AN INTRODUCTION TO ADMINISTRATIVE PROTECTION FOR PHARMACEUTICALS

GAO XIA-YUN*

This Paper focuses on three primary topics: (1) the origination and major contents of administrative protection for pharmaceuticals; (2) the characteristics of administrative protection for pharmaceuticals; and (3) the implementation of administrative protection for pharmaceuticals.

ORIGINATION AND MAJOR CONTENTS OF ADMINISTRATIVE PROTECTION FOR PHARMACEUTICALS

Administrative protection for pharmaceuticals is a special protection for exclusivity which is different from patents, trademarks, or copyrights. This program was originated from Article 2 of the Memorandum of Understanding Between the Governments of People's Republic of China and the United States of America on Protection for Intellectual Property (MOU), signed on January 17, 1992. The Article provides administrative protection for pharmaceutical products and agrochemical products. (Hereafter, any references are only with regard to administrative protection for pharmaceuticals.)

Provisions on the protection can be summarized as follows. A pharmaceutical product that was granted a product patent in the U.S. during the period of January 1, 1986 and January 1, 1993, that has been approved for marketing in the U.S. by the Food and Drug Administration (FDA), and that has not been sold in the territory of China, is eligible to apply for administrative protection in China after signing a contract for manufacturing or distribution with a Chinese enterprise as legal entity. After examination and approval by the competent authorities of China, the product concerned would be granted an exclusive right of administrative protection for seven and a half years, starting from the date of certificate issuance.

According to Article 2 of the MOU, China enacted the Regulation...
tions on Administrative Protection for Pharmaceuticals (Regulations), which were approved by the State Council and promulgated by the State Pharmaceutical Administration of China. These Regulations came into force on January 1, 1993. Subsequently, China signed bilateral agreements on administrative protection in succession with Switzerland, the European Union, Japan, and Norway. The Regulations are now applied to the above contracting countries as well.

The rights of administrative protection for pharmaceuticals are explicitly specified in the Regulations. For pharmaceutical products under administrative protection, the health authorities of China shall not approve any other entity to manufacture or sell the same without license from the exclusive right holder. Administrative protection is a transitional protection only. In time, fewer drugs will be eligible for administrative protection because the Patent Law of China began to provide protection for drug products on January 1, 1993, while the number of patents issued between January 1, 1986 and January 1, 1993 is fixed. The program of administrative protection will terminate automatically as soon as protection is finished for all these drug products that were both patented and approved for sales.

CHARACTERISTICS OF ADMINISTRATIVE PROTECTION

Comparing patent protection with administrative protection, we can find an apparent difference between them. The major points are demonstrated below.

A. Scope of Protection

To view the conditions for protection, administrative protection covers a specific drug product included in the patent claims issued between January 1, 1986 and January 1, 1993, and at the same time approved for marketing by the health authorities. A patent, on the other hand, protects a range of products defined by the claims.

B. Supply of Products

When applying for administrative protection, the applicant has to submit a copy of contract with a qualified Chinese enterprise as legal entity on manufacture or sales of the drug concerned. This means that a foreign enterprise intending to apply for administrative protection for a pharmaceutical in China has to make the product available to the Chinese market, including manufacturing and sales. However, for a patent application, it is not possible to require supplying the
product covered by the application, because when a patent application is filed, the development of the product is still at a very early stage, and therefore it is not possible to supply the product. Even for those valid patents that were already granted, it may not be one hundred percent feasible to provide products.

C. Economic Benefits

Drugs seeking administrative protection are patent drugs already on the market. Some have been selling well on the international market. Under such conditions, the economic benefit is significant if the administrative protection is approved and an exclusivity of seven and a half years on the Chinese market is available. Although these products have not and could not obtain patent protection in China, administrative protection will enable the right holders to obtain very solid economic benefits, perhaps greater benefits than under patent protection. Administrative protection may be greater, because when patent protection is filed the technology is not yet mature and it may take several years or more to develop the products and then make profit. Furthermore, some patents may not ultimately become a commercial products.

To conclude the above, providing administrative protection by China means providing a special exclusive protection for foreign pharmaceutical manufacturers. This will not only allow a substantial economic benefit for the right holders, but will also provide a better environment for investment. We hope that the foreign pharmaceutical manufacturers can bring their new products and new technologies under patent protection to China for cooperative production with Chinese enterprises. However, presently, while a majority of products applied for administrative protection are or will be imported for marketing in China in the form of finished preparations, only a minor part are or will be jointly manufactured in China. The latter is mostly formulating preparations from imported bulk materials or repackaging of finished preparations.

IMPLEMENTATION OF THE REGULATIONS

In order to implement the Regulations, State Pharmaceutical Administration of China has set up a special office, the Office of Administrative Protection for Pharmaceuticals (OAPP), authorized as the receiving and examination organization of application for administrative protection for pharmaceuticals. At the same time, Huake Pharmaceutical Intellectual Property Consultative Center is
designated as the agency for applications for administrative protection.

It has been over four years since January 1, 1993 when the Regulations on Administrative Protection for Pharmaceuticals came into force, OAPP has been strict, serious and fair in executing the Regulations. By July 10, 1997, China had received ninety applications filed by applicants from the USA, Japan, Switzerland, England, Germany, Ireland, Italy, Netherlands, Sweden, Belgium, Finland, and France. Among these eighty-five were accepted, seventy-one approved, eighty-four concluded, while others are under examination.

In order to better implement the Regulations and to make the examination procedures perfect, China has made some corresponding provisions. We are sure these provisions conform with the Regulations and the MOU. Furthermore, we are striving to improve and perfect our work in the future so that the Regulations can be better implemented.