs are issued, potential transaction costs will grow as well, making pools even more important."[65] However, if we were to look at it from the viewpoint of licensees, who are not members of patent pools, the anti-competitive effects of patent pools seem just as persuasive.

In 1999, Taiwanese enterprises accused Phillips Electronics, N.V., the Sony Corporation (Japan), and Taiyo Yuden (Japan) of abusing their monopolistic power on the CD-R market

59. *Id.* at point 4.
60. *Id.* at points 6–8.
61. *Id.* at point 9.
62. *Id.*
63. Steven C. Carlson, *Patent Pools and the Antitrust Dilemma*, 16 YALE J. ON REG. 357, 373–76 (1999).
64. *Id.* at 379–381; U.S. Dept. of Justice and FTC, Antitrust Guidelines For the Licensing of Intellectual Property, 5.5 (1995), ***available at*** http://www.usdoj.gov/utr/public/guidelines/ipguid/htm (last visited Aug. 18, 2002).
65. Robert P. Merges, *Institutions for Intellectual Property Transactions: The Case of Patent Pools*, ***in*** EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY 123, 154 (Rochelle Cooper Dreyfuss et al. eds., 2001).

by demanding excessive royalties,[66] engaging in cartel activities by bundling patents and by licensing in packages, tying in patents that have already expired, and obscuring information about the patents to be licensed.[67] This time, the FTC found that the defendants indeed violated several articles of the FTA.

The FTC determined that the defendants were horizontal competitors in the CD-R patent-licensing market. The defendants' assertion that the patents they owned were collectively necessary for the production of a certain product, and that the patents complemented each other, did not affect the determination of a horizontal relationship, since the defendants admitted that they still offered individual licenses competitively.

The FTC went on to find that the defendants violated article 14 of the FTA by engaging in two cartel activities. First, Sony and Taiyo Yuden promised Phillips that "all the licensing requests on their patents at issue will be forwarded to Phillips, and no other licensing agreements will be agreed upon, except for other cross licensing agreements of a broad coverage."[68] Second, Phillips, in its response to the complainant, stated, "Phillips, Sony and Taiyo Yuden have all agreed that there is only one way of calculating royalty, namely 3% of the net sales price and at least 10 Japanese Yen for each CD-R."[69] Such cartel activities were sufficient to affect the market function of producing and trading products or providing services, because the defendants owned all the patents necessary for the production of CD-Rs and thus together possessed a worldwide monopoly status; the collective licensing left no room for individual licensing.

The FTC further held that the defendants engaged in monopolistic conduct by undertaking through a cartel in the CD-R patent-licensing market, and that they also violated articles 10(2), (4) of the FTA.[70] Phillips defended their royalty scheme as necessary to recovering their tremendous R&D investment at the time when licensing agreements were first negotiated. However, the FTC looked into the drastic price drop (U.S.$7 for each CD-R in 1996, and less than U.S.$0.5 in 2000) and the sixty-fold growth in volume worldwide (182 million CD-R in 1997 and 3.6 billion CD-R in 2000). It came to the conclusion that the maintenance of such a royalty scheme would reap for the defendants royalties of twenty to sixty times more in 2000 than the expected amount. On the other hand, defendants refused to lower their royalty scheme to match market demand. Hence the defendants were found guilty of abusing their monopolistic market power through charging royalties far in excess of those expected by the licensors.

66. The demanded royalty is the higher of 3 percent of the net sales price or ten Japanese Yen for each CD-R—currently, ten Yen is about 17.8 percent of the sales price of a CD-R in contrast to the average royalty of less than 5 percent in most computer industries.

67. Decision No. 21 (2001) of the FTC, see Phillips Electronics, N.V. et al., 10 FTC Gazette 2001, No. 2, 151–180.

68. *Id.*

69. *Id.*

70. Article 10 of the FTA prescribes:

> No monopolistic enterprise shall:
>
> 1. directly or indirectly prevent other enterprises from competing by unfair means;
> 2. improperly set, maintain, or change the prices for goods or the remuneration for services;
> 3. make a trading counterpart give preferential treatment without justification; or
> 4. otherwise abuse its market power.

(2000) (ROC).

Phillips et al. were also found to be illusive about important trading information, such as the contents, scope, terms of patents and the number of patents they individually owned. Moreover, the FTC found defendants' demands that licensees withdraw their applications for the invalidity of patents, as a precondition for concluding the licensing contracts was improper conduct for exercising one's patent rights. All of these mounted to a so-called exploitative abuse of monopoly power and therefore violated article 10(4) of the FTA. Thus, Phillips must pay a fine of NT$8 million, Sony NT$4 million, and Taiyo-Yuden NT$2 million.[71]

The Taiwan experience shows that multinational conglomerates are not immune to temptation when it comes to conducting anti-competitive activities, especially in the name of intellectual property. Given the already unbridgeable imbalance between the licensing and licensed parties,[72] no one can expect OEM companies to check or challenge the validity of the patents in question. Additionally, patent pools formed by the IP giants further worsen the position of licensees. It has been suggested that open membership and non-exclusive licensing among pool members be taken as an important mechanism for preventing anti-competitive harm from pooling.[73] However, this seems insufficient. The step and direction that the Taiwanese FTC has taken in placing patent pools and cross licensing agreements under the scrutiny of rules concerning cartel and the abuse of monopoly power, is more appropriate action.

VI. Conclusion

To conclude, a brief recap follows:

i. Inward and outward investment, whether in the form of capital or technology, is subject to prior approval by the Investment Commission, MOEA. Approval is routinely granted, except for certain investments with Mainland China. A wide range of tax incentives is available for inward investment.
ii. In Taiwan, technology transfer or licensing agreements will typically be treated as contracts for work. It is, however, suggested to contractually exclude provisions of the CC that rest the risks of payment entirely with the contractor for work.
iii. The Copyright Act, Patent Act and the Integrated Circuit Layout Protection Act provide for compulsory licensing. Yet they are seldom used. The parallel import of patented goods or protected integrated circuit layouts is permissible only with the consent of the patentee of an invention or design patent or the right holder of integrated circuit layouts. Parallel import of copyrighted goods by non-copyright holders is allowed only on a very limited basis. In contrast, the parallel import of trademarked goods is allowed in principle.
iv. The importance of antitrust rules with regard to patent and know-how licensing agreements in Taiwan is expected to increase with the promulgation of Guideline of Technology Licensing Agreements by the FTC. The FTC has recently placed the patent pools and cross licensing agreements under the scrutiny of rules concerning cartel and abuse of monopoly power.

71. Phillips Electronics, N.V. et al., 10 FTC Gazette 2001, No. 2, 151–180.
72. In the Phillips case, more than 100 foreign patents are involved, none of which are Taiwanese.
73. Merges, *supra* note 65, at 164.