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Could plurilateral agreements provide a way forward out of the current impasse of the WTO/Doha Round?

Policy Debate between Prof. Dr. Raymond Saner, Director of Diplomacy Dialogue and:

- Mr. Grant Aldonas, Senior Advisor (Non-resident), Centre for Strategic and International Studies
- Mrs. Jane Drake-Brockman, Global Services Network
- Mr. Guy de Jonquières, Senior Fellow at ECIPE
- Ambassador B. K. Zutshi, Ambassador of India to the General Agreement on Tariffs and Trade (1989 to 1994)

Introduction

The Doha Development Agenda (DDA) launched in 2001 was supposed to achieve further trade liberalisation while at the same time taking into account the needs of developing countries. Ten years have passed since its inception and no end of the Round is in sight.¹

In this context of prolonged impasse, plurilateral agreements might provide a solution to solve the impasse of WTO/DDA and offer as well a basis for future trade agreements within the WTO context.

This Policy Debate addresses the following question: *Could plurilateral agreements provide a way forward out of the current impasse of the WTO/Doha Round?*

The inputs for this Policy Debate are based on the exchanges amongst the participants in the CUTS Online Trade Forum² from 06 to 10 January 2012.

All the participants agreed to include their inputs in this Diplomacy Dialogue/CSEND Policy Debate and, in some cases, they decided to edit and/or include additional inputs. CSEND thanks the authors for their contributions.

This Diplomacy Dialogue policy debate is an open forum. Experts who would like to add their comments and suggestions are welcome to do so. We will upload additional comments that help further deepen and broaden the discussion.

Experts interested in submitting further contributions are invited to send their texts to the following address: saner@diplomacydialogue.org with copy to filadoro@csend.org

Geneva, 10th April 2012

¹ See CSND Briefing Paper 'Doha stalemate: Implications and ways forward' at <http://www.diplomacydialogue.org/publications/trade-diplomacy/105-dohastalemate-implications-and-ways-forward-csend-policybrief-genevaugust-2011>

² See <http://groups.google.com/group/cuts-tradeforum>

*Prof Raymond Saner*³

I have submitted to the readers of the CUTS-Trade Forum that plurilateral agreements could provide a way forward out of the current impasse arguing that plurilateral agreements are within the WTO in contrast to the ever growing FTAs, RTAs and BITs. As you all know, the US representative proposed such an approach for negotiation of services at the MC8. The reactions as reported by Bridges were mixed. Some countries were in favour, others expressed strong reservations. From my understanding, plurilateral agreements offer market access based on reciprocity (see e.g. China's current negotiation for membership of the GPA), other countries can join if seen useful. It is a transparent process and disputes could be solved through the DS process within WTO in contrast to disputes related to FTA/RTAs which remain outside WTO.

³ CUTS Online Trade Forum, 06 January 2012.

Grant Aldonas, Senior Advisor (Non-resident), Centre for Strategic and International Studies⁴

I don't disagree. For me, plurilaterals fall in the category of doing what is practical. It helps avoid the unit veto any country can exercise under the principle of a single undertaking and it offers a way to experiment with new disciplines in the absence of progress among the group as whole, while at least arguably being less inconsistent with the idea of multilateralism, if not the MFN principle, by virtue of the fact that the talks are within the framework of the WTO and, therefore, more transparent.

You have the benefit of history on your side in suggesting plurilaterals as a practical solution. They provided a means of breaking the impasse in the negotiations that led to the Tokyo Round, when countries like India were not prepared to accept the additional disciplines implied in the Tokyo Round codes.

Your approach also has the benefit of ensuring that the resulting agreements are subject to WTO dispute settlement. That would help ensure a more consistent development of trade jurisprudence and international economic law than would be the case with preferential trade arrangements or BITs.

Given those virtues, the question is why the "market" for trade policy reforms has moved in the opposite direction? I think the answer there may well lie in a dispiriting disbelief that the WTO can function. It also certainly arises from the very nature of a preferential arrangement and ultimately back to the mercantilist logic of trade negotiations and the collective action problem I alluded to in earlier notes.

Still worth pursuing. However, I think, as a matter of law, that opening the door to discussions of plurilaterals will require the same consensus that has eluded us thus far in the DDA to, since it necessarily implies a deviation from MFN.

⁴ CUTS Online Trade Forum, 07 January 2012.

Why we need to rethink the modalities of services trade negotiations?

Trade negotiations on services have proven difficult to date, both in the DDA and in various bilateral contexts. Contributing factors include: lack of information among governments on the services economy and their own commercial interests in services; absence of coordinated domestic strategies for services development; consequent policy uncertainty and defensiveness; lack of domestic impetus for regulatory reform; inadequate private sector stakeholder consultation and absence of international support for domestic regulatory transparency institution building.

The nature of a multilateral “round” and the WTO concept of a “single undertaking” have perhaps also impacted negatively on the prospects for services, given that the negotiating focus to date in the DDA has been on agriculture and manufactures.

Aspects of the GATS and the GATS negotiating modalities are also problematic, for example: the technical complexity of GATS schedules; the unintelligibility of the GATS itself and its disconnect from business reality; uncertainties in GATS interpretation given the relative absence of dispute settlement case law; and the absence of any “formula” by which to quantify progress in reducing services barriers and the public opacity of services “offers”. The fact that “behind-the-border” services barriers relate to core aspects of a country’s domestic legislation leads to additional problems, intensified by absence of regulators from the negotiating table and lack of global support for international regulatory dialogue.

The content and coverage of the recent GATS negotiations has also become increasingly outdated. The DDA excluded key services –related topics such as investment, competition policy and mutual recognition of regulatory authorities. There is moreover an increasing need for services negotiations to cover a range of “21st Century” issues, including for example global supply chain interoperability.

It should not be surprising that questions started to arise as to whether a plurilateral approach might be more effective, given that less than a third of the WTO members had in any case submitted a DDA services offer.

Consideration has to be given to ways in which a services plurilateral might be devised, for example what would constitute a “critical mass” and how it might be achieved. The WTO Information Technology Agreement has been cited as a potential “critical mass” model, where benefits are extended on an MFN basis; another model cited is the WTO Agreement on Government Procurement for which the benefits accrue on a reciprocal basis only to the signatories. It is also important to remember that in effect continued negotiations on services were already mandated as part of the built-in agenda from the Uruguay Round and all it would take to recommence them is political will to do so.

⁵ Comments kindly provided by Mrs. Drake-Brockman.

Consideration also needs to be given to the extent and magnitude of potential “free rider” problems i.e. whether market forces alone would provide sufficient incentives for initial non-parties to a plurilateral agreement to come on board. The underlying economics (i.e. the known productivity enhancing impact of reform to behind-the-border barriers) suggests that there would be strong natural incentives for initial non parties to join in, in order to compete effectively for inward foreign investment in the services sector. This is borne out in the case of telecoms where there is research evidence that countries that have not signed the WTO Basic Telecommunications Reference Paper fail to attract telecoms investment.

One working assumption might therefore be that a plurilateral negotiation that attracted a “critical mass” of major players would place economic pressure on non-participants to cooperate or face significant competitive disadvantages. To allow MFN to operate, any such “critical mass” negotiations would need to be within the WTO framework. Another possibility might be plurilateral negotiations outside the WTO Framework, building on current experience for example in negotiating the Trans Pacific Partnership (TPP) agreement.

In any case, negotiating modalities would need to be structured to avoid the difficulties of past request/offer negotiations. This might require a simple multi-modal services accord, for example a standstill and rollback-type deal, without individual schedules, or with negative, if any, listings. It would be important for business confidence to cover a very broad range of services sectors.

It would be important to apply the many lessons learned from the last decade of bilateral services trade and investment negotiations. Bilateral efforts to liberalise services have used various types of architecture. Some have followed the GATS architecture; others have departed from it significantly, including through recourse to the powerful negative list approach and use of “ratchet mechanisms”. Others are explicitly “living agreements” which cater for continuous enhancement of their liberalising content through permanent ongoing negotiations accompanied by regulatory benchmarking dialogue and stakeholder consultation.

Jane Drake-Brockman, Global Services Network⁶

There is more than one model for plurilateral negotiations on services, both inside and outside the WTO. I attach a paper, put together by the City UK⁷ to which I, and others in the Global Services Coalition, contributed, which describes and discusses the various options.

The GPA is indeed one model. It is conditional MFN - i.e. reciprocal, is under the WTO umbrella, open to all WTO members and can utilise the WTO DS mechanisms.

The ITA is another model. It was MFN-based, generated on a critical mass basis and brought under the WTO umbrella.

ACTA is sometimes referred to as another model, outside the WTO. Similarly TPP. Renegotiation of aspects of the GATS is yet another possible option.

The fact is that only one third of WTO members have submitted services offers in the DDA. So the DDA negotiations can hardly really have been described as “multilateral” anyway; they have in fact already been plurilateral.

The services business community wants the negotiations to continue. Independently of negotiations on other topics. Plurilateral is fine, given that the DDA negotiations were effectively plurilateral anyway. The big questions on modalities are mfn or non-mfn – and inside the WTO or outside?

I personally have a strong preference for critical mass mfn-based plurilateral negotiations under the umbrella of the WTO. Chinese, Indian and Brazilian participation would be essential, and they are currently nay-sayers. The market would eventually bring them on board; because they will not attract FDI in services unless they open up to it. And the interim extension to them of any mfn-based liberalisation resulting from a plurilateral could be expected to benefit participants to the agreement at least as much as non-participants, given (1) the economics of services trade liberalisation – where domestic firms gain as much as foreign firms as the domestic regulatory burden is eased and (2) the fact that services liberalisation is difficult to implement on a preferential basis.

But it would obviously be better to have the nay-sayers come on board at the outset; and the negotiations take place inside the WTO (though not necessarily in Geneva). This is now a key issue for global services industry business advocacy.

⁶ CUTS Online Trade Forum, 07 January 2012.

⁷ Note available from <http://www.thecityuk.com/assets/Uploads/Next-Generation-Negotiations-25-Oct-2011-FINAL.pdf>

*Guy de Jonquières*⁸

I have been following with interest the discussion about plurilaterals. It does, indeed, seem that these offer the only realistic prospect in the foreseeable future for negotiating liberalising agreements in services in the WTO. However, there are a number of questions that, to me at least, appears unresolved, in addition to those already raised.

One is whether and how it would be possible to bring any of the larger developing countries on board. I am unclear whether it would be possible to negotiate a services plurilateral on the basis of conditional reciprocity. That would leave "critical mass" as the obvious approach. But could there be a "critical mass" without at least India and China participating? Technically, perhaps yes, since in many services sectors the bulk of exports is accounted for by industrialised countries. But politically, would it not risk being divisive to have an agreement that involved only OECD members plus perhaps a few others, such as Hong Kong and Singapore?

True, the telecoms, financial services and IT plurilaterals all managed to attract participation by a range of developing countries, but for reasons specific to the industries concerned and to circumstance and timing. Telecoms succeeded because the industry's traditional business model was already collapsing under the impact of technological change that was making monopolies, with their inherent cross-subsidies, economically unsustainable; financial services was doomed to succeed because the negotiations coincided with the Asian financial crisis and failure would have risked further destabilising international financial markets (IMF pressure on the crisis-hit economies to launch structural reforms undoubtedly helped, as well); and the ITA was feasible because it was fairly easy to demonstrate to developing economies involved in global electronics production chains that taxing the imported inputs essential to their manufactured exports was a dumb idea.

But what today are the sectors in which it is possible to demonstrate to developing countries that lowering their barriers to services trade is clearly in their economic self-interest?

Another question concerns regulation. The evidence suggests strongly that simply obtaining commitments to remove barriers to services trade is not enough, on its own, to liberalise trade. Such commitments, to be effective, need also to be backed by credible domestic competition policy machinery. The failure of New Zealand's initial attempts at national telecoms liberalisation, undertaken without the underpinning of pro-competitive legislation, is a good example of why. It triggered litigation that ended up in the lap of Britain's Law Lords who, as I recall, refused to rule because there was no applicable NZ law on which to base a judgment.

Undoubtedly the most novel and important feature of the telecoms agreement was the "reference paper", which committed participating WTO members to abide by a number of pro-competitive principles. I suspect that the same holds true for other services sectors as well. The question then becomes how pro-competitive regulation should be structured. There are a number of options. The most obvious are

⁸ CUTS Online Trade Forum, 09 January 2012, original input edited by Mr. de Jonquières.

harmonisation of rules (complex and time-consuming) and mutual recognition (which intrinsically requires a high degree of trust between different regulatory authorities).

Finally, is there any fresh thinking about how to resolve the thorny old problem of federal/sub-federal jurisdiction in those countries where it applies? Obvious examples in the US are insurance, medicine and the law, and the number of sectors where the states have primacy appears to be growing. I gather that some states have even started imposing their own regulation on hairdressers, in order to restrict competition from out of state. Or is the only realistic option to accept that the best is the enemy of the good and that having some sub-federal entities on board is better than having none at all?

I do not pretend to have answers to all these questions, but would be interested to hear more from those who have studied them in greater depth than I.

*Jane Drake-Brockman, Global Services Network*⁹

Services negotiations need new negotiating modalities. “Stand-alone” is one requirement. “Plurilateral” is another. But there is more. For all the reasons Guy identifies, the regulators need to be included at the negotiating table. We need a generic “Services Reference Paper” setting out pro-competitive whole-of-services principles against which to benchmark services regulation. And in lieu of any “formula” on the basis of which to liberalise, we need at least some common measures of levels of services protection. We do not need the failed request-offer process. We do not need positive schedules of commitments.

Why should developing countries take an interest? Because getting rid of inefficient services regulation provides the single biggest domestic whole-of-economy productivity boost on offer. It also improves domestic competitiveness in the services sector itself which pretty much everywhere now employs most people and generates most GDP.

Detail around these issues can be found in the PECC/ADBI report “Services Trade: Challenges for the 21st century” at http://www.pecc.org/images/stories/press-releases/PR_111215_Services-trade.pdf

⁹ CUTS Online Trade Forum, 09 January 2012.

*Ambassador B. K. Zutshi, Ambassador of India to the General Agreement on Tariffs and Trade (1989 to 1994)*¹⁰

Most of these ideas are not new, which is not to suggest that they may not be explored for a way out at this stage for advancing negotiations, at least in the services sector. It is true that a new round of GATS negotiation from January 2000 was a part of the outcome of the Uruguay Round, and these were initiated in January 2000 in terms of that commitment, but got subsumed in the wider Doha Round undertaking. Theoretically, therefore, it should be possible to delink them from the Doha Development Round to be pursued separately.

The problem though is that by that token some members will also ask for agriculture negotiations to be delinked from the DDR and be pursued independently as there was also a commitment in the UR to undertake a fresh round of agriculture negotiations from January 2001. Those interested in agriculture negotiations, led by Brazil and Argentina, are unlikely to agree to the resumption of services negotiations without agriculture negotiations also being delinked and resumed. This is not possible, given the US-EU stance on the issue, not certainly at this point in time.

One may recall that a major reason for widening the scope of the post-UR work programme of the newly established WTO, which ultimately resulted in the DDA, was the position taken by the US and the EU that in agriculture they would have to make concessions without the prospects of getting anything new in return in that sector and that for them it was essential to also have prospects of receiving concessions in other areas. It may also be recalled that during the present round members interested in agricultural liberalisation linked progress in services negotiations with that in agriculture negotiations, even beyond the notion of a single undertaking under which members could have allowed differential progress in different negotiating areas subject to the principle that 'nothing is settled until everything is settled'. In that light the prospects of resumption of services negotiations alone are rather dim.

As to recourse to plurilateral negotiations of different varieties, there are issues of WTO law and of good faith of past negotiations that need to be addressed first. Other than for such agreements negotiated under Article V of the GATS, there has to be a consensus on going down this route, which will be possible only if the benefits of such plurilateral agreements among a subset of members are extended to non-participants to these negotiations on an MFN basis. This will be possible only if participants in such negotiations also include major developing and emerging market countries like Argentina, China, Brazil, India, South Africa, and Russia. The absence of these countries will pose the 'free rider' problem to the major developed countries and perhaps rightly so. A plurilateral agreement where concessions are confined to the participating members only is not legally permissible, except the one-time dispensation under the Annex on Article II Exemptions. This was a major issue in the GATS negotiations as the US wanted MFN also to be a negotiated commitment.

This also means a basic and fundamental shift in MTN's from the notion of their single undertaking character, which brings into question the good faith nature of the UR negotiations and the DDA

¹⁰ CUTS Online Trade Forum, 10 January 2012, original input edited by Ambassador Zutshi.

negotiating mandate. If single undertaking approach was good for these two sets of negotiations on the ground of facilitating exchange of concessions among participants with differently endowed competitive abilities, why is not so for present and future negotiations? It cannot be that the developed countries having secured the inclusion of the services trade and the intellectual property rights in the MTS and finding themselves in difficulties in undertaking further reform in the agriculture sector, the single undertaking notion is no longer relevant. Developing countries, more than ever, need the leverage provided by the single undertaking character of the MTN's for securing concessions of vital interest to them and for political economy reasons. Politically, a multilateral trade negotiation is not a feasible proposition at this point in time. But that does not mean that this position is not going to change. An assessment about the prospects of resuming MTNs will need to be undertaken after the US elections this fall. The dangers to the MTS (WTO) as a result of the current impasse are exaggerated. There is no dearth of Cassandras now, as at several points during the UR negotiations, who had pronounced the then MTS as dead or dying. Strategically, for developing countries, it is not a good idea to join in plurilateral negotiations in services at this time, even under the threat of Article V negotiations, which can be checked and challenged for consistency with the Article V disciplines.

In regard to preparing a Reference Paper for Services on the lines of the Reference Paper on telecommunications, this is also not a new idea. In fact, some work has been done on such a Paper for Mode-4 liberalisation, which is very much on the table in the services negotiations. It is not feasible to have a reference paper to cover all the service sectors. We may need a number of sector-specific reference papers. What is really needed at this time is to complete negotiations on Subsidies, emergency safeguard measure, government procurement and disciplines on qualification requirements and procedures and on technical standards and licensing requirements, which are the left over issues of the framework agreement from the UR.

*Prof. Raymond Saner*¹¹

Many thanks for your stimulating and substantial responses to my initial kick-off question as to the viability of a plurilateral alternative approach to the current DDA impasse be that for the services sectors or for WTO-DDA in general. When I wrote my initial input, I thought as well of GATT/Nama and GATT/agriculture not only GATS/services but the subsequent inputs from Jane, Grant and Guy resulted in a focus on primarily services. Staying with this narrower scope, I have a few comments and further queries.

Jane: The paper which you shared with the readers of this forum is a very comprehensive and a well thought out analysis of the services negotiations with a very detailed discussion of the different plurilateral solutions available to the WTO member countries. In the paper, four choices of plurilateral approaches have been listed (pp. 4-5). Later in the paper, suggestion is made that the main alternative forms of services plurilaterals are only two out of the four namely

1. A GATS agreement ITA type- critical mass to cover sector, limited actors and subsequent MFN sharing of benefits and
2. A WTO agreement under GATS Art. V type labeled “plurilateral agreement having regard to Economic Integration”.

The paper further suggests that a non MFN plurilateral agreement along the example of GPA “looks unlikely to find favor” and also adds a suggestion to proceed towards a “GATS Version 2.0 Concept” which would, among different items, consist of members negotiating and adopting a cross-sectoral reference paper modeled e.g. on the Telecom/IT plurilateral which would be based on participation of domestic regulators.

Part of the attraction and growing success of the GPA is the non-MFN architecture which has convinced China to start accession negotiations and India supposedly also signaled interest in joining the GPA. The same process could be envisaged for other services sectors. To link a plurilateral to MFN could make it very difficult for such members to get support domestically and since WTO Plurilaterals are open-architecture based agreements, the exclusivity is not permanent. Plurilateral agreements could over time become fully multilateralised reaching MFN status or close to it.

Another issue is the suggestion of asking members to negotiate and agree on a cross-sectoral reference paper. This sounds like a mini-Doha agreement in disguise for GATS. I would imagine that members prefer to keep some grey areas. Too much transparency and normative rigour could make it difficult for many members to sell such a reference paper at home especially if the reference paper becomes normative.

¹¹ CUTS Online Trade Forum, 10 January 2012.

Grant: thanks for giving us the benefit of your broad and at the same time specific historical knowledge of the trade negotiations. We agree with each other on most of your comments. I just have a question regarding your ending note when you state:

Still worth pursuing. However, I think, as a matter of law, that opening the door to discussions of plurilaterals will require the same consensus that has alluded us thus far in the DDA to, since it necessarily implies a deviation from MFN

Are you saying that starting negotiations on any new plurilateral service agreements would need the full consensus of the current WTO membership? Was that the case when GPA was started? And if so, is there any way around it other than taking a service plurilateral outside of the WTO as Jane's paper suggested as the fourth plurilateral option?

Guy: you wonder how it would be possible to bring any of the larger DCs on board of a service plurilateral. At the same time, you state that the telecom, financial services and IT plurilaterals came about because of the fast technological change and concomitant change of the respective industries which made continuation of traditional sector regulation based on cross-subsidization too costly for OECD governments. You also wonder how it might be possible to demonstrate to DCs that lowering their barriers to services trade is in their economic self-interest. You also wonder how to solve the federal/sub-federal jurisdiction issue in light of possible plurilaterals which by definition, being within WTO, are signed by national governments, not provincial authorities

My main response to your comments is that China and India, two very large DCs, anticipate economic benefits in joining the GPA and may also expect domestic regulatory secondary benefits in better controlling their domestic actors and provinces. It must make economic sense to both large DCs to want to join the GPA.

*Guy de Jonquères*¹²

Thank you for your comments. I'll leave Grant and Jane to reply to these sections that relate to their points. For my part, I would add just two things. First, my assumption is that the question of the feasibility of involving DCs in services plurilaterals goes wider than the GPA. Second, that the indifference of most DCs towards the services talks in the Doha round doesn't encourage confidence that they would see virtue in pursuing liberalisation in other WTO negotiations. Of course, economic logic argues in favour of their doing so. But implementing it requires a strong political commitment by governments to overcome powerful domestic resistance. It is hard, for instance, to envisage Beijing rushing to negotiate the opening to international competition of SOE monopolies in network industries. The latter both wield a lot of political clout and are often spoken of by Chinese policymakers as national champions. At the very least, it seems to me that any attempt to launch new plurilaterals in the WTO needs to be preceded by a very precise identification of the priority sectors to be targeted and by serious diplomatic efforts to sound out the attitude of leading DCs and to solicit their views and participation from the outset. Otherwise, we risk ending up with not much more than an OECD agreement negotiated under WTO auspices. I am far from sure that that would be positive for the WTO as an institution.

¹² CUTS Online Trade Forum, 10 January 2012, original input edited by Mr. de Jonquères.

*Jane Drake-Brockman, Global Services Network*¹³

It is true that the idea of plurilateral negotiations on services is not brand new. The idea has evolved, particularly over the last five years, in concert with the diminishing fortunes of the DDA. Its recent origin lies largely in thought leadership in the business community; it is worth retracing this recent history.

The first phase of thinking centred on plurilateral approaches as a means of completing the DDA. In 2007, a Warwick Commission Report recommended critical mass mfn-based plurilateral approaches, in order to complete the Doha Round. The following year, in 2008, the Australian Services Roundtable insisted (in light of prospective “Doha-lite” outcomes on services) that any DDA outcome must “build-in” continuation of services negotiations post-Doha, on a stand-alone critical mass mfn basis. In 2009, a World Bank research paper by Aaditya Mattoo proposed a plurilateral approach specifically for services. That same year, the Hong Kong Coalition of Services Industries circulated an informal “rethink” at the Global Services Summit in Washington, DC, proposing immediate recommencement post-Doha of stand-alone critical mass, mfn-based plurilateral negotiations on services. A year later, at the end of 2010, the Cordell-Hull Institute meeting in Sydney recommended a plurilateral approach to completing the DDA negotiations on services.

The more recent phase of business thinking switched rapidly into a post-Doha mindset. The Global Services Coalition, meeting in Hong Kong, called in July 2011 for stand-alone services plurilaterals in the WTO, irrespective of what happens in the DDA. In November last year, the APEC Business Advisory Council called on APEC to consider modalities for new, stand-alone plurilaterals on services. The Pacific Economic Cooperation Council (PECC) surveyed business and government opinion in Asia-Pacific and found 72 percent of respondents thought APEC members should promote a plurilateral agreement on services. The subsequent PECC/ADBI Taskforce on Services called on APEC to build support for stand-alone critical mass mfn-based plurilateral negotiations on services, irrespective of what happens in the DDA. The Trans Atlantic Taskforce on Trade and Investment 2012 similarly recommends post-Doha plurilateral negotiations, including on services.

This idea has certainly now captured official imagination. The WTO Ministerial in December 2011 called for “fresh approaches”, including plurilaterals and the United States called specifically for services plurilaterals. The idea gained serious momentum at the informal Trade Ministers meeting at the World Economic Forum in Davos this January. The “Really Good Friends of Services” met in Geneva in both January and February; 18 members (including EU 27) are participating in the talks. The Group is now reporting, in the interests of transparency and inclusiveness, to the WTO Council on Services. The participants account for roughly 75 percent of world trade in services. More participants would be needed to ensure “critical mass”. The addition of India and China would bring the sum to 87 percent. As Guy so rightly emphasises, encouraging wide participation has to be a central focus of government and business attention.

Thanks to the Global Services Coalition, the idea now has a new name; the International Services Agreement or ISA. There are of course two camps of business, as well as official and academic thinking with respect to modalities. The bulk of East Asian opinion, and European opinion, appears to lie with the

¹³ Comments kindly provided by Mrs. Drake-Brockman.

“critical mass, MFN based, inside the WTO” camp. United States opinion appears to be drawn more to the “non-mfn, FTA-style coalition of the willing camp under GATS Article V i.e. outside the WTO”. Either way, business commentators, for whom regulatory incoherence is a daily irritant, are calling for ways to be found of including the regulators in any new negotiations and of working harder towards agreement on best practice principles.

In considering these developments, it is important to emphasise that the DDA negotiations on services were already effectively plurilateral anyway. Only one-third out of 144 members had tabled a DDA offer. It should come as no surprise therefore that business observers are calling for at least those governments to get on with it. Equally importantly, as Ambassador Zutshi points out, the legal mandate for stand-alone services negotiations already exists, irrespective of the DDA. Such negotiations are mandated in the “built-in” agenda at the conclusion of the Uruguay Round. All it would take to get on with them is political will.

The simple fact is that services growth is too important to the world economy to ignore this emerging opportunity, especially at a time when the world economy needs a boost. The contribution of services industries to global GDP, employment, investment, productivity and poverty reduction is overwhelmingly important. Three fifths of the global stock of FDI is now in services. All traded goods, moreover, embody services, accounting on average for around 25 percent of value add (or 50 percent in the case of high tech goods). Reducing the costs of doing business in services is as important to manufacturers and farmers as it is to services firms. With the DDA going nowhere, services plurilaterals are the best way forward for the WTO.

Summary of the main ideas debated and concluding remarks as of 10th April 2012 by the DD/CSEND team:

- 1. Plurilateral approach.* It is a **practical solution** that helps avoid the unit veto any country can exercise under the principle of a single undertaking and it offers a way to experiment with new disciplines in the absence of progress among the group as whole. However, as a matter of law, discussions on **plurilateral agreements will require the same consensus that has eluded thus far the DDA**, since it necessarily implies a deviation from MFN. Plurilaterals provided a means of breaking the impasse in the negotiations that led to the Tokyo Round, when countries like India were not prepared to accept the additional disciplines implied in the Tokyo Round codes.
- 2. Plurilateral agreements.* This type of agreements could provide a way forward out of the current impasse arguing that plurilateral agreements are within the WTO in contrast to the ever growing FTAs, RTAs and BITs. Plurilateral agreements **offer market access** based on reciprocity, **other countries can join** if seen useful. It is a **more transparent process** and the resulting agreements are subject to **WTO dispute settlement**. That would help ensure a more consistent development of trade jurisprudence and international economic law than would be the case with preferential trade arrangements or BITs.
- 3. Critical mass and extension of benefits.* A plurilateral negotiation that attracts a “critical mass” of major players would place economic pressure on non-participants to cooperate or face

significant competitive disadvantages. To allow MFN to operate, any such “critical mass” negotiations would need to be within the WTO framework. Another possibility might be plurilateral negotiations outside the WTO Framework, building on current experience for example in negotiating the **Trans Pacific Partnership (TPP) agreement**. The **WTO Information Technology Agreement** has been cited as a potential “critical mass” model, where benefits are extended on an MFN basis; another model cited is the **WTO Agreement on Government Procurement** for which the benefits accrue on a reciprocal basis only to the signatories.

4. **Free rider concerns.** Consideration needs to be given to the extent and magnitude of potential “free rider” problems i.e. whether market forces alone would provide sufficient incentives for initial non-parties to agree to a plurilateral agreement.
5. **Rethinking the modalities of a services trade negotiation in terms of a plurilateral approach.** Trade negotiations on services have proven difficult to date, both in the DDA and in various bilateral contexts due to:
 1. lack of information among governments on the services economy and their own commercial interests in services;
 2. absence of coordinated domestic strategies for services development; consequent policy uncertainty and defensiveness;
 3. lack of domestic impetus for regulatory reform; inadequate private sector stakeholder consultation and absence of international support for domestic regulatory transparency institution building.
6. The content and coverage of the recent **GATS negotiations has also become increasingly outdated**: DDA excluded key services –related topics such as investment, competition policy and mutual recognition of regulatory authorities. It would be important to apply the many lessons learned from the last decade of bilateral services trade and investment negotiations. **Bilateral efforts to liberalise services have used various types of architecture.**
7. **The idea of plurilateral negotiations on services is not a brand new idea.** The idea has evolved, particularly over the last five years, in concert with the diminishing fortunes of the DDA. Some of the proposals suggesting a plurilateral approach to negotiations are: **Warwick Commission Report** (2007); the **Australian Services Roundtable** (2008) in light of prospective “Doha-lite” outcomes on services); a **World Bank** research paper by Aaditya Mattoo (2009) proposing a plurilateral approach specifically for services; the **Hong Kong Coalition of Services Industries** proposing immediate recommencement post-Doha of stand-alone critical mass, mfn-based plurilateral negotiations on services; the **Cordell-Hull Institute** meeting (2010) in Sydney recommending a plurilateral approach to completing the DDA negotiations on services. More recently, the **Global Services Coalition**, meeting in Hong Kong, calling in July 2011 for stand-alone services plurilaterals in the WTO, irrespective of what happens in the DDA. In November last year, the **APEC Business Advisory Council** called on APEC to consider modalities for new, stand-alone plurilaterals on services. The **WTO Ministerial in December 2011** called for “fresh approaches”, including plurilaterals and the United States called specifically for services

plurilaterals. The idea gained serious momentum at the informal Trade Ministers meeting at the **World Economic Forum** in Davos this January. The “**Really Good Friends of Services**” met in Geneva in both January and February; 18 members (including EU 27) are participating in the talks.

8. *Participation of developing countries.* Developing countries should take an interest in a plurilateral approach because getting rid of inefficient services regulation provides the single biggest domestic whole-of-economy productivity boost on offer. It also improves domestic competitiveness in the services sector itself which pretty much everywhere now employs most people and generates most GDP. A plurilateral agreement would be possible if participants in such negotiations also include major **developing and emerging market countries like Argentina, China, Brazil, India, South Africa, and Russia**. The absence of these countries will pose the ‘free rider’ problem to the major developed countries and perhaps rightly so.
9. *Regulators need to be included at the negotiating table.* The evidence suggests strongly that simply obtaining commitments to remove barriers to services trade is not enough, on its own, to liberalise trade. Such commitments, to be effective, need also to be backed by credible domestic competition policy machinery. A generic “Services Reference Paper” is needed to set out pro-competitive whole-of-services principles against which to benchmark services regulation. And in lieu of any “formula” on the basis of which to liberalise, at least some common measures of levels of services protection are needed.

10. Some questions that remain unresolved are:

11. Whether and how it would be possible to bring any of the larger developing countries on board. Could there be a "critical mass" without at least India and China participating? But politically, would it not risk being divisive to have an agreement that involved only OECD members plus perhaps a few others, such as Hong Kong and Singapore?
12. What are the sectors which could be used to show to DCs that lowering their barriers to services trade is clearly in their economic self-interest?
13. Is there any fresh thinking about how to resolve the thorny old problem of federal/sub-federal jurisdiction in those countries where it applies? Is the only realistic option to accept that the best is the enemy of the good and that having some sub-federal entities on board is better than having none at all?
14. How should pro-competitive regulation in the services sector be structured?
15. In conclusion, based on the ideas summarized above, plurilateral agreements might constitute a solution to the impasse of WTO/DDA as well as a basis for future trade agreements within the WTO context. This approach would help WTO members to reach an agreement on those issues in which there might be a consensus and offer other WTO members options to join over time. If the

plurilateral deals are well conceived and designed, non-participant WTO members would have an incentive to join them at some later point.

16. A plurilateral approach would bring transparency to the system, allow related disputes to be solved through the WTO Dispute Settlement Body and be based on the MFN principle. Such an option should carefully consider the “free rider” problem and the extension on a MFN basis to the non-participants in order to provide sufficient incentives for initial non-parties to a plurilateral agreement to join such plurilateral agreements at a later stage.