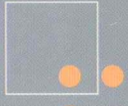
WTO-PLUS IN FREE TRADE AGREEMENTS

CHANG-FA LO



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Chang-fa Lo

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Author Chang-fa Lo

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PREFACE

The term "WTO-plus" is widely used. It is applied in various contexts to reflect the obligations assumed by a country being greater than what are currently imposed or required by the agreements under the WTO. More often it is used to describe the broader coverage of matters by the FTA than those required and covered by relevant WTO agreements. The discussions of this book focus on this aspect.

There are basically three categories of the provisions in FTAs: The first category includes those provisions dealing with the matters which are required by the GATT 1994 to be included in the FTAs. If there were no such provisions or contents included, the trade agreements would not be considered as legitimate FTAs under WTO and thus the agreements cannot be the basis for constituent members to depart from the MFN requirements. Provisions concerning tariff elimination and elimination of restrictive regulation of commerce between FTA parties are of this kind. The book discusses the extent that tariffs and other restrictive regulations of commerce are to be eliminated.

The second category includes those FTA matters not required by the WTO, but allowed or admitted by explicit WTO provisions or not denied by WTO practices. The matters explicitly allowed to be included in FTAs are those permitted under GATT Articles XI, XII, XIII, XIV, XV and XX. A difficult issue is whether those matters not in this list, especially the antidumping, countervailing and safeguard provisions in FTAs, are also allowed under the WTO. The book discusses the related issues for clarification.

The third category includes those matters not covered by the WTO or, although covered by the WTO, not allowed by the WTO to be an exception to the MFN principle. The intellectual property provisions in FTAs are basically the subject covered by the WTO but without specific authorization

under the TRIPS Agreement to qualify such provisions in the FTAs as exceptions to the MFN obligation in this agreement. From the perspective that the inclusion of intellectual property protection in FTAs is not required by the WTO, they are WTO-plus provisions. From the perspective that many intellectual protections in FTAs exceed the minimum requirements of the TRIPS Agreement, such provisions are also TRIPS-plus. The book discusses intellectual property right under FTAs as WTO-plus and TRIPS-plus.

The book will also analyze legal issues concerning GPA-plus issues because of its unique status from WTO perspective. Other WTO-plus issues discussed in this book include those relating to competition, investment, and environmental protection. These are all under the third type of FTA provisions, which can be generally considered as WTO-plus matters. The book will elaborate the plus aspects of FTAs concerning these issues.

In addition to those commonly included WTO-plus chapters in the FTAs, the book will also explore about whether it is appropriate to have a health chapter in FTAs to become a positive WTO-plus element.

The author expects that the book will clarify issues that have not been fully elaborated before so that there will be clear understanding on WTO-plus issues. Hopefully, it would help WTO Members to negotiate further rules on FTAs under the WTO, to formulate their FTA rules and policies concerning the plus aspects, and to help dispute settlement decisions on the related issues.

Chang-fa Lo
At Asian Center for WTO and International Health Law and Policy, National Taiwan University College of Law

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CHAPTER 1

INTRODUCTION

I. MEANING OF WTO-PLUS

1. WTO-Plus in the Context of WTO Accessions

The term "WTO-plus" is applied in different situations and various contexts. It is basically to reflect the commitments made or the obligations assumed being greater than what are currently imposed or required by the agreements under the World Trade Organization (hereinafter WTO).[1]

"WTO-plus" is commonly used to describe the commitments made by acceding Members during their accessions to the WTO with the contents and levels of obligations exceeding those required by WTO agreements. When a country negotiates its accession to the WTO, it could be requested to make concessions exceeding the requirements of the existing WTO agreements or to commit to follow rules stricter than what are required under the WTO. These are "WTO-plus" commitments or concessions.[2] China's accession to the WTO is a salient example in this regard and the safeguards provision in its accession protocol is of this nature.

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[1] The term "plus" is also used in many other contexts. For instance, since the negotiated Free Trade Agreement of the Americas (FTAA) is modeled on North American Free Trade Agreement (NAFTA), it has been described as "NAFTA plus". San Sebastián M, Hurtig, *A. Moving on from NAFTA to the FTAA?: the impact of trade agreements on social and health conditions in the Americas, in Rev Panam Salud Publica. 2004;16(4):272-8*, cited from http://journal.paho.org/?a_ID=358.

[2] Nhan Nguyen, *WTO Accession at Any Cost? Examining the Use of WTO-Plus and Obligations for Least-Developed Country Applicants*, 22 Temp. Int'l & Comp. L.J. 243 (2009).

When China acceded to the WTO, it was required by WTO Members to accept special safeguard provisions in its WTO accession protocol. Under such safeguard provisions, other WTO Members are entitled to make country-specific safeguard measures specifically against China,[3] while if

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[3] Section 16 (Transitional Product-Specific Safeguard Mechanism) of Protocol on the Accession of the People's Republic of China has the following provisions:

"1. In cases where products of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products, the WTO Member so affected may request consultations with China with a view to seeking a mutually satisfactory solution, including whether the affected WTO Member should pursue application of a measure under the Agreement on Safeguards. Any such request shall be notified immediately to the Committee on Safeguards."

"2. If, in the course of these bilateral consultations, it is agreed that imports of Chinese origin are such a cause and that action is necessary, China shall take such action as to prevent or remedy the market disruption. Any such action shall be notified immediately to the Committee on Safeguards."

"3. If consultations do not lead to an agreement between China and the WTO Member concerned within 60 days of the receipt of a request for consultations, the WTO Member affected shall be free, in respect of such products, to withdraw concessions or otherwise to limit imports only to the extent necessary to prevent or remedy such market disruption. Any such action shall be notified immediately to the Committee on Safeguards."

"4. Market disruption shall exist whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry. In determining if market disruption exists, the affected WTO Member shall consider objective factors, including the volume of imports, the effect of imports on prices for like or directly competitive articles, and the effect of such imports on the domestic industry producing like or directly competitive products."

"5. Prior to application of a measure pursuant to paragraph 3, the WTO Member taking such action shall provide reasonable public notice to all interested parties and provide adequate opportunity for importers, exporters and other interested parties to submit their views and evidence on the appropriateness of the proposed measure and whether it would be in the public interest. The WTO Member shall provide written notice of the decision to apply a measure, including the reasons for such measure and its scope and duration."

"6. A WTO Member shall apply a measure pursuant to this Section only for such period of time as may be necessary to prevent or remedy the market disruption. If a measure is taken as a result of a relative increase in the level of imports, China has the right to suspend the application of substantially equivalent concessions or obligations under the GATT 1994 to the trade of the WTO Member applying the measure, if such measure remains in effect more than two years. However, if a measure is taken as a result of an absolute increase in imports, China has a right to suspend the application of substantially equivalent concessions or obligations under the GATT 1994 to the trade of the WTO Member applying the measure, if such measure remains in effect more than three years. Any such action by China shall be notified immediately to the Committee on Safeguards."

"7. In critical circumstances, where delay would cause damage which it would be difficult to repair, the WTO Member so affected may take a provisional safeguard measure pursuant to a preliminary determination that imports have caused or threatened to cause market disruption. In this case, notification of the measures taken to the Committee on Safeguards and a request for bilateral consultations shall be effected immediately thereafter. The

WTO Members are to resort to safeguard measures against other WTO Members, such measures need to be applied in a non-discriminatory manner under Article XIX of the General Agreement on Tariffs and Trade 1994 (hereinafter GATT 1994) and to be applied to an imported product irrespective of its source under Article 2.2 of the Agreement on Safeguards.[4]

Safeguards measure is only an example in China's accession protocol having such WTO-plus nature. As a writer commented, "Unlike any other WTO protocol of accession, the China Protocol is not a standardized document. Instead, it contains a large number of special provisions that elaborate, expand, modify or deviate from the existing WTO agreements… [with] obligations exceeding the existing requirements of the WTO agreements…"[5] These expanded obligations can all be generally considered as the "WTO-plus" obligations.

As a matter of fact, WTO-plus elements regarding acceding Members are not just found in China's accession protocol. As a general principle, most countries acceding to the WTO are requested to assume obligations not limited to those required by the WTO agreements existing at the time of their accessions. For instance, when Cambodia joined the WTO in October 2004, it agreed to achieve full implementation of the Agreement on Trade Related

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duration of the provisional measure shall not exceed 200 days during which the pertinent requirements of paragraphs 1, 2 and 5 shall be met. The duration of any provisional measure shall be counted toward the period provided for under paragraph 6."

"8. If a WTO Member considers that an action taken under paragraphs 2, 3 or 7 causes or threatens to cause significant diversions of trade into its market, it may request consultations with China and/or the WTO Member concerned. Such consultations shall be held within 30 days after the request is notified to the Committee on Safeguards. If such consultations fail to lead to an agreement between China and the WTO Member or Members concerned within 60 days after the notification, the requesting WTO Member shall be free, in respect of such product, to withdraw concessions accorded to or otherwise limit imports from China, to the extent necessary to prevent or remedy such diversions. Such action shall be notified immediately to the Committee on Safeguards."

"9. Application of this Section shall be terminated 12 years after the date of accession."

The text of Protocol can obtained from the WTO website at http://www.wto.org/English/thewto_e/acc_e/completeacc_e.htm#cam.

4 Hua Liu and Laixiang Sun, *Beyond the Phase out of Quotas in the Textile and Closing Trade: WTO-Plus Rules and the Case of US Safeguards against Chinese Exports in 2003*, Asia-Pacific Development Journal, Vol. 11, No. 1, at 49, June 2004. This paper basically explains the difference between China-specific safeguard provisions in China's WTO accession protocol and the general WTO Agreement on Safeguard. The paper can be found at http://www.unescap.org/pdd/publications/apdj_11_1/liu&sun.pdf#search='WTO%20plus'.

5 Julia Ya Qin, *"WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol*, Journal of World Trade 37(3), 483-522, (2003).

Aspects of Intellectual Property Rights (TRIPS Agreement), including for pharmaceutical products, not later than 1 January 2007.[6] If there were no such WTO-plus commitment, Cambodia as a least-developed country would have been entitled to a delay to the end of 2015 for the implementation of the TRIPS Agreement in regard to pharmaceutical patents.[7]

2. WTO-Plus in the Context of WTO Negotiations

Sometimes the term "WTO-plus" is used to describe possible new norms proposed to be included into the WTO. For instance, a suggestion of an inclusion of investment rules regulating tax incentives that is not currently covered by WTO rules on subsidies is the situation of this nature.[8]

Although there have been some investment provisions in the WTO agreements, including those in the Agreement on Trade-Related Investment Measures (TRIMS Agreement) (concerning some trade related investment measures) and in the General Agreement on Trade in Services (GATS) (concerning mode 3 commercial establishment, which is basically investment activity in nature), there is no comprehensive investment agreement under the WTO. In Doha Ministerial Declaration[9], ministers decided to continue discussion on the relations between trade and investment.[10] This was basically an attempt to establish a set of WTO-plus rules dealing with investment matters in the trade organization. Similar attempt was shown in regard to competition policy. Doha Declaration instructed negotiators to explore the establishment of modalities for negotiations on competition

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6 See Table 12 "Action Plan for Implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights" and paragraph 206 in the Report of the Working Party on the Accession of Cambodia (WT/ACC/KHM/21, 15 August 2003), in which the representative of Cambodia confirmed that Cambodia would apply the Agreement on Trade-Related Aspects of Intellectual Property Rights no later than 1 January 2007 according to the Action Plan in Table 12. The Report is available at the WTO website at http://www.wto.org/English/thewto_e/acc_e/completeacc_e.htm#cam.

7 Steve Charnovitz, *The World Trade Organization in 2020*, 1 J. Int'l L. & Int'l Rel. 167, at 180 (Winter, 2004/Spring, 2005).

8 Jeremiah Johnson, *WTO Plus: Creating Liberal Investment through Regulating Tax Incentives*, Expresso Preprint Series, paper 102 (2003); the paper can be found at http://law.bepress.com/cgi/viewcontent.cgi?article=1236&context=expresso.

9 WT/MIN(01)/DEC/1, 20 November 2001. The text of the Declaration is available at the WTO website at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm# relationship.

10 Paragraphs 20-22 of Doha Declaration.

policy.[11] However, the attempts did not succeed when the General Council decided on the Doha Agenda work program on 1 August 2004 (known as the "July Package") that the topics of the relationship between trade and investment as well as the interaction between trade and competition policy would not form part of the Work Programme set out in Doha Declaration and thus no work towards negotiations on any of these issues would take place within the WTO during the Doha Round.[12]

3. FTA Itself Being a WTO-Plus

Sometimes it is considered that a free trade agreement (hereinafter "FTA") itself is a WTO-plus in nature, because the extent and level of liberalization under an FTA must always go beyond the commitments under WTO.[13] The level of contemplated trade liberalization under the WTO is described in the Preamble of the Agreement Establishing the World Trade Organization as "the substantial reduction of tariffs and other barriers to trade." While the level of liberalization required by the WTO concerning FTAs is that "the duties and other restrictive regulations of commerce are eliminated on substantially all the trade" with respect to trade in goods (Article XXIV:8 of GATT 1994). The required extent of liberalization under an FTA will be discussed in later chapters of this book. For the purpose of better understanding, a conceptual comparison of these two levels of liberalization is shown in the following diagram.

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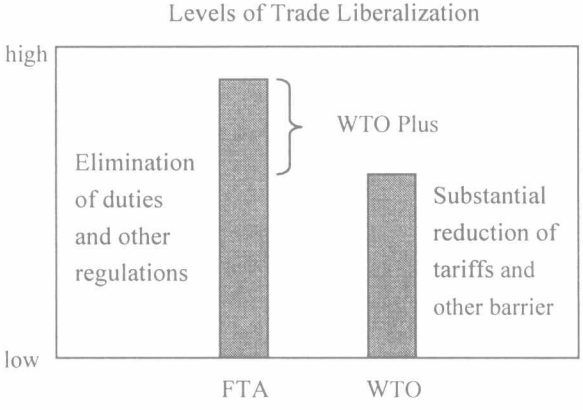
[11] Paragraphs 23-25 of Doha Declaration.

[12] WT/L/579, 2 August 2004. The document is available at the WTO website at http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm.

[13] Mr. Yen Ching-Chang's Speech, cited from http://www.taiwanwto.ch/doc/pages/statements/index/ambassador.htm; also Chan Mang-jurn, *Analysis on the Strategy of Taiwan-Japan FTA*, http://www.inpr.org.tw/publish/pdf/m21_7.pdf.

Diagram 1-1

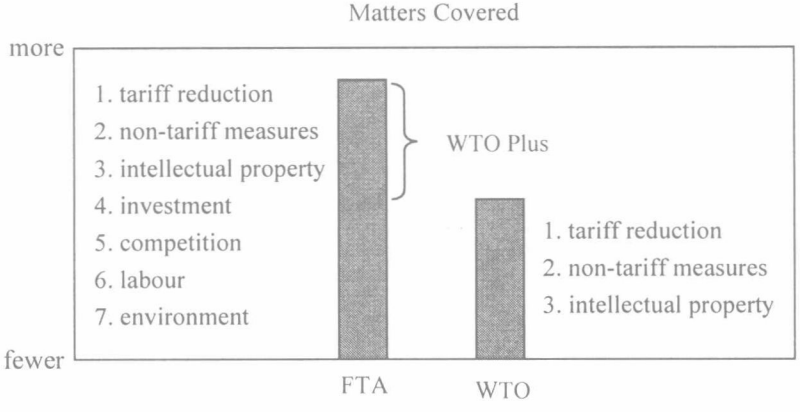


The characterization of FTA itself being a WTO-plus is of some helps for clarifying the nature of FTA or the relations between the WTO and an FTA. However, stressing the FTA itself being a WTO-plus is not a critical issue, because, the rule has been clear that an FTA must contain deeper liberalization of the trade between its constituent members than that required by the WTO concerning WTO Members. The important and sometimes difficult questions should be to identify the scope of FTA matters that have gone beyond those allowed by the WTO and to decide those not permitted under the WTO rules.

4. WTO-Plus in the Context of FTA

The term "WTO-plus" is used more often to describe the broader coverage of matters by the FTA than those required and covered by relevant WTO agreements. The discussions of this book focus on this aspect. WTO-plus in the context of FTA will be explained throughout the book from different perspectives. The following diagram is to show the conceptual comparison between the WTO and the FTA concerning the matters covered in their respective agreements.

Diagram 1-2



II. Reasons to Discuss WTO-Plus Aspects of FTA

One of the most important and difficult issues in international trade policy and law is the relations between the WTO and FTAs. From the perspective of multilateral framework, the proliferation of FTAs certainly poses an important challenge to the WTO. The relation between the WTO and FTAs from this perspective has been discussed by many commentators with the debates about, for instance, whether FTAs are stumbling blocks or building blocks for the WTO.[14]

The book does not intend to engage in the debates on such issues. Instead, it discusses the relations between the WTO and FTAs from the perspective of whether the matters covered by the FTA are within the scope of the WTO and what would be the legal status of FTAs including such kinds of provisions from WTO perspective. The merits of discussing this aspect of WTO-FTA relations are apparent. There is no definite scope specified and instructed by the WTO to be included in an FTA and thus many FTAs have their own unique coverage, although many of the matters covered by different FTAs are similar. Also there are confusions and misunderstandings about the legal status under the WTO for relevant FTA chapters for different matters. A comprehensive clarification and rationalization of the relations

[14] Sungjoon Cho, *Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 Harv. Int'l L.J. 419 (Summer, 2001).

between WTO and FTAs are thus needed.

It must be noted about the reason for this book to choose FTAs, instead of other kinds of regional trade agreement, for such comparison. There are different types of economic arrangement in terms of their respective levels and extents of integration. They are the FTA, the customs union, the common market, and the economic union.[15] FTA and customs union together are called regional trade agreement (RTA) in WTO practice. A Member of the WTO is given a defense[16] for its deviation from other obligations of the

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[15] Their respective meanings are as the following: 1. Free trade area: which the internal trade is liberalized, however, the external trade of the constituent members to which is not unified; 2. customs union, in which the internal trade is liberalized and there is common trade policy for which by the constituent members; 3. common market, in which free movements of production factors are allowed; 4. economic union, in which there is common currency. As explained by an author: "There are four basic levels of economic integration, which include (1) a free trade area, (2) a customs union, (3) a common market, and (4) an economic union." "A free trade area is the least integrative model, with focus on eliminating taxes, quotas, tariffs and other trade barriers among member countries without forming collective policy for relations with nonmembers." "In a customs union, on the other hand, members not only agree to eliminate trade barriers, they also agree to a common trade policy regarding nonmembers." "A common market goes a step further, as it incorporates the tenets of a customs union but seeks to integrate further the factors of production–labor, capital and technology – thus eliminating restrictions mainly in the areas of immigration and investment." "Lastly, the creation of a true economic union requires integration of economic policies in addition to the free movement of goods, services, and factors of production across borders." "A common monetary and tax policy as well as a common currency among members further characterize an economic union." See Michael R. Czinkota et al., *International Business* 256-57 (5th ed., 1999); cited from Scott R. Jablonski, *NAFTA Chapter 11 Dispute Resolution and Mexico: A Healthy Mix of International Law, Economics and Politics*, 32 Denv. J. Int'l L. & Pol'y 475, at 479 (Summer 2004). See also Chang-fa Lo, *The Reciprocity Principle in the International Regulation of Economic Relations* 202-03 (1990).

[16] Article XXIV: 5 of GATT 1994 states in part: "the provision of this Agreement shall not prevent… the formation of a customs union or of a free trade area…" In paragraph 45 of the Appellate Body Report on *Turkey – Textiles* (DS 34. The Appellate Body Report was adopted on 19 December 1999. The text of the Report can be found at the WTO website at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds34_e.htm), it is stated: "[I]n examining the text of the chapeau to establish its ordinary meaning, we note that the chapeau states that the provisions of the GATT 1994 '*shall not prevent*' the formation of a customs union. We read this to mean that the provisions of the GATT 1994 *shall not make impossible* the formation of a customs union. Thus, the chapeau makes it clear that Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible 'defence' to a finding of inconsistency. Footnote 13 of this Report further explains some historical discussions about the nature of the term '*shall not prevent*' by stating in part the following:"

> "We note that legal scholars have long considered Article XXIV to be an 'exception' or a possible 'defence' to claims of violation of GATT provisions. An early treatise on GATT law stated: '[Article XXIV] establishes an *exception to GATT obligations* for