

**COMMUNICATION FROM THE EUROPEAN COMMUNITY  
AND ITS MEMBER STATES**

The following communication, dated 6 September 2004, is being circulated at the request of the Delegation of the European Communities.

**TRANSITIONAL REVIEW MECHANISM PURSUANT TO PARAGRAPH 18  
OF THE PROTOCOL ON THE ACCESSION OF THE PEOPLE'S  
REPUBLIC OF CHINA ("CHINA")**

**I. GENERAL**

1. The EC is transmitting these comments and questions in advance of the meeting of the TRIMs Committee on 26 October 2004, in order for the Chinese authorities to reply and to complete any information that may be incomplete. The questions build upon the previous meetings of the Committee on TRIMs on 14 October 2002 and 3 October 2003, as well as previous questions from the EC and its member States as contained in documents G/TRIMS/W/21 and G/TRIMS/W/31.

2. Once the information to be provided by China in accordance with paragraph 8 and paragraph IV.3(a) of Annex 1A of its accession protocol has been received, the EC may submit additional questions.

The EC's comments and questions relate to the following priority items:

- Amendment of clauses contained in contractual arrangements that are incompatible with the TRIMs Agreement;
- New Automobile policy (investment provisions).

3. In connection with its accession to the WTO, China assumed a number of commitments with respect to existing WTO agreements and the obligations contained therein.

4. On TRIMs, has China committed itself to comply fully with the TRIMs Agreement through abolishing legislation and other measures constituting TRIMs **upon joining the WTO** and through "providing relevant information, including information contained in Annex 1A, to each subsidiary body in advance of the review". More specifically, paragraph 3 of the Accession Protocol for China reads:

"3. China shall, upon accession, comply with the TRIMs Agreement, without recourse to the provisions of Article 5 of the TRIMs Agreement. China shall

eliminate and cease to enforce trade and foreign exchange balancing requirements, local content and export or performance requirements made effective through laws, regulations or other measures. Moreover, China will not enforce provisions of contracts imposing such requirements. Without prejudice to the relevant provisions of this Protocol, China shall ensure that the distribution of import licences, quotas, tariff-rate quotas, or any other means of approval for importation, the right of importation or **investment** by national and sub-national authorities, **is not conditioned on**: whether competing domestic suppliers of such products exist; or **performance requirements** of any kind, such as local content, offsets, the **transfer of technology**, export performance or the conduct of research and development in China.”

## **II. AMENDMENT OF TRIMS INCOMPATIBLE CLAUSES IN CONTRACTUAL ARRANGEMENTS**

5. Paragraph 3 of the Protocol of accession lays out a clear obligation for China to not only abolish or amend TRIMS-incompatible legislation, but also to ensure that any contracts containing TRIMS-incompatible commitments and obligations would not be enforced.

6. However, the EC notes that – according to the Chinese answers provided during previous TRMs – obligations contained in existing contractual arrangements may nevertheless remain valid and enforceable even where such arrangements contain TRIMS-incompatible commitments.

7. During the last TRM regarding TRIMS, China stated its respect for the freedom of parties to enter into contracts and added that commitments entered into by (foreign) producers continue to be enforceable, as “such commitments cannot be deemed invalid ... [and] the enterprise shall continue to honour its commitment made in the contract” and the fact that, in relation to foreign investment, the contracts and articles of association of a foreign invested enterprise become effective only after they have been approved by the competent authority.

8. That answer would appear to be in contradiction with the explicit undertaking under paragraph 3 of the Protocol to ensure that contracts which contain TRIMS-incompatible commitments and obligations are no longer enforced.

9. **In this context, the EC would be grateful if China could:**

**Confirm that contractual arrangements which contain TRIMS-incompatible commitments and obligations should be amended in such a way that they will contain obligations which are fully compatible with the TRIMS Agreement?**

**Indicate how such amendments might be instituted, including through a renegotiation of the relevant parts of a contract?**

**Confirm that for its part it will ensure that any contracts which may contain TRIMS incompatible commitments and obligations will not be enforced by China, including before domestic law courts or other administrative tribunals or bodies and that the TRIMS-incompatible commitments and obligations are to be considered null and void?**

## **III. NEW AUTOMOBILE POLICY (INVESTMENT PROVISIONS)**

10. The EC understands that under the new Chinese Automobile Policy maximum foreign participation in joint ventures is capped at 50% and that under the new Chinese Automobile Policy the

maximum number of joint ventures per investor is capped at two. The EC further understands that for operations in the export processing zones none of the above restrictions apply.

11. Paragraph 3 of the Protocol of accession (set out above) stipulates that: "(...) China shall ensure that (...) the right of investment (...) is not conditioned on: (...) export performance (...)".

12. In the light of the above understanding of the relevant features of the new Chinese Automobile Policy and the Chinese undertaking contained in the Protocol of accession, the state of affairs may be summarised as follows: fully foreign-owned production is only allowed in export processing zones and approval of such investments will only be granted for investment in such zones. In other words: in order to obtain approval of investment beyond 50% foreign ownership, foreign producers will have to locate their production in an export processing zone. Thereby, the approval or actual right could be conditional upon acceptance and fulfilment of an export performance requirement.

13. **In this context, the EC would be grateful if China could:**

**Confirm the relevant features of its new Automobile Policy and provide additional details about features relevant for the approval of investments in the export processing zones and for the operation of businesses established in those zones, including the extent to which export (and the volume of such exports) is actually required and/or necessary for enterprises located in those zones, with the consequence that such export performance becomes a condition for approval of foreign majority-owned investment and/or the unlimited number of joint ventures?**

**Clarify which government ministry or agency is responsible for export processing zones and which regulation foresees the abolition of otherwise applicable joint venture restrictions provided the investment is located in an export processing zone?**

**Provide further details about the characteristics of the export processing zones, including the possibility of importing goods processed in the zones into the mainland? Are there circumstances under which this importation takes place on a duty-free basis?**

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