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:


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.

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.”