

## **TRADE**

### **Films for Theatrical Release**

**Memorandum of Understanding  
Between the  
UNITED STATES OF AMERICA  
and CHINA**

Signed at Geneva April 25, 2012

*with*

Annex



NOTE BY THE DEPARTMENT OF STATE

Pursuant to Public Law 89—497, approved July 8, 1966  
(80 Stat. 271; 1 U.S.C. 113)—

“ . . . the Treaties and Other International Acts Series issued under the authority of the Secretary of State shall be competent evidence . . . of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and international agreements other than treaties, as the case may be, therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof.”

**CHINA**

**Trade: Films for Theatrical Release**

*Memorandum of understanding  
signed at Geneva April 25, 2012;  
Entered into force April 25, 2012.  
With annex.*

**Memorandum of Understanding between the People's Republic of China and  
the United States of America Regarding Films for Theatrical Release**

Whereas the United States of America ("United States") requested consultations with the People's Republic of China ("China") in the World Trade Organization ("WTO") on April 10, 2007 regarding measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products (DS363);

Whereas the WTO's Dispute Settlement Body ("DSB") adopted its recommendations and rulings in DS363 on January 19, 2010; and

Whereas China and the United States signed "Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding" on April 8, 2011 ("Sequencing Agreement") (WT/DS363/18 and WT/DS363/18/Corr.1);

China and the United States have agreed to the following provisions, including the provisions in the Annex hereto, which are part of this Memorandum of Understanding:

**Revenue-Sharing Films**

1. China confirms that enhanced format films are not subject to the 20-film commitment set forth in the Additional Commitments under Sector 2.D. of its GATS Schedule ("Revenue-Sharing Film Commitment"). China further agrees that it will allow the importation of at least 14 enhanced format revenue-sharing films per calendar year beginning in 2012.
2. In any contract for the distribution of a revenue-sharing film between a U.S. enterprise and a Chinese state enterprise, the U.S. enterprise will be allocated 25 percent of gross box office receipts, and the Chinese state enterprise shall be responsible for the payment of all taxes, duties and expenses. The term "gross box office receipts" means all monies or other things of value received by the theaters exhibiting the film in exchange for admission.

**Films Other Than Revenue-Sharing Films**

3. In any contract for the distribution of a film other than a revenue-sharing film between a U.S. enterprise and a Chinese state enterprise, the contract will be based on commercial terms, consistent with the terms prevailing in countries whose markets are comparable to China's market based on annual box office revenue, number of screens, annual admissions and admissions per screen.

***CN* Distribution**

4. China confirms that any Chinese enterprise is eligible to apply for and be granted a license to distribute imported films and that nothing in China's laws, regulations or government rules prevents any eligible Chinese enterprise from applying for and receiving a license to distribute, and operating as a distributor of, these films.

5. China will promote reform in the distribution of imported films and will actively encourage more Chinese enterprises, including private enterprises, to obtain licenses and to participate in the distribution of these films.

6. China will approve any application for a license received from a Chinese enterprise if the Chinese enterprise fulfills valid requirements established by China. For the purpose of a license to distribute imported films, valid requirements are limited to requirements that are applied in a non-discretionary and non-discriminatory manner.

7. China confirms that there are no barriers to U.S. enterprises contracting directly with any licensed Chinese enterprise for the distribution of imported films, subject to the understanding that China currently requires certain Chinese state enterprises to distribute imported revenue-sharing films subject to the Revenue-Sharing Film Commitment.

8. China will ensure that no Chinese government entity or Chinese state enterprise, including the film importer, directly or indirectly influences the negotiation, terms, amount of compensation or execution of any distribution contract involving a licensed Chinese private enterprise.

#### **Other Provisions**

9. For any imported film, in accordance with relevant provisions of the Administrative Approval Law, China will ensure that the content review process is administered in a transparent manner, is completed in less than 30 days, and will not undermine the provisions of this Memorandum of Understanding. If a film is rejected for importation as a result of the content review process, China will ensure that the responsible regulatory agency promptly provides notice and the reasons for the rejection to the U.S. enterprise or any Chinese enterprise representing it.

10. China will ensure that Chinese policies and practices relating to film exhibition will not undermine the provisions of this Memorandum of Understanding.

11. China and the United States will periodically consult about the implementation of the commitments set forth in this Memorandum of Understanding.

12. In calendar year 2017, China and the United States will engage in consultations. Through this consultation process, China and the United States will provide for further meaningful compensation to the United States in terms of the number of enhanced format films to be imported each year and the share of gross box office receipts received by U.S. enterprises. China and the United States also will discuss the matter of China implementing the DSB's recommendations and rulings with regard to films in DS363.

CK

13. The following definitions apply to this Memorandum of Understanding:

- a. "Chinese state enterprise" means any Chinese state-owned or state-controlled enterprise.

JS

- b. "Chinese enterprise" includes any Chinese state-owned or state-controlled enterprise or private Chinese-invested enterprise.
- c. "U.S. enterprise" means any U.S. enterprise, as well as any affiliate of a U.S. enterprise, regardless of its ownership or location; it also includes any enterprise authorized by a U.S. enterprise to contract with a Chinese enterprise for the importation and distribution of the U.S. enterprise's films.
- d. "Films" means films for theatrical release (also known as motion pictures) in China.
- e. "Revenue-sharing films" means films licensed for distribution on the basis of a sharing of the box office revenue in China as described in paragraph 2.
- f. An "enhanced format" film includes any film that is to be exhibited in China in a large screen format such as IMAX, in 3D format and/or in any other enhanced format, whether or not currently in existence, and encompasses the film's other formatted versions, if any, that are to be exhibited in China during the same release period.
- g. The "WTO Agreement" means the *Marrakesh Agreement Establishing the World Trade Organization*, done on April 15, 1994.

14. This Memorandum of Understanding is without prejudice to the rights and obligations of China and the United States under the WTO Agreement, the DSB recommendations and rulings in DS363, and the Sequencing Agreement.

15. Notwithstanding paragraph 14, the United States confirms that, with regard to issues related to films in DS363, it will neither request initiation of procedures pursuant to Article 21.5 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") nor request suspension of concessions or other obligations pursuant to DSU Article 22.6 prior to January 1, 2018, as long as the United States considers that China is in compliance with all of its obligations under this Memorandum of Understanding.

16. In the event that China and the United States agree that China has implemented the DSB's recommendations and rulings with regard to films in DS363, this Memorandum of Understanding shall terminate on the date of that agreement.

17. Nothing in this Memorandum of Understanding shall require changes to be made to a contract for the distribution of a particular imported film if the film has been accepted for release in China and the contract was signed prior to 18 February 2012.

Done in Geneva, Switzerland, 25 April 2012, in two original versions in Chinese and English, respectively, each text being equally authentic.

CA For the Government  
of the People's Republic of China:

Yi Xiaozhun

For the Government  
of the United States of America:

Michael Fuchs

李

**Annex to  
Memorandum of Understanding between the People's Republic of China and  
the United States of America Regarding Films for Theatrical Release**

In any contract relating to the distribution of imported films involving a Chinese state enterprise, the following terms shall apply:

- a. The U.S. enterprise shall be advised and consulted with respect to any marketing and advertising plans by the Chinese distributor in connection with the distribution of the film. The U.S. enterprise shall have the right to conduct at its discretion supplemental marketing and advertising activities.
- b. Any contract entered into by the Chinese distributor with a sub-distributor in China must be negotiated in good faith, with the participation of the U.S. enterprise, and must be pre-approved in writing by the U.S. enterprise.
- c. The Chinese distributor is obligated to require any sub-distributor to comply with all of the terms of the contract between the U.S. enterprise and the Chinese distributor.
- d. Content review approval shall be the sole obligation of the Chinese distributor and shall be completed in a timely manner.
- e. The Chinese distributor shall be obligated to demonstrate to the U.S. enterprise, in an official writing, any content review rejection by the responsible Chinese regulatory authority.
- f. If the contract between the U.S. enterprise and the Chinese distributor has been entered into prior to content review, in the event of content review rejection, the contract shall provide first for the opportunity for substitution or re-editing of the film, subject to good faith negotiation and agreement between the U.S. enterprise and the Chinese distributor, and shall not make content review rejection an automatic material breach of the contract that provides justification for any termination or cancellation of the contract or refund of any payment paid under the contract.
- g. The U.S. enterprise shall have the right to receive and to audit information (including box office receipts, where relevant) regarding the implementation of the Chinese distributor's obligations under the contract between the U.S. enterprise and the Chinese distributor as well as the obligations of any sub-distributor under a contract between the distributor and the sub-distributor.
- h. The U.S. enterprise and the Chinese distributor shall agree to designate in writing the country whose laws shall govern the interpretation of the contract between the U.S. enterprise and the Chinese distributor as well as the jurisdiction and forum in which any dispute related to the contract shall be resolved, including but not limited to arbitration and arbitration rules in any jurisdiction and forum to which they agree.

GK

李

**美利坚合众国与中华人民共和国  
关于用于影院放映的电影的  
谅解备忘录**

鉴于 2007 年 4 月 10 日，美利坚合众国（美国）在世界贸易组织（WTO）就影响某些出版物及视听娱乐产品的贸易权和发行服务的措施请求与中华人民共和国（中国）磋商（DS363 案）。

鉴于 WTO 争端解决机构（DSB）于 2010 年 1 月 19 日通过了 DS363 案的建议和裁决；并且

鉴于中国和美国于 2011 年 4 月 8 日签署“争端解决规则与程序的谅解第 21 和 22 条下的程序之协议”（顺序协议）（WT/DS363/18 和 WT/DS363/18/Corr.1）；

中国和美国达成如下协议条款，包括作为本谅解备忘录一部分的附件中的条款：

**分账式影片**

1. 中国确认高技术格式影片不列入中国服务贸易减让表 2.D. “其他承诺”项下的 20 部电影的承诺内（分账式影片承诺）。中国进一步同意，自 2012 年起将允许每个自然年度进口不少于 14 部高技术格式影片。
2. 在任何美国企业和中国国有企业间的分账式影片发行合同中，美国企业将分得总票房收入的 25%，中国国有企业将承担所有税金、关税和费用。“总票房收入”一词指影院放映影片出售电影票所获得的所有货币收入或其他有价物。

**非分账式影片**

3. 关于任何美国企业和中国国有企业间的非分账式影片发行合同，该等合同将基于与可比国家通行的条款相一致的商业条款（所谓可比国家是指其市场在年度票房收入、银幕数量、年度观影人次和平均每一银幕的观影人次方面与中国电影市场有可比性的国家）。

**发行**

4. 中国确认任何中国企业均有资格申请并获得进口影片的发行许可，并且中国法律、法规或政府规章不会妨碍任何有资格的中国企业申请、获得发行许可，并成为该等影片的发行商。
5. 中国将推动进口影片的发行改革，积极鼓励更多中国企业包括私营企业，获得许可并参与发行该等影片。



6. 如果中国企业满足中国规定的有效条件，中国将会批准该等中国企业递交的许可申请。就发行进口电影的许可规定的条件应限于以非任意和非歧视方式适用的条件。
7. 基于目前中国要求特定的中国国有企业在分账式影片承诺下发行进口分账式影片的认识，中国确认在直接与任何有权发行进口电影的中国企业签订合同方面，美国企业将不存在任何障碍。
8. 中国将确保中国政府机构或中国国有企业，包括电影的进口商，不会直接或间接地影响任何涉及已获得许可的中国私营企业发行合同的谈判、条款、金额或执行。

#### 其他条款

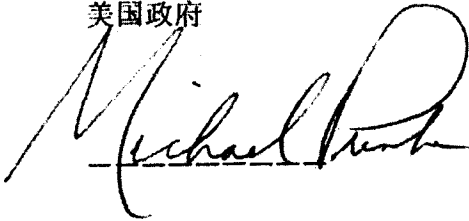
9. 就任何进口影片，根据《行政许可法》的相关条款，中国将确保内容审查程序以透明的方式于 30 天内完成，并且将不会减损本谅解备忘录的条款内容。如果一部影片因未通过内容审查程序被拒绝进口，中国将确保负责的监管机构及时向美国企业或任何代表美国企业的中国企业提供通知及拒绝的原因。
10. 中国将确保影片公映的相关政策和实践不会减损本谅解备忘录的条款内容。
11. 中国和美国将定期地对本谅解备忘录承诺的执行进行磋商。
12. 在 2017 自然年度，中国和美国将进行磋商。通过该磋商程序，中国和美国将在每年进口的高技术格式电影数量和美国企业获得的总票房比例方面向美国提供进一步有意义的补偿。中国和美国也将就中国执行 DSB 在 DS363 案中关于电影问题的建议和裁决的事宜进行讨论。
13. 以下定义适用于本谅解备忘录：
  - a. “中国国有企业”系指任何中国的国有企业或国家控制的企业。
  - b. “中国企业”包括任何中国国有企业、国家控制的企业或私营中资企业。
  - c. “美国企业”系指任何美国企业，及美国企业的任何关联方（不考虑其所有权或位置），并且包括经美国企业授权与中国企业签订进口、发行美国影片合同的任何企业。
  - d. “影片”“电影”系指用于在中国影院放映的影片。
  - e. “分账影片”系指如第 2 段所述在中国以票房收入比例进行分账方式获得许可发行的影片。
  - f. “高技术格式”影片包括任何在中国以大银幕格式放映的影片，如 IMAX、3D 格式和/或任何其他不论现在是否存在的高技术格式，以及包括同时在中国放映的该等影片其他格式版本。
  - g. “WTO 协定”系指 1994 年 4 月 15 日制定的“马拉喀什建立世界贸易组织协定”。
14. 本谅解备忘录不会影响中国和美国在 WTO 协定、DSB 就 DS363 的建议和裁决

以及顺序协议下的权利和义务。

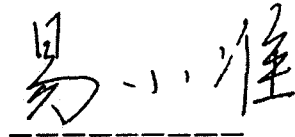
15. 尽管有第 14 段之规定，美国确认，就 DS363 案中有关电影的问题，只要美国认为中国遵守了本谅解备忘录项下的所有义务，在 2018 年 1 月 1 日前，美国不会要求启动 WTO《关于争端解决规则与程序的谅解》(“DSU”) 第 21.5 条项下的程序，也不会根据 DSU 第 22.6 条要求授权中止减让或其他义务。
16. 如果中国和美国同意中国已经执行 DSB 关于 DS363 案中有关电影的建议和裁决，本谅解备忘录将自前述同意达成之日终止。
17. 如果影片在 2012 年 2 月 18 日前已经被同意在中国放映并且其发行合同已经签署，本谅解备忘录不要求修改该等进口影片的发行合同。

本谅解备忘录于 2012 年 4 月 25 日于瑞士日内瓦订立。两份原版文件分别由中文和英文书写，每一版本同样作准。

美国政府



中国政府



CA

李

美利坚合众国与中华人民共和国  
关于用于影院放映的电影的谅解备忘录  
附件

任何涉及中国国有企业的进口电影发行合同应当适用如下条款：

- a. 中国发行商应当告知美国企业并与之商议与电影发行有关的营销和宣传规划。美国企业有权自行开展其他营销和宣传活动。
- b. 中国发行商与中国分发行商之间的任何合同必须在有美国企业参与的情况下，善意协商并获得美国企业的事先书面同意。
- c. 中国发行商有义务要求任何分发行商遵守中国发行商与美国企业达成的合同的条款。
- d. 内容审查批准应当由中国发行商独立负责，且应当及时完成。
- e. 中国发行商应当有义务将中国负责的监管机关的任何内容审查拒绝决定以正式书面形式向美国企业说明。
- f. 如果美国企业和中国发行商在内容审查前订立合同，在内容审查被拒绝的情形下，合同应规定在美国企业和中国发行商善意谈判并达成一致的前提下首先给予替换或再次编辑影片的机会，并且内容审查被拒不应当自动导致合同的实质性违约，从而适用合同项下的终止或取消合同或返还已付款款的条款。
- g. 就美国企业与中国发行商订立的合同中中国发行商义务的履行情况和发行商与分发行商订立的合同中分发行商义务的履行情况，美国企业有权获得并审计与之有关的信息（如果相关，包括票房情况）。 OK
- h. 美国企业和中国发行商应当就美国企业和中国发行商间订立的合同的解释问题书面约定所适用的法律，并对合同争议的管辖权和法院地进行约定，包括并不限于仲裁以及管辖地的仲裁规则及他们同意的仲裁地。