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CHINA – CERTAIN MEASURES CONCERNING THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

REQUEST FOR CONSULTATIONS BY THE UNITED STATES

The following communication, dated 23 March 2018, from the delegation of the United States to the delegation of China and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the Government of the People's Republic of China ("China") pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Article 64 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPS Agreement") (to the extent that Article 64 corresponds to Article XXII of the *General Agreement on Tariffs and Trade 1994*), with respect to certain Chinese measures pertaining to the protection of intellectual property rights.

China denies foreign patent holders the ability to enforce their patent rights against a Chinese joint-venture party after a technology transfer contract ends. China also imposes mandatory adverse contract terms that discriminate against and are less favorable for imported foreign technology. Therefore, China deprives foreign intellectual property rights holders of the ability to protect their intellectual property rights in China as well as freely negotiate market-based terms in licensing and other technology-related contracts.

The legal instruments through which China imposes these measures include the following, operating separately or collectively:

- *Foreign Trade Law of the People's Republic of China* (adopted at the Eighth Session of the Standing Committee of the Seventh National People's Congress on May 12, 1994, effective July 1, 1994, in Executive Order No. 22, amended by the Eighth Session of the Standing Committee of the Tenth National People's Congress on April 6, 2004, effective July 1, 2004, in Executive Order No. 15, further amended November 7, 2016, in Executive Order No. 57)
- *Regulations of the People's Republic of China on the Administration of the Import and Export of Technologies* (Order of the State Council No. 331, issued December 10, 2001, effective January 1, 2002, amended January 8, 2011, in Order of the State Council No. 588)
- *Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures* (adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, effective July 8, 1979, in Order No. 7 of the Chairman of the Standing Committee, amended April 4, 1990, in Executive Order No. 27, further amended March 15, 2001, in Executive Order No. 48, and September 3, 2016, in Executive Order No. 51)
- *Regulations for the Implementation of the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures* (State Council, Guo Fa [1983] No. 148, issued September 20, 1983, effective September 20, 1983, amended January 15, 1986, in Guo Fa [1986] No. 6, further amended December 21, 1987, in Guo Fa [1987]

No. 110, July 22, 2001, in Order of the State Council No. 311, January 8, 2011, in Order of the State Council No. 588, and February 19, 2014, in Order of the State Council No. 648)

- *Contract Law of the People's Republic of China* (adopted at the Second Session of the Ninth National People's Congress on March 15, 1999, effective October 1, 1999, in Executive Order No. 15)

as well as any amendments, or successor, replacement, or implementing measures.

The *Regulations of the People's Republic of China on the Administration of the Import and Export of Technologies*, operating separately or together with other listed instruments, appear to be inconsistent with Article 3 (National Treatment) of the TRIPS Agreement, solely or in conjunction with Article 28.2 of the TRIPS Agreement, because:

- Article 24 of the *Regulations* accords less favorable treatment to foreign intellectual property rights holders as compared to Chinese intellectual property rights holders. For example, Article 24 requires that licensors to imported technology contracts indemnify licensees for all liabilities for infringement resulting from the use of the transferred technology.
- Article 27 of the *Regulations* accords less favorable treatment to foreign intellectual property rights holders as compared to Chinese intellectual property rights holders. For example, Article 27 requires that any improvements in imported technology belong to the party making the improvement.
- Article 29 of the *Regulations* accords less favorable treatment to foreign intellectual property rights holders as compared to Chinese intellectual property rights holders. For example, Article 29(3) prohibits an imported technology license contract from restricting a Chinese party from improving the technology or from using the improved technology.

The *Regulations for the Implementation of the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures*, operating separately or together with other listed instruments, appear to be inconsistent with Article 3 (National Treatment) of the TRIPS Agreement, solely or in conjunction with Article 28.1(a), (b) or Article 28.2 of the TRIPS Agreement, because:

- Article 43 of the *Regulations* accords less favorable treatment to foreign intellectual property rights holders as compared to Chinese intellectual property rights holders. For example, Article 43(4) provides a Chinese joint-venture party the right to continue to use technology transferred under a technology transfer contract after the expiration of the contract.

The *Regulations for the Implementation of the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures*, operating separately or together with other listed instruments, appear to be inconsistent with Article 28.1(a), (b) of the TRIPS Agreement because:

- Article 43 of the *Regulations* denies foreign patent holders their exclusive rights, including to prevent third parties not having the foreign patent holder's consent from acts listed in Article 28.1(a), (b) of the TRIPS Agreement.¹ For example, Article 43(4) provides a Chinese joint-venture party the right to continue to use technology transferred under a technology transfer contract after the expiration of the contract.

We look forward to receiving your reply to the present request and to scheduling a mutually convenient date for consultations.

¹ See TRIPS Agreement Article 28.1(a), (b): "A patent shall confer on its owner the following exclusive rights: (a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product; (b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process."