

China's Response Strategies under the Reform of the WTO Special and Differential Treatment Provisions

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Abstract. Special and differential treatment, as an important foundation of the WTO, safe-guards the development rights and interests of developing country members, while to a certain extent promoting fairness and justice under free trade. Special and differential treatment aims to provide developing members with preferential treatment to promote the economic and trade development of developing countries, and requires developed members to undertake the obligation to give more preferential policies to developing members for this purpose. The contrast in power between developing and developed members has evolved in line with economic globalization, making the shortcomings and controversies of the special and differential treatment provisions increasingly apparent. This paper contains three main points: firstly, the controversies and shortcomings of the reform of the special and differential treatment provisions, secondly, a specific analysis of China's enjoyment of the special and differential treatment provisions, and thirdly, China's response strategies. The aim of this paper is to propose corresponding coping strategies for China in the S&D treatment negotiations and future economic and trade development, including the attitude that China should maintain towards S&D treatment in the negotiations. Therefore, it is concluded that in the process of reforming the S&D treatment provisions, China should adhere to its status as a developing country and apply the principles of S&D treatment, but at the same time should be prepared to graduate from its developing country status.

1. Introduction

With the continuous development of economic globalization and global value chains, it is necessary to reform the WTO. The "special and differential treatment" provisions (hereinafter referred to as S&D treatment provisions) have been controversial between developing and developed countries. The S&D treatment clause is a unilateral special preference granted to developing countries by the WTO in order to promote the trade progress of developing countries and achieve national economic development, and the principle that WTO allows developing countries to make less concessionary commitments than developed countries [1]. According to the latest statistics of the WTO Secretariat (WT/COMTD/W/239), there are 155 provisions on special and differential treatment under the WTO system, which mainly provide for preferential treatment in the following six areas: enhancement of trade opportunities for developing members; the need for WTO members to protect the interests of developing members; flexibility for developing members in terms of commitments, conduct and use of policy instruments; transition periods; technical assistance; and the use of technical assistance. The preferential treatment for LDC members is mainly in the following six areas: enhancing trade opportunities for developing members; the need for WTO members to protect the interests of developing members; flexibility for developing members in the use of commitments,

conduct and policy instruments; transition periods; technical assistance. Preferential treatment for LDCs. On 10 February 2020, the Office of the United States Trade Representative (USTR) published a list of 25 developing economies that have been denied the right to "Special and Differential Treatment". At the WTO General Council meeting held on 13 October 2020, the US and China again engaged in a heated exchange on the SDT issue. As a result, "special and differential treatment" for developing countries has attracted widespread attention and has been richly discussed in relevant studies. At the same time, the US believes that China should not continue to be considered a developing country and that the WTO should clearly define who can benefit from the S&D treatment and not allow some countries to enjoy special and differential treatment by virtue of their status as developing countries.

This paper mainly uses the methods of documentary and comparative analysis. In addition to the specific rules of the WTO agreements, it is important to consider the use of comparative analysis to compare the special and differential treatment provisions in other agreements and to examine the close link between international relations and special and differential treatment in order to provide more suggestions for China's response to reform. The study of the principle of special and differential treatment requires an understanding of all the relevant provisions of the WTO agreements on the principle of special and differential treatment, which can be divided into six

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categories, as well as a specific analysis of the preferential treatment currently enjoyed by China in the light of the relevant documents on China's accession to the WTO and the provisions of the agreements, and in the light of China's current development situation.

2. Controversies and shortcomings of the reform of the special and differential treatment provisions

2.1 Controversial views on key member reform

2.1.1 US and other developed country perspectives

The developed countries, represented by the US, the EU and Japan, have all made statements and proposals on the reform of the WTO, the most prominent of which is the definition of the status of developing countries, and therefore in the joint statement of the US, the EU and Japan, the three countries have also agreed to advocate the establishment of criteria for developing members of the WTO. The US believes that the Marrakesh Protocol's reference to "the existence of needs and concerns at different levels of economic development" suggests that there should be a plurality of levels of development among members, whereas the WTO's existing definition of national levels of development is in a "dualistic" structure, i.e. there are only developed countries. The WTO's existing definition of national development levels is in a "binary" structure, i.e. there are only two levels of development, developed and developing. It ignores many other factors that determine the level of development, such as economic, social and trade. This "binary" structure does not reflect the reality of the situation [2]. In its report, the EU points out that the WTO has development at its core and that there is a prevailing view that the rules of global trade are somehow an obstacle to development and that developing countries need to be exempt from them in order to safeguard their own development. In fact, however, the gap between developing and developed countries is becoming increasingly thin, and the reality of rapid economic growth in some developing countries is being ignored. The main source of tension in the WTO, and the impediment to progress in the negotiations, is the fact that some developing countries enjoy special and differential treatment despite the significant economic differences between them and other developing countries in their capacity as developing countries.

2.1.2 China and other developing country perspectives

China also believes that from the perspective of responding to the development needs of the times, China should take a supportive attitude towards the issue of WTO reform and is committed to actively helping the WTO to resolve the current crisis. China issued a "China's Proposal Paper on WTO Reform" (hereinafter referred to as the "Proposal Paper") in August 2019, in which China

set out the basic principles it should hold on the issue of WTO reform. Firstly, China believes that WTO reform should uphold non-discriminatory and open trade, which is an important value for the multilateral trading system; secondly, China believes that the WTO should safeguard the development interests of developing members, including the smaller degree of market opening that developing members should enjoy, a longer transition period for opening up, the flexibility to retain policy space and the acceptance of technical assistance. Thirdly, China believes that WTO reform should follow the principle of consensus. Thirdly, China believes that WTO reform should be based on the principle of consensus. From the three principles of the Position Paper, China's position and attitude towards S&D treatment is clear: China believes that it is necessary to uphold the existence of S&D treatment in the first place, and to ensure that developing members enjoy S&D treatment while it strives to undertake its own obligations.

In addition to China, we should also pay attention to the attitudes of other developing countries towards S&D treatment, as an examination of their attitudes and positions is important not only for this reform but also for the study of the S&D provisions themselves. In the document "The Continuing Relevance of Special and Differential Treatment in Helping Developing Members Promote Development and Guarantee Inclusiveness", scholars have collated the demands of Latin American countries in the context of WTO reform, and in the document "The Continuing Relevance of Special and Differential Treatment in Helping Developing Members Promote Development and Guarantee Inclusiveness", Venezuela, Libya and Cuba advocate the continuation of special and differential treatment and affirm the "self-identification" approach. In the document "The continued relevance of special and differential treatment in helping developing members to promote development and guarantee inclusiveness"[3].

2.2 Status of special and differential treatment provisions

2.2.1 Lack of identification criteria

As mentioned earlier in the overview of special and differential treatment, the WTO does not clearly define developed and developing countries, and members identify themselves as developed or developing countries by self-identification, while developed countries have the right to challenge the self-identification of developing countries[4]. For example, the EU delegation challenged Korea's status as a developing country in the discussion of the Appellate Body report in the Korean beef case, arguing that Korea did not qualify as a "developing member" under the Agreement on Agriculture[5]. Developing countries may be challenged on their status due to the lack of identification rules, which may result in them not enjoying the special and differential treatment they are entitled to and suffering the adverse consequences; developed countries may also challenge the infringement of their rights due to the lack of

identification rules. Just like the USA, The United States cannot stand the fact that WTO rules apply only to a small number of members, while more developed members, such as China, can enjoy the same special and differential treatment as sub-Saharan Africa through self-designation as developing members. The United States cannot stand the fact that WTO rules apply only to a small number of members, while more developed members such as China can enjoy the same special and differential treatment as sub-Saharan Africa through self-designation as a developing member, leading to the loss of the WTO negotiating function and institutional marginalization.

The so-called dissatisfaction of developed countries with the way in which they self-identify is also based on the lack of criteria. Under this issue then arises the question of how to establish criteria for the identification of developing countries. As far as the current state of research is concerned, the ultimate criterion for identifying a country as a developed or developing country should be its overall level of development, and it is not accurate to use GDP alone. And what we mean by comprehensive level of development should include, in addition to the level of economic development, a country's resources and environment, such as productive capital, natural capital, human capital and environmental damage, as well as the state of social development, such as employment rate and poverty rate[6]. As a result, new research theories have emerged from leading international institutions and experts on the criteria for identifying 'developing countries', in addition to the 'GDP-only' theory. The following principles should be followed in the identification of developing members: 1. The identification of developing members is a complex matter and cannot be based on a single factor alone; 2. In the selection of factors for consideration, while recognizing the importance of trade and economic factors, factors such as individual employment and income growth should also be considered.

2.2.2 Transition period and graduation issue timing controversy

Taking into account the weaker capacity of developing members compared to developed members, developing members may fulfil their commitments in steps or phases during the transition period in accordance with specific provisions. Once the specified transition period has been reached, the developing member moves on to the next stage, which is the stipulated graduation of the developing member. With the improvement of economic development and trade forms, WTO expects more from developing members to continuously improve their capacity to enjoy rights and fulfil obligations commensurate with their capacity. Therefore, it is worth noting that the reason why developing members are able to enjoy special and differential treatment is that the WTO protects their right to development and makes up for their lack of development capacity, in order to achieve the so-called fair justice. This is also a necessary mechanism to protect the interests of developed members and the right to development. However, there will be direct conflicts

between developed and developing countries in the "transition period" and graduation issues. For example, in the case of Indonesia's Specific Measures Affecting the Automotive Sector, which concerned the provision of Article 27(3) of the Agreement on Subsidies and Countervailing Measures (ASC), Indonesia's failure to provide a transition period for the application of Article 27(3) of the Agreement on Subsidies and Countervailing Measures (SCM) was a major obstacle to the effective use of the provision[8].

In the above analysis, the main shortcomings of the provisions on transition and graduation in the special and differential treatment provisions are that there are major differences between the two sides on the issue of timing. Whether from the perspective of developed country members or developing country members, there is inevitably a certain degree of subjectivity, and many factors need to be considered in order to balance the interests of the two parties. The economic gap and the overall capacity gap between developing and developed country members cannot be bridged only through time. Therefore, based on the aforementioned recommendation of the developed countries and other members to graduate as soon as possible, it is worth studying and discussing how China should respond to its status as a developing country and whether it should graduate.

2.2.3 Vague and unworkable formulation of specific rules

Following the Doha Round, some scholars have argued that special and differential treatment has not yet moved away from the concept of 'soft law'. There is currently no uniform definition of 'soft law' in international jurisprudence, but its counterpart, 'hard law', is well known to us. An important indicator of the distinction between 'soft law' and 'hard law' in international jurisprudence is the existence of coercive force to ensure the implementation of the law. Special and differential treatment provisions are regarded by academics as a kind of "soft law", mainly because of their vague formulation of specific rules, lack of operability and thus lack of binding force. In the current WTO legal system, many of the special and differential treatment provisions are formulated in weak terms, such as "may" or "should", resulting in less binding provisions. There are also provisions that appear to impose obligations on developed country members, but in practice the nature and content of such obligations are uncertain, for example, Article 37(1) of GATT 1947, which sets out the commitments of developed country members as "Developed Parties shall implement the following provisions to the maximum extent possible", and paragraph 3, which states that governments shall make every effort to maintain the profitability of trade at a fair level, such as by setting, directly or indirectly, the resale price of products produced wholly or mainly in the territory of less developed countries. While it is true that these provisions impose obligations on developed country members to grant preferential treatment to developing country members, it is also true that developing countries

cannot claim clear legal rights through these provisions, as the expressions "best efforts" and "to the extent possible" are highly confusing and deceptive. The expressions "best efforts" and "to the extent possible" are very confusing and deceptive and we cannot determine a clear standard from them.

3. Analysis of the special and differential treatment enjoyed by China

3.1 China-specific analysis

3.1.1 China is still the largest developing country

The fact that China remains a developing country has both a theoretical and a practical basis. Firstly, the theoretical basis for China's status as a developing country lies in the fact that there is a basis for the self-identification of developing countries within the WTO framework. Various factors have led to a gap between developing and developed countries in various areas, and the self-identification approach is a good way to alleviate the contradictions and differences between the North and the South in this regard. The self-identification approach is applicable and it is reasonable for China to self-identify as a developing country based on its natural disparities in development[8].

Secondly, China's status as a developing country is based on reality. However, even if China achieves the great achievement of building a moderately prosperous society in 2020, there is still a large gap between China's GDP per capital and the developed countries in all aspects. The main contradiction in Chinese society: the contradiction between the people's growing need for a better life and unbalanced and insufficient development. This means that China's international status as the world's largest developing country remains unchanged. China's fundamental judgement that the country is still a developing country is realistic, and the fact that China is a developing country does not need to be discussed or questioned. China is moving from a developing country to a medium developed country, and all kinds of products are changing from a weak comparative advantage to a strong comparative advantage. As a country with a very large economy and an uneven level of social development, the standards for developed countries under the WTO mechanism are not appropriate to the level of development of China as a whole, so China remains a developing country and should continue to enjoy special and differential treatment.

3.1.2 China's level of WTO accession commitments is much higher than that of other developing countries

China's accession commitments are at a much higher level than those of other developing countries and are subject to a large number of special rules that apply only to Chinese trade. China has undertaken not to invoke the provisions of the SCM Agreement that grant special

treatment to developing countries[8]. The Protocol to China's accession to the World Trade Organisation sets out China's obligations under the World Trade Organisation Agreement, as well as many additional China-specific commitments arising from China's need to transform its economy and trade patterns. China's Protocol of Accession includes a China-specific safeguard mechanism, special anti-dumping rules and a special methodology for determining and measuring the benefits of subsidies. It also creates a unique, 10-year review mechanism designed to monitor China's progress in meeting many of its WTO commitments and to ensure access to up-to-date information on China's use of industrial schemes.

China's WTO accession agreement reinforces China's obligation not to use minimum or reference prices as a means of determining tariff prices. With regard to market access negotiations, China's position is that, as a relatively late acceding member, it should not be required to make additional new concessions in the Doha Round. It has formed a coalition with 13 other recently acceded members, calling for special treatment for these members in line with their recent accession commitments. As the country most often targeted by anti-dumping measures and the largest user of anti-dumping measures, China has a strong stake in the outcome of the negotiations. As a developing country, China has joined the WTO with a higher level of commitments than other developing countries, but is not only actively integrating into the world economy, but is also contributing more actively to it. From this fact, China, as a developing country, should enjoy and needs to apply the right to special and differential treatment.

3.2 analysis of the application of specific provisions

3.2.1 Analysis of the application of specific provisions

There are 13 articles in the General Agreement on Trade in Services (GATS) relating to the special treatment of developing members. With the exception of two provisions relating to the least developed members, only some of the remaining 11 articles are of practical relevance to China. In recent years, China has made great strides in trade in services; it has become a pioneer in digital services trade as it continues to grow in scale. In recent years, as China has opened pilot free trade zones, expanded the scope of liberalisation and promoted the pre-entry national treatment plus negative list system, many of China's services trade sectors no longer restrict foreign entry or even foreign shareholding, and it is believed that the future negative list for foreign investment can be further slimmed down. China has already made significant achievements in the world of trade in services, so the special and differential treatment provisions of the GATS in recent years have less practical significance for the development of China's trade in services.

3.2.2 Few applicable provisions in the trade remedy system

The SCM Agreement contains 16 articles on special treatment for developing members, mainly in Part VIII, which provides for the use of import substitution subsidies and export subsidies by developing members within a certain transitional period, as well as the application of de minimis exemptions. According to the Accession Report and the Accession Protocol, upon accession, China eliminates all prohibited subsidies and waives its special and differential treatment in respect of actionable subsidies. In addition, China is entitled to S&D treatment under 27.10-27.12 and 27.15 (de minimis subsidies). In other words, the de minimis level for China is increased from 1% to 2% and the de minimis level is increased from 3% to 4% compared to developed members. There is a provision in the Anti-Dumping Agreement for special treatment for developing members, which provides for developed members to explore the possibility of constructive remedies before imposing anti-dumping duties on developing members. Although China has not waived this preferential treatment in the Protocol of Accession and the Instrument of Accession, this article is of little significance to China at present. The reason for this is that this article is a typical soft law provision, and due to its lack of operability, it is very difficult for developing members to win cases under this article in practice, for example, *India v. EC Cotton Bed Linen Dumping Case* and *Brazil v. EC Malleable Cast Iron Pipes or Fittings Dumping Case* are the best examples.

3.2.3 Limited role of dispute settlement clauses

In addition to the two provisions for LDC Members, China enjoys a total of nine provisions on special treatment for developing Members under the Understanding on Dispute Settlement Procedures and Rules, which mainly include special attention to the interests of developing Members, special dispute settlement procedures, inclusion of members from developing Members in the panel of experts, reference to special and differential treatment applicable in dispute settlement procedures in the report of the panel of experts, extension of time limits for consultations and defence, provision of legal assistance, etc. The Panel's report should include references to the special and differential treatment applied in the dispute settlement procedure, extension of time for consultations and defence, provision of legal assistance, etc. Most of the SDT provisions that China enjoys are declaratory in nature, i.e. they provide that the panel or other members should pay special attention to the actual problems and interests faced by developing members, but in practice these provisions have played a very limited role. Secondly, among the remaining provisions on special and differential treatment, China has made great progress in the training of WTO-related personnel and in defending its interests in the WTO system, and the provision of legal aid and special treatment for the extension of the defence period has been of limited assistance to China.

4. China's strategy for dealing with reform

4.1 China should insist on special and differential treatment

First of all, China's specific national conditions determine that China is still a developing country, and there are political and economic gaps between China and developed countries. While special and differential treatment is of great significance to developing countries, China joined the WTO as a developing country at the beginning of its accession, and although it has experienced multiple hiccups and made many concessions on the scope of treatment it enjoys, once China gives up special and differential treatment it will have serious implications for China and will have a negative impact on its own development, so we should make it clear that treating special and Therefore, we should be clear about the position and attitude that China should uphold in dealing with special and differential treatment, and take the principle of upholding special and differential treatment. The special and differential treatment that China currently enjoys in practice does have some significance for China. Although many of the special and differential treatment provisions are of limited use to China at present, there are still some provisions that play a role for China. The capacity assistance and special considerations for developing members under the TBT Agreement provide China with some room for manoeuvre in dealing with technical barriers to trade from developing members and the rational use of technical trade policies within China, which is conducive to the prosperity of China's import and export trade[9]. For example, the upgrading of the de minimis subsidies standard under the SCM Agreement can at least provide China with a certain defence to countervailing investigations.

Meanwhile, on the one hand, China should strengthen communication with these more developed developing members to avoid more members from leaving the developing member group under the bullying of the U.S. and others. On the one hand, China should strengthen communication with these more developed developing members to prevent more members from leaving the group of developing members under the bullying and inducement of the United States; on the other hand, China and On the other hand, China and these members should inform each other in a timely manner about their respective negotiation bottom lines and negotiation strategies, and may even work together to determine their own negotiation strategy in order to reach a smooth conclusion. On the other hand, China and these members should inform each other in a timely manner about their respective negotiation bottom lines and negotiation strategies, and even jointly determine some of the interests that need to be given up in order to strive for a smooth conclusion of negotiations. On the other hand, China and these members should inform each other in a timely manner about their respective negotiating bottom lines and negotiating strategies, and even jointly determine some of the benefits to be given up in order to

reach a successful negotiation, so as to increase the negotiating leverage of developing members in the negotiation of special and differential treatment.

4.2 Reasonable response to developed countries' claims for special and differential treatment

Although China has explicitly renounced 45 of these provisions, it is still able to enjoy another 110 SDTs. In order to avoid disputes and reflect the role of a great power, China can make concessions in the following aspects, on the premise of correctly understanding the current situation of China's development: China can explicitly renounce some provisions that are no longer valid in practice. For example, Article 18(7) of the GATT provides that a "developing member" may modify or withdraw a concession in order to promote the establishment of a particular industry. For some provisions that are no longer necessary in light of China's current development, such as the so-called protection of infant industries, China can also explicitly waive these provisions, considering that China's industries and economy are already competitive internationally[8]. China could also make concessions in some industrial sectors with a high degree of development, either through more tariff concessions within the WTO framework or by expanding its opening up and further reducing the scope of the negative list based on negotiations.

4.3 China can make conditional concessions

As mentioned above, it is important for China to maintain its developing member status. However, the US and other developed countries have repeatedly pointed out that they believe China should give up its status as a developing country, and in this WTO reform, China will also face questions from other countries about its status as a developing country. We cannot deny and ignore the fact that China's level of development is increasing every year, and that some indicators show a higher level than other developed countries. Therefore, we need to determine first of all to stick to the principle of special and differential treatment in the short term, and in the medium and long term to be ready to gradually move towards graduation and to take on more responsibilities, to be ready to graduate from developing countries.

We therefore need to consider that when China's level of development and overall capacity has increased compared to the present, or even when it enters the World Bank's classification of high-income countries in the near future, the special and differential treatment clause will no longer apply to China, and China will have new problems and difficulties in its economic development, i.e. how to be able to releasing the potential for economic growth and how to deal with other countries as developed countries in the future. The question of attitudes and principles in trade negotiations with other countries in their capacity as developed countries. Therefore, China can promote more commercial trades during the new situation.

5. Conclusion

Through the above analysis, the reason why special and differential treatment under the WTO is facing this reform is that developed country members believe that they are suffering from unfair treatment in economic and trade development due to the excessive special and differential treatment enjoyed by some developing country members, while taking on more obligations. In this context, the shortcomings of the special and differential treatment provisions are analysed, including the issues of identification of developing countries, the transition period and graduation, as well as the formulation and operability of specific rules. At the same time these issues are also the focus of controversy among countries in the negotiations.

This paper also analyses the specific situation of China and the specific S&D provisions that it enjoys, as evidenced by the fact that China is still a developing country. Although many concessions have been made on the scope of the treatment enjoyed, once China gives up the S&D treatment it will have serious implications for China and will have a negative impact on its own development, so we should make clear the position and attitude that China should adhere to when dealing with S&D treatment and take the principle of adhering to S&D treatment.

Finally, a number of recommendations are made for China's response to the reform, in terms of preparing for imminent graduation in the medium and long term while maintaining special and differential treatment and maintaining developing country status. However, the paper does have research gaps, for example, in the issue of identification, it fails to identify the criteria for the identification of developing country status; in the issue of ambiguity in the formulation of specific rules, how to refine and standardise the specific formulation of the provisions is also worth further research.

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