

## Questionnaire on Exceptions and Limitations to Patent Rights

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

Country: Republic of Korea (South Korea) .....  
Office: Korean Intellectual Property Office.....

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### Section I: General

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.

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. 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.

The legal standard for patentability includes industrial applicability (Article 29(1) of the Korean Patent Act (hereinafter referred to as “Patent Act” or omitted), novelty (Article 29(1)) and inventive step (Article 29(2)). Such legal standards do not change according to technical fields.

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.<sup>1</sup>

Notwithstanding Article 29, any invention that is liable to injure public order, morality or public health shall not be patented (Article 32).

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<sup>1</sup> This question does not imply that the topic of exclusions from patentability is dealt with in this question exhaustively.

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?

A patentee shall have an exclusive right to “work” a patented invention (Article 94), and exercise the right exclusively (Article 126). Pursuant to Article 2(3) of the Act, “working” of an invention means the following acts:

- (a) acts of manufacturing, using, assigning, leasing, importing or offering for assignment or lease (including displaying for assignment or lease) an invented product;
- (b) acts of using an invented process; and
- (c) acts of using, assigning, leasing, importing or offering for assignment or lease a product manufactured by an invented process for manufacturing a product, in addition to the acts mentioned in subparagraph (b).

Rights accorded to the patent applicant after publication of the patent application:

An applicant may demand a person who has commercially or industrially worked the filed invention after the laying-open of the invention to pay compensation after the registration of the patent right (Article 65(2)).

3. Which exceptions and limitations does the applicable law provide in respect to patent rights (please indicate the applicable exceptions/limitations):

- Private and/or non-commercial use;
- Experimental use and/or scientific research;
- Preparation of medicines;<sup>2</sup>
- 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.<sup>3</sup>

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”.

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.).

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<sup>2</sup> For example, extemporaneous preparation of prescribed medicines in pharmacies.

<sup>3</sup> For example, in some countries where patent rights extend to propagated or multiplied material derived from patented biological material, certain uses by farmers of harvested plant material or of breeding livestock or other animal reproductive material under patent protection on his own farm do not constitute patent infringement. Similarly, in some countries, patent rights do not cover uses by breeders of patented biological material for the purpose of developing a new plant variety (see paragraphs 133 to 137 of document SCP/13/3).

**Section II: Private and/or non-commercial use**

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

Article 94: A patentee has an exclusive right to work a patented invention commercially and industrially.

Article 65(2): An applicant may demand a person who has commercially or industrially worked the filed invention after being warned as provided for in paragraph (1) or knowing that an application for the invention has been laid open, to pay compensation in an amount equivalent to what he/she would have normally received for the working of the invention from the date of the warning or the time when he/she knew that the patent application of the invention had been laid open to the time of the registration of the patent right.

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

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6. (a) What are the public policy objectives for providing the exception?

Considering the purpose of the Patent Act, which is to develop industries, to provide the exception of private or theoretical working of a patented invention is legitimate.

(b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:

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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):

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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):

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9. 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:

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10. Which challenges, if any, have been encountered in relation to the practical implementation of the exception in your country? Please explain:

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**Section III: Experimental use and/or scientific research <sup>4</sup>**

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

Article 96(1): The effect of a patent right does not extend to any of the following subparagraphs:

(i) working a patented invention for research or experimental purposes(including approval and registration of drugs under the Korean Pharmaceutical Affairs Act and research or experiments for registration of agrochemicals under the Korean Agrochemicals Control Act)

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

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13. (a) What are the public policy objectives for providing the exception?

To better understand the contents and effects of a patented invention, a third party shall be allowed to work the invention. Also, there are possibilities of developing an advanced invention based on the working of the patented invention. The working of a patented invention contributes greatly to the advancement of technologies and as long as a product developed based on the results of the working of the invention is not put on the market, the patentee does not suffer a direct loss.

(b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:

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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:

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<sup>4</sup> Exceptions and limitations on acts for obtaining regulatory approval are dealt with in Section VII of the questionnaire.

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):

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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:

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: .....

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

Please explain by citing legal provision(s) and/or decision(s):

Article 96(1): The effect of a patent right does not extend to any of the following subparagraphs:

(i) working a patented invention for research or experimental purposes(including approval and registration of drugs under the Korean Pharmaceutical Affairs Act and research or experiments for registration of agrochemicals under the Korean Agrochemicals Control Act)

18. 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 purpose

Both of the above

The commercial intention of the experimentation and/or research is not relevant

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):

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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):

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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:

To better understand the contents and effects of a patented invention, a third party shall be allowed to work the invention. Also, there are possibilities of coming up with an advanced invention based on the working of the patented invention. The working of a patented invention contributes greatly to the advancement of technologies and as long as a product developed based on the results of the working of the invention is not put on the market, the patentee does not suffer a direct loss.

22. Which challenges, if any, have been encountered in relation to the practical implementation of the exception in your country? Please explain:

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**Section IV: Preparation of medicines**

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

Article 96(2): The effects of a patent right for the invention of products used for diagnosis, therapy, alleviation, medical treatment or prevention of human disease (referred to as "medicines") that are manufactured by mixing two or more medicines, or for the invention of processes for manufacturing medicines by mixing two or more medicines, do not extend to acts of dispensing medicines under the Pharmaceutical Affairs Act or to medicines manufactured by such acts.

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

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25. (a) What are the public policy objectives for providing the exception? Please explain:

Taking into account an act of preparing medicine by a doctor has a social mission with a particular purpose of helping citizens, when becoming patients, recover their health, it is considered inappropriate for the effect of a patent right to extend to an act of preparing medicine. Yet, it is interpreted that medicine itself is generally deemed to be prepared by a medicine manufacturer with a patent license granted, and legally sold by a doctor.

- (b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:

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26. Who is entitled to use the exception (for example, pharmacists, doctors, physicians, others)? Please describe:

A doctor

27. Does the applicable law provide for any limitations on the amount of medicines that can be prepared under the exception?

Yes

No

If yes, please explain your answer by citing the relevant provision(s) and/or decision(s):

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28. 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):

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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:

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30. Which challenges, if any, have been encountered in relation to the practical implementation of the exception in your country? Please explain:

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**Section V: Prior use**

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

Article 103: When filing a patent application, a person who has made an invention without prior knowledge of the contents of an invention described in an existing patent application, or who has learned how to make the invention from such a person and has been working the invention commercially or industrially in the Republic of Korea in good faith or has been making preparations to work the invention is entitled to have a nonexclusive license on the patent right for the invention under the patent application.

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

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33. (a) What are the public policy objectives for providing the exception? Please explain:

Under the first-to-file system, if a holder of a patented invention in good faith is not allowed to work the invention, it could do an unexpected damage to the holder. Therefore, a non-exclusive license based on prior use is included in the first-to-file system to address any deficiencies in formalities. The non-exclusive license based on prior use is recognized to realized the fairness between a patent right holder and a prior user. Also, it would be a disadvantage to a national economy if the business facilities of a prior user are not allowed.

- (b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:

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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):

Article 103: “a person who has made an invention without prior knowledge of the contents of an invention described in an existing patent application, or who has learned how to make the invention from such a person and has been working the invention commercially or industrially in the Republic of Korea in good faith or has been making preparations to work the invention”

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

Remuneration is not paid to the patentee considering the nature of free non-exclusive license.

36. According to the applicable law, can a prior user license or assign his prior user’s right to a third party?

- Yes  
No

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

If yes, please explain what those conditions are:

Article 102(5): A nonexclusive license other than those described in paragraphs (3) and (4) may not be transferred without the consent of the patentee, unless the transfer

is made with the underlying business or through inheritance or other general succession.

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

If yes, please explain the conditions under which such use can continue to apply:

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39. 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):

Article 104(1): Where a person has been commercially or industrially working an invention in the Republic of Korea, or has been making preparations to work the invention, before the registration of a request for an invalidation trial of the concerned patent or utility model, without knowing that the patented invention is subject to invalidation, the person is entitled, under any of the following circumstances, to have a nonexclusive license on that patent right or a nonexclusive license on the exclusive license to the patent right existing when the patent or utility model registration was invalidated; however, the nonexclusive license must be limited to the invention or device being worked or for which preparations for working are being made, and to the purpose of such working or preparations:

1. the original patentee, where one of two or more patents granted for the same invention has been invalidated;
2. the original owner of a utility model right, where a patented invention and a device registered as a utility model are the same and the utility model registration has been invalidated;
3. the original patentee, where the patent has been invalidated and a patent for the same invention has been granted to an entitled person;
4. the original owner of a utility model right, where the utility model registration has been invalidated and a patent for the same invention as the device has been granted to an entitled person; or
5. in the cases referred to in subparagraphs (i) to (iv), a person who, at the time of registering a request for an invalidation trial of an invalidated patent right or utility model right, has been granted an exclusive license, a nonexclusive license or a nonexclusive license on the exclusive license and the license has been registered; however, a person falling under Article 118(2) is not required to register the license.

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:

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41. Which challenges, if any, have been encountered in relation to the practical implementation of the exception in your country? Please explain:

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**Section VI: Use of articles on foreign vessels, aircrafts and land vehicles**

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

Article 96(1): The effect of a patent right does not extend to any of the following subparagraphs:

2. vessels, aircraft or vehicles merely passing through the Republic of Korea, or machinery, instruments, equipment or other accessories used on the vessels, aircraft or vehicles

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

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44. (a) What are the public policy objectives for providing the exception? Please explain:

Even though the working of transportation methods infringes the rights of a patentee, damage which vessels, aircraft or vehicles merely passing through the Republic of Korea would do to a patentee is, if any, little since such transportation methods just pass through the country in a short time. If such transportation methods are banned from passing through Korea, it would raise a critical problem in the international transportation system. It is based on Article 5(3) of the Paris Convention for the Protection of Industrial Property.

(b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:

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45. The exception applies in relation to:

- Vessels
- Aircrafts
- Land Vehicles
- Spacecraft

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):

Article 96(1)(2): "merely passing through the Republic of Korea,"

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):

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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):

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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:

Even though the working of transportation methods infringes the rights of a patentee, damage which vessels, aircraft or vehicles merely passing through the Republic of Korea would do to a patentee is, if any, little since such transportation methods just pass through the country in a short time. If such transportation methods are banned from passing through Korea, it would raise a critical problem in the international transportation system.

50. Which challenges, if any, have been encountered in relation to the practical implementation of the exception in your country? Please explain:

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**Section VII: Acts for obtaining regulatory approval from authorities**

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

Article 96(1): The effect of a patent right does not extend to any of the following subparagraphs:

(i) working a patented invention for research or experimental purposes(including approval and registration of drugs under the Korean Pharmaceutical Affairs Act and research or experiments for registration of agrochemicals under the Korean Agrochemicals Control Act)

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

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53. (a) What are the public policy objectives for providing the exception? Please explain:

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(b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:

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54. Who is entitled to use the exception? Please explain:

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55. The exception covers the regulatory approval of:

any products  
certain products. Please describe which products: .....

56. 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: **loan, transfer**.....

57. 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):

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58. 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:

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59. Which challenges, if any, have been encountered in relation to the practical implementation of the exception in your country? Please explain:

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**Section VIII: Exhaustion of patent rights**

60. Please indicate what type of exhaustion doctrine is applicable in your country in relation to patents:

- National
- Regional
- International
- Uncertain, please explain.....

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

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

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61. (a) What are the public policy objectives for adopting the exhaustion regime specified above? Please explain:

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(b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:

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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?

- Yes
- No
- Uncertain

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

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63. Has the applicable exhaustion regime been considered adequate to meet the public policy objectives in your country? Please explain:

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64. Which challenges, if any, have been encountered in relation to the practical implementation of the applicable exhaustion regime in your country? Please explain:

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**Section IX: Compulsory licenses and/or government use**

*Compulsory licenses*

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

Article 107

(1) Where a patented invention falls under any of the following subparagraphs, a person who intends to work the patented invention may request the Commissioner of the Korean Intellectual Property Office to make an adjudication (referred to as "an adjudication") for the establishment of a nonexclusive license, provided no agreement is reached despite having a consultation (referred to as "a consultation" in this Article) under reasonable conditions with the patentee or exclusive licensee on the grant of a nonexclusive license for the patented invention or a consultation is impossible to arrange; however, the person may request an adjudication even in the absence of a consultation if the patented invention is to be worked non-commercially for the public interest or in any case that falls under subparagraph 4:

1. where the patented invention has not been worked for more than three consecutive years in the Republic of Korea, except for natural disasters, unavoidable circumstances or other justifiable reasons prescribed by Presidential Decree;
2. where the patented invention has not continuously been worked commercially or industrially in the Republic of Korea on a substantial scale during a period of three years or more without justification, or where the domestic demand for the patented invention has not been satisfied to an appropriate extent and under reasonable conditions;
3. where working the patented invention non-commercially is necessary for the interests of the public; or
4. where working the patented invention is necessary to remedy a practice determined to be unfair after the judicial or administrative process;
5. where working the patented invention is necessary for the export of medicine to a country (referred to as "an importing country") that intends to import the medicine (including effective ingredients that are necessary for the production of the medicine and diagnostic kits necessary for the use of the medicine) in order to treat diseases that threaten the health of the majority of its citizens.

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

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

(4) When the Commissioner of the Korean Intellectual Property Office makes an adjudication under subparagraphs 1 to 3 or 5 of paragraph (1), the following conditions apply to the person for whom the adjudication was made:

1. where the adjudication is made under subparagraphs 1 to 3 of paragraph (1), the nonexclusive license must be implemented for the primary purpose of meeting domestic demand; and
2. where the adjudication is made under subparagraph 5 of paragraph (1), all the medicine produced under the terms of the adjudication must be exported to importing countries.

(5) The Commissioner of the Korean Intellectual Property Office shall ensure that

reasonable consideration is given to every adjudication. When making an adjudication under subparagraph 4 or 5 of paragraph (1), the Commissioner of the Korean Intellectual Property Office may consider the factors in each of the following subparagraphs:

1. where an adjudication is made under subparagraph 4 of paragraph (1), the need to rectify unfair transactions; and
  2. where an adjudication is made under subparagraph 5 of paragraph (1), the economic value generated in importing countries by the working of the patented invention.
- (6) For semiconductor technology, a request for adjudication may be made only in the cases set forth in subparagraph (1) 3 (where the noncommercial working of the patented invention is permitted in a limited way for the interests of the public) and (1) 4.
- (7) An importing country is limited to a country which is either a World Trade Organization (WTO) member country that has notified the WTO of the following particulars or a non-WTO member country listed in a Presidential decree, and which has notified the Republic of Korea of the following particulars:
1. the name of the medicine and the quantity required by an importing country;
  2. where the importing country is not one of the least developed countries listed in a resolution of the General Assembly of the United Nations, confirmation by the importing country that it has insufficient or no manufacturing capability to produce the medicine concerned; and
  3. where the medicine concerned is patented in the importing country, confirmation by the importing country that it has granted or intends to grant a compulsory license.
- (8) The term medicine in paragraph (1) 5 of this Article refers to any of the definitions in the following subparagraphs:
1. patented medicine;
  2. medicine manufactured by means of a patented process;
  3. patented effective ingredients necessary for the production of the medicine; or
  4. patented diagnostic kits necessary for the production of the medicine.
- (9) The documents for submission and other necessary matters concerning a request for adjudication are prescribed by Presidential Decree.

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

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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: .....

68. (a) What are the public policy objectives for providing compulsory licenses in your country? Please explain:

Where a patentee abuses a patent right such as intentionally not working a patented invention or being reluctant to cooperate for the working of the invention by another

person other than the patentee, a third party shall be allowed to work the patented invention to contribute to industrial development, which serves the purpose of the Patent Act.

(b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:

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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):

Article 107(1) 2 : where the patented invention has not continuously been worked commercially or industrially in the Republic of Korea on a substantial scale during a period of three years or more without justification, or where the domestic demand for the patented invention has not been satisfied to an appropriate extent and under reasonable conditions

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):

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71. In case of the grant of compulsory licenses on the grounds of non-working or insufficient working, does the applicable law provide for a certain time period to be respected before a compulsory license can be requested?

- Yes
- No

If yes, what is the time period?

Article 107(2): Paragraph (1) 1 and 2 of this Article do not apply unless a period of four years has elapsed after the filing date of the application for a patented invention.

72. 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

If yes, what are “legitimate reasons”? .....

73. 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 legal provision(s) and/or decision(s):

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74. If the applicable law provides for the grant of compulsory licenses on the ground of anti-competitive 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):

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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:

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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:

Article 106(2) 3: When the Government or any person, other than the Government, works a patented invention pursuant to paragraph (1), he/she or it shall promptly notify the patentee, exclusive licensee or non-exclusive licensee of the pact of working under paragraph (1).

Article 110(2): The remuneration for the license and the method and time of payment must be specified in an adjudication.

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:

Article 106(2)(i): “in time of war, uprising, or other similar emergency”

78. Please indicate how many times and in which technological areas compulsory licenses have been issued in your country:

In December 1980, the patent on the method of manufacturing Bis-thio benzene (owned by Nippon Soda Co. of Japan) was granted the non-exclusive license since it had not been commercially worked for the previous three years without justifiable grounds.

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:

Issuing compulsory licenses is considered adequate since the Commissioner of KIPO grants a non-exclusive license by the request made by a person who intends to work a patented invention after undertaking certain procedures, in order to serve the purpose of the Patent Act.

80. Which challenges, if any, have been encountered in relation to the use of the compulsory licensing system provisions in your country? Please explain:

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*Government use*

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

Article 106 bis (1) Where the non-commercial working of a patented invention is necessary for national defense in time of war, uprising, or other similar emergency or for the public interest, the government may expropriate the patent right (in the case of subparagraph 1 only), work the patented invention or require a person other than the government to work the patented invention.

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

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

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

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

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.....

83. 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: .....

84. (a) What are the public policy objectives for providing government use in your country?

To prepare for expected concerns that if inventions crucial for national security are monopolized by a certain person, it could adversely affect national security

(b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:

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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:

Article 106 bis (1): Where the non-commercial working of a patented invention is necessary for national defense in time of war, uprising, or other similar emergency or for the public interest

86. Please indicate how many times and in which technological areas government use has been issued in your country:

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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:

Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (Security Exceptions: the government’s position on restriction of an individual’s property right is minimized) is reflected in the legal framework to limit the issuance of government use only in time of war, uprising, or other similar emergencies.

88. Which challenges, if any, have been encountered in relation to the use of the government use mechanism in your country? Please explain:

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

*Farmers’ use of patented inventions*

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

Article 57(1) of the Seed Industry Act: A variety protection right-holder shall have an exclusive right to license the protected variety for business purposes.

90. If the exception is provided through case law, please cite the relevant decision(s) and provide a brief summary of such decision(s):

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.....

91. (a) What are the public policy objectives for providing the exception related to farmers’ use of patented inventions? Please explain:

Where a variety protection right-holder abuses a protected variety, such as intentionally not working the protected variety or being reluctant to cooperate for the working of the variety by another person other than the variety protection right-holder, a third party shall be allowed to work the protected variety to contribute to industrial development, which

serves the purpose of the Seed Industry Act.

(b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:

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92. 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 the exception, limitations on their use, as well as other criteria, if any, applied in the determination of the scope of the exception):

Article 68 of the Seed Industry Act (Rulings on Establishment of Non-Exclusive Licenses):

(1) Where a protected variety falls under any of the following subparagraphs, a person who intends to license the protected variety may apply for a ruling on the establishment of a non-exclusive license (hereinafter referred to as "ruling") to the Minister for Food, Agriculture, Forestry and Fisheries: *Provided*, That an application for a ruling pursuant to subparagraph 1 or 2 may be made only where he/she is unable to consult on the grant of a non-exclusive license with a variety protection right-holder or an exclusive licensee of the protected variety, or fails to reach an agreement after consultation:

1. Where a protected variety has not been licensed for three or more consecutive years in the Republic of Korea without a natural disaster other *force majeure* or other justifiable grounds prescribed by Presidential Decree;

2. Where a protected variety has not been licensed for three or more consecutive years in the Republic of Korea, without justifiable grounds, on a reasonable business scale or has failed to satisfy the domestic demand in due degree and on reasonable conditions;

3. Where a protected variety is required to be licensed non-commercially because an urgent adjustment of supply and demand or dissemination is required due to a war, a natural disaster or a calamity;

4. Where a protected variety is required to be licensed in order to correct matters recognized as unfair trading practices in accordance with judicial or administrative procedures.

(2) Paragraph (1) shall not apply to a protected variety where three years have not passed from the date of registration for the establishment of a variety protection right.

(3) Where the Minister for Food, Agriculture, Forestry and Fisheries makes a ruling, he/she shall review the necessity for the establishment of a nonexclusive license for each application.

(4) Where the Minister for Food, Agriculture, Forestry and Fisheries makes a ruling, he/she shall set conditions that a non-exclusive license shall be mainly used for the purpose of supply for the domestic demand: *Provided*, That this shall not apply where he/she makes a ruling on the application pursuant to paragraph (1) 4.

(5) Where the Minister for Food, Agriculture, Forestry and Fisheries makes a ruling pursuant to paragraph (1) 4, he/she may take the purport that the ruling is to correct unfair trading practices, into consideration in the decision of such royalties.

(6) Where the Minister for Food, Agriculture, Forestry and Fisheries makes a ruling, he/she shall undergo deliberation by the Seed Council pursuant to Article 158.

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:

Where a variety protection right-holder abuses a protected variety, such as intentionally not working the protected variety or being reluctant to cooperate for the working of the variety by another person other than the variety protection right-holder, a third party shall

be allowed to work the protected variety to contribute to industrial development, which serves the purpose of the Seed Industry Act.

94. 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:

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*Breeders' use of patented inventions*

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

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96. If the exception is provided through case law, please cite the relevant decision(s) and provide a brief summary of such decision(s):

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97. (a) What are the public policy objectives for providing the exception related to breeders' use of patented inventions? Please explain:

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.....

- (b) Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:

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98. 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 the exception, limitations on their use, as well as other criteria, if any, applied in the determination of the scope of the exception):

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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:

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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:

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***Section XI: Other Exceptions and Limitations***

101. Please list any other exceptions and limitations that your applicable patent law provides:

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102. In relation to each exception and limitation, please indicate:

- (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):

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- (ii) the public policy objectives of each exception and limitation. Where possible, please explain with references to the legislative history, parliamentary debates and judicial decisions:

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- (iii) the entitlement and the scope of the exception and limitation by citing legal provision(s) and/or decision(s):

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In addition, in relation to each exception and limitation, please explain:

- (i) whether its applicable legal framework is considered adequate to meet the objectives sought (for example, are there any amendments to the law foreseen?):

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- (ii) if there have been any challenges encountered in the practical implementation of the exception in your country:

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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:

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[End of Questionnaire]