

Committee on Trade-Related Investment Measures

**TRANSITIONAL REVIEW MECHANISM PURSUANT TO PARAGRAPH 18 OF THE
PROTOCOL OF ACCESSION OF THE PEOPLE'S REPUBLIC OF CHINA TO THE
WORLD TRADE ORGANIZATION¹**

REPORT OF THE CHAIRMAN

1. Pursuant to Paragraph 18 of the Protocol of Accession of the People's Republic of China, the Committee on Trade-Related Investment Measures carried out the seventh annual review under China's Transitional Review Mechanism (TRM) at its meeting on 23 October 2008.
2. Written questions regarding China's Transitional Review were submitted in advance of the review by the European Communities. This submission was circulated as document G/TRIMS/W/60, dated 14 October 2008.
3. In a communication dated 8 October 2008, China submitted information on Annex 1A of its Protocol of Accession in connection with this review. This submission was circulated in document G/TRIMS/W/59, dated 9 October 2008.
4. Annex 1 to this report reproduces the relevant section of the Minutes of the TRIMs Committee's meeting held on 23 October 2008 in which Members' substantive discussions regarding China's seventh Transitional Review are reflected.

¹ WT/L/432

Annex 1

Relevant Sections of the Minutes
of the meeting held on 23 October 2008

(G/TRIMS/M/27)

C. TRANSITIONAL REVIEW MECHANISM PURSUANT TO PARAGRAPH 18 OF THE PROTOCOL OF ACCESSION OF THE PEOPLE'S REPUBLIC OF CHINA TO THE WORLD TRADE ORGANIZATION

7. The Chairman recalled that under Paragraph 18 of China's Protocol of Accession (WT/L/432) the TRIMs Committee was required to review annually, over a period of eight years after China's accession, the implementation by China of the TRIMs Agreement and the related provisions of the Protocol of Accession, and to report to the Council for Trade in Goods (CTG) on the results of its review. The sixth annual review of China had taken place on 1 November 2007, and the relevant report had been submitted to the CTG as document G/L/835.

8. With respect to this year's review, he said that, in order to discharge its reporting obligations in a timely manner, the TRIMs Committee needed to undertake the review and submit its report in advance of the next meeting of the CTG which was scheduled for 18 November 2008. Pursuant to paragraph 18 of China's Protocol of Accession, the CTG would in turn report to the General Council by the end of the year.

9. He said that the Committee had received a communication from the European Communities which contained comments and questions to China in the context of the Transitional Review. This communication had been circulated in document G/TRIMS/W/60. The Committee had also received a communication from China concerning information required under Annex 1A of its Protocol of Accession, which had been circulated as document G/TRIMS/W/59.

10. He proposed that, in keeping with previous practice, the Committee conduct the review in the following manner: he would first give the floor to the delegation of the European Communities that had submitted questions to China, and to any other delegation that wished to comment on this item. He would then invite the delegation of China to answer the questions and provide any other information they might wish to share with the Committee.

11. The Committee so agreed.

12. The representative of the European Communities welcomed the opportunity to participate in the seventh Transitional Review. The EC continued to believe that the Transitional Review Mechanism (TRM) was a useful mechanism, and therefore, they encouraged China to participate actively in this Review. The TRM was a fundamental multilateral forum for exchanging concerns with China's WTO compliance efforts and it served to provide further transparency for China's trade regime, which the EC believed was appreciated by the entire WTO membership.

13. The EC's concerns had been set out in detail and in writing in the communication circulated on 14 October 2008 in G/TRIMS/W/60. His intention was to highlight their key concerns and questions at the present meeting rather than to dwell at length on the document. As a preliminary remark, he noted that his delegation was well aware of the repetitive nature of the EC's comments, most of which had been raised in this Committee in the past. However, his authorities felt that it was important not to ignore the issues that their questions addressed until they had been answered in a

fully satisfactory manner. The EC looked forward to engaging in a fruitful discussion, and hoped that China would be able to provide comprehensive information and respond to their questions in a substantive manner in the course of the present meeting.

14. The first issue that the EC wished to address at the present meeting concerned the clauses contained in contractual arrangements that were incompatible with China's obligations under its Accession Protocol. In light of the EC's concerns regarding the procedures to amend contracts which contained TRIMs incompatible clauses, China had noted that investors could change the terms of a contract filing an application to relevant authorities. The EC invited China to elaborate further on this application process, in particular how China monitored it so as to ensure its compliance with the TRIMs Agreement. In addition, the EC requested China to clarify how it ensured that the approval for investment by national and sub-national authorities was not conditioned on either performance requirements or local content requirements of any kind.

15. The second issue concerned the Regulations for the Implementation of the Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures. During previous TRM exercises, China had noted that amendments had been made to the Law on Sino-Foreign Equity Joint Ventures of the People's Republic of China with a view to removing all articles that were in contradiction with the TRIMs Agreement. However, the EC argued that Articles 41 and 43 of the Regulations for the Implementation of this Law still imposed requirements on technology transfer agreements concluded by Joint Ventures. In reference to Article 41, in particular, China stated that it was not a performance requirement and it only aimed at ensuring that technology was 'appropriate and advanced'. Nonetheless, the EC was still concerned about the provisions set forth in Article 43, and their linkage with Article 41. The EC therefore invited China to explain how the requirements contained in Article 41 and Article 43 related to the relevant provision of the Accession Protocol and whether it considered that these requirements resulted in equal treatment for imported goods as compared to domestic products.

16. In conclusion, he said that the EC looked forward to written responses and additional information that China could provide at the present meeting on these, as well as all the other points raised in the EC communication (G/TRIMS/W/60).

17. The representative of China thanked the EC for the questions received and for their interest in the policies and measures of his Government mentioned in their questions. He also wished to note that in the transitional review carried out in the Market Access Committee in 2008 the EC had put forward to China a list of questions. Many of those questions were difficult for his authorities to respond to in that Committee in view of the mandate of that Committee, because the questions concerned more or less the same policies and measures of the Chinese Government, which, in their view, were more appropriate to be dealt with in the TRIMs Committee. His responses therefore would also cover the questions of the EC posed in the Market Access Committee.

18. The first substantive issue he wished to take up was the joint venture ownership limitation, which seemed to be a general concern of the EC. The EC argued on this in all the sectors it mentioned in its questions addressed to China, including automobile, petrochemical, energy and environment sectors, and even retail and wholesales. He said that these comments and urges were well taken note of by his competent authorities. The Chinese Government fundamentally had no different views with the EC in that it was in the interests of all to further liberalize trade and investment. As a matter of fact, it was the policy direction that the Chinese Government had always been adhering to in the past 30 years and one which China would always stick to in the future. The continual revision of the *Industrial Catalogue for the Guidance of Foreign Investment* had always reflected China's progress in investment liberalization in specific sectors. With regard to the latest revision of the Catalogue, he referred to document G/TRIMS/W/59 which contained the information notified by China in 2008 on Annex 1A of the Protocol. However, in view of the level of

development, the liberalization steps may legitimately be different in specific sectors and in different Members including even developed Members. As had been repeatedly said, the Chinese Government believed that it had the legitimate right to independently judge on the level of maturity of specific industries and to decide on the speed of investment liberalization which it believed would best serve the interests of China. His authorities did not think that in this particular respect there was such a question of consistency with WTO obligations. In these sectors that the EC had been pushing China, it was not the case that China would not further the opening-up process, but rather that China needed a bit more time, as other Members also did where they believed that they needed time in the liberalization of certain sectors.

19. With regard to the *Steel Industry Development Policy*, firstly he could clarify that Article 23 applied equally to foreign and domestic investors and that his delegation had not been informed by his competent authority of any additional requirements or tests applicable only to foreign investors. Secondly, regarding Article 18 of the *Policy*, it was a reflection of the general guidance nature of the industrial policy and was not directly applicable itself. In light of China's commitments in the WTO, in particular those under the TRIMs Agreement, no concrete measures had been taken to require the use of national equipment. Neither had there been any condition imposed on importation of equipments and technologies as to whether they could not be made in China.

20. As concerned the *Automobile Industry Development Policy*, EC had asked for information on its latest development in its questions raised in the Market Access Committee. There was actually not much information in this respect. His authorities were not aware of the imposition of any additional obligations on foreign investors or of limitation concerning the production of auto parts. A related development was that the Dispute Settlement Body of the WTO had adopted the Panel Report concerning China's import administration of auto parts, and the case was now in the appellate procedure as his authorities disagreed with some of the points reached in the Report.

21. On the questions concerning the local content requirements, firstly he wished to note that, as explained in the transitional reviews in previous years, with the revision of China's laws and regulations on foreign investment, China had honoured its accession commitments made in the Accession Protocol and the Working Party Report. He added that trade policies and measures were uniformly implemented in China, and that in order to ensure the uniform implementation, China had the *Regulations on Submission of Regulations and Rules for Record*, which required that all the local regulations and rules formulated be submitted to the State Council (the Legislative Affairs Office of the State Council) for record and review within 30 days of promulgation. This record and review process would identify in time potential inconsistency of the local regulations and rules with those of the Central Government and would have it addressed according to legislation procedures. Furthermore, citizens, enterprises and other entities may also propose in writing to the Legislative Affairs Office of the State Council to initiate a review process whenever they identified any legislation inconsistency or failure in uniform application of laws, regulations and rules.

22. In addition to that, the systems of administrative review (administrative reconsideration) and judicial review were also available in China. They were embodied in the *Law on Administrative Reconsideration* and the *Administrative Procedure Law* and a series of judicial interpretations including in the trade area the *Rules on Certain Issues in the Trial of International Trade Related Administrative Cases* issued by the Supreme People's Court. If a citizen, a legal person or any other organization considered that their lawful rights or interests had been infringed upon by a specific administrative act of an administrative organ or its personnel, they may apply for administrative reconsideration or may bring a suit before a people's court according to stipulated procedures.

23. On the number of applications filed for amending contracts for the purpose of eliminating the TRIMs incompatible clauses, the fact was that their competent authority and its designated bodies across the country had to process so many investment contracts including new and revised ones that

he thought it was virtually impossible and also meaningless for them to have statistics only for this specific purpose.

24. On the questions concerning Articles 41 and 43 of the *Regulations for the Implementation of the Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures*, in their view it was clear enough in the actual wording of the legal text of the *Regulations*, and also in practice, that Article 43 contained no compulsory requirement that foreign investors must include a technology transfer agreement in their contract. Whether or not to include technology transfer agreement in a contract was at the discretion of the foreign investors and their domestic counterparts. If such an agreement was included in the business contract between the parties of the joint venture, the legitimate rights of all the parties would be better protected under Article 43.

25. Finally, on questions concerning the new *Anti-Monopoly Law*, their position was that it was not appropriate that the TRIMs Committee addressed competition policy issues. However, out of good faith, he wished to provide some preliminary information on allocation of competence among relevant authorities. This information was subject to further possible adjustment as the functioning of the authorities was still at a very early stage. He said that the relevant authorities in this regard included the Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC), and the State Administration of Industry and Commerce (SAIC). Among them the MOFCOM was responsible for the anti-monopoly review on the concentration of business operators, or undertakings, the SAIC was in charge of the enforcement against such monopoly behaviour as monopoly agreements, abuse of dominant position in the market, with the exception of price-fixing activities, which would be dealt with by the NDRC. Moreover, the MOFCOM and the NDRC would form an inter-ministry joint conference mechanism together with other specific competent authorities to carry out national security examinations on mergers and acquisitions of domestic enterprises by foreign investors, and in this respect the MOFCOM was responsible for receiving and answering the applications of foreign investors.

26. The Chairman said that with regard to the Committee's reporting obligation to the CTG, he understood that Members would wish the Committee to follow the same procedure that had been adopted in previous years, i.e., the Chairman would submit a brief, factual report, which would include references to the submissions made in connection with this year's Review and would contain in the Annex the relevant parts of the Minutes of this meeting. He had taken the liberty of asking the Secretariat to prepare a draft outline of his report for Member's consideration. This had been circulated as document G/TRIMS/W/57. If Members agreed to this outline, and once the relevant section of the Minutes had been attached to it, he would forward the report to the CTG.

27. The Committee took note of the statements made under this item and agreed on the proposed procedure to discharge its reporting obligations concerning China's TRM.
