关于权利例外和限制的调查问卷

Questionnaire on Exceptions and Limitations to Patent Rights

The answers to this questionnaire have been provided on behalf of:

Country: Office:	中华人民共和国 中华人民共和国国家知识产权局
Person to be	contacted:
Name:	
Title:	
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第一部分:一般性信息 [Section I: General]

本部分意在了解各局所适用的法律中关于专利权的例外和限制的规定的一般情况。为本调查问卷的目的, "所适用的法律"是指国家法和区域适用的成文法及判例法。

[This section is intended to obtain general information on exceptions and limitations to patent rights that are provided under the applicable laws. For the purpose of this questionnaire, the term "applicable law" refers to relevant national and regional statutory law and, where applicable, case law.]

调查问卷中使用的术语取其一般的含意,意在涵盖所用的每个概念的广义解释,各局所适用法律中关于例外和限制的准确用词有可能不同。对于各种限制和例外的更为详细的解释可参见以下文件: SCP/13/3, SCP/15/3 和 CDIP/5/4。

[The terms used in the questionnaire are drafted in a general way aiming at providing a broad understanding of each concept used, assuming that the exact wording of these exceptions and limitations might differ under the applicable laws. More detailed explanations of the various exceptions and limitations may be found in the following documents: SCP/13/3, SCP/15/3 and CDIP/5/4.1

- 1. 作为本调查问卷涉及的专利例外和限制的背景,一项发明可以被授予专利权的法律标准是什么?如果专利性标准因技术领域不同而有差异,请举例解释。请说明法律渊源(成文法、判例法),指出有关规定和/或概述有关判决。
- [1. As background for the exceptions and limitations to patents investigated in this questionnaire, what is the legal standard used to determine whether an invention is patentable? If the standard for patentability includes provisions that vary according to the technology involved, please include examples of how the standard has been interpreted, if available. Please indicate the source of law (statutory and-or case law) by providing the relevant provisions and/or a brief summary of the relevant decisions.]

根据中国专利法的规定,一项发明被授予专利权应当具备新颖性、创造性和实用性。专利性标准不因技术领域差异而不同。

中国专利法第二十二条规定:

" 授予专利权的发明和实用新型,应当具备新颖性、创造性和实用性。

新颖性,是指该发明或者实用新型不属于现有技术;也没有任何单位或者个人就同样的发明或者实用新型在申请日以前向国务院专利行政部门提出过申请,并记载在申请日以后公布的专利申请文件或者公告的专利文件中。

创造性,是指与现有技术相比,该发明具有突出的实质性特点和显著的 进步,该实用新型具有实质性特点和进步。

实用性,是指该发明或者实用新型能够制造或者使用,并且能够产生积极效果。"

请列出你国法律中对专利性的排除事项。如果排除事项的渊源与专利性标准的渊源不同,请指出排除事项的渊源,并指出判例法或解释与主题排除问题有关的判决。¹

[Correspondingly, please list exclusions from patentability that exist in your law. Furthermore, please provide the source of those exclusions from patentability if different from the source of the standard of patentability, and provide any available case law or interpretive decisions specific to the exclusions.¹

根据中国专利法第五条的规定,对违反法律、社会公德或者妨害公共利益的 发明创造,不授予专利权;对违反法律、行政法规的规定获取或者利用遗传资 源,并依赖该遗传资源完成的发明创造,不授予专利权。

中国专利法第二十五条规定,对下列各项,不授予专利权:

- (一)科学发现;
- (二)智力活动的规则和方法;
- (三)疾病的诊断和治疗方法;
- (四)动物和植物品种;
- (五)用原子核变换方法获得的物质;
- (六)对平面印刷品的图案、色彩或者二者的结合作出的主要起标识作用的设计。(注:中国专利法授予包括发明、实用新型和外观设计在内的三种类型专利权)

¹ 本问题不表明本问卷将全面讨论专利主题排除这一问题。

This question does not imply that the topic of exclusions from patentability is dealt with in this question exhaustively.

- 2. 作为本调查问卷涉及的专利例外和限制的背景,专利所赋予的独占权是什么?请指出相关规定或判例法。此外,如果专利申请的公布会给专利申请人带来一定的独占权,此种权利是什么?
- [2. As background for the exceptions and limitations to patents investigated in this questionnaire, what exclusive rights are granted with a patent? Please provide the relevant provision in the statutory or case law. In addition, if publication of a patent application accords exclusive rights to the patent applicant, what are those rights?]

根据中国专利法第十一条,专利所赋予的独占权是指,发明和实用新型专利 权被授予后,除另有规定的以外,任何单位或者个人未经专利权人许可,不得实 施其专利,即不得为生产经营目的制造、使用、许诺销售、销售、进口其专利产 品,或者使用其专利方法,以及使用、许诺销售、销售、进口依照该专利方法直 接获得的产品。

中国专利法对公布后的专利申请给予临时保护,具体而言,专利法第十三条规定,发明专利申请公布后,申请人可以要求实施其发明的单位或者个人支付适 当的费用。

3. 对于专利权, 你局适用的法律规定了哪种例外和限制(请指出适用的例外/限制):

[3.		ch exceptions and limitations does the applicable law provide in respect to patent rights
	(plea	ase indicate the applicable exceptions/limitations):
		Private and/or non-commercial use;
		Experimental use and/or scientific research;
		Preparation of medicines; ²
		Prior use;
		Use of articles on foreign vessels, aircrafts and land vehicles;
		Acts for obtaining regulatory approval from authorities;
		Exhaustion of patent rights;
		Compulsory licensing and/or government use;
		Exceptions and limitations related to farmers' and/or breeders' use of patented
		inventions. ³]
		, 私人和/或非商业使用
	\times	实验使用和/或科学研究
		配制药品 2
		· 在先使用
		外国船只、航空器和陆地车辆上的使用

² 例如,在药房按处方配制药物

³ 例如,在有些国家,专利权延伸至由被授予专利权的生物材料衍生出的繁殖或增殖材料,农民在自己的农场使用受专利保护的植物或饲养受专利保护的牲畜或其他动物不构成侵犯专利权。类似的,在某些国家,专利权不延及养殖者为了培育新的植物品种的目的使用受专利保护的生物材料(参见文件SCP/13/3 第 133 至 137 段。)

X	为获得主管机关的行政审批而进行的行为
X	专利权利用尽
X	强制许可和/或政府使用
	与农民和/或养殖者使用被授予专利权的发明有关的权利例外和限制 ³

如果所适用的法律规定了以上列出的限制和例外,请填写第二至第十部分。如果 所适用的法律不包含全部第二至第十部分中涉及的限制和例外,则只需要针对其 他部分作答。如果所适用的法律还包括没有在上文列出的限制和例外,请在第十 一部分"其他例外"处回答。

[If the applicable law provides for any of the above-listed exceptions and limitations, please fill out those parts of Sections II to X that apply to you. If the applicable law does not contain all of the exceptions and limitations provided in Sections II to X, then you should respond only to the other parts of the questionnaire. If the applicable law includes other exceptions and limitations that are not listed above, please answer the questions under Section XI "Other Exceptions".]

在参考判例法的情况下,如果可能,请注明所述判例公开的官方来源(例如,公开号、出版、名称、网址 URL等)

[Where reference is made to case law, please indicate, if possible, the official source in which the case has been published (for example, the publication number, issue, title, URL, etc.).]

第二部分:私人使用和/或非商业使用

Section II: Private and/or non-commercial use

- 4. 如果此种例外规定于成文法中,请指出相关规定:
- [4. If the exception is contained in statutory law, please provide the relevant provision(s):]

中国专利法第十一条赋予专利权人禁止他人为生产经营目的实施其发明创造的权利。如果不是为生产经营目的,例如为了个人消费的目的或其他非商业性的目的,进行了制造、使用、销售、或进口行为,并不构成实施专利的行为,无需获得专利权人的许可。

- 5. 如果此种例外规定于判例法中,请引证有关判决并做简要说明:
- [5. If the exception is provided through case law, please cite the relevant decision(s) and provide its(their) brief summary:]

无

- 6. (a) 规定此种例外的公共目标是什么?
- [6. (a) What are the public policy objectives for providing the exception?]

专利制度通过赋予专利权人在一定期限内实施其发明创造的独占权,并由此 获得充分的经济回报,实现激励发明创造的目标。专利制度目标还在于推动发明 创造的应用、促进科技进步和经济社会的发展,因此,在激励创新的同时专利制 度需确保权利人与社会公众合法利益的适当平衡。个人使用和非商业性的使用并不影响权利人或其他社会公众的经济利益,不应允许权利人予以独占。如果无论为何种目的,在任何情况下只要未经专利权人的允许制造、使用、许诺销售或者进口专利技术一概被认为侵犯专利权,将使专利权的范围过宽,干扰社会公众的正常活动,不利于技术知识的创造者和使用者权益的合理平衡,不利于促进经济发展和增进整个社会的福祉。

- (b) 如可行,请结合立法历史、议会辩论和司法判决进行解释:
- [(b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:]

此种例外明确规定于 1985 年 4 月 1 日生效实施的中国专利法中,迄今为止中国专利法经过三次修改,但是第十一条中关于专利所赋予的独占权仅涉及为生产经营目的的行为的规定没有发生变化。

- 7. 所适用的法律是否对"商业性的"或"非商业性的"和/或"私人"有所定义,请引证相关规定和/或判决予以说明:
- [7. If the applicable law defines the concepts "non-commercial", "commercial" and/or "private", please provide those definitions by citing legal provision(s) and/or decision(s):]

中国专利法及其实施细则没有对"商业性的"或"非商业性的"和/或"私人"作出定义,也没有对专利法第十一条中"为生产经营的目的"作进一步定义。一般认为,所谓"为生产经营目的"是指为工农业生产或者为商业经营的目的,其范围十分广泛,与是否营利无关,也不决定于实施行为主体本身的性质是营利机构还是非营利机构。

- 8. 如果所适用的法律中有其他确定此种例外范围的标准,请引证相关规定和/或判决对该标准予以说明:
- [8. If there are any other criteria provided in the applicable law to be applied in determining the scope of the exception, please provide those criteria by citing legal provision(s) and/or decision(s):]

无

- 9. 此种例外的法律框架是否达到了预期的目标? (例如,是否预期将对法律进行修改)?请予解释:
- Is the applicable legal framework of the exception considered adequate to meet the objectives sought (for example, are there any amendments to the law foreseen)? Please explain:]

是

- 10. 在你的国家,这一例外的实际运用中遇到何种问题?请予解释:
- [10. Which challenges, if any, have been encountered in relation to the practical implementation of the exception in your country? Please explain:]

无

第三部分:实验使用和/或科学研究4

Section III: Experimental use and/or scientific research 4

- 11. 如果此种例外规定于成文法中,请指出相关规定:
- [11. If the exception is contained in statutory law, please provide the relevant provision(s):]

中国专利法第六十九条规定,专为科学研究和实验而使用有关专利的,不视为侵犯专利权。

- 12. 如果此种例外规定于判例法中,请引证有关判决并做简要说明:
- [12. If the exception is provided through case law, please cite the relevant decision(s) and provide its(their) brief summary:]

无

- 13. (a) 规定此种例外的公共目标是什么?
- [13. (a) What are the public policy objectives for providing the exception?]

专利制度需要兼顾专利权人、专利技术使用者和社会公众的利益,以便使专利制度达到最佳的社会效益。科技创新总是需要在原有的技术基础上进行,如果为科学研究和实验的目的而使用有关专利都需要征得专利权人的许可,可能会妨碍他人进行研究开发,不利于科学技术的进步,有悖于专利法的立法宗旨。

- (b) 如可行,请结合立法历史、议会辩论和司法判决进行解释:
- [(b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:]

此种例外明确规定于 1985 年 4 月 1 日生效实施的中国专利法中,迄今为止中国专利法经过三次修改,但是有关此项例外的规定没有发生变化。

⁴ 为获得行政审批而进行的行为的侵权例外和限制在本问卷的第七部分。

Exceptions and limitations on acts for obtaining regulatory approval are dealt with in Section VII of the questionnaire.

- **14.** 所适用的法律是否因进行实验或研究的组织的性质(例如,商业性的或非营利性的单位)而有不同的规定?请予解释:
- [14. Does the applicable law make a distinction concerning the nature of the organization conducting the experimentation or research (for example, whether the organization is commercial or a not-for-profit entity)? Please explain:]

适用此种例外与一个单位的性质无关。如果一个生产经营单位所进行的行为 仅仅是对某项专利技术本身进行研究和实验,则可以适用此种例外,不视为侵犯 专利权;而一个科研单位利用某项专利技术作为手段来进行其他的科研项目,则 不属于此种例外的范围,构成侵犯专利权。

- **15**. 如果所适用的法律中对"实验使用"和/或"科学研究"进行了定义,请引证相关规定和/或判例:
- [15. If the applicable law defines the concepts "experimental use" and/or "scientific research", please provide those definitions by citing legal provision(s) and/or decision(s):]

在中国专利法中并没有直接对"科学研究和实验"作出定义。

- 16. 如果实验和/或研究的目的与确定此种例外的范围有关,请说明:
- [16. If the purpose of experimentation and/or research is relevant to the determination of the scope of the exception, please indicate what that purpose is:]

实验和/或研究的目的是:

[Experimentation and/or research should aim to:]

	determine how the patented invention works
	determine the scope of the patented invention
	determine the validity of the claims
	seek an improvement to the patented invention
	invent around the patented invention
	other, please specify:
	7
\times	确定被授予专利的发明的工作情况
	确定被授予专利的发明的范围
	, 确定权利要求的有效性
	」 妈还仅有安尔的有效性
\times	对被授予专利的发明进行改进
X	围绕授予专利权的发明进行发明
]
	│ 其他,请指出:

- 17. 下述事项是否是确定此种例外的范围的标准,请说明
- [17. If any of the following criteria is relevant to the determination of the scope of the exception, please indicate:]

	 Research and/or experimentation must be conducted on or relating to the patented invention ("research on")
	□ Research and/or experimentation must be conducted with or using the patented
	invention ("research with") Both of the above
	Bout of the above
	所进行的研究和/或实验必须与被授予专利的发明有关(就其进行实
	验)
	所进行的研究和/或实验必须利用或使用被授予专利的发明(用其进行
	实验)
	上述二者
	请引证法律和/或判例进行解释:
	[Please explain by citing legal provision(s) and/or decision(s):]
	エ
	无
	实验和/或研究的商业目的是否会影响适用此种例外,请说明此种例外是否适以下活动:
+1 J ! 18.	久下伯勾: If the commercial intention of the experimentation and/or research is relevant to the
	determination of the scope of the exception, please indicate whether the exception covers
	activities relating to:]
	A non-commercial purpose
	A commercial purposeBoth of the above
	☐ The commercial intention of the experimentation and/or research is not relevant
	非商业目的的
	商业目的的
	上述两种
	实验和/研究的商业目的与确定是否适用此种例外不相关

19. 国家法如果对于"商业"和"非商业"目的的实验有不同的规定,请指出规定或实例予以说明。请引证法律规定和/或判决:

[19. If the applicable law makes a distinction between "commercial" and "non-commercial" purpose, please explain those terms by providing their definitions, and, if appropriate, examples. Please cite legal provision(s) and/or decision(s):]

无

- 20. 如果适用的法律还规定了确定此种例外的范围的其他标准,请对这些标准予以说明。请引证法律规定和/或判例予以说明:
- [20. If the applicable law provides for other criteria to be applied in determining the scope of the exception, please describe those criteria. Please illustrate your answer by citing legal provision(s) and/or decision(s):

无

- **21**. 此种例外的法律框架是否达到了预期的目标? (例如,是否预期将对法律进行修改)?请予解释:
- [21. Is the applicable legal framework of the exception considered adequate to meet the objectives sought (for example, are there any amendments to the law foreseen)? Please explain:]

是

- 22. 在你的国家,这一例外的实际运用中遇到何种问题?请予解释:
- [22. Which challenges, if any, have been encountered in relation to the practical implementation of the exception in your country? Please explain:]

无

第四部分: 配制药物

Section IV: Preparation of medicines

- 23. 如果成文法中规定了此种例外,请指出相关规定:
- [23. If the exception is contained in statutory law, please provide the relevant provision(s):]

在中国,医生处方和医生对处方的调剂以及根据医生处方配药的过程被认为不具备工业实用性,不会被授予专利权。中国专利法及其实施细则中没有关于将按照医生处方配制药物的行为作为侵权例外的规定。

- 24. 如果此种例外是由判例法所规定,请引证有关判决并概述内容:
- [24. If the exception is provided through case law, please cite the relevant decision(s) and provide its(their) brief summary:]

无

25.	(a) 规定此种例外的公共政策目标是什么?请予解释:
[25.	(a) What are the public policy objectives for providing the exception? Please explain:]

	(b) 如可行,请结合立法历史、议会辩论和司法判决进行解释: [(b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:]
26. [26.	谁有权利用此例外(例如,药剂师、医生、医师、其他人)?请描述: Who is entitled to use the exception (for example, pharmacists, doctors, physicians, others)? Please describe:]
27. [27.	所适用的法律中对于依此例外而配制的药物数量有无限制? Does the applicable law provide for any limitations on the amount of medicines that can be prepared under the exception?]
	□ Yes □ No
	□ 有□ 没有
	如果有,请引证有关规定和/或判决进行解释: [If yes, please explain your answer by citing the relevant provision(s) and/or decision(s):]
28. 准。 [28.	如果适用的法律中对于适用此例外的范围有其他的确定标准,请说明这些标请引证法律规定和/或判决详细说明: If the applicable law provides for other criteria to be applied in determining the scope of the exception, please describe those criteria. Please illustrate your answer by citing legal
	provision(s) and/or decision(s):]
29. 行修	此种例外的法律框架是否达到了预期的目标? (例如,是否预期将对法律进资)? 请予解释
[29.	Is the applicable legal framework of the exception considered adequate to meet the objectives sought (for example, are there any amendments to the law foreseen)? Please explain:]
30	左旋的国家。这一例处的实际运用由遇到何种问题? 请予解释.
30. [30.	在你的国家,这一例外的实际运用中遇到何种问题?请予解释: Which challenges, if any, have been encountered in relation to the practical

implementation of the exception in your country? Please explain:]

第五部分: 在先使用 Section V: Prior use

- 31. 如果此种例外规定于成文法中,请提供相关规定:
- [31. If the exception is contained in statutory law, please provide the relevant provision(s):]

中国专利法第六十九条 有下列情形之一的,不视为侵犯专利权;

- (二)在专利申请日前已经制造相同产品、使用相同方法或者已经作好制造、使用的必要准备,并且仅在原有范围内继续制造、使用的。
- 32. 如果此种例外规定于判例法中,请引证有关判决并做简要说明:
- [32. If the exception is provided through case law, please cite the relevant decision(s) and provide its(their) brief summary:]

无

- 33. (a) 规定此种例外的公共目标是什么?
- [33. (a) What are the public policy objectives for providing the exception? Please explain:]

专利法设立此种例外的目的是为了平衡权利人和第三方的合法利益。这种限制可以消除实际生活中存在的已经投入人力、物力完成的发明创造的单位或者个人,因没有先申请专利而不能再实施自己的智力成果的不公平结果。但是,需要说明的是,先用权人只能在原有的范围内继续制造和使用,超过原有范围的制造和使用,则属于侵犯专利权的行为。

- (b) 如可能,请结合立法历史、议会辩论和司法判决进行解释
- (b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:

此种例外明确规定于 1985 年 4 月 1 日生效实施的中国专利法中,迄今为止中国专利法经过三次修改,但是该条规定没有发生变化。

- **34**. 适用法律怎样定义"使用"的范围?适用法律对于在先使用者"使用"的应用规定了任何数量或数量限制吗?请通过引证法条或判决解释你们的答复:
- [34. How does the applicable law define the scope of "use"? Does the applicable law provide for any quantitative or qualitative limitations on the application of the "use" by prior user? Please explain your answer by citing legal provision(s) and/or decision(s):]

"在先使用"是指在专利申请日前已经制造相同产品、使用相同方法或者已经作好制造、使用的必要准备的行为。

对于申请日前的制造、使用或准备并无数量规定或数量限制的规定,如果实际的产量并未达到生产设计能力,那么在原有设备生产能力下达到的产量,也应 当被认为是在原有规模内。继续制造或使用则必须在原有的范围内。

35. 对于例外的运用,适用法律规定了给予专利权人报酬吗?

[35..... Does the applicable law provide for a remuneration to be paid to the patentee for the exercise of the exception? Please explain:]

只要是在原有范围内的继续使用,就不需要向专利权人支付费用。

36. [36.	根据适用法律,在先使用者能将其在先使用权许可或转让给第三方吗? According to the applicable law, can a prior user license or assign his prior user's right a third party?]		
	□ Yes □ No		

37. 如果第 **36** 题的答案是肯定的,对于该种许可或转让,适用法律就在先使用例外的继续应用设立了条件吗?

[37.	In case of affirmative answer to question 36, does the applicable law establish conditions
	on such licensing or assignment for the continued application of the prior use exception?]

Yes No	
	是
	否

如果是,请解释这些条件

[If yes, please explain what those conditions are:]

先用权的转移(包括转让、继承等)是受到限制的。它只能随同制造相同产品、使用相同方法的企业或者企业中制造相同产品、使用相同方法的部分,或者随同原先准备制造、使用的企业或者企业的部分一起转移。

38. ù	这一例外适用于这样的情形吗,	即在被无效或驳回后、	但是在恢复或获得授
权前,	第三方已经使用了可取得权利	的发明或已经为此适用	做好了一些准备?

[38.	Does this exception apply in situations where a third party has been using the patented invention or has made serious preparations for such use after the invalidation or refusal of the patent, but before the restoration or grant of the patent?]				
	□ Yes □ No				
	是 否				
	如果是,请解释这样的使用能够得以继续应用的条件 [If yes, please explain the conditions under which such use can continue to apply:]				
	如果所适用的法律中有其他确定此种例外范围的标准,请引证相关规定和/或 付该标准予以说明:				
[39.	If the applicable law provides for other criteria to be applied in determining the scope of				

9. If the applicable law provides for other criteria to be applied in determining the scope of the exception, please describe those criteria. Please illustrate your answer by citing legal provision(s) and/or decision(s):

无

- **40**. 此种例外的法律框架是否达到了预期的目标? (例如,是否预期将对法律进行修改)? 请予解释
- [40. Is the applicable legal framework of the exception considered adequate to meet the objectives sought (for example, are there any amendments to the law foreseen)? Please explain:]

是

- 41. 在你的国家,这一例外的实际运用中遇到何种问题?请予解释
- [41. Which challenges, if any, have been encountered in relation to the practical implementation of the exception in your country? Please explain:]

无

第六部分: 外国船只、航空器和陆地车辆上的使用 Section VI: Use of articles on foreign vessels, aircrafts and land vehicles

42. 如果此种例外规定于成文法中,请提供相关规定

[42. If the exception is contained in statutory law, please provide the relevant provision(s):]

中国专利法第六十九条 有下列情形之一的,不视为侵犯专利权:

- (三)临时通过中国领陆、领水、领空的外国运输工具,依照其所属国同中国 签订的协议或者共同参加的国际条约,或者依照互惠原则,为运输工具自身需要 而在其装置和设备中使用有关专利的。
- 43. 如果此种例外规定于判例法中,请引证有关判决并做简要说明:
- [43. If the exception is provided through case law, please cite the relevant decision(s) and provide its(their) brief summary:]

无

- 44. (a) 规定此种例外的公共目标是什么?请解释:
- [44. (a) What are the public policy objectives for providing the exception? Please explain:]

对专利权的这一限制,是为了保证国际交通自由,符合国际惯例,符合巴黎 公约中对此的相关规定。

- (b) 如可能,请结合立法历史、议会辩论和司法判决进行解释:
- [(b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:]

此种例外明确规定于 1985 年 4 月 1 日生效实施的中国专利法中,迄今为止中国专利法经过三次修改,但是该条规定没有发生变化。

45. [45.	例外应用关联于下列交通工具: The exception applies in relation to:]
	VesselsAircraftsLand VehiclesSpacecraft
	船只

- 46. 在例外范围的定义里,适用法律用了这样的术语例如"临时"和/或"偶然"或其他类似术语吗?请引用法条或判决指明这些术语的定义
- [46. In determining the scope of the exception, does the applicable law apply such terms as "temporarily" and/or "accidentally" or any other equivalent term in relation to the entry of foreign transportation means into the national territory? Please provide the definitions of those terms by citing legal provision(s) and/or decision(s):]

适用法律里使用了"临时"一词。

中国专利法第六十九条规定的此种例外仅适用于临时通过中国领陆、领水、 领空的外国运输工具。临时进入是非长期在中国国内运营,包括暂时进入和偶然 进入。暂时进入包括定期进入;偶然进入指由于特殊情况进入中国领陆,如船舶 进港避风,飞机因为气象条件迫降等。

- **47**. 所适用的法律对于在外国船只、航空器、陆地车辆和空间飞行器上使用专利产品的例外规定了限制吗(例如,设备专用于外国船只、航空器、陆地车辆和空间飞行器的需要)?请引用法条或判决对答案进行解释:
- [47. Does the applicable law provide for any restrictions on the use of the patented product on the body of the foreign vessels, aircrafts, land vehicles and spacecraft for the exception to apply (for example, the devices to be used exclusively for the needs of the vessel, aircraft, land vehicle and/or spacecraft)? Please explain your answer by citing legal provision(s) and/or decision(s):]

是。此种例外保护只适用于运输工具为自身需要在其装置和设备中使用有关 专利的行为。本项的目的在于维护国际间运输的自由,因此,对有关专利的使用 权限于运输工具本身的需要,即为构成运输工具本身的功能所必要的行为。该项 中使用专利,指使用专利产品或者专利方法,不包括制造、许诺销售、销售和进 口专利产品的行为。

- **48.** 如果所适用的法律中有其他确定此种例外范围的标准,请引证相关规定和/或 判决对该标准予以说明:
- [48. If the applicable law provides for other criteria to be applied in determining the scope of the exception, please describe those criteria. Please illustrate your answer by citing legal provision(s) and/or decision(s):]

无

- **49**. 此种例外的法律框架是否达到了预期的目标? (例如,是否预期将对法律进行修改)?请予解释
- [49. Is the applicable legal framework of the exception considered adequate to meet the objectives sought (for example, are there any amendments to the law foreseen)? Please explain:]

是

- 50. 在你的国家,这一例外的实际运用中遇到何种问题?请予解释
- [50. Which challenges, if any, have been encountered in relation to the practical implementation of the exception in your country? Please explain:]

无

第七部分: 为获得行政审批通过的行为

Section VII: Acts for obtaining regulatory approval from authorities

- 51. 如果此种例外规定于成文法中,请指出相关规定
- [51. If the exception is contained in statutory law, please provide the relevant provision(s):]

中国专利法第六十九条 有下列情形之一的,不视为侵犯专利权:

- (五)为提供行政审批所需要的信息,制造、使用、进口专利药品或者专利 医疗器械的,以及专门为其制造、进口专利药品或者专利医疗器械的。
- 52. 如果此种例外规定于判例法中,请引证有关判决并做简要说明
- [52. If the exception is provided through case law, please cite the relevant decision(s) and provide its(their) brief summary:]

无

- 53. (a) 规定此种例外的公共目标是什么
- [53. (a) What are the public policy objectives for providing the exception? Please explain:]

药品或医疗器械关系到公众健康,各国对其投放市场都实行严格的审批制度,且审批时间较长。为了通过审批,生产厂家要进行研究、分析和临床实验等一系列活动,以取得审批需要的数据和其他信息。对获得专利的药品和医疗器械,仿制企业(非专利权人)为了在专利权保护期届满后及时推出仿制品,往往需要在专利有效期内制造、使用或进口这些药品或器械,以从事研究、分析等活动,提前获得审批需要的数据和信息。这就必须获得专利权人的许可并支付专利使用费,否则将会构成侵权。如果等到专利权保护期届满后再进行制造等行为,其产品上市就要在专利权保护期届满后一段时间,而这段时间仿制药品和医疗器械不能投放市场,在客观上延长了专利的保护期限。为了使社会公众在药品和医疗器械专利保护期满后及时获得价格低廉的药品和医疗器械,专利法规定了此种例外。

- (b) 如可行,请结合立法历史、议会辩论和司法判决进行解释
- [(b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:]

此种例外在 1985 年 4 月 1 日生效实施的中国专利法中并无规定,在 2009 年 10 月 1 日生效的中国专利法中增加此项规定。

- 54. 谁有资格使用这个例外?请解释
- [54. Who is entitled to use the exception? Please explain:]

为了提供行政审批所需要的信息而需要制造、使用、进口专利药品或专利医疗器械的人,以及专门为其制造、进口专利药品或专利医疗器械的人。

55. [55.	行政审批例外的范围涉及: The exception covers the regulatory approval of:]
	□ any products □ certain products. Please describe which products:
	────────────────────────────────────
	按照这个例外,就取得专利权的发明而言,请指出下列哪些(或个)行为是许的? Please indicate which acts are allowed in relation to the patented invention under the exception?]
	 Making Using Selling Offering for sale Import Export Other. Please specify:
	★ 制造★ 使用★ 销售
	一 许诺销售 进口 出口

	其他,请写明:
判决对该标 [57. If the s the ex provis	后适用的法律中有其他确定此种例外范围的标准,请引证相关规定和/或准予以说明: applicable law provides for other criteria to be applied in determining the scope of acception, please describe those criteria. Please illustrate your answer by citing legal sion(s) and/or decision(s):]
无	
行修改)? [58. Is the	applicable legal framework of the exception considered adequate to meet the tives sought (for example, are there any amendments to the law foreseen)? Please
是	
[59. Which impler	J国家,这一例外的实际运用中遇到何种问题?请予解释 n challenges, if any, have been encountered in relation to the practical mentation of the exception in your country? Please explain:]
无	
第八部分: 专 Section VIII:	利权用尽 Exhaustion of patent rights
[60. Please	你们国家的专利权利用尽原则: e indicate what type of exhaustion doctrine is applicable in your country in relation ents:]
□ R □ In	ational egional nternational ncertain, please explain:
	国内 地区 国际 不确定,请解释:
	此种例外规定于成文法中,请指出相关规定: exception is contained in statutory law, please provide the relevant provision(s):]

中国专利法第六十九条 有下列情形之一的,不视为侵犯专利权:

(一)专利产品或者依照专利方法直接获得的产品,由专利权人或者经其许可的单位、个人售出后,使用、许诺销售、销售、进口该产品的。

如果此种例外规定于判例法中,请引证有关判决并做简要说明:

[If the exception is provided through case law, please cite the relevant decision(s) and provide its(their) brief summary:]

无

- 61. (a) 上述权利用尽制度所采用的公共政策目标是什么? 请解释:
- [61. (a) What are the public policy objectives for adopting the exhaustion regime specified above? Please explain:]

专利权人对其专利具有独占权,但其专利产品在合法售出(包括专利权人自己售出或者经专利权人许可的人售出)后,专利权权利即为用尽,对这些产品的使用、许诺销售、销售等行为不再需要经过专利权人的许可,购买者可自由处置。这是对专利权的一种合理限制,目的是防止专利产品在市场上的流通和使用受到限制,以维护正常的经济秩序。

(b) 如可行,请结合立法历史、议会辩论和司法判决进行解释: [(b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:]

在 1985 年 4 月 1 日生效实施的中国专利法中规定了专利权国内用尽,2009 年 10 月 1 日生效的中国专利法将此例外修改为专利权的国际用尽。

62.	所适用的法律允	公许专利权人通过在产	品上进行标注以	便对专利产	品的进口和
分销	i限制予以限制,	从而避免此种例外的	适用吗?		

[62.	Does the applicable law permit the patentee to introduce restrictions on importation or
	other distribution of the patented product by means of express notice on the product that
	can override the exhaustion doctrine adopted in the country?]

 No Jncertain
是否

Yes

不确定

请引用法条或判决对答案进行解释:

[Please explain your answer by citing legal provision(s) and/or decision(s):]

根据专利法第六十九条的规定,只要专利产品或者依照专利方法直接获得的产品由专利权人或经其许可售出后,使用、许诺销售、销售、进口该产品的行为就不视为侵犯专利权。此种例外的适用并不考虑专利权人是否在售出产品上进行标注及标注何种内容。

- 63. 适用权利用尽制度已经充分满足了你们国家的公共政策目标吗?请解释:
- [63. Has the applicable exhaustion regime been considered adequate to meet the public policy objectives in your country? Please explain:]

是

- 64. 在你的国家,这一例外的实际运用中遇到何种问题?请予解释:
- [64. Which challenges, if any, have been encountered in relation to the practical implementation of the applicable exhaustion regime in your country? Please explain:]

无

第九部分:强制许可和政府使用

Section IX: Compulsory licenses and/or government use

强制许可

Compulsory licenses

- 65. 如果此种例外规定于成文法中,请指出相关规定:
- [65. If the exception is contained in statutory law, please provide the relevant provision(s):]

中国专利法第六章"专利实施的强制许可"规定有下列情形之一的,国务院 专利行政部门可以给予实施发明专利或者实用新型专利的强制许可:

- (1)专利权人自专利权被授予之日起满三年,且自提出专利申请之日起满四年,无正当理由未实施或者未充分实施其专利的(专利法第四十八条);
- (2)专利权人行使专利权的行为被依法认定为垄断行为,为消除或者减少该 行为对竞争产生的不利影响的(专利法第四十八条);
- (3)在国家出现紧急状态或者非常情况时,或者为了公共利益的目的(专利 法第四十九条):

- (4)为了公共健康目的,对取得专利权的药品,国务院专利行政部门可以给 予制造并将其出口到符合中华人民共和国参加的有关国际条约规定的国家或者地 区的强制许可(专利法第五十条);
- (5)一项取得专利权的发明或者实用新型比前已经取得专利权的发明或者实用新型具有显著经济意义的重大技术进步,其实施又有赖于前一发明或者实用新型的实施的,国务院专利行政部门可以给予实施前一发明或者实用新型的强制许可(专利法第五十一条)。
- 66. 如果此种例外规定于判例法中,请引证有关判决并做简要说明:
- [66. If the exception is provided through case law, please cite the relevant decision(s) and provide its(their) brief summary:]

无

- 67. 给予强制许可的情形:
- [67. What grounds for the grant of a compulsory license does the applicable law provide in respect to patents (please indicate the applicable grounds):]

Non-working or insufficient working of the patented invention

	Refusal to grant licenses on reasonable terms
	Anti-competitive practices and/or unfair competition
	Public health
	National security
	National emergency and/or extreme urgency
	Dependent patents
	Other, please specify:
	未实施或未充分实施专利发明
	以合理的条件下拒绝许可
\times	垄断行为或不正当竞争
	公共健康
	国家安全
	国家紧急状态或者非常情况
\bowtie	
\boxtimes	从属专利
	其他,请写明:

- 68. (a) 给予强制许可的公共政策目的:
- [68. (a) What are the public policy objectives for providing compulsory licenses in your country? Please explain:]

限制专利权人滥用权利,推动发明创造的应用,保证专利制度的正常运转, 保障国家和公共利益。

- (b) 可能的情况下,请就立法历史,议会讨论和司法判决进行解释:
- [(b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:]

在 1985 年中国专利法立法之初就对强制许可作出了规定,随后,有关强制许可的规定经历了多次修改与完善。

- **69**. 如果适用法规定了可以以未实施或未充分实施专利发明为由给予强制许可,请引用法律规定解释这些定义:
- [69. If the applicable law provides for the grant of compulsory licenses on the ground of "non-working" or "insufficient working", please provide the definitions of those terms by citing legal provision(s) and/or decision(s):]

根据中国《专利法实施细则》第七十三条,"未充分实施其专利"是指专利权人及其被许可人实施其专利的方式或者规模不能满足国内对专利产品或者专利方法的需求。

- 70. 进口专利产品或者用专利方法制造产品是否构成"实施"专利?请引用相关法律规定解释:
- [70. Does the importation of a patented product or a product manufactured by a patented process constitute "working" of the patent? Please explain your answer by citing legal provision(s) and/or decision(s):

根据中国专利法的规定,进口专利产品或者使用专利方法制造产品构成"实施"专利。

根据中国专利法第十一条的规定,"实施专利"包括为生产经营目的制造、使用、许诺销售、销售、进口其专利产品,或者使用其专利方法以及使用、许诺销售、销售、进口依照该专利方法直接获得的产品。

71. 如果以未实施或未充分实施专利发明为由给予强制许可,在请求给予强制许可之前是否有一特定的期限?

_. /1.	working, does the applicable law provide for a certain time period to be respected before a compulsory license can be requested?]
	□ Yes □ No
	是 否
	如果是,期限是什么? [If yes, what is the time period?]
出专和	艮据中国专利法第四十八条规定只有在专利权被授予之日起满三年,且自提 问申请之日起满四年的情况下,才能以未实施或者未充分实施为理由请求给 引许可。
	在以未实施或未充分实施专利发明为由请求给予强制,专利权人是否可以证 下作为是合法的,从而拒绝给予强制许可? In case of the grant of compulsory licenses on the grounds of non-working or insufficient working, does the applicable law provide that a compulsory license shall be refused if the patentee justifies his inaction by legitimate reasons?]
	□ Yes □ No
	<u></u> 是 否
	如果是,什么是合法的理由? [If yes, what are "legitimate reasons"?]
例如E	口果专利权人能证明其不作为有正当理由,就可以拒绝给予专利强制许可。 由于政府禁止或者限制该类产品的生产、进口或者流通,则不能以未实施或 它分实施为理由给予强制许可。

73. 以合理的条件在合理长的时间内专利权人拒绝许可为由请求给予强制,请对

If the applicable law provides for the grant of compulsory licenses on the ground of refusal by the patentee to grant licenses on "reasonable terms and conditions" and within a "reasonable period of time", please provide the definitions given to those terms by citing

解释这些条件的定义

legal provision(s) and/or decision(s):]

[73.

根据中国专利法,"以合理条件请求专利权人给予实施其专利的许可,然而未能在合理长的时间内获得其许可"不是请求颁发强制许可的理由,而是以未实施或者未充分实施专利发明为由,或者以从属专利为由请求颁发强制许可的程序性条件。

条件的合理性通常根据所涉及的发明或者实用新型专利的具体情况来确定,例如技术领域、市场前景、同类技术的使用费、作出发明或实用新型投入的资金等等。合理长的时间要根据专利权人对发明或者实用新型在经济上和技术上两方面因素作出考虑所需要时间来衡量。

- **74**. 如果允许以反竞争措施为由进行强制许可,请说明哪些与专利相关的反竞争措施可能导致强制许可?
- [74. If the applicable law provides for the grant of compulsory licenses on the ground of anticompetitive practices, please indicate which anti-competitive practices relating to patents may lead to the grant of compulsory licenses by citing legal provision(s) and/or decision(s):]

中国专利法允许以消除或者减少对竞争产生不利的影响作为理由给予实施专利的强制许可,一旦反垄断执法机构或者法院作出的认定专利权人行使专利权的行为构成垄断的行政决定或者司法判决生效后,国务院专利行政部门就可以根据具备实施条件的单位或者个人的申请,给予实施专利的强制许可,以消除或者减少垄断行为对竞争产生的不利影响。

- **75**. 如果允许以从属专利为由进行强制许可,请说明要进行强制许可从属专利必须满足的条件?
- [75. If the applicable law provides for the grant of compulsory licenses on the ground of dependent patents, please indicate the conditions that dependent patents must meet for a compulsory license to be granted:]

从属专利的强制许可应满足两个条件:一是有两项发明或者实用新型,后一项发明或者实用新型的实施有赖于前一项发明或者实用新型的实施;二是后一项发明或者实用新型比前一项具有显著经济意义的重大技术进步。

- 76. 适用的法律是否就受益人向专利权人支付补偿作出一般性的规定?
- [76. Does the applicable law provide a general policy to be followed in relation to the remuneration to be paid by the beneficiary of the compulsory license to the patentee? Please explain:]

中国专利法第五十七条规定,取得实施强制许可的单位或者个人应当付给专利权人合理的使用费,或者依照中华人民共和国参加的有关国际条 约的规定处理

使用费问题。付给使用费的,其数额由双方协商;双方不能达成协议的,由国务 院专利行政部门裁决。

- **77**. 如果允许以国家紧急状态或者非常情况为由进行强制许可,如何定义上述两个概念以及其适用的范围?
- [77. If the applicable law provides for the grant of compulsory licenses on the ground of "national emergency" or "circumstances of extreme urgency", please explain how the applicable law defines those two concepts and their scope of application, and provide examples:]

中国专利法及其实施细则没有对"国家紧急状态"和"非常情况"作出定义。一般认为战争或危机国家安全的紧急状态,或者自然灾害、疾病流行都属于国家紧急状态或非常情况的范围。

- 78. 请说明在你的国家已经允许了多少次强制许可,各是什么技术领域?
- [78. Please indicate how many times and in which technological areas compulsory licenses have been issued in your country:]

未颁发过强制许可。

- **79**. 现行的关于颁发强制许可的法律框架是否充分达到了所寻求的目标? (例如,是否有修改法律的预期)
- [79. Is the applicable legal framework for the issuance of compulsory licenses considered adequate to meet the objectives sought (for example, are there any amendments to the law foreseen)? Please explain:]

是

- 80. 在你的国家实施强制许可相关的规定过程中遇到了什么挑战?
- [80. Which challenges, if any, have been encountered in relation to the use of the compulsory licensing system provisions in your country? Please explain:]

无

政府使用

Government use

- 81. 如果此种例外规定于成文法中,请指出相关规定:
- [81. If the exception is contained in statutory law, please provide the relevant provision(s):]

报经	中国专利法第十四条规定,国有企业事业单位的发明专利,对国家利益或者利益具有重大意义的,国务院有关主管部门和省、自治区、直辖市人民政府国务院批准,可以决定在批准的范围内推广应用,允许指定的单位实施,由单位按照国家规定向专利权人支付使用费。	F
82. [82.	如果此种例外规定于判例法中,请引证有关判决并做简要说明: If the exception is provided through case law, please cite the relevant decision(s) and provide its(their) brief summary:] 无	•
83. [83.	允许政府使用的情形: What grounds for the grant of government use does the applicable law provide in respect to patents (please indicate the applicable grounds):] Non-working or insufficient working of the patented invention Refusal to grant licenses on reasonable terms Anti-competitive practices and/or unfair competition Public health National security National emergency and/or extreme urgency Dependent patents Other, please specify:	ect
	未实施或未充分实施专利发明 在合理的条件下拒绝许可 垄断行为或不正当竞争 公共健康 国家安全 国家紧急状态或者非常情况 从属专利 其他,请写明:发明专利对国家利益或者公共利益具有重大意义的。	

- 84. (a) 允许政府使用的公共政策目的::
- [84. (a) What are the public policy objectives for providing government use in your country?]

为保障国家利益和公共利益,有时需要对发明专利予以推广利用,但若专利权人与被许可人逐一订立实施许可合,不利于迅速推广应用。有的专利权人为了获得垄断利益,会限制其专利的实施,不愿意其专利得到广泛应用。因此,国家需要通过行政权力强制对某些主体享有的专利权进行推广应用,允许指定的单位实施。

- (b) 如可行,请结合立法历史、议会辩论和司法判决进行解释:
- [(b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:]

此种例外明确规定于 1985 年 4 月 1 日生效实施的中国专利法中,迄今为止中国专利法经过三次修改,该条中关于政府推广应用某些发明专利的范围和程序有所调整。

- **85**. 如果以国家紧急状态或者非常情况为由允许政府使用,如何定义上述两个概念以及其适用的范围?
- [85. If the applicable law provides for the grant of government use on the ground of "national emergency" or "circumstances of extreme urgency", please explain how the applicable law defines those two concepts and their scope of application, and provide examples:]

无

- 86. 请说明在你的国家已经颁布了多少次政府使用许可,各是什么技术领域?
- [86. Please indicate how many times and in which technological areas government use has been issued in your country:]

无

- **87**. 此种例外的法律框架是否达到了预期的目标? (例如,是否预期将对法律进行修改)?请予解释:
- [87. Is the applicable legal framework for the issuance of government use considered adequate to meet the objectives sought (for example, are there any amendments to the law foreseen)? Please explain:]

是

- **88**. 此种例外的法律框架是否达到了预期的目标? (例如,是否预期将对法律进行修改)?请予解释:
- [88. Which challenges, if any, have been encountered in relation to the use of the government use mechanism in your country? Please explain:]

无

第十部分:农民或养殖者使用专利发明的权利例外与限制

Section X: Exceptions and limitations related to farmers' and/or breeders' use of patented inventions

农民使用专利发明

Farmers' use of patented inventions

- 89. 如果此种例外规定于成文法中,请指出相关规定:
- [89. If the exception is contained in statutory law, please provide the relevant provision(s):]

无

- 90. 如果此种例外规定于判例法中,请引证有关判决并做简要说明:
- [90. If the exception is provided through case law, please cite the relevant decision(s) and provide a brief summary of such decision(s):]

无

期)

91. [91.	(a) 提供农民使用专利发明权利例外的公共政策目的: (a) What are the public policy objectives for providing the exception related to farmers' use of patented inventions? Please explain:]			
	(b) 如可行,请结合立法历史、议会辩论和司法判决进行解释:			
	[(b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:]			
00				
92.	请引用相关法律规定解释例外的范围:			
[92.	Please explain the scope of the exception by citing legal provision(s) and/or decision(s)			

93. 现行法律框架是否充分达到了所寻求的目标? (例如,是否有修改法律的预

determination of the scope of the exception):]

(for example, interpretation(s) of statutory provision(s) on activities allowed by users of the exception, limitations on their use, as well as other criteria, if any, applied in the

[93.	Is the applicable legal framework of the exception considered adequate to meet the objectives sought (for example, are there any amendments to the law foreseen)? Please explain:]
94. [94.	在你的国家实施农民使用专利发明权利例外过程中遇到了什么挑战? Which challenges, if any, have been encountered in relation to the practical implementation of the exception related to farmers' use of patented inventions in your country? Please explain:]
养殖	·····································
Bree	ders' use of patented inventions
95. [95.	如果此种例外规定于成文法中,请指出相关规定: If the exception is contained in statutory law, please provide the relevant provision(s):]
	无
96. [96.	如果此种例外规定于判例法中,请引证有关判决并做简要说明: If the exception is provided through case law, please cite the relevant decision(s) and provide a brief summary of such decision(s):]
	无
97. [97.	(a) 提供农民使用专利发明权利例外的公共政策目的: (a) What are the public policy objectives for providing the exception related to breeders' use of patented inventions? Please explain:]
	(b) 如可行,请结合立法历史、议会辩论和司法判决进行解释:
	[(b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:]
98. i	清引用相关法律规定解释例外的范围:

Please explain the scope of the exception by citing legal provision(s) and/or decision(s) (for example, interpretation(s) of statutory provision(s) on activities allowed by users of

[98.

	determination of the scope of the exception):]
99. 现 期)	行的法律框架是否充分达到了所寻求的目标? (例如,是否有修改法律的预
[99.	Is the applicable legal framework of the exception considered adequate to meet the objectives sought (for example, are there any amendments to the law foreseen)? Please explain:]
100. ব	E你的国家实施养殖者使用专利发明权利例外的过程中遇到了什么挑战?
[100.	Which challenges, if any, have been encountered in relation to the practical implementation of the exception related to breeders' use of patented inventions in your country? Please explain:]
	<i>部分</i> :其他例外与限制 n XI: Other Exceptions and Limitations
101. [101.	如果成文法中规定了其他例外和限制,请指出相关规定: Please list any other exceptions and limitations that your applicable patent law provides:]
	无
102. [102.	就其他例外和限制,请说明 : In relation to each exception and limitation, please indicate:]
	(1) 引用相关规定说明法律渊源 [(i) the source of law (statutory law and/or the case law) by providing the relevant provision(s) and/or a brief summary of the relevant decision(s):]
	(2) 公共政策目的,可能的情况下,请就立法历史,议会讨论和司法判决进行解释: [(ii) the public policy objectives of each exception and limitation. Where possible, please

decisions:]

explain with references to the legislative history, parliamentary debates and judicial

.....

103. 如果在专利体系之外有其他权利限制的机制(如竞争法),请列举并说明该机制:

103. If other mechanisms for the limitation of patent rights external to the patent system exist in your country (for example, competition law), please list and explain such mechanisms:

根据中国植物新品种保护条例第十条的规定,利用授权品种进行育种及其他 科研活动或者农民自繁自用授权品种的繁殖材料可以不经品种权人许可,不向其 支付使用费,但是不得侵犯品种权人享有的其他权利。

> 调查问卷完 [End of Questionnaire]