WORLD TRADE ORGANIZATION

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Committee on Anti-Dumping Practices

CHAIR'S REPORT TO THE COUNCIL FOR TRADE IN GOODS ON TRANSITIONAL REVIEW OF CHINA

1. The Committee on Anti-Dumping Practices undertook the sixth Transitional Review of China pursuant to Paragraph 18 of the Protocol on the Accession of the People's Republic of China (WT/L/432) at its meeting of 22-23 October 2007.

2. There is no information specified for submission to the Committee under Annex 1A to the Protocol. Members submitted questions in the context of the transitional review relating to China's implementation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-dumping Agreement). These can be found in documents G/ADP/W/462 (submitted by the United States), G/ADP/W/463 (submitted by Japan).

3. The statements made at the meeting of 22-23 October 2007, at which the transitional review was item K of the agenda, are reflected in the minutes of the meeting, which will be circulated as document G/ADP/M/33. The relevant paragraphs of the minutes, which reflect the statements made and the discussion at the meeting, are annexed.

Excerpt from the minutes of the regular meeting of the Committee on Anti-Dumping Practices held on 22-23 October 2007, to be circulated as document G/ADP/M/33

D. TRANSITIONAL REVIEW UNDER PARAGRAPH 18 OF THE PROTOCOL OF ACCESSION OF THE PEOPLE'S REPUBLIC OF CHINA TO THE WORLD TRADE ORGANIZATION

1. The Chairperson recalled that Paragraph 18 of the Protocol of Accession of the People's Republic of China to the World Trade Organization provided that all subsidiary bodies, including this Committee, "which have a mandate covering China's commitments under the WTO Agreement or [the] Protocol shall, within one year after accession, review, as appropriate to their mandate, the implementation by China of the WTO Agreement and of the related provisions of [the] Protocol." China was to provide relevant information in advance of the review, including information specified in Annex 1A to the Protocol. China also could raise issues relating to any reservations under Section 17 or to any other specific commitments made by other Members in the Protocol, in subsidiary bodies which had a relevant mandate. The Committee was required to report the results of the review promptly to the Council for Trade in Goods. The review was to take place after accession in each year for eight years, with a final review in year 10 or at an earlier date decided by the General Council.

2. The Chairperson further recalled that there were no procedures set out for the conduct of the transitional review in the Protocol, except that China was to provide relevant information in advance of the review. No information was specified for submission to the Committee under Annex 1A.

3. The Chairperson noted that the delegations of the United States and Japan had submitted questions in the context of the transitional review which had been circulated in documents G/ADP/W/462 and W/463, respectively.

4. In response to the Chairperson's invitation for any statements of a general nature, the delegate of the United States noted that this was the sixth annual review of China's implementation of its anti-dumping regime under the Transitional Review Mechanism created by China's Protocol of Accession. As in the past, the United States approached this mechanism with the understanding that the Transitional Review Mechanism was designed to help Members understand and assess the progress that China had made in adopting and complying with WTO disciplines. From that perspective, the Transitional Review Mechanism continued to be a useful mechanism. It helped to provide needed additional transparency for China's trade regime, as it allowed Members to seek and obtain clarifications regarding China's various trade policies and practices. It also provided Members with a multilateral forum for conveying their expectations of China and their concerns with China's implementation and compliance efforts. In that regard, the Transitional Review Mechanism was a useful supplement to bilateral discussions with China.

5. Since China's accession to the WTO in December of 2001, China had been incrementally improving its compliance efforts in the anti-dumping area. Yet, nearly six years later, some aspects of China's anti-dumping regime remained obscure and appeared to fall short of meeting the standards of transparency and procedural fairness embodied within the requirements of the Anti-Dumping Agreement.

6. The United States first wished to address China's notification obligation. In past transitional reviews before the Committee, the United States had noted that China did not appear to have notified all relevant legislation to the Committee, and this continued to be a problem. In fact, regulatory measures that the United States had inquired about at the previous year's transitional review had not been notified one year later, nor had any explanation been given for this lack of notification. These regulatory measures appeared to affect key aspects of China's anti-dumping regime, but they had not

been notified to the Committee. Lapses in notification denied other WTO Members the opportunity to review and comment on the content of new regulations. This process allowed WTO Members to obtain needed clarifications, and helped to avoid misunderstandings and conflicts in actual anti-dumping proceedings. The United States noted that China had recently submitted to the Committee helpful answers to questions posed by the United States and the European Communities regarding legislation that China had notified the previous year. The United States urged China to build upon this step by notifying the regulatory measures addressed in the questions that the United States had submitted in connection with the present transitional review.

7. Looking at how China had been conducting its anti-dumping regime, it was clear that China continued to be an active user of the anti-dumping remedy. It also was clear that China was continuing to improve its compliance with the demanding standards of the Anti-Dumping Agreement. However, more needed to be done in this area.

8. In past transitional reviews before the Committee, the United States had expressed concern that critical arguments or evidence put forward by interested parties had not been addressed adequately in either preliminary or final determinations by China's administering authority, the Ministry of Commerce ("MOFCOM"). As China's anti-dumping regime had matured, many of the anti-dumping measures it had put in place would soon reach the five-year mark. Given the evidentiary problems encountered in China's anti-dumping investigations, it was critical that China ensure that the procedures governing the expiration and review of anti-dumping measures meet the high standards of the Anti-Dumping Agreement. Full access to critical arguments and evidence needed to be provided to interested parties in expiry reviews, as well as full opportunities for due process. Therefore, the United States urged China to continue to develop its expiry review regulations and procedures as soon as possible and to notify them promptly to the Committee.

9. The United States noted as well that procedural and substantive deficiencies continued to be found, especially in injury and causal link determinations made by MOFCOM's Investigation Bureau for Industry Injury (IBII). In 2006, China had continued to remedy some of these problems, terminating the anti-dumping investigations of butanols and octanol due to findings of no injury. However, the United States remained concerned because China had not clearly addressed the fundamental issues plaguing its affirmative injury and causal link decisions, which often cited either no evidence at all or evidence that did not adequately address the arguments made. As the United States had previously emphasized, conclusory statements without evidentiary support did not constitute "positive evidence" within the meaning of Article 3.1 of the Anti-Dumping Agreement. In particular, the WTO's anti-dumping rules required the investigating authority to make available to all interested parties details of the factual basis and reasoning supporting the investigating authority's decisions, as well as complete accounts of the petitioners' allegations and briefs.

10. Interested parties, including responding parties and US Government representatives, continued to be frustrated in their attempts to obtain adequate non-confidential versions of documents, such as Chinese industry responses to IBII questionnaires, reports on the results of on-the-spot verifications and disclosure of anti-dumping margin calculations. Article 6.5 of the Anti-Dumping Agreement required that non-confidential summaries of confidential documents be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. As the United States had explained during previous transitional reviews, without access to confidential information submitted to MOFCOM, it was essential that responding parties have comprehensive and informative non-confidential summaries in order to be able to mount an effective defence. The United States urged China to remedy these shortcomings in order to ensure that the determinations in forthcoming proceedings were conducted in accordance with the tenets of the Anti-Dumping Agreement.

11. The United States also urged China to ensure the application of fair procedures to all parties to an investigation or review as envisioned by the Anti-Dumping Agreement. For investigations and reviews, this included, but was not limited to, timely access to administrators and favourable consideration of hearing requests, as embodied in Article 6.2 of the Anti-Dumping Agreement. It also was important to provide all interested parties with the opportunity to raise issues in an open and transparent setting at an early stage of every proceeding. While MOFCOM had begun to hold more public hearings, the United States was concerned that China continued to resort to meetings with selected parties as a principal means to obtain the views of parties. The United States reiterated that interested parties not present for such meetings needed to be quickly informed of matters discussed at these meetings and to be given an opportunity to present their rebuttals, in accordance with Article 6.3 of the Anti-Dumping Agreement.

12. Finally, the United States continued to urge China to put in place governing procedures and to refine the process by which MOFCOM and Chinese customs officials at China's ports confirmed the precise merchandise subject to each anti-dumping measure and the anti-dumping duty rates applicable to each importer. The United States called to China's attention Article 5.9 of the Anti-Dumping Agreement, which provided that anti-dumping proceedings shall not hinder customs clearance. The US Government had received reports from responding parties of Chinese customs authorities either assessing anti-dumping duties on merchandise not subject to a measure, or imposing seemingly unreasonable burdens of proof before allowing entry of non-subject merchandise. Although MOFCOM had shown improvement in responding in a timely manner to these customs problems once raised by interested parties, these situations were needlessly hindered by the lack of uniform procedures to resolve this type of dispute.

13. In sum, the United States recognized the progress that China had made in developing a legal framework for its anti-dumping regime, which took into account the principles of transparency and fair procedures as set forth in the Anti-Dumping Agreement. The United States urged China to continue to improve the conduct of its anti-dumping proceedings in order to complement that progress. The United States looked forward to seeing continued improvement, and offered its assistance to China in pursuit of that goal.

14. The delegate of Japan noted that his delegation generally shared the views in the statement by the United States concerning the objectives of the Transitional Review Mechanism and the usefulness of the review in terms of transparency and the assessment of China's consistency with its obligations under the Protocol of Accession. Concerning Japan's particular questions, one concerned procedures, and one concerned an individual case.

15. Japan considered the answers that China had provided to its questions the previous year to have been very helpful in showing how China's system worked. Having studied those responses, Japan still had a specific question on China's use of adverse facts available.

16. The question as presented in writing had two parts, and Japan wished to provide additional explanation as to the point of the question, which concerned the application of adverse facts available to unknown exporters or non-registered exporters. The previous year, China's answer was very clear that it had a specific procedure on its website and specific time periods, and that answer was appreciated. Nevertheless, the question still remained concerning the uniform application of adverse facts available. The spirit of the Appellate Body's ruling in the *Mexico – Rice* case appeared relevant. The Appellate Body had stated that the investigating authorities should ensure that an interested party was aware that if it did not supply the required information within a reasonable period, the authorities would be free to make determinations on the basis of facts available, including those contained in the application for the initiation of the investigation. The Appellate Body had gone on to say, however, that an exporter that was unknown to the investigating authority - and, therefore, was not notified of the information required to be submitted to the investigating authority - was denied such an

opportunity. Therefore, if the authority used the facts available in the application for the initiation of the investigation against an exporter that had not been given notice of the information the investigating authority required, the authority acted inconsistently with the Anti-Dumping Agreement.

17. Japan's concern was that although China had a website notification process, there were still exporters that were not known to the investigating authority. There could be two such situations: one, an exporter that had not registered as a participant in the investigation; and the other, an exporter that knew nothing about the website. For example, one very small exporter might not be aware at all of the website, and of course it would not receive any questionnaire. Where there was uniform application of adverse facts available, that very small exporter would still be subject to the adverse facts available. It thus seemed to Japan that the Chinese implementation was uniformly to apply adverse facts available in all cases. In this regard, it might be helpful to consider the practices of other investigating authorities, which distinguished among several types of situations. In some cases in China, exporters were aware of the website, but did not respond to it and thus did not receive questionnaires. In other cases, however, exporters are not aware of the website and then they did not know anything about the investigation. There were thus several cases in the context of application of adverse facts available. For the small exporter that was not aware of the website, and thus had no chance of participating in the investigation, the uniform application of adverse facts available was adverse to its interests. For Japan, this meant that a careful distinction of cases was called for, in light of the spirit of the Appellate Body's decision in *Mexico – Rice*.

18. Japan's second concern had to do with China's final determination on electrolytic capacitor paper from Japan. While this concern could have been raised in another format, such as a review of semi-annual reports, Japan had decided to raise it in the transitional review, because it related to the regulation itself, and because there was some urgency in obtaining clarification on this matter. The issue was the injury finding, and in particular the non-attribution requirement, pursuant to Articles 3.1 and 3.5. In the view of Japan, Chinese practice fell short of the requirements of the Anti-Dumping Agreement in the light of the Appellate Body jurisprudence. In particular, Article 3.5 stipulated that injury caused by factors other than the investigated imports should not be attributed to the imports. The Appellate Body had ruled that this meant that investigating authorities needed to separate and distinguish the injurious effect of imports and other factors.

19. This requirement to separate and distinguish the various causes of injury was, in Japan's view, a very strong requirement under Article 3.5. In the particular case at hand, there had been a rapid increase of imports from Members other than Japan, while the Japanese market share had remained the same. Under these circumstances, the investigating authority of China had not separated and distinguished clearly the injurious effect of the imports from the other sources. Japan had a very strong concern over this practice of China, and thus took the present opportunity to clarify this matter with China.

20. The delegate of China stated, by way of general remarks, that this was the sixth transitional review by the Committee on China's anti-dumping regime. In the preceding five years the Committee had already had quite a number of discussions with regard to China's anti-dumping regime in its framework of legislation review and in the process of review of China's anti-dumping actions. As a result, Members must already have a very clear understanding of China's anti-dumping regime.

21. Concerning China's legislative framework, China had notified the Committee of dozens of rules and regulations to show the transparency of its anti-dumping regime. China also had made tremendous efforts to improve the information disclosure procedures, as embodied in its newly-promulgated legislation in this regard. China thus believed that the anti-dumping regime of China was fully consistent with the Anti-Dumping Agreement.

22. Concerning the questions that China had received prior to the meeting, China would provide answers to the questions one-by-one, starting with those posed by the United States.

23. Starting with Section 1 of the questions, on "Notifications", in answer to the first question, China had notified to the WTO, the previous week, the *Regulations on Information Accession and Information Disclosure in Industry Injury Investigations*.

24. Regarding the question concerning the *Regulations on Responding to Anti-Dumping Cases of Export Products*, China believed that these *Regulations* did not fall within the scope of the notification requirement under the Anti-Dumping Agreement. Pursuant to Article 1 and Article 18.5 of the Agreement, WTO Members were required to notify only their laws and regulations relating to anti-dumping measures or investigations taken by the Members themselves. The *Regulations on Responding to Anti-Dumping Cases of Export Products* of China were used to provide Chinese exporters with directions on how to respond to anti-dumping investigations initiated by WTO Members other than China, and thus were not related to anti-dumping measures or investigations taken or initiated by China. Considering these reasons, China believed that these *Regulations* were not subject to the notification requirement under the Anti-Dumping Agreement.

25. Regarding the question on notification procedures for expiry reviews, China had not formulated specific regulations on procedures for expiry reviews. As to Announcement No. 62 referred to in the written questions from the United States, this was just a notice of anti-dumping measures expected to be subject to expiry reviews in the near future. The notice was not a regulation with regard to procedures for expiry reviews, but a description of China's current practice.

26. China then took up Section 2 of the questions, on information disclosure. Regarding disclosure of factual information mentioned in the written questions of the United States, China believed that its legislative regime and the practical measures it took in this regard were totally consistent with the Anti-Dumping Agreement. With regard to investigations on the incidence of dumping and dumping margins, according to the provisional rules of MOFCOM on disclosure of information in anti-dumping investigations, MOFCOM not only would disclose to a responding foreign exporter or producer all data, evidence, information and reasons used to establish the dumping case and the determined dumping margin for that company, by which the exporter or producer can duplicate the calculation process for the dumping margin; MOFCOM also would disclose relevant essential facts to other interested parties, including the governments of the exporting Members concerned about how the determination was made. MOFCOM had always treated transparency as one of the principles of crucial importance in conducting its anti-dumping investigations.

27. In injury investigations, MOFCOM informed all interested parties of the essential facts under consideration pursuant to the *Regulations on Information Accession and Information Disclosure in Industry Injury Investigations*. Basically, three approaches could be identified. First, MOFCOM transferred all received non-confidential information to the public reading room within seven working days. Any interested parties could have access to these materials. Second, MOFCOM disclosed to the interested parties, generally 30 days before the final determination, the essential facts that formed the basis for its decisions whether to apply definitive measures. Third, in each final determination, MOFCOM published a report concerning the anti-dumping decision. In each report, MOFCOM explained the facts and the reasons for the injury finding in detail. China believed that such efforts ensured the transparency of its injury investigation process and determinations.

28. China then presented answers to the questions on expiry reviews. Regarding the protection of the rights of interested parties, China responded that it always gave interested parties opportunities to participate in investigations, and to have access to critical documents and information necessary to protect their interests in the spirit and principal of being fair, just and open. MOFCOM had enacted a provisional rule on access to non-confidential information in anti-dumping investigations according to

Article 6 of the AD Agreement, which had taken effect in April 2002 The requirement on access to non-confidential information specified in this rule was applied equally in expiry review investigations. In injury investigations, the *Regulations on Information Accession and Information Disclosure in Industry Injury Investigations* had been applied to expiry reviews so that interested parties had adequate access to public information, including evidence submitted by the domestic industry, to defend their interests. In the past, for anti-dumping expiry reviews, the Chinese authorities had given sufficient opportunities to interested parties to express their views. In practice, the authorities would formally notify the exporting country's embassy in China about the receipt of an application from the domestic industry before initiation. After initiation, interested parties were given 20 days to register and to make comments. During the process of the investigation, interested parties had the right to apply for hearings. Before making decisions, the authority disclosed both the legal basis and the facts to the interested parties, and gave them the right to comment. Throughout the course of an investigation, the authorities could meet with interested parties on request to learn their views and comments.

29. Regarding the refund of anti-dumping duties, there was no such problem in the current practice of China. Article 11.3 of the Agreement provided that the duty could remain in force pending the outcome of expiry reviews. China's anti-dumping duties were assessed on a prospective basis, and review decisions entered into force from the date of their publication and did not have retrospective effect. The Chinese believed that this rule maintained stability and predictability.

30. Concerning the questions on registration procedures, the delegate of China indicated that China conducted anti-dumping investigations strictly in accordance with the Anti-Dumping Agreement as well as with China's laws and regulations. The investigating authority informed all interested parties of the information required and, throughout an investigation, interested parties were given ample opportunity to submit evidence and materials, and to make relevant comments. As had been indicated in previous transitional reviews, the Chinese anti-dumping practices were not inconsistent with the Anti-Dumping Agreement. China's anti-dumping investigation respondent-registration procedure was based on the provisions of China's anti-dumping law, and gave a period of time for interested parties to express their willingness to participate in the investigation. This period of time was not included in the 37 days which was specifically granted for respondents to answer the questionnaire. All interested parties, including the unregistered parties could, through their governments or from the Chinese official website or other means, gain access to the questionnaire and then submit it. On the date of initiation, the Chinese authorities sent the initiation notice as well as the non-confidential version of the application and other related documents to all known foreign enterprises and their embassies in China and informed, as relevant, interested parties through the involved governments. In the initiation notice the Chinese authorities stated clearly the consequences of not participating in anti-dumping investigations and the right of the authorities to make decisions based on the facts and information available.

31. According to Article 6.1 and Article 6.8 of the Agreement, the authorities could make decisions based on facts available in cases where any interested parties refused to give access to or did not provide the necessary information within a reasonable period of time. According to paragraphs 1 and 7 of Annex 2 of the Agreement, there would be a less favourable result to the party who was not cooperative. China's practice was consistent with the provisions of the Anti-Dumping Agreement.

32. With regard to the question on the final anti-dumping determination against electrolytic capacity paper ("ECP") from Japan, the delegate of China responded that in that case, pursuant to Article 3.1 of the Anti-Dumping Agreement MOFCOM had made an objective examination of the volume of the dumped imports and the effect of the dumped imports on prices and the consequent impact on the domestic industry based on positive evidence. Members could find the examinations in the final determination report on pages 29-34. Pursuant to Article 3.5 of the Anti-Dumping Agreement, MOFCOM had analyzed the causality between dumped imports and injury, and then had

addressed all other factors that might have caused injury. After this analysis, MOFCOM found that other factors were not the reason for the material injury. This analysis could be found on pages 35-38 of the final report. Therefore, China believed that the anti-dumping determination was not inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement. At the same time, MOFCOM had separated and distinguished the injurious effects of the imports from countries and areas other than Japan. Members could find this analysis on pages 36-37 of the final report. Neither the Anti-Dumping Agreement nor the Appellate Body in the *US – Hot-Rolled Steel* case provided a specific methodology to separate and distinguish injurious effects. Nevertheless, MOFCOM had made a specific disclosure to Japan's embassy in China concerning this issue. In that disclosure MOFCOM had made a detailed explanation in response to Japan's argument. After the final determination in the case, the responding party had applied for an administrative review. The review tribunal had upheld the original determination of the investigating authority. After the administrative review, no rebuttal arguments had been received.

33. The representative of Japan thanked the delegation of China for the informative explanations. On the question of the registration procedure, while the explanation was better than that provided the previous year, Japan was still wondering about the uniform application of adverse facts available. Indeed, Japan had provided a supplementary explanation to its own question on this subject, and perhaps to catch up with that on the spot would be a bit burdensome, but Japan remained unsure of the exact practice of China in this regard. In particular, Japan wished to know whether under China's system there could be a uniform application of adverse facts available in a normal case.

34. Concerning the investigation on ECP, Japan appreciated China's explanation, which had been detailed and informative, and had explained the current state of play of the cases, i.e., the original investigation and the follow-up administrative review requested by the Japanese firms. The information was quite useful, and Japan therefore requested China to provide a written explanation or a copy of the statement itself, which would allow Japan to better assess the case.

35. The delegate of China stated that his delegation had given a very detailed explanation in China's statement, to which there was nothing to add. Further views and comments could be exchanged after the meeting.

36. The representative of the United States thanked the Chinese delegation for its very detailed responses. It was difficult, however, to ask cogent follow-up questions when the responses were not available in writing in advance, and when the responses were read so rapidly it was even more difficult. The United States would look at the minutes of the meeting and consider additional avenues of inquiry at that time. The United States had two follow-up questions, the first in respect of US question 2, asking whether China would notify the *Regulations on Responding to Anti-Dumping Cases of Export Products*. The United States understood China's explanation, and might disagree with China on whether or not this measure should be notified. As far as the United States was aware this was a very unique measure in the anti-dumping area and for that reason alone the United States urged China to notify it, so that all Members could understand it.

37. The second point related to US question 4, asking China to explain what specific steps MOFCOM had taken since the previous year's transitional review to improve its disclosure of anti-dumping margin calculations. China's response seemed to have been a simple description of the rules that were in place, and did not address whether or not MOFCOM had taken steps in the past year to improve how it handled disclosures of anti-dumping margin calculations. The United States would appreciate hearing from China about any such specific steps.

38. The delegate of China responded that his delegation had provided detailed responses to the questions, to which it had nothing to add.

39. The delegate of the United States indicated that the responses had been read rapidly, and he was not certain that he had heard all of the details. The Chairperson asked whether China would be willing to re-read the portion of its statement that responded to US question 4, in view of the speed at which the answers had been read, to ensure that the minutes of the meeting would be accurate.

40. The delegate of China indicated that his delegation had given a very detailed explanation, to which it had nothing to add, and that any additional questions could be sent to China before the next transitional review.

41. The delegate of Japan stated that while China's explanation regarding Japan's procedural question on the uniform application of adverse facts available had been very helpful, Japan was not sure that the question had been fully addressed. Japan wished to express its concern over this matter, and noted that his delegation would reflect on how to proceed on future occasions. Concerning the ECP case, the Chinese explanation had been very comprehensive on the facts and the legal implications. Japan particularly appreciated China's mentioning the concept of separating and distinguishing causes of injury, and how this had been done in the particular case, but was still not sure whether this analysis had been adequate. Japan therefore reiterated its concern over this issue, and would reflect on how to proceed. Japan asked China to take note of this point for future proceedings. Again, accurate minutes would be very much appreciated.

42. The delegate of the United States stated that his delegation found it regrettable that China would not respond to a simple request from the United States and the Chairperson to repeat its response to question 4.

43. The representative of China stated that his delegation's position was quite clear. China had provided a very detailed explanation to every question by Members.

44. The Chairperson thanked the delegation of China for the detailed information and answers that it had provided. The Chairperson also thanked the Members that had undertaken to submit written questions. He urged all delegations to help to ensure the accuracy of the minutes.

45. Concerning the report that the Committee was required to provide to the Council for Trade in Goods concerning the transitional review, the Chairperson recalled that the Protocol contained no guidelines for this report, and further recalled that in the past the Chairperson of the Committee, acting on his or her own responsibility, had prepared a brief factual report with references to the documents concerned and attaching the portion of the minutes of the meeting that related to the transitional review. The Chairperson suggested proceeding on the same basis for the 2007 report.

46. The Committee so decided.