

**THE LEGALITY OF CREATING PLURILATERAL AGREEMENTS
WITHIN THE WTO FOR SINGAPORE ISSUES**

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I. INTRODUCTION

1. This note seeks to assess whether it is actually legal, under the WTO Agreement, for WTO Members to undertake and conclude negotiations for plurilateral agreements in the WTO vis-a-vis the Singapore issues.
2. The Singapore issue proponents would be likely to say that yes, it is legal, and will likely point to the following to support their argument: (i) that the text of the WTO Agreement itself provides for explicit recognition of the existence or possible existence of such agreements in the WTO context (e.g. Arts. II.3, III.1, IV.8, IX.5, IX.9, X.10, XII.3, XIII.5, XIV.4, XV.2, and XVI.5) and (ii) WTO practice has recognized the ability of WTO members to agree on PTAs such as the Annex 4 PTAs and the Information Technology Agreement.

**II. WTO'S SOLE MANDATE IS TO NEGOTIATE MULTILATERAL TRADE AGREEMENTS,
NOT PLURILATERAL TRADE AGREEMENTS**

3. On the other hand, it can also be argued that while some WTO Members may individually agree to negotiate a PTA, the WTO itself (meaning all of its Members deciding by consensus in the Ministerial Conference or the General Council) does not have the legal authority under Art. III.2 of the WTO Agreement to agree to negotiate a PTA.
4. Art. III.2 of the WTO Agreement states as follows:

The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade negotiations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.

5. One could argue that the focus in Art. III.2 on "multilateral trade negotiations" means that, except for the Annex 4 PTAs agreed to in the Uruguay Round, the WTO per se can engage only in such MTNs rather than in negotiations for the creation of PTAs. That is, one could say that the WTO Agreement's provisions that recognize the existence of PTAs refer only to those PTAs that were concluded as part of the Uruguay Round and were explicitly referred to in Annex 4 of the WTO Agreement. This means that any PTAs subsequently (i.e. post-Uruguay Round) negotiated by WTO Members individually amongst themselves (which they can do as sovereign states not acting pursuant to any WTO obligation) would not and should not fall within the scope and framework of the WTO Agreement.
6. It should be noted that as far as the WTO is concerned (as opposed to WTO Members individually), there is a clear distinction between what constitutes "multilateral trade agreements" and PTAs under Art. II.2 and II.3 of the WTO Agreement. In making this distinction between two types of trade agreements, one could possibly argue that the same distinction would also therefore apply to trade negotiations in that there would hence be two types of trade negotiations corresponding to the two types of trade agreements -- i.e. (i) "multilateral trade negotiations" leading to the creation of "multilateral trade agreements" recognized under Art. II.2 and relating to Members' "multilateral trade relations"; and (ii) "plurilateral trade negotiations" leading to the creation of PTAs to govern individual Members' "plurilateral trade relations". But since Art. III.2 of the WTO Agreement states that the WTO can be the forum for "further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations," one can argue that the WTO (as an organization with an international legal personality separate from that of its Members), acting through the Ministerial Conference or the General Council, can authorize only those negotiations that are "multilateral" in character and extent rather than "plurilateral."
7. Of course, the Singapore issue proponents could come back and say that the word "multilateral" should also be interpreted as including or covering the word "plurilateral" on the ground that the plural term ("multilateral") would necessarily include the singular or, in this case, anything short of the plural (i.e. "plurilateral"). The possible response to this could be that when it comes to treaty interpretation, treaty provisions should be interpreted with the intention of giving

effect to each and every term in the treaty on the assumption that the treaty-makers meant each and every term to have a special effect in the context of the treaty. This means that where the treaty effectively makes a distinction between specific terms - i.e. "multilateral" vs. "plural" in the context of defining what are multilateral trade agreements under Art. II.2 and what are plurilateral trade agreements under Art. II.3 - that distinction should also be applied or taken into account when reading similar terms elsewhere in the treaty. As applied to Art. III.2 then, the fact that the treaty focuses solely on "multilateral" should be taken to mean that as far as the functions of the WTO are concerned, it can concern itself only with "multilateral" trade agreements and "multilateral" trade relations, it effectively ruled out the possibility of the WTO per se authorizing Members to engage, under WTO auspices, in plurilateral negotiations. Of course, there is nothing to stop individual WTO Members from agreeing to engage in plurilateral trade negotiations, but such should not be done under, nor the mandate sought for from, the WTO per se via a General Council or Ministerial Conference decision. We should also note that in 1996, when the mandate was established for the conduct of negotiations for the ITA, the mandate was established NOT by the Ministerial Conference but rather only by the ministers of the WTO Members, acting individually, who wanted to engage in the negotiations.

8. Any PTA (on Singapore issues, for example) negotiated after the Uruguay Round should, therefore, be done outside the WTO. The PTA may, of course, refer to various provisions in the WTO agreements or reproduce them in toto, but it should not be subsumed within the WTO framework.
9. In fact, when one reads the Singapore Declaration on the ITA, one can see that the participants did not expressly make the ITA itself fall within the WTO's framework. In fact, one could argue that the ITA itself, as a distinct PTA, remains outside the WTO framework because there has not been any Ministerial Conference decision, "made exclusively by consensus" under the terms of Art. IX.9 of the WTO Agreement (which governs the incorporation of PTAs into the WTO framework), that added the ITA to Annex 4 of the WTO Agreement. The Singapore Ministerial Declaration on Trade in IT Products was made NOT by the WTO Ministerial Conference but rather only by the ministers of the WTO Members specifically listed in that declaration. In order not to be bogged down by the requirements of Art. IX.9 of the WTO Agreement vis-a-vis incorporation of the ITA into the WTO framework, what the ITA did was that it required the ITA participants to incorporate their ITA market access commitments into their GATT 1994 schedules as revisions thereto. Since the ITA referred to tariff bindings, it was fairly easy for the ITA participants to incorporate them into their GATT 1994 commitments by simply revising their GATT 1994 schedules and notifying other WTO Members of such revision. By doing so, they made their ITA commitments (but not the ITA itself) fall under the scope of the GATT 1994 and its MFN, NT, and market access obligations. Since their ITA commitments, by virtue of such

- incorporation, became part of their GATT 1994 commitments, any violation thereof then could become subject to DSU proceedings.
10. However, if the PTA were to refer to new rules governing areas not presently covered by existing WTO agreements - such as the Singapore issues - incorporating such new rules created under a post-Uruguay Round PTA into the WTO framework would be problematic and more difficult. First of all, the PTA participants will have to get the consensus approval of the Ministerial Conference under Art. IX.9 of the WTO Agreement in order to have their PTA be included as an Annex 4 PTA. In the event that such Art. IX.9 consensus approval has been obtained, then the PTA becomes a WTO agreement (though binding only on the PTA participants). Inclusion as an Annex 4 PTA is important as the first step for the PTA participants to be able to avail themselves of the DSU mechanism (subject to the terms of Appendix 1 of the DSU regarding the applicability of the DSU to the Annex 4 PTA). The second step is for the PTA participants to get an amendment to the DSU's Appendix 1(C) listing of Annex 4 PTAs covered by the DSU. In order to amend the DSU, the provisions of Art. IX.8 of the WTO Agreement will have to be complied with - e.g. the decision to approve an amendment to the DSU and render such amendment applicable to all WTO Members must be done by the Ministerial Conference by consensus.
 11. If the PTA participants are not able to get their PTA be added as an Annex 4 PTA, then the DSU cannot be made applicable to the extra-WTO PTA. Even if the PTA participants are WTO Members, they cannot and should not be able to utilize the WTO's dispute settlement procedures to settle PTA-related disputes because under Art. 1.1 and 1.2 of the DSU, it applies only to the "covered agreements" listed in Appendices 1 and 2 of the DSU. Since Appendix 1(C) lists down only the four Uruguay Round Annex 4 PTAs as being covered by the DSU (assuming the Uruguay Round PTA parties made a decision in that respect), it automatically excludes any other PTA from the scope of application of the DSU. The rule of treaty interpretation applicable here is "inclusio unius est exclusio alterius" - i.e. the specific inclusion of certain items in a list excludes all other items that are not in the list.

III. CONCLUSION

12. In summary, it can be argued that:
 - i. the WTO per se, acting through the Ministerial Conference or the General Council, does not have the legal authority to mandate the launch, conduct, and implementation of Singapore issue PTA. Since there is a clear distinction made in Art. II.2 and II.3 of the WTO Agreement between "multilateral" and "plurilateral" trade agreements, such distinction should also be applied when dealing with what can be valid subjects for the WTO's mandate. Under Art.

III.2 of the WTO Agreement, the WTO can serve as the forum only of "multilateral" trade negotiations leading to "multilateral" trade agreements. Hence, it can be argued that the WTO per se (as distinct from the legal personalities of its Members) cannot serve as the venue, nor be able to provide the mandate for, the launch, conduct, and implementation of Singapore issue PTAs. However, countries interested in participating in such PTAs (like on Singapore issues) are free to do so in their sovereign capacities, and the PTAs that would result from such negotiations would be free-standing and legally distinct treaties separate from that of the WTO Agreement and its annexes;

- ii. post-Uruguay Round Singapore issues PTAs that done by WTO Members individually amongst themselves do not per se fall within the WTO framework. This of course means that any obligations or commitments under such PTAs apply only to those that agree to be bound thereunder;
 - iii. for such post-Uruguay Round PTAs to be covered within the WTO framework, the provisions of Art. IX.9 of the WTO Agreement need to be complied with in order for such PTAs to be considered as Annex 4 PTAs. Even if such PTAs were to be included in Annex 4, their obligations would still be binding only on those WTO Members that agree to join the PTA;
 - iv. for the DSU to be made applicable to post-Uruguay Round PTAs once they have been incorporated in the WTO framework as Annex 4 PTAs pursuant to Art. IX.9 of the WTO Agreement, the DSU's Appendix 1(C) listing of Annex 4 PTAs covered by the DSU needs to be amended in accordance with the provisions of Art. IX.9 of the WTO Agreement. Even if Appendix 1(C) of the DSU is amended so as to include the new PTAs, the DSU can be invoked by and applied to the PTA participants alone in accordance with their decision on the terms of the application of the DSU to the PTA.
13. Since both Art. IX.8 and IX.9 of the WTO Agreement requirement consensus decisions by the Ministerial Conference, such requirement can be used by WTO Members opposed to new rules relating to Singapore issues under a negotiated PTA to block the inclusion of such Singapore issue PTAs into the WTO framework. If blocking inclusion as an Annex 4 PTA does not work, then such WTO Members should still have the opportunity to block the application of the DSU to the Singapore issue PTAs by not agreeing to any DSU amendments that would inclusion such PTAs in the DSU's Appendix 1(C).
14. Of course, the ability to use the consensus decision-making rules to block Singapore issue PTAs depends on the political will of WTO Members opposed to such PTAs to use their consensus-based veto power.



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