

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 sixth annual review under China's Transitional Review Mechanism (TRM) at its meeting on 1 November 2007.
2. Written questions regarding China's Transitional Review were submitted in advance of the review by the United States and the European Communities. These submissions were circulated as documents G/TRIMS/W/54 and G/TRIMS/W/55, respectively.
3. In a communication dated 30 October 2007, China submitted information on Annex 1A of its Protocol of Accession in connection with this review. This submission was distributed in document G/TRIMS/W/56, dated 31 October 2007.
4. The relevant sections of the Minutes of the TRIMs Committee's meeting held on 1 November 2007 in which Members' substantive discussions regarding China's sixth Transitional Review are reflected are reproduced in the Annex to this report.

¹ WT/L/432

ANNEX

Relevant Sections of the Minutes of the Meeting held on 1 November 2007

(G/TRIMS/M/26)

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

10. 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 fifth annual review of China had taken place on 25 October 2006, and the relevant report had been submitted to the CTG as document G/L/792.

11. 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 23 November 2007. 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.

12. He said that the Committee had received communications from the United States and the European Communities which contained comments and questions to China in connection with the Transitional Review. These communications had been circulated in documents G/TRIMS/W/54, and G/TRIMS/W/55, respectively. The Committee had also received a communication from China, dated 30 October 2007, concerning information required under Annex 1A of its Protocol of Accession. This had been distributed as document G/TRIMS/W/56.

13. He proposed that, in keeping with previous practice, the Committee conduct the review in the following manner: he would first give the floor to those delegations 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.

14. The Committee so agreed.

15. The representative of the European Communities welcomed the opportunity to participate in the sixth 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.

16. The EC's concerns had been set out in detail and in writing in the communication circulated on 16 October 2007 in G/TRIMS/W/55. His intention was to highlight their key concerns and questions at the present meeting rather than dwell at length on the document. As a preliminary remark he said that it was regrettable that the EC was obliged to raise again in their submission a good number of issues that had been raised in the TRIMs Committee in the past and to repeat questions that had not yet been answered in a fully satisfactory fashion. It was also regrettable that China had not circulated any written contribution for this exercise ahead of the present meeting. In this context, the EC recalled China's obligations to provide relevant information to the TRIMs Committee in advance

of the Review. He therefore hoped that China would provide comprehensive information and responses in a more substantive fashion in the course of the present meeting.

17. The first issue that he wished to raise 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 the investors could change the terms of a contract by filing an application to the relevant authorities. The EC invited China to elaborate further on this application process, in particular, as to 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 investments by national and sub-national authorities was not conditioned on either performance requirements or local content requirements of any kind.

18. 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 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 had stated that it was not a performance requirement and that it only aimed at ensuring that the 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 Articles 41 and 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.

19. The third issue concerned local content requirements in the energy and petrochemical sectors. With regard to the Measures for the Operation and Management of Clean Development Mechanism (CDM) projects, the EC was concerned about the local content requirements they contained. In particular, these local content requirements could reach 70 per cent for new projects in the renewable energy sector. In this context, the EC invited China to clarify the existence of these requirements and the impact they could have in foreign-invested joint venture enterprises.

20. In addition, the EC wished to refer to the draft legislation from the National Development and Reform Commission (NDRC) which aimed at increasing the localization of large-scale petrochemical projects. It was said that the overall objective would be to achieve a 75 per cent localization rate by 2010. In this regard, the EC requested China to explain how these requirements were consistent with paragraph 7.3 of its Protocol of Accession and to shed some light on the preparations for approving this draft legislation.

21. 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 and all the other points raised in the EC's communication in G/TRIMS/W/55.

22. The representative of the United States said that the questions to China from his delegation had been circulated in document G/TRIMS/W/54. It contained several issues on which his authorities had continuing concerns and he looked forward to hearing the responses from China.

23. The representative of China wished to clarify the questions and comments his delegation had received prior to the meeting in relation to the TRIMs Agreement and Article 18 of China's Accession Protocol.

24. First, regarding the new *Automobile Industry Development Policy*, he said that it should be noted that the Policy only provided general guidance to the industry, and that it did not constitute a mandatory requirement. Furthermore, the Chinese Government had not formulated any subsequent follow-up measures regarding Article 47 of the Policy. With regard to questions on "2+2" and foreign share-holding limit, he reiterated that the Chinese Government had the legitimate right to make independent judgment on the level of maturity of the industry and provide guidance on development of the sector. As long as China's practices were not inconsistent with WTO rules and/or with its WTO accession commitments, the position of the Government remained the same.

25. Secondly, with regard to the *Steel Industry Development Policy*, he wished to make the following clarification. In relation to outdated production capacity and obsolete technology and products, on 2 December 2005 the State Council had published the *Interim Regulation on Accelerating Industry Restructuring*, and the National Development and Reform Commission (NDRC) had published NDRC Decree No. 40 of 2005 the *Catalogue of Products for Guidance of Industry Restructuring*. In this context, the former three sets of *Catalogues of Outdated Production Capacity, Techniques and Products* had been abolished. The two documents gave clear definitions on "advance and practical" vis-à-vis "outdated production capacity and products". Members could download these two documents from the NDRC website, at www.ndrc.gov.cn. Regarding Article 18 of the Policy, like the *Automobile Industry Development Policy*, the *Steel Industry Development Policy* only served as a general guide to the industry, and the Chinese Government had not implemented any subsequent compulsory measures to reduce import or encourage production localization. Regarding the ownership of intellectual property rights (IPR), he said that it was not a compulsory requirement for IPR transfer. Foreign investors, together with their Chinese counterparts, had the full liberty to decide by themselves on whether or not to include a technology transfer requirement in their investment contracts for iron and steel projects.

26. As concerned TRIMs incompatible clauses, he said that China had revised the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures, the Law on Chinese-Foreign Contractual Joint Ventures, and the Law on Wholly Foreign-Owned Enterprises and their respective operational regulations. The revision included the elimination and cessation of enforcement of requirements on foreign exchange balance, local content, export performance, compulsory technology transfer, etc. This revision had been widely publicized through extensive media coverage. The Chinese Government respected the freedom of contractors. As concerned terms with regard to foreign exchange balance, local content, and export performance contained in the contracts of foreign-invested enterprises previously approved before the amendment of the relevant laws, if the contracting parties of both sides agreed to remove these terms, they could file an application to the relevant authorities. The application would be processed in a timely manner following the TRIMs agreement. As concerned the number of applications filed, he regretted that his authorities were unable to obtain this detail prior to the present meeting. The specific procedures for filing such applications were clearly defined in detail in the above-mentioned three Laws and their implementing measures. Members could have access to these Laws at the website of the Central Government of China, at www.gov.cn.

27. With regard to the existing text of Article 43 of the *Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures*, he said that it clearly stipulated that those Joint Ventures, wishing to enter into a business contract, including a technology transfer agreement, should submit the contract to the competent authority for approval. He said it was clear, in practice or in the actual wording, that Article 43 contained no compulsory requirement for foreign investors to include a technology transfer agreement in their contract. Whether or not to include technology transfer agreement in the business contract was at the discretion of the foreign investors and their domestic counterpart. It was in fact due to the availability of Article 43 that the legitimate rights of foreign investors were better protected if they voluntarily decided to include a technology transfer agreement in their contract.

28. Regarding the status of the *Industrial Catalogue for Foreign Investment*, he said that the Chinese Government was in the process of revising the Catalogue, and that views and opinions from the competent authority, business associations, and enterprises or individuals, foreign or domestic, would be solicited.

29. As concerned the issue of local content requirements in the energy and chemical sectors, he said that, as far as he knew, the Chinese Government had always abided by its accession commitments and had followed the WTO rules in real earnest. He was not aware of any compulsory requirements for local content as was mentioned by the EC, especially regarding the Clean Development Mechanism (CDM) projects. Members would see that this was the case by downloading and consulting the document mentioned by the EC at www.cdm.ccchina.gov.cn. The document contained some articles which in fact encouraged the importation and use of foreign equipment and technology.

30. Regarding the Mergers and Acquisitions (M&A) regulation and Anti-Monopoly Law, he wished to confirm that neither of the documents contained such requirements as local content and technology transfer, or import restriction. Therefore, it was the view of the Chinese Government that those questions and comments regarding the two documents had no relevance in the context of the TRIMs Agreement or to the mandate of this Transitional Review Mechanism. Therefore, he suggested that Members not discuss these questions under the TRM agenda item of the present meeting.

31. The representative of the European Communities appreciated the efforts made by China to address the issues raised by the EC and to provide responses to their questions at the present meeting, though not exactly the way his delegation would have wanted to hear. However, out of consideration for delegates at the present meeting, and in view of the complicated character of the legislation that China had outlined and the fact that a few websites had been mentioned, he asked whether the Chinese delegation was prepared to submit this information in writing.

32. The representative of the United States thanked China for the information provided at the present meeting, and said that he too felt that it would be useful to have the information in writing, or at least a copy of China's statement, in order to be able to accurately report to his authorities.

33. The representative of China said that the Chinese Government was not under any obligation to provide written responses to the questions and comments. However, for the purpose of transparency, he would provide a copy of his statement to the Secretariat.

34. 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/53. If Members agreed to this outline, and once the relevant sections of the Minutes had been attached to it, he would forward the report to the CTG.

35. 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.
