



## China as a WTO developing member, is it a problem?

Weinian Hu

### Abstract

The developing member status is an area identified for WTO reform by the US, the EU and the Trilateral Trade Ministerial Cooperation. The grievance is that some of the world's top trading nations that declared themselves as developing members are taking advantage of the 155 special and differential treatment provisions embedded to date across the range of WTO agreements, resorting to weaker commitments, undermining the functioning of the multilateral trading system and impeding the negotiation of future agreements.

The developing member status *per se* is not a problem in relation to China's commitments undertaken at its WTO accession, neither following accession as far as the three agreements that China participated in are concerned. China relinquished most special and differential treatment provisions at its accession, and many of its commitments are WTO-plus in nature. Within this remit, the problem lies in China's lack of faithful compliance with certain accession commitments, such as notification and transparency. However, China's developing member status could be a problem for the ongoing fisheries subsidies negotiations, especially given its world-leading fishing capacity. This presumption could also be true for other negotiations, for example those regarding the joint initiative on the trade-related aspects of e-commerce.

China's persistent claim of developing member status at the WTO may be understood as a result of political positioning, too, because championing "South-South cooperation" is a strategic priority for China's diplomacy.

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China's WTO developing member status has long been a subject for debate, and even more so recently amidst the reform calls for enhanced WTO disciplines with regard to, for example, the notification and transparency obligations within the remit of the Agreement on Subsidies and Countervailing Measures (ASCM). Closer inspection shows that the developing member status per se may not have practical implications regarding those commitments that China pledged at its WTO accession, nor to the three agreements it has participated in since accession. This is because China did not accede to the WTO as a developing country and, following accession, appeared not to opt for less or weaker commitments by taking advantage of the special and differential treatment (SDT) provisions that the three relevant agreements afford to WTO developing members.

In this context, faithful implementation of outstanding WTO commitments, such as notification, would be much more important than the developing status of China. This proposition is equally applicable to the ongoing fisheries subsidies agreement negotiations with regard to the negotiation objective of "precise reporting" (of fisheries subsidies). But there is more. From the onset, China's developing member claim is challenged due to its high fishing capacity, and is therefore regarded as a developed country. China's disputed developing member status and its position of asserting "development interests for developing countries" in trade negotiations will impact on the conclusion of the fisheries subsidies agreement, and most possibly on other future agreements. Therefore, the present call for reforming the WTO developing member status is valid.

One chief motive for questioning China's WTO developing member claim is the suspicion that the country has been resorting to weaker commitments by taking advantage of the so far 155 SDT provisions<sup>1</sup> embedded across the range of WTO agreements, and therefore, allegedly, undermines the functioning of the multilateral trading system. It came as no surprise that WTO developing member status is identified as an area where the WTO's rules-making capacity requires enhancement, according to the Commission's Concept Paper on WTO Modernisation published in September 2018. The EU-Japan-US Trilateral Trade Ministerial Cooperation (hereunder the Trilateral Cooperation) equally sees the imperative to reform the SDT mechanism in current and future WTO negotiations, and calls on "advanced WTO members"

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<sup>1</sup> The SDT itself has attracted many doubts over the decades since the Uruguay round often on the actual benefits accrued from the SDT for WTO developing members for integration into the multilateral trading system. Therefore, there have been calls to reform the SDT mechanism to make its provisions more precise, effective and operational. See Ademola Oyejide T., Special and Differential Treatment, in Hoekman B. et al (ed.) Development, Trade and the WTO, A Handbook, the World Bank, Washington DC (2002), at pp.504-8. See also [https://www.wto.org/english/tratop\\_e/dda\\_e/status\\_e/sdt\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/status_e/sdt_e.htm) (last accessed 30 September 2019).

to make full commitments in ongoing and future WTO negotiations. The dynamics of this discussion are also on full display at the WTO General Council.<sup>2</sup>

This research report underlines the fact that the commitments China made at its WTO accession are specific, and were not negotiated with regard to the country's developing member claim but the "special and unusual characteristics of the Chinese economy" and its market size. As a result, and especially during the bilateral negotiations conducted with the United States and the EU, China conceded to relinquish most SDT provisions and made many pledges that are WTO-plus in nature. Therefore, China's persistent developing member claim is in reality less relevant to its WTO accession obligations, nor even to the two multilateral protocols and one plurilateral agreement that it signed up to post-accession. The country did opt into a number of SDTs, but they are often related to procedure, such as the right to review a countervailing measure, rather than representing a weaker commitment, so their significance is negligible.

At the same time, China has yet to implement faithfully some of the more significant WTO accession commitments, including those related to operations of state-owned enterprise (SOEs) and subsidy notification obligations, including fisheries subsidies notification. Indeed, those are the same WTO reform areas identified by the EU and the Trilateral Cooperation because the present disciplines, as they argue, are either not effective enough for enforcement or not updated in order to capture and rectify the distorting trade practices or policies. Nonetheless, due to the constraints of the consensus-based WTO rules-making procedure, the efforts for reform spearheaded by the EU and the Trilateral Cooperation may become redundant if China's participation is absent. The same outcome will likely occur when a plurilateral arrangement is sought in order to effect any WTO rule-changes. Having said that, to participate or not to participate in the EU-led or the Trilateral-led reform initiative is not a question for China. After all, the country has its own WTO reform proposal that aims to achieve development interests for developing countries.<sup>3</sup> The overriding question for China is of

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<sup>2</sup> See Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements, JOB/GC/204/Rev.2, JOB/CTG/14/Rev.2, 27 June 2019; An Inclusive Approach to Transparency and Notification Requirements in the WTO, JOB/GC/218, JOB/CTG/15 JOB/SERV/292, JOB/IP/33 JOB/DEV/58, JOB/AG/158, 27 June 2019; the Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness, WT/GC/W/765/Rev.2, 26 February 2019; Pursuing the Development Dimension in WTO Rule-making Efforts, WT/GC/W/770/Rev.2, 6 May 2019; Strengthening the WTO to Promote Development and Inclusivity, WT/GC/W/778/Rev.1, 22 July 2019. Moreover, in July 2019 the USTR was tasked to use all available means to secure changes in the WTO to prevent unqualified developing countries from taking advantage of WTO rules and negotiations. China is highlighted as an illustration. See President Trump's Memo dated 26 July 2019, which points out that, among others, nearly two-thirds of WTO members, including some of the world's wealthiest economies, claim developing member status. Consequently, the Memo alleged that such members make weaker commitments, and this harms not only other developed economies but also economies that truly require special and differential treatment. China is singled out as the country that "most dramatically illustrates the point". See Memorandum on Reforming Developing-Country Status in the World Trade Organization, Presidential Memoranda, 26 July 2019.

<sup>3</sup> See China's proposal on WTO reform published in May 2019. Among others, it pleads for safeguarding the development interests of developing members, particularly in the areas of agriculture, trade remedy rules, fisheries subsidies, e-commerce and new issues, such as investment facilitation.

faithfully implementing its outstanding WTO commitments, which are in essence a contractual duty that the country has yet to fulfil.

This report will first examine how SDT provisions may be enjoyed by developing members, when different forms of obligations must be respected at the same time. Applying the two above-mentioned considerations on which China's WTO accession negotiations were based, it will then emphasise a number of more significant Chinese commitments, including those on notification. It will also demonstrate that China did not take advantage of its developing member status when participating in the three agreements following accession. Since China's claim of developing member status is in dispute with regard to the fisheries subsidies agreement negotiation, the report will lay out the controversies in this regard and this, consequently, leads to a brief case study of the country's weak enforcement in subsidies notification obligations. Before concluding, the report suggests a way forward for enhanced notification.

## 1. SDT provisions and how they may be enjoyed by developing members

There are no definitions of “developed” and “developing” members within the context of the WTO. Ordinarily, members announce for themselves whether they are “developed” or “developing”,<sup>4</sup> though other members can challenge the decision of a member that makes use of SDT provisions available to developing members, a category which also includes least developed countries (LDC).<sup>5</sup>

The WTO developing member status affords certain SDT privileges, e.g. a longer transitional period before implementing an agreement, or a temporary use of a policy instrument with a view to fully implementing an agreement and integrating the multilateral trading system. Therefore, the SDT mechanism, also known as flexibility, is designed to accomplish two objectives: (a) to enhance market access conditions in the face of the divergent interests and priorities between developing and developed beneficiary members, and (b) to exempt developing members from certain multilateral trade disciplines and thus offer them some

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4 Singapore argued that it is a small economy with no natural resources and a high reliance on global trade, therefore it is a WTO developing member. See Chan C., Singapore Supports Update of WTO Rules, Will Not Use Special Provisions for Developing Nations, Channel News Asia, 19 September 2019. Available at: <https://www.channelnewsasia.com/news/singapore/singapore-supports-update-of-wto-rules-developing-country-status-11918958> (last accessed 22 August 2019). Indeed, queries will arise when Singapore is heard claiming a WTO developing member. Singapore's GDP per capita reached \$64,581.944 in 2018, that was 30% higher than the average GDP per capita of a high-income country which stood at \$44,705.873. Available at: <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=SG-XD> (last accessed 28 July 2019).

Having said that, Zhang Xiangchen et al provided a rundown of different theories, such as ‘poverty as capability deprivation’ advocated by Amartya Sen, based on which a country may be qualified as developing country. See Zhang X., Xu Q. & Wang J., Capacity Constraint: A Fundamental Perspective for the Development Issue at WTO, *Journal of World Trade* 53, no. 1 (2019): 1–38.

<sup>5</sup> Available at: [https://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm) (last accessed 21 July 2019).

flexibility in the use of various trade and trade-related measures.<sup>6</sup> Developing members can receive technical assistance, too.<sup>7</sup> However, the status does not automatically qualify a developing member, self-declared or not, an access to all SDT provisions. Consequently, the use of SDTs is defined by obligations, usually in the forms of time limits and thresholds.

The manner in which a developing member may benefit from an SDT provision depends, in the first place, on how its WTO accession is negotiated and certainly the *status quo* of its trade practices at the time of accession. For example, the SDTs provided by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) were less relevant to China at its accession. In this regard, patent rights protection is a case in point. China already incorporated all the main ingredients prescribed by the TRIPS Agreement in its domestic patent legislation in 1992, nine years ahead of its WTO accession. This includes the 20-year protection term for invention patents, and the expanded scope of patentable subject matters to include pharmaceutical, agricultural chemical process and products, etc.<sup>8</sup> The Chinese legislature amended the Patent Law in 1992 in order to implement the provisions concluded under the Sino-US MOU on the Protection of Intellectual Property, signed in the same year.<sup>9</sup>

Apart from negotiations, a developing member may also choose to opt in or out of the SDTs provided by a specific WTO agreement. China opted out of the eight-year transitional period that the ASCM offers to developing members as will be elaborated below. China also opted out from the flexibilities provided by the Trade Facilitation Agreement (TFA)<sup>10</sup> as far as implementation is concerned. China implemented 94.5% of all the provisions by the time the Agreement entered into force on 22 February 2017; a further 4.5% of the provisions were implemented after a transitional period of one year. Three more provisions still require implementation and China has notified the TFA Council that by 22 February 2020 they will all be implemented.

Moreover, the SDT does not automatically provide blanket coverage to all self-claimed developing members. Some SDTs are only available to a limited number of specified developing members. Within this context, even when a developing member is eligible to enjoy certain SDTs, that privilege often comes with obligations, which is anyway often the case when an SDT is applied. For example, the ASCM acknowledges that subsidy could be a policy instrument for development for certain developing members. But when reading Article 27.2(a) and Annex VII of the ASCM together, only 21 specified developing members are qualified to enjoy this

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<sup>6</sup> See Ademola Oyejide T., Special and Differential Treatment, in Hoekman B. et al (ed.) Development, Trade and the WTO, A Handbook, the World Bank, Washington DC (2002), at pp. 504-8.

<sup>7</sup> Available at: [https://www.wto.org/english/tratop\\_e/devel\\_e/dev\\_special\\_differential\\_provisions\\_e.htm#legal\\_provisions](https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm#legal_provisions) (last accessed 28 July 2019).

<sup>8</sup> For the evolution of patent legislation in China, see Hu W., International Patent Rights Protection – the Case of China, Routledge, 2017, at pp.122-36.

<sup>9</sup> Article 1 of the Memorandum of Understanding between the Government of the People's Republic of China and the United States of America on the Protection of Intellectual Property, 1992.

<sup>10</sup> SDT measures provided by the TFA cover flexibilities of commitments, of action, and use of policy instruments, transitional time periods, technical assistance and special provisions relating to LDCs.

privilege for the purpose of export performance,<sup>11</sup> within the meaning of Article 3.1(a) of the ASCM. With a more generous coverage, Article 27.2(b) of the ASCM provides developing members a transitional period of eight years to implement Article 3.1(a) of the Agreement. If qualified to apply this flexibility, the modes of application must be, nonetheless, consistent with Article 27(4) of the ASCM. As a result, qualified developing members are required not to increase the level of subsidies for export performance, and should eliminate them sooner if the use of such subsidies for export performance is inconsistent with their development needs. Apart from that, all members must comply with the prohibitions of subsidies for the purpose of export performance as prescribed by Article 3.1(a), as illustrated by Annex I, of the ASCM. Still, this privilege is applicable only if it is admitted into a member's accession agreement after negotiations. In other words, if a member fails to claim it, then this provision will not be applicable to the member concerned.

As far as the obligations attached to the various SDTs are concerned, in the event of a breach the WTO Dispute Settlement Body (DSB) will decide on sanctions as the 'mailbox case' illustrates. The TRIPS Agreement provides a five-year transitional period for developing members.<sup>12</sup> Article 65.4 of the Agreement further prescribes that a developing member may delay in providing patent protection to a product for an additional five years if the area of technology of that product in question is not protected in its territory on the date of its WTO accession. As a WTO developing member, India claimed both privileges successfully. Nonetheless, before India was able to apply Article 65.4 to delay providing patent rights protection to pharmaceutical products, the country was obliged to institute a 'mailbox' facility for those patent applications for pharmaceutical or agricultural chemical products that were submitted to Indian patent authorities in the intervening years.<sup>13</sup> Moreover, such a facility must not be instituted merely based on administrative practice by virtue of Article 70(8)(a), which was confirmed pursuant to the decision laid down by the DSB in the case *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (DS50). On top of that, by virtue of Article 70(9) of the TRIPS Agreement, during the transitional period when a patent application was submitted for one of the above-mentioned products, India was compelled to grant five-year exclusive marketing rights to the product concerned on the condition that it had already obtained a patent granted by another member of the TRIPS Agreement. The DSB decided against India when it failed its obligations with regard to the 'mailbox' facility as well as the "exclusive marketing rights", after America lodged a complaint.

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<sup>11</sup> The group of specific developing members consist of 1) LDCs designated as such by the United Nations that are members of the WTO; 2) Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, Honduras, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe, and each of them is subject to the provisions applicable to other developing country members according to Article 27.2(b) when GNP per capita has reached \$1,000 per annum.

<sup>12</sup> Article 65 (1)(2) of the TRIPS Agreement.

<sup>13</sup> The 'mailbox' facility is an arrangement by which patent applications of pharmaceutical, agricultural chemical products were accepted, the respective filing date was assigned, but without the need to process these applications until the transitional period was due in 2005. For detailed discussion on the 'mailbox' facility, see Hu W., *International Patent Rights Protection – the Case of China*, Routledge, 2017, at pp.156-7.

Similarly, in the case China — Domestic Support for Agricultural Producers (DS511), the Appellate Body found that the country's specific domestic support was inconsistent with its obligations under Articles 3.2 and 6.3 of the Agreement on Agriculture (AoA) for breaching the rule of *de minimis*, China conceded to the findings and pledged to implement the recommendations and rulings of the DSB.<sup>14</sup>

On the other hand, currently many SDT provisions are 'best endeavour' type of clauses that lack precision, operationality and enforceability,<sup>15</sup> so their actual impact on a member's (weaker) commitment may therefore not be attainable after all. Quite possibly, also in addition, some developing members do not necessarily have the intention of claiming any SDT benefits, although they declared the developing status. For example, Singapore, as one of the richest nations in the world by GDP per capita, has made it clear that it will not seek special provisions in negotiations under its developing member status in the WTO.<sup>16</sup> Therefore, the developing status *per se* may not be an enabler for SDT flexibilities, while much is determined at the member's WTO accession negotiations, which is the case of China.

## 2. China's WTO commitments

### 2.1 At accession

China did not accede to the WTO as a developing country. Its lower-middle income level in 2001,<sup>17</sup> which should have qualified the country as a WTO developing member was ignored, and the accession was negotiated on the basis of the "special and unusual characteristics of the Chinese economy" and its market size,<sup>18</sup> as the US professed. Consequently, the series of WTO-plus commitments that China concluded with the US and the EU in their respective bilateral

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<sup>14</sup> Subsequently, China and the US reached an agreement to implement the DSB's recommendations and rulings by 31 March 2020. See China – Domestic support for agricultural producers (DS511).

<sup>15</sup> See the Communication of the Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness, WT/GC/W/765/Rev.2, 4 March 2019. This communication, dated 26 February 2019, is being circulated at the request of the delegations of China, India, South Africa, the Bolivarian Republic of Venezuela, Lao People's Democratic Republic, Plurinational State of Bolivia, Kenya, Cuba, Central African Republic and Pakistan.

<sup>16</sup> See Singapore supports update of WTO rules, will not use special provisions for developing nations: Chan Chun Sing, Channel News Asia, 18 September 2018 <https://www.channelnewsasia.com/news/singapore/singapore-supports-update-of-wto-rules-developing-country-status-11918958> (last accessed 22 September 2019).

<sup>17</sup> China's GDP per capita was \$1,053.108 in 2001, which was below the average in middle income countries (\$1,272.598) but above the average in lower middle-income countries (\$564.122). <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=CN-XN> (last accessed 29 July 2019).

<sup>18</sup> These characteristics include the high degree of state participation in the Chinese economy; a series of industrial policy measures intended to draw jobs and technology to China, such as local content, offset and export performance requirements as well as forced technology transfer, dumping, etc. See Statement of Ambassador Charlene Barshefsky, United States Trade Representative, on Accession of China to the WTO, hearing before the Committee on Ways and Means, House of Representatives, 3 May 2000.



accession agreement were incorporated into China's WTO accession package.<sup>19</sup> The concessions that China made are wide-ranging and encompass not only areas in trade and investment, but also in the organisation and functioning of the country's judiciary and administration, which was unprecedented at the WTO.<sup>20</sup>

Indeed, the terms for China's WTO accession are China-specific and demanding. China pledged to eliminate all subsidy programmes within the meaning of Article 3 of the ASCM – for the purposes of export performance or for the use of domestic over imported goods – immediately, upon accession, in accordance with Paragraph 10.3 of its WTO Protocol of Accession. As to agricultural export subsidies, China pledged to eliminate and not to introduce them pursuant to the conclusion of the US-China Bilateral WTO Agreement, in November 1999. Based on the same bilateral agreement, Article 15(a) of China's Accession Protocol prescribes a 15-year period for price compatibility when determining dumping margins and, in the meantime, China's special economic characteristics, whether a market economy or not, must be taken into account when identifying and measuring subsidy benefits if any. This provision incorporated the guarantee that America had struck with China for continuing using the “non-market economy” methodology applied in anti-dumping cases when calculating dumping margins for the same period of 15 years.<sup>21</sup>

Also, following the agricultural domestic subsidy case mentioned before, in relation to the *de minimis* threshold applied when calculating a member's current AMS (Aggregate Measurement of Support) within the meaning of Article 6.4 of the AoA on domestic support commitments, China pledged 8.5% for both product-specific and non-product-specific support of the total value of production of a basic agricultural product during the relevant year.<sup>22</sup> This is lower than the 10% exemption applied to developing members, and higher than the 5% for developed members.<sup>23</sup> It should be noted that AMS is an area where China seeks redress in its WTO reform proposal dated 13 May 2019. The country found “significant inequity, imbalance and unfairness persist in current rules on agriculture” because, as it observed, some developed members enjoy high levels of AMS and therefore are able to surpass the 5% *de minimis* threshold to provide domestic support to a number of specific products, while the majority of developing members have no entitlement to AMS. Furthermore, some developing members

<sup>19</sup> For a detailed explanation on the WTO accession process, see [https://www.wto.org/english/thewto\\_e/acc\\_e/acc\\_e.htm](https://www.wto.org/english/thewto_e/acc_e/acc_e.htm) (last accessed 29 July 2019). Note that the accession procedures are outlined in document WT/ACC/22/Rev.1, as a practical, non-binding guide.

<sup>20</sup> For details of China's WTO-plus accession obligations, see Qin J. ‘WTO-plus’ obligations and their implications for the World Trade Organization system – an appraisal of the China Accession Protocol, *Journal of World Trade* 37 (3): 483-522, 2003.

<sup>21</sup> See Statement of Ambassador Charlene Barshefsky, United States Trade Representative, on Accession of China to the WTO, hearing before the Committee on Ways and Means, House of Representatives, 3 May 2000.

<sup>22</sup> See Paragraph 235 of the Report of the Working Party on the Accession of China, 1 October 2001, WT/ACC/CHN/49.

<sup>23</sup> Article 6.4, WTO Agreement on Agriculture.

could not implement domestic public stockholding programmes necessary for food security purposes.<sup>24</sup>

Within the context of the ASCM, other major commitments to which China conceded at its accession included relinquishing a transitional period and arrangements as provided by Article 27 of the ASCM and under which, for example, a developing member may use subsidies as a policy instrument for export performance purposes for a period of eight years within the meaning of Article 3.1(a) as mentioned above.

China did opt in to some SDTs at its accession. For example, China opted into Article 27.10-12 and 27.15 of the ASCM.<sup>25</sup> The former governs determination of *de minimis* within the remit of Article 15.3 with regard to injury caused by subsidised imports, while Article 27.15 retains a developing member's right to request to review a countervailing measure in order to examine whether it is consistent with the provisions of Articles 27.10-11 of the ASCM. Those opt-ins concern procedures, and are not about lesser commitment; therefore, their significance is nearly negligible.

## 2.2 After WTO accession

After acceding to the WTO in 2001, China accepted two multilateral instruments, namely, the 2005 protocol amending the TRIPS Agreement and the 2014 protocol concerning the Trade Facilitation Agreement (TFA). China is also a participant in the expanded version of the plurilateral Information Technology Agreement (ITA) concluded in December 2015. China has so far not used the protocol amending the TRIPS Agreement. The country opted out from the flexibilities afforded to developing members by the other two agreements, respectively.

On grounds of public health, the amendment of the TRIPS Agreement in 2005 allows low-cost generic medicines to be produced and exported under a patent compulsory licence exclusively for the purpose of serving the needs of LDCs when they have insufficient or no capacities in manufacturing pharmaceutical products. This new flexibility provided by TRIPS,<sup>26</sup> also known as the "Paragraph 6 System", extends the remit of compulsory licencing for use beyond the domestic market, and Article 31*bis* of the TRIPS Agreement came into effect on 23 January 2017.<sup>27</sup> The amendment was accepted by China in November 2007, and then ratified by the

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<sup>24</sup> See China's Proposal on WTO Reform, WT/GC/W/773, 13 May 2019 at para2.11.

<sup>25</sup> See Paragraph 171 of the Report of the Working Party on the Accession of China, 1 October 2001, WT/ACC/CHN/49.

<sup>26</sup> When applying the principle of flexibility, national interests are accommodated and, at the same time, provisions and principles under the TRIPS Agreement are complied with. Flexibility, derived from the national treatment, is one of the principles that the TRIPS Agreement engages in order for achieving harmonised patent rights protection at international level with the minimum protection standards. See Hu W., *International Patent Rights Protection – the Case of China*, Routledge, 2017, at pp.56-60.

<sup>27</sup> WTO members on 6 December 2005 approved changes to the TRIPS Agreement in order to make permanent a decision on patents and public health originally adopted in 2003. This was formally built into the TRIPS Agreement after acceptance of the Protocol amending the TRIPS Agreement by two thirds of the WTO's members. The

2008 Patent Law (it came into force on 1 October 2009) in which Articles 50, 53 and 57 provide a legal basis for China to act as an exporter of generic medicines, but with qualifications. That means this undertaking can only take place under “national emergency or other circumstances of extreme urgency” by virtue of Article 49 of the 2008 Patent Law.<sup>28</sup> Within this context, China has not acted as an exporter so far, and neither, in fact, as an importer. As required, either as an importer or an exporter, notifications must be submitted to the TRIPS Council by the member concerned with precise information, such as specific imports under the instrument and the grant of compulsory licences for export. To date, only Rwanda submitted its notification as an importer, and Canada as an exporter.<sup>29</sup>

Adopted by the General Council in November 2014, the Protocol of amendment to insert the TFA into Annex 1A of the WTO Agreement provides the flexibilities that allow WTO developing members to determine when they will implement individual provisions of the Agreement. Developing members may equally identify provisions that they will only be able to implement given technical assistance and support for capacity building. China accepted the Protocol on 4 September 2015, a year after it was adopted by the General Council. As to implementation, China implemented 94.5% of all the provisions by the time the Agreement entered into force (i.e. Category A provisions); a further 4.5% of the provisions were implemented after a transitional period of one year (i.e. Category B provisions). China does not have any Category C commitments, which means those commitments will only be implemented after a transitional period and with technical assistance.<sup>30</sup> Three more provisions still require implementation and China has notified the TFA Council that by 22 February 2020 they will all be implemented.<sup>31</sup> Therefore, on the whole, China has implemented the TFA in a timely manner. The developing member status appears irrelevant for the country in implementing the provisions.

In addition to the two multilateral protocols, China participated in the expanded version of the ITA which was concluded in 2015. The expanded ITA aims to eliminate tariffs on 201 items

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amendment took effect on 23 January 2017. See [https://www.wto.org/english/tratop\\_e/trips\\_e/amendment\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/amendment_e.htm) (last accessed 1 October 2019).

<sup>28</sup> Subsequently, the definition of a pharmaceutical product is provided by Rule 73 of the Revised Rules for the Implementation of the Patent Law of China, and the dedicated administrative procedure is prescribed by Articles 22 and 33 of the Measures for Compulsory Licensing of Patent Implementation, 15 March 2012.

<sup>29</sup> Available at [https://www.wto.org/english/tratop\\_e/trips\\_e/public\\_health\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/public_health_e.htm) (last accessed 1 October 2019).

<sup>30</sup> To benefit from the SDTs provided by the TFA, a member must categorise each provision of the Agreement and notify other WTO members of these categorisations in accordance with specific timelines outlined in the Agreement. There are three categories in this regard, Category A refers to those provisions that the member will implement by the time the Agreement enters into force (or in the case of a least-developed country member within one year after entry into force); Category B is for those provisions that the member will implement after a transitional period following the entry into force of the Agreement; Category C is for those provisions that the member will implement on a date after a transitional period following the entry into force of the Agreement and requiring the acquisition of assistance and support for capacity building. See <https://www.tfafacility.org/trade-facilitation-agreement-facility> (last accessed 8 August 2019).

<sup>31</sup> The three provision are: establishment and publication of average release times (Article 7.6), exchange of information (Article 12.2) and provision of information (Article 12.6.1). See Notification of Category Commitments under the Agreement on Trade Facilitation, 7 August 2019, G/TFA/N/CHN/1/Add.3.

valued at over \$1.3 trillion per year by 53 members which between them account for approximately 90% of world trade in the products proposed for inclusion in the expansion.<sup>32</sup> The expanded Agreement also contains a commitment to tackle non-tariff barriers in the IT sector, and to keep the list of products covered under review to determine whether further expansion may be needed to reflect future technological developments. The schedule of ITA 1996 was incorporated in China's WTO Accession Protocol.<sup>33</sup> As a participant in the expanded ITA, China's expanded ITA tariff elimination schedule indicates that the first tariff cuts for the covered products took place on July 1, 2016, which was confirmed at the meeting of the country's Trade Policy Review conducted in the same year. In this respect, China assumed substantial responsibilities as the country is one of the world's largest manufacturers and traders of IT products.

### 2.3 Other decisions on SDT

In addition to the above, there are a few dozen SDT decisions<sup>34</sup> adopted at ministerial and General Council level that came into force after China's WTO accession, and some of them may be applicable to China, such as the decisions on public food stockholding for security purposes<sup>35</sup> and fisheries subsidies.<sup>36</sup> It is observed that development interests regarding these two subjects are also highlighted in China's WTO reform proposal dated May 2019, as they fall under the SDG goals that China wishes to champion. But after a detailed check, the three decisions on the subject of public food stockholding are "best endeavour" type of flexibilities and for clarifications of existing provisions, and negotiations have been ongoing.<sup>37</sup> There are two more SDT decisions concerning agricultural subsidies.

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<sup>32</sup> The new accord covers new generation semi-conductors, semi-conductor manufacturing equipment, optical lenses, GPS navigation equipment, and medical equipment such as magnetic resonance imaging products and ultra-sonic scanning apparatus.

<sup>33</sup> See Status of Implementation, note by the Secretariat, Committee of Participants on the Expansion of Trade in Information Technology Products, 10 October 2018, G/IT/1/Rev.58.

<sup>34</sup> For all the decisions related to SDTs, see Special and Differential Treatment Provisions in WTO Agreements and Decisions, Note by the Secretariat, 12 October 2018, WT/COMTD/W/239.

<sup>35</sup> Public Stockholding for Food Security Purposes – Ministerial Decision of 7 December 2013 (WT/MIN(13)/38 - WT/L/913), Public Stockholding for Food Security Purposes – Decision of 27 November 2014 (WT/L/939), and Special Safeguard Mechanism for Developing Country Members – Ministerial Decision of 19 December 2015 (WT/MIN/(15)/43 - WT/L/978).

<sup>36</sup> Fisheries Subsidies – Ministerial Decision of 13 December 2017 (WT/MIN(17)/64-WT/L/1031).

<sup>37</sup> Presently, there are altogether three decisions on SDT concerning public food stockholding. The 2013 decision provide that, until a permanent solution is reached, the domestic support provided by developing members under their "existing" public stockholding programmes for food security purposes are protected against legal challenges under the AoA as long as the transparency, safeguard and anti-circumvention provisions are respected. It is noted in the meantime that this interim solution has not been used. The 2014 decision clarified the duration of the interim solution. It also put the "public stockholding" negotiations on an accelerated and separate track from the DDA negotiations, and the negotiations have to be pursued as a priority. As to the 2015 decision, it reaffirmed that the General Council Decision applicable to developing members only, and the negotiations have been ongoing since.

The Bali Ministerial Decision added the programmes to the list of general services of the AoA, which are related to land reform and rural livelihood security in order to address challenges of rural development, food security and poverty alleviation. Although such programmes<sup>38</sup> are by nature domestic support, a qualified developing member may not be compelled to undertake the commitments of reducing such domestic support according to the obligations under Article 6.4 of the AoA. China may implement the aforementioned programmes as “justified” non-tariff measures for the same purposes as dictated by the Ministerial Decision because, by virtue of Article 7.2 of the Accession Protocol, China pledged to eliminate and not introduce, re-introduce or apply non-tariff measures unless they are justified under the provisions of the WTO Agreement. (It should be noted that this pledge is equally applicable when implementing Articles III and XI of GATT 1994.)

Also, on agriculture, the ministers agreed in December 2015 that developing members should have the right of recourse to a special safeguard mechanism (SSM), which is a ‘safe box’ for *bona fide* food aid vis-à-vis the elimination of export subsidisation, as envisaged under Paragraph 7 of the Hong Kong Ministerial Declaration. The negotiations are ongoing. On the other hand, as to the Ministerial Decision on eliminating export subsidies entitlements by the end of 2018,<sup>39</sup> three members had since done so. But in China’s case, the country pledged not to maintain, neither to introduce, agricultural subsidies, in accordance with Article 12 of its Accession Protocol.

There are also three ministerial decisions on SDTs that reiterate members’ commitment to implement existing obligations of notification and transparency with respect to 1) Article 25.3 of the ASCM on fisheries subsidies; 2) regional trade agreements (RTAs); and 3) preferential trade arrangements (PTAs). For RTAs and PTAs, under consideration of technical constraints, both ministerial decisions provide developing members with the flexibility of a delayed submission of required data from 10 to 20 weeks if the RTAs or the PTAs concerned involve only developing members.<sup>40</sup> Technical support shall also be available if requested. The same flexibility was adopted with regard to PTAs, including technical support.<sup>41</sup> It should be noted that none of the transparency mechanisms have been invoked by any developing members.

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<sup>38</sup> See General Services - Ministerial Decision of 7 December 2013 (WT/MIN(13)/37 - WT/L/912). Policies under the General Services involve expenditures (or revenue foregone) in relation to programmes which provide services or benefits to agriculture or the rural community. They shall not involve direct payments to producers or processors. See Annex 2, paragraph 2 of the AoA.

<sup>39</sup> See Export Competition – Ministerial Decision of 19 December 2015 (WT/MIN/(15)/45 - WT/L/980)

<sup>40</sup> Otherwise, the ten-week timeframe applies if a RTA is between developed and developing members. RTA parties are required to submit to the WTO Secretariat e-data (if possible) as specified in the Annex, so that the Secretariat can draft the Factual Presentation of the RTA. See Transparency Mechanism for Regional Trade Agreements – Decision of 14 December 2006 (WT/L/671).

<sup>41</sup> Otherwise, the ten-week timeframe applies if a RTA is between developed and developing members. RTA parties are required to submit to the WTO Secretariat e-data (if possible) as specified in the Annex, so that the Secretariat can draft the Factual Presentation of the RTA. See Transparency Mechanism for Regional Trade Agreements – Decision of 14 December 2010 (WT/L/806).

## 2.4 Fisheries subsidies agreement negotiation

Nonetheless, with regard to implementing Article 25.3 of the ASCM for precise reporting, and for negotiating the fisheries subsidies agreement at large, China has shown reservations under the ongoing negotiations. Note that the negotiation is conducted within the framework of the ASCM for clarifying and detailing the present provisions in order to 1) prohibit certain forms of fisheries subsidies that contribute to overcapacity and overfishing, and 2) eliminate subsidies that contribute to illegal, unreported and unregulated fishing (IUU-fishing). The ministerial decision in December 2017<sup>42</sup> noted that members re-committed to implement existing notification obligations under Article 25.3 of the ASCM, which requires notifications to be “sufficiently specific” so that members will be able to evaluate the trade effects and to understand the operation of notified subsidy programmes. In this respect, China has let it be known that its capacity constraints as a developing country and the absence thus far of a comprehensive statistical system make it difficult to notify relevant measures and implement disciplines of overcapacity, overfishing or overfished stocks, since basic supporting data is missing.<sup>43</sup> Though it is acknowledged that the subject of fisheries subsidies attracts considerable debate<sup>44</sup> and that there is so far no definition of ‘fisheries subsidies’,<sup>45</sup> while notification of fisheries subsidies could be a challenge even for the EU,<sup>46</sup> the world’s largest fisheries market,<sup>47</sup> China’s argument is debatable, especially against its WTO accession pledge of “full notification” as will be elaborated below.

From the outset, China’s developing member status is self-declared and openly challenged. For example, due to its high fishing capacity rather than to its country/political entity in general, as seen from the latest statistics published by FAO (Box 1), the country is regarded as a developed, not a developing, country.<sup>48</sup> The ensuing questions are two-fold, irrespective of whether China’s developing member status is recognised or challenged. First, how hard would China

<sup>42</sup> See Ministerial Decision of 13 December 2017 (WT/MIN(17)/64-WT/L/1031).

<sup>43</sup> See Zhang X., Xu Q. & Wang J., Capacity Constraint: A Fundamental Perspective for the Development Issue at WTO, *Journal of World Trade* 53, no. 1 (2019), at p.23.

<sup>44</sup> See The WTO’s Fisheries Subsidies Negotiations, Analytical Note, South Centre, SC/AN/TDP/2017/5, July 2017.

<sup>45</sup> The FAO made an attempt to define fisheries subsidies as “government actions or inactions outside of normal practices that modify—by increasing or decreasing—the potential profits by the fisheries industry in the short-, medium- or long-term”. See Westlund L., *Guide to Identifying, Assessing, and Reporting on Subsidies in the Fisheries Sector*, FAO Fisheries Technical Paper 438, FAO, Rome, 2004.

<sup>46</sup> For example, it is found that the EU’s data on fishing activities collected within the framework of the Control Regulation was not sufficiently complete and reliable. Catch data for vessels making paper-based declarations – a significant portion of the EU fleet – was incomplete and often incorrectly recorded, say the auditors. There were significant discrepancies between declared landings and subsequent records of first sale. See EU fisheries controls: more efforts needed, say Auditors, European Court of Auditors, Press Release, Luxembourg, 30 May 2017.

<sup>47</sup> See Fishery and Aquaculture Statistics, the Year Book 2017, Food and Agriculture Organisation of the United Nations, Rome, 2019.

The EU has a Common Fisheries Policy and is implemented by the European Maritime and Fisheries Fund (EMFF), for the years 2014-2020, with a total allocated amount of €6.4 billion which translates into €800 million per year.

<sup>48</sup> See Sumaila U. et al, *Global Fisheries Subsidies*, Note for the EU Parliament, Directorate-General for Internal Policies, Policy Department B: Structural and Cohesion Policies, 2013, at p.41.

negotiate for itself and on behalf of developing members in order to attain certain SDT flexibilities? Given its top fisheries production capacity in the world and leadership among the developing members, China's position will undoubtedly influence the conclusion of the agreement. It is acknowledged that the main reason for providing fisheries SDT is to protect artisanal fishing activities, which are a major supplier of employment, income and food in many developing countries, and to reserve policy space for future development of the fisheries sector in developing countries.<sup>49</sup> It is noted that China has been calling persistently for SDT flexibilities on fisheries subsidies for WTO developing members ever since its WTO accession.<sup>50</sup> Second, even as a developing member, China must strive to meet the notification obligations prescribed by Article 25.3 of the ASCM. It is worth recalling that China committed at its accession to provide information "as specific as possible following the requirements of the questionnaire on subsidies as noted in Article 25 of the SCM Agreement".<sup>51</sup> This commitment has, nonetheless, not been fulfilled, as noted by the 2018 WTO Trade Policy Review. China's subsidies notifications are in general delayed for years, with missing information and the notifications submitted do not go beyond the notified programmes, while it is known that China has continued to provide substantial support for, among others, fisheries. For some reason, official expenditure figures on these support programmes were not made available. For example, on domestic support for fisheries 2015-2017, the type of support that China submitted to the WTO only concerned transfer payments,<sup>52</sup> while there are indications that the fuel subsidies provided for the world's largest fishing fleet constitute the biggest fisheries subsidies programme.<sup>53</sup> According to the FAO, sizeable national fishing subsidisation programmes are one factor<sup>54</sup> that contributes to overcapacity in world fisheries. Other programmes include,

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<sup>49</sup> See The WTO's Fisheries Subsidies Negotiations, Analytical Note, South Centre, SC/AN/TDP/2017/5, July 2017.

<sup>50</sup> China's very first proposal as a WTO member country was submitted to the WTO in June 2002 about the matter of fisheries subsidies, with regard to the scope, SDT flexibilities and "non-actionable" subsidies. See Proposal from the People's Republic of China on Fisheries Subsidies, TN/RL/W/9, 20 June 2002. At the time of writing, China's latest proposal on fisheries subsidies agreement negotiation was submitted on 4 June 2019, with regard to, among others, approaches for a capping and reduction, compliance, and "green box measures", which include "beneficial subsidies" (i.e. fisheries management and services, fishery research and development), for meeting sustainable development goals and transparency for such measures, and SDT flexibilities for WTO developing members and China called for LDCs to be exempted from "capping and reduction". See A Cap-based Approach to Address Certain Fisheries Subsidies That Contribute to Overcapacity and Overfishing, Communication from China, TN/RL/GEN/199, 4 June 2019.

<sup>51</sup> See the Protocol on the Accession of China, WT/L/432, 23 November 2001, at para 10.1 at p.78.

<sup>52</sup> See Trade Policy Review, Report by the Secretariat, China, WT/TPR/S/375, 6 June 2018, at pp.12, 69.

<sup>53</sup> It is also estimated that, for example, annual expenditure for fisheries subsidies was estimated at RMB 40.383 billion (€5.24 billion) for 2013. Most of this amount – 94% – was in the form of fuel subsidies. See Mallory T.G., Fisheries subsidies in China: Quantitative and qualitative assessment of policy coherence and effectiveness. *Marine Policy* (68), 2016, at p.74.

<sup>54</sup> Other factors are, for instance, 1) resilient profitability of fishing activities, whereby technical progress and relative price inelasticity of demand for fish have largely compensated for diminishing yields in overfished fisheries; 2) mobility of distant water fleets; 3) failure of fisheries management (in general) and of commonly used management methods (in particular) such as catch (total allowable catch), gear and spatial and temporal restrictions – which aim essentially at controlling fishing mortality indirectly through regulating the catching activities – rather than aiming to directly address the reasons why fishers are motivated to invest in excessive capital and capacity. See Measuring Fish Capacity, FAO Fisheries Technical Paper 445.

based on a study published in 2013, fuel subsidies that contribute to the greatest part of the total subsidy (22% of the total), followed by subsidies for management (20%), ports and harbours (10%) and fleet modernisation (close to 10%).<sup>55</sup>

*Box 1. A few facts on China's fisheries production<sup>56</sup>*

For capture fisheries, in 2017 China was the top-ranking fishing country in terms of quantity, with 15,373,196 tonnes, followed by Indonesia, India, the United States of America, and the Russian Federation. Compared to 2016, world capture fisheries in marine waters reached 80.6 million tonnes in 2017, representing an increase of more than 3.2 million tonnes. China, the Philippines, Malaysia and South Africa experienced the main decreases, while Chile, India, Peru, Norway and Denmark the highest increases. In 2017, China was also the world's top aquaculture producer (46.8 million tonnes, excluding aquatic plants and non-food products), followed by India (6.2 million tonnes), Indonesia (6.2 million tonnes) and Vietnam (3.8 million tonnes).

Note that China has recently revised its 2012–2016 fisheries and aquaculture production statistics based on the results of its Third National Agriculture Census conducted in 2016. The overall result of this revision was a downward correction of its production (excluding aquatic plants) for 2016 of about 13.5% or 5.2 million tonnes, of which 7.0% (or 3.4 million tonnes) for aquaculture data and 10.1% (or 1.8 million tonnes) for capture fisheries. This, together with other changes, implied the downward adjustment of 2016 global statistics by about 2% for capture production and 5% for aquaculture production. China's historical statistics for the period 2009–2011 were subsequently revised by the FAO in order to respect historical trends in annual variation of total production.

The world fishing fleet consisted of about 4.5 million vessels in 2017, relatively stable since 2008. China has the largest number of fishing vessels in the world, with 599,331 motorised vessels and 346,829 vessels propelled by oars or sails, followed by Indonesia, India, the United States of America, and the Russian Federation.

In 2017, about 40.4 million people were engaged in fisheries and 19.3 million in aquaculture worldwide. China has reported declining employment in both sectors since 2012 and this impacts the global totals.

In 2017, China was by far the main fishery exporting country, followed by Norway, Vietnam and India. The country was the world's third importing country of fisheries commodities, behind the US and Japan in the same year. Nonetheless, the growth rate of China's fishery exports has been declining in recent years from 7.2% in 2013 to 2.0% in 2017; for the same period, the growth rate of import has been slow-paced increasing from 0.3% to 0.4%.<sup>57</sup>

<sup>55</sup> See Sumaila U. et al, Global Fisheries Subsidies, Note for the EU Parliament, Directorate-General for Internal Policies, Policy Department B: Structural and Cohesion Policies, 2013, at p.41.

<sup>56</sup> See Fishery and Aquaculture Statistics, the Year Book 2017, Food and Agriculture Organisation of the United Nations, Rome, 2019.

<sup>57</sup> See Trade Policy Review, Report by the Secretariat, China, WT/TPR/S/375, 6 June 2018, at p.113.



To summarise the above breakdown, it shows that China's WTO developing status was not a problem at its accession, nor following accession when China participated in the three agreements for lesser and weaker commitments.

The situation could be different as far as the ongoing fisheries subsidies agreement negotiation is concerned, if at all, and then to what extent, China may be able to claim certain SDT flexibilities with its disputed developing member status. The types of fisheries SDTs come in various forms: 1) exclusion from disciplines, either unconditional or based on fulfilling certain requirements; 2) technical assistance and capacity building; 3) transitional arrangements, e.g. transitional period for implementation or; 4) peace clause protecting countries from being brought to dispute settlement. The strongest and most effective form of SDT is partial or complete exclusion from disciplines. Various proposals submitted to the WTO Negotiating Group on Rules suggest exemption from the disciplines for artisanal / small-scale / subsistence fisheries. But the challenge, to start with, has been to define 'artisanal' or 'small-scale' fisheries.<sup>58</sup> China, in its latest proposal at the time of writing, dated June 2019, calls for appropriate and effective special and differential treatment to be accorded to developing country members and least developed country members, and for the latter to be exempted from capping and reduction for subsidies reduction.<sup>59</sup>

As to fisheries subsidies notification, which is a component of the fisheries subsidies agreement negotiation, China has met with the same failure as mentioned above for other trade areas, such as agriculture subsidies notification. In this respect, aside from its more major commitments, China has yet to fulfil its obligations of notification in general. For example, the 2018 WTO Trade Policy Review disclosed that, during the reviewing period, China's most recent notification on domestic support on agricultural products was submitted in 2015 and only covered the period 2009-10. In December 2018, China submitted domestic support notifications to the Committee of Agriculture for the period 2011-2016.<sup>60</sup> Reading its accession pledges, China's developing member status and its capacity constraints would not appear sufficient to explain the discrepancies in the country's subsidies notification.

### 3. Delayed and incomplete subsidies notifications render China's high commitments redundant

There are a number of reasons which may explain why China conceded to accept those high demands in order to secure WTO accession. For example, in order to obtain from America the status of permanent normal trade relations (PNTR) so that the country would no longer be subject to the annual congressional approval of the US President's waiver, the process was always highly unpredictable and often politicised due to PNTR's statutory linkage with human

<sup>58</sup> See The WTO's Fisheries Subsidies Negotiations, Analytical Note, South Centre, SC/AN/TDP/2017/5, July 2017.

<sup>59</sup> See A Cap-based Approach to Address Certain Fisheries Subsidies That Contribute to Overcapacity and Overfishing, Communication from China, TN/RL/GEN/199, 4 June 2019.

<sup>60</sup> See Notification, Committee on Agriculture, G/AG/N/CHN/42-G/AG/N/CHN/47.

rights conditions beyond freedom of emigration.<sup>61</sup> Engaging external pressure to push forward domestic reforms could be another reason, as the battles between the reformists and conservatives within the Chinese leadership had been waged for a long time, and may be pertinent even now. Or, perhaps China negotiated a bad deal due to its capacity constraints,<sup>62</sup> given the fact that some of its high accession commitments were simply unattainable. At the same time, it was certainly a strategic decision for the US and the EU to bring about China's WTO accession so that the huge market could be regulated under WTO rules. With its accession, China would lower many layers of high trade barriers and abolish policies that limited market access, including to the agricultural market, very important to the US. It was equally envisaged that, by integrating the world trading system, China would become a force of peace and stability, especially in the Asia-Pacific region.<sup>63</sup> Therefore, China's accession to the WTO was in the interest of many of the parties involved.

However, high commitments will only be meaningful when they are fully implemented. There are examples that suggest China was probably not fully aware of all the complexity and technicalities involved when committing to certain WTO-plus obligations. A case in point is China's commitment to establish financing of car purchases by non-banking institutions within one year, which was in effect an impossible commitment to deliver. It was revealed that, while answering a query raised at the first transitional review conducted by the WTO Committee on Trade in Financial Services in 2002, China told the members that there were still no regulations to implement this specific obligation. This was because, historically, institutions specialised in financing car purchases did not exist in China, neither there were any governing regulations covering licencing procedures, business scope, etc.; therefore the one-year period was too short for China to draft all necessary legislation, let alone to enforce it. The process of drafting was further delayed because some related administrative rules also required amendment, in order to maintain consistency. Finally, given the requirement of transparency in the drafting process, consultations took place between the relevant administrative agencies and interested parties, including the embassies of some members in China and some multinational automobile corporations. After the initial round of consultation, further amendments were made that required further comments and, therefore, further delays in legislation occurred.<sup>64</sup>

Nonetheless, the initial impediments to compliance that confronted China were understood by members overall. As to implementation of its commitments *per se*, major contention did not emerge. Some members raised concerns in specific areas, such as the agricultural and financial

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<sup>61</sup> Due to the so-called Jackson-Vanik amendment to the Trade Act of 1974. It intended to affect US trade relations with non-market economies that restrict freedom of emigration and other human rights.

<sup>62</sup> See Zhang X., Xu Q. & Wang J., Capacity Constraint: A Fundamental Perspective for the Development Issue at WTO, *Journal of World Trade* 53, no. 1 (2019), at p.6.

<sup>63</sup> See Statement of Ambassador Charlene Barshefsky, United States Trade Representative, on Accession of China to the WTO, hearing before the Committee on Ways and Means, House of Representatives, 3 May 2000.

<sup>64</sup> See Report of the Meeting Held on 21 October 2002, Note by the Secretariat, WTO Committee on Trade in Financial Services, S/FIN/M/37, 24 October 2002, at pp.5-8.

sectors<sup>65</sup> or intellectual property rights protection, which were related to delays in implementation, or to transparency of the legal framework and enforcement issues.<sup>66</sup> In general, China's efforts in compliance were acknowledged. A widely-shared assessment among WTO members was that the problems encountered primarily reflected technical difficulties, not a broad pattern of non-compliance.

It must be highlighted that, in the run-up to China's WTO accession, the US, the EU (and some of its member states) and a number of other countries, such as Canada, launched their respective technical assistance programmes to support China's wide-ranging economic and societal reforms, especially with regard to applying new market-driven trade legislation, rules and policies. In the case of the EU, for example, its assistance programmes focused on a wide range of subjects, such as agriculture, legal cooperation and public administration training, village governance and human rights protection.<sup>67</sup> In 2000, the amount allocated to conducting the bilateral EU-China cooperation projects already totalled around €60 million per year.

In the same breath, it was also commonly agreed at the time that though implementation was seen as taking place following accession, compliance would be continually tested in the years ahead, especially with regard to compliance at the provincial and municipal levels, where administrative and judicial capacity constraints, and vested interests would likely hamper progress in, for example, eliminating restrictive practices such as the pervasive inter-provincial

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<sup>65</sup> With regard to trade in financial services, the concerns raised during the initial reviews were related to, for example, transparency of governing regulations (e.g. national treatment for internal branching), and banking services (e.g. the minimum registered capital requirement or operational capital requirement for foreign-invested banks, financing of car purchases, requirement of the qualification of the lead partner in a new Sino-foreign fund management joint venture company, MFN regarding the licensing of A Share trading). Additionally, there were the issues of written submission and delays in implementing certain commitments. See Report of the Meeting Held on 21 October 2002, Note by the Secretariat, WTO Committee on Trade in Financial Services, S/FIN/M/37, 24 October 2002, at pp.2-13

<sup>66</sup> Other concerns raised were related to the reporting procedure. For example, the US was disappointed not to have received China's responses in writing to the questions previously posed, and prior to the Committee of Agriculture meeting, which was an obligation under China's Protocol of Accession. See Transitional Review under Paragraph 18 of the Protocol of Accession of the People's Republic of China, in the Summary Report of the Meeting Held on 26 September 2002, WTO Committee on Agriculture, G/AG/R/32, 6 November 2002, at pp.9-15.

<sup>67</sup> See the Joint Statement of the 3<sup>rd</sup> EU-China Summit, Beijing, 23 October 2000. Note that on 19 May in the same year, the EU and China concluded their bilateral agreement on China's WTO accession on 19 May 2000. Moreover, according to the Joint Statement of the 2<sup>nd</sup> EU-China Summit, Beijing, 21 December 1999, the EU and China have conducted extensive cooperation with each other in many projects such as environmental protection, agriculture, the training of simultaneous interpretation, China-Europe International Business School, intellectual property rights, involving science, technology, finance, industry, education, development aid and others. The EU also offered an aid package to assist China in establishing a sound financial system. This very rich programme of bilateral cooperation has eventually evolved to become known nowadays as the EU-China Dialogue Architecture which consists of around 68 dialogues encompassing the pillars of political, economic and sectoral and people-to-people dialogues. Thanks to the dialogues and their many concrete project deliverables, the EU-China comprehensive strategic partnership is able to achieve mutual benefits, address frictions and identify synergies for closer cooperation.

taxes, fees and other non-tariff obstacles.<sup>68</sup> These concerns, regrettably, were reflected in reality and notification is an area that has been badly affected.

As mentioned above, China's notification on agricultural domestic support was seriously delayed. In fact, annual notification should be submitted no later than 30 June, in accordance with Article 25 of the ASCM. Besides that, there are also issues about incomplete submission as mentioned above, seen from the 2018 Trade Policy Review as reported by the WTO Secretariat. Notably, the Secretariat further pointed out that among the notifications submitted, "some notifications including those on state-trading enterprises, domestic support, and subsidies provided by the central government remain pending".<sup>69</sup> This is in marked contrast to China's accession commitments.

At the time of accession, China committed to notify any subsidy programmes, as determined, at all levels of government, in law or in fact, within the meaning of Article 1 of the ASCM with regard to subsidy. China also committed that the information provided in notification should be as specific as possible as prescribed by Article 25 of the ASCM. Equally, China informed the members that it would progressively work towards a full notification of subsidies, as contemplated by Article 25 of the ASCM and Annexes 5A and 5B of its Accession Protocol. It should be noted that "full notification" referred to the subsidies programmes that were beyond the scope of Annexes 5A and 5B of China's Accession Protocol, as written in the Working Party's Report which is a component of China's WTO accession package. Examples of such subsidies included state support through the banking system, notably by government-owned banks, in the form of policy loans, the automatic roll-over of unpaid principal and interest, forgiven non-performing loans, and the selective use of below-market interest rates. Some members also referred to unreported tax subsidies, investment subsidies and subsidies provided by sub-national governments, some of which favoured exporting firms. Other members mentioned subsidies granted to the telecommunications, footwear, coal and shipbuilding sectors.<sup>70</sup> China has not fulfilled the obligation of "full notification" as noted by the 2018 Trade Policy Review, which is also evidenced concerning its fisheries subsidies.

In fact, in recent years, those specific examples given in the context of "full notification" of subsidies, as mentioned above, have grown to become focuses of contention between China and its major trading partners. Coupled with delayed and incomplete notifications, and the uncertainty of the definition of a state-owned enterprise and, consequently, of a public body, the specificity of a subsidy is even harder to determine for the purpose of Article 2 of the ASCM. Specificity is essential to establish a prohibited or an actionable subsidy, so that members could

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<sup>68</sup> See Rumbaugh T. and Blancher N., China: International Trade and WTO Accession, IMF Working Paper, WP/04/36, at pp. 9-10.

<sup>69</sup> See Paragraph 2.21, Trade Policy Review, Report by the Secretariat, WT/TPR/S/375, 6 June 2018.

<sup>70</sup> Additionally, China was required to notify under the transitional review mechanism, taking place every year in the first eight years of its accession, fiscal and other transfers between or among the among SOEs in the agricultural sector whether national or sub-national and enterprises that operate as state trading enterprises in the agricultural sector. See Paragraph 173 of the Report of the Working Party on the Accession of China, 1 October 2001, WT/ACC/CHN/49.

seek redress either by going to the DSB or by imposing countervailing measures. In the absence of due notifications, the functioning of the ASCM will be reduced, and foreign businesses adversely affected by unfair advantages from the beneficiaries of such subsidies will be left without recourse. The market order safeguarded by the ASCM will thus be distorted.

Especially within this context, it came as no surprise that there have been calls for enhanced discipline in subsidy notification. The European Commission's DG Trade has identified a number of options to advance this course, including that of installing a general rebuttable presumption procedure according to which all non-notified subsidies would be presumed to be actionable.<sup>71</sup> Submitted to the WTO Council for Trade in Goods in June 2019, the US proposed to enhance notification obligations by introducing a number of punitive administrative measures for when notification obligations are not met. This initiative is intended to apply to 14 agreements and decisions<sup>72</sup> overseen by the 12 committees under the Goods Council. The US proposal may equally be seen as an initiative of the Trilateral Cooperation. With the aim of eliminating market-distorting and protectionist practices<sup>73</sup> undertaken by third countries, since its inception in December 2017, one of the measures proposed by the Trilateral trade ministers for addressing distorting market practices is to improve the effectiveness and efficiency of the WTO monitoring function, including strengthening notification requirements.

Nonetheless, doubts remain as to the effectiveness of these initiatives, especially if China's participation is missing.

#### 4. The way forward for an enhanced subsidy notification obligation

To install a general rebuttable presumption procedure as proposed by DG Trade, an amendment of Article 25.7 of the ASCM is required because the present provision holds notification of a subsidy measure without prejudice. But in the light of a possible "rebuttable presumption", a subsidy which is not notified would be presumed actionable for causing serious prejudice to other members within the meaning of Article 6 of the ASCM. Consequently, in order to quash the presumption, the subsidising member must establish that no causal link exists between the subsidy concerned and the serious prejudice caused. Though the Commission believes that this solution would not alter the extent of subsidies notifications for the subsidising member yet create a strong incentive for complying with existing obligations under the ASCM, the whole process of negotiations would most certainly be very long and could

<sup>71</sup> See Improving Disciplines on Subsidies Notification, TN/RL/GEN/188, 30 May 2017.

<sup>72</sup> See Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements, JOB/GC/204/Rev.2, JOB/CTG/14/Rev.2, 27 June 2019. This proposal is co-sponsored by Argentina, Australia, Canada, Costa Rica, the EU, Japan, New Zealand and Chinese Taipei.

The specific trade subjects of the agreements and decision are in relation to agriculture, market access, subsidies, anti-dumping measures, safeguards, state trading, import licensing, sanitary and phytosanitary measures, technical barriers to trade, rules of origin, etc.

<sup>73</sup> Such practices include government-financed and supported capacity expansion, unfair competitive conditions caused by large market-distorting subsidies and state-owned enterprises, forced technology transfer, and local content requirements and preferences.

even fall into prolonged paralysis. The same fate would likely be met by the American proposal submitted at the Goods Council as mentioned above. Already, probably as a counter proposal, a number of members have called for an “inclusive approach” to transparency on the grounds of developing members’ constrained capacity in fulfilling their notification obligations. On the other hand, together with like-minded members, the Trilateral Cooperation may opt for a plurilateral arrangement so that the objective could be reached more swiftly. However, China’s participation in this initiative to submit itself to, and to abide by, strengthened discipline on notification would be key for success.

Of course, members may use national legislation for trade remedy purposes. As prescribed by its bilateral WTO agreement concluded with China, America may continue to use the full range of its trade laws, including Section 301, Special 301 and countervailing duty and anti-dumping laws against China to address a wide variety of unfair acts, policies, and practices.<sup>74</sup> But national recourse would only be legitimate if it is undertaken in consistency with relevant WTO rules. In the case of the ASCM, the imposition of a countervailing duty must be in accordance with the provisions of Article VI of GATT 1994 and the terms of the ASCM.<sup>75</sup> As illustrated by the case United States – Countervailing Duty Measures on Certain Products from China (DS437), the US Department of Commerce was found to have acted inconsistently with Article 1.1(a)(1) of the ASCM in respect of 1) the grounds upon which to determine “public body” (i.e. majority owned or otherwise controlled by the Government of China); 2) the approach of “rebuttable presumption” in determining whether a state-owned enterprise is a “public body”.<sup>76</sup> Therefore, engaging China looks unavoidable when aiming for a swifter enhancement of the notification obligation.

## Conclusion

It has long been acknowledged that a development divide exists between WTO members and, at the same time, the priorities of developing and developed members differ. To achieve the purpose of development for all, the WTO provides as a matter of principle greater flexibility and special privileges, including transition periods, to developing members, in order for them to adjust to the often unfamiliar and challenging WTO provisions. With necessary technical assistance, this arrangement comes with obligations so that eventually a developing member

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<sup>74</sup> This should include 1) trade agreement violations; 2) acts, policies or practices that are unjustifiable (defined as those that are inconsistent with US international legal rights) and that burden or restrict US Commerce; and 3) acts, policies or practices that are unreasonable or discriminatory and that burden or restrict US Commerce. See Trade Act of 1974, 19 U.S.C. § 2411(a)-(b).

<sup>75</sup> See Article 10 of the ASCM. The provision further prescribes that Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of the ASCM and the Agreement on Agriculture.

<sup>76</sup> On other issues, the US Department of Commerce was found acted in consistency with the relevant provisions of the ASCM. This includes, benefit benchmark, specificity, “facts available” and export restraints. See United States – Countervailing Duty Measures on Certain Products from China (DS437). Available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds437\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds437_e.htm) (last accessed 3 October 2019).

will be fully integrated into the rules-based multilateral trading system by conducting international trade on the same level.

This paper lays out the fact that the extent and the depth of enjoyment of SDTs by WTO developing members are not determined by the self-claimed developing status *per se*, rather by such members' respective accession negotiations. In the first place, the SDT provisions are bound by specific obligations, often in the forms of time limits and thresholds. The WTO trade policy review mechanism further scrutinises a member's questionable trade policies and practices. The dispute settlement mechanism provides the last resort for rectifying a developing member's possible breach of SDTs obligations. Therefore, the application of the SDTs is specific and restricted.

There are also cases where a member declared developing status but without claiming the SDT flexibilities provided, as in the case of Singapore. For China, it has been persistent in claiming the developing status in the process of WTO accession negotiations, but the claim was quashed while full consideration was given to the country's economic characteristics and its market size. As a result, many WTO-plus obligations were concluded at the bilateral negotiations, and then incorporated into China's WTO accession package. A number of SDTs that China opted into have very limited significance when enforcing its accession commitments because these SDTs concern procedures, rather than lesser or weaker commitments. Therefore, the developing status was irrelevant, and not a problem, to China at its accession. After China acceded to the WTO, for the two protocols and one plurilateral agreement in which it participated, as explained above, there exists little evidence to show that China took advantage of its developing member status for delayed implementation or for lesser or weaker commitments. Nevertheless, the situation may be different for the ongoing fisheries subsidies agreement negotiation, as China's claim of developing member status has met challenges, and the country is regarded as a developed member due to its high fishing capacity. In the same context, regarding precise fisheries subsidies notification within the meaning of Article 25.3 of the ASCM, China has let its capacity constraints be known, and there have been evident discrepancies between its subsidies notifications in general and its accession pledges, such as on agricultural subsidies. Therefore, China's enjoyment of SDT flexibilities provides a mixed picture.

On the other hand, China's WTO developing member status claim may be understood as a result of political positioning to accomplish its aspiration for solidarity with developing members, which has always been cherished by China as its diplomatic foundation. In the same context, and moreover, instead of being a follower of existing trade rules dictated by the developed members, China will most certainly wish to carve out a multilateral trade policy space for itself and on behalf of developing countries in order to promote mutual development to "further expand South-South cooperation". This is a strategic priority for China's diplomacy.<sup>77</sup>

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<sup>77</sup> See Ning S., China's Relations with Developing Countries: Building Consensus on Development and Leading South-South Cooperation, in *The CIIS Blue Book on International Situation and China's Foreign Affairs*, 2019, by China Institute of International Studies, at p.374.

It is therefore doubtful if the country would ever change this positioning, and admit to being a developed member, which is, in effect, less relevant to the progress of its economic development, but rather political. This positioning will certainly influence the fisheries subsidies agreement negotiation, as many big fishing nations are developing countries, such as Indonesia and India.

In any case, aside from the developing member status, what really matters is compliance. In this regard, China has not been implementing faithfully all of its pledges made at its WTO accession. Nearly two decades after its accession, China, a quick learner and nowadays a competent operator at the WTO,<sup>78</sup> should have since acquired plenty of capacity and confidence to fully comply with its obligations. Actions to achieve this objective would be a constructive step for forging more reliable relations between China and its major trading partners, for which China has made a gesture in this direction by submitting, though belatedly, the missing agricultural domestic support notifications in December 2018. “Full notification” should follow. After all, due notification is not only a contractual obligation to fulfil, but also a way to manifest China’s ambition as a defender of the rules-based multilateral trading order.

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If the issue of development interest is examined against the historical background, one could appreciate that, since early 1960s, China has been positioning itself to be in alliance with the group of then newly independent developing countries in Asia and Africa, such as Myanmar, Pakistan, and Algeria, and vowed not to let a few big nations decide alone on international affairs in postcolonial times. This position was spoken of by China’s then Premier Zhou Enlai after a whirlwind tour of 13 countries in Asia and Africa during the period of December 1963 – February 1964. See the Three Tours Led by Premier Zhou Enlai (in Chinese). Available at [https://www.fmprc.gov.cn/web/ziliao\\_674904/wjs\\_674919/2159\\_674923/t9010.shtml](https://www.fmprc.gov.cn/web/ziliao_674904/wjs_674919/2159_674923/t9010.shtml) (last accessed 29 September 2019).

<sup>78</sup> For example, China has acquainted itself with the dispute settlement procedures fairly quickly through participation, as a third party but of course also as a complainant and a respondent – reflecting therefore a “learning by doing” approach. To date, China participated in 179 cases as a third party; the case number is higher than America’s and India’s which stands at 156 and 162, respectively, at the time of writing. China is a claimant of 21 cases, and a respondent of 44 cases. See [https://www.wto.org/english/thewto\\_e/countries\\_e/china\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/china_e.htm) (last accessed 20 November 2019).



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