



# TRADE AND DEVELOPMENT SYMPOSIUM

## Perspectives on the Multilateral Trading System

A Collection of Short Essays

## Towards a multilateral framework on competition policy

By Pradeep Mehta



International Centre for Trade  
and Sustainable Development



Schweizerische Eidgenossenschaft  
Confédération suisse  
Confederazione Svizzera  
Confederaziun svizra

Federal Department of Economic Affairs FDEA  
State Secretariat for Economic Affairs SECO

## Introduction

With trade liberalisation opening up markets, the world is fast growing towards one global village. The boundaries that separate nation states from one another are fast disappearing. While this is a much desired development, on the flip side, it has witnessed unregulated spill overs of enormous proportions of anti-competitive practices beyond borders, to have caused huge damages especially to the lesser developed victims that have yet to establish a strong competition regime at the domestic front.

While cross-border operations and international trade have spread at a fast pace, the same cannot be said about international co-operation to act against such anti-competitive practices which seems to still be at a nascent stage. While agreements exist at the bilateral and regional levels, their potential is rather limited for developing countries. Scholars and policy makers globally are of the view that only a binding multilateral agreement with a designed focus to promote competition throughout the world would be able to achieve this.

With this intention, an initiative was taken under the aegis of the WTO at the Singapore Ministerial Conference in 1996. A Working Group was set up to explore the interaction between trade and competition policy. Further, at the WTO Ministerial Meeting in Doha in 2001, a formal recognition was given to the case for a multilateral framework to enhance the contribution of competition policy to international trade and development.

Unfortunately, the policy failed to gain consensus. Countries continuously expressed oppositions to this idea, which was accompanied by investment policy, transparency in government procurement and trade facilitation. Eventually three of them, including competition policy were dropped from the Doha Agenda in 2004. However, countries agreed to pursue trade facilitation. The biggest opposition was to investment policy as that would have lead to shrinking of the policy space, but not so much as the ones on competition policy and government procurement.

Today when countries are continuing to pay overcharges for multi-jurisdictional mergers and the welfare reducing export cartels that are exempt from domestic competition regimes of countries, the case for a multilateral competition agreement (MCA) depends largely on its capacity to address these issues. Furthermore, there is also an ongoing disagreement on the consensus of an MCA by those who argue that there are practical limitations of any multilateral agreement that amounts to a requirement for standardised domestic competition policy rules on the part of developing countries. As a result, a WTO requirement for such policies is bound to have limited impact.

This brief piece would analyse the case for a multilateral framework on competition and explore certain responses to the challenges posed by such an initiative.

## Problematique

Q.1 The main question is whether a multilateral framework on competition would help in tackling

different types of cross-border anti-competitive practices especially from the point of developing countries?

Q.2 Furthermore, is WTO the appropriate forum to host such an agreement?

Some apprehensions with the MCA are as below:

The ambiguity surrounding the MCA is centred around the core WTO principles which are likely to tilt the balance in favour of the developed countries and disadvantage the developing ones.

**Non-discrimination:** The inclusion of Most Favoured Nation status and National Treatment would mean no special restrictions on foreign investments and hence in effect work to the detriment of the domestic companies who are not on equal footing to compete with foreign firms. Furthermore, many developing countries feel that they should be able to use different read lenient standards while dealing with a merger between two domestic companies than where one of the companies is big and of foreign origin. However, if the WTO core principle of non-discrimination were to apply to the multilateral agreement then using these differential standards would not be possible.

**Market access:** This would lead to greater concentration of market power by the MNCs in the name of competition. Many anti-competitive practices arising out of FDI and others can be only tackled by the domestic competition authorities. The lesser developed countries might find it challenging to handle powerful MNCs. An example worth reporting here is the agrifood system in Latin America, where FDI has totally altered the market structure and the competition scenario against local competitors. The supermarket revolution accompanied with rapid consolidation and internationalisation has driven most local small farms and firms out of business with serious implications for income and employment. MCA does not provide any remedy in this regard.

Secondly, the approach with which the MCA would tackle cross-border anti-competitive practices remains unclear. For example, export cartels that have been categorised as officially sanctioned restraints on trade, have a significant influence on prices in general and on the swing of prices of primary products in particular. A recent study highlighted the overcharge paid by India due to anti-competitive practices in the global potash market. Under a competitive scenario, the price of potash would decline from \$574 per tonne in 2011 to \$217 by 2015, and subsequently increase to \$488 by 2020. However, in the continuing presence of fertiliser cartels, the price of potash would steadily increase from \$574 per tonne in 2011 to \$734 in 2020 (Jenny, 2011). Interestingly they are usually not covered by competition policy. A multilateral agreement on competition that would be likely to ban such cartels may yield a mixed array of benefits and costs for less-developed countries. In particular any prohibitions or bans on export cartels that directly impact international trade may imply detrimental consequences for LDCs that rely mainly on export earnings from primary commodities. For many less-developed countries, the export of primary agricultural or mineral commodities is the principal source of earnings from international trade and therefore how such primary commodity trade

would be treated under an international competition policy agreement would be of great concern.

Furthermore, cross border violations of intellectual property rights have become very prevalent. While developed countries are able to take action, developing countries lack the capacity to do so. A case in point is when the innovation market was threatened when Sanofi-Synthelabo proposed to acquire Aventis SA. Both US and EU had serious doubts that competition might be reduced to the detriment of patents and saw to it that Sanofi consented to sell or to grant licences for a series of pharmaceutical products in their market before authorising the acquisition. Though the same effects could be felt in other developing markets, the transaction was not further challenged elsewhere. TRIPs Agreement refers Member States to their national laws to take necessary action. Such national laws might be absent in many cases of developing countries. There is no saying that an MCA would be able to provide effective protection against unfair competition and control anticompetitive practices related to IPRs especially in the case of lesser developed countries.

Of late there has been a growing trend of anti-dumping actions slapped on developing country exports by developed country governments. These actions subvert the process of competition rather than protecting it. Whether the MCA would be able to correct this is another challenge.

The second question is with regard to the debate that is centred around whether WTO is the right forum to host the multilateral agreement. Many developing countries have put forward a broad veto in this regard as they argue that in the past, most agreements forged within the WTO framework have served to benefit the developed country members and has been accused of setting standards and rules in a "one size fits all" manner. TRIPs, GATS and other such agreements have oft been criticised to be grossly imbalanced against the interests of developing countries and consumers. Therefore there is apprehension that negotiations for an MCA would focus more on market access rather than curbing abusive practices that affect social welfare and long-term sustainable development.

## Responses to Challenges

When the MCA idea was dropped from the Doha agenda, along with investment and transparency in government procurement, the basic foundation of such opposition was that there was no consensus on the robustness of the link between trade and competition and on whether that linkage is strong enough to call for a multilateral competition policy. Besides, developing countries argued that given the lack of expertise and resources as well as ill-developed domestic competition regimes, they were sceptical about the gains from such a multilateral accord. Nevertheless, during the launch of the Havana Charter in 1948, the demand for multilateral rules on restrictive business practices came first from developing countries.

Today, nearly 130 countries have adopted a competition law as against only 35 countries which had a competition law in 1995 when the WTO came into being. Furthermore, interactions between trade and competition could not be more intimate in a rapidly

integrating global economy where trade is severely subject to a variety of anti-competitive practices, investment rules and intellectual property related issues. Global problems call for global solutions and much of a correct policy response can be hoped to emanate from a forceful multilateral agreement.

Such an agreement should be crafted in a fashion that it realises maximum benefits for developing countries and consumers. This requires the need for a body that would conduct a dispassionate study on the interactions between trade and competition on a contemporary basis and the impact of the cross-border anticompetitive practices suffered by countries globally especially the lesser developed ones to devise an effective mechanism of international economic governance.

Such a study would come up with findings that would form the core of the MCA. Some of the issues that it should look into in order to address the specific challenges mentioned in the earlier section are as below. It is therefore suggested that MCA be exempted from single undertaking commitment and public interest is made the inherent component in its enforcement. This would help strike a balance between economic interests (market access, merger issues etc) and social interests of developing countries.

### *Special and Differential Treatment*

An option to address issues regarding the core WTO principles regarding non-discrimination may be to provide special and differential treatment to developing and least developed countries that need export cartels to promote national growth and hence allowing for them to operate such export cartel exemptions albeit for small and medium firms alone while banning such exemptions for industrialised nations. This had been argued before at the WGTCF.

There is therefore need for a tailor made approach as opposed to a one size fits all approach. It is needless, however, to say that such provisions would require intensive effort and negotiation which is a challenge that developing and least developed countries will be faced with as well.

### *Adopting an incremental approach*

The apprehensions surrounding the core WTO principles could be answered through exercising some flexibility and incremental approaches. Such an approach would frame the agreement with the objective of serving the interest of consumers. Therefore it would focus more on making cooperation and information sharing rather than market access achieved through such an agreement.

### *Technical assistance by the WTO*

The WTO could assist lesser developed countries through its Aid for Trade initiative especially in supporting the lesser developed countries by meeting the adjustment costs of their trade reforms. It should also help build their capacity in terms of building a strong competition regime which would help them fight the negative externalities of the beggar thy neighbour policies of their trading partners.

### *Mandatory competition advocacy and the role of civil society*

Furthermore, if WTO competition processes are made to incorporate competition advocacy and the participation of civil society, then the resulting outcomes will tend to have a more fair outcome. Civil societies can also work to promote transparent investigation procedures.

#### Peer Review Mechanism

This mechanism is already used at the WTO to check trade practices (TPRM). It would create informal discussion forums where a gradual process of convergence is generated. This would be a platform for information sharing and technical assistance for members to learn from each other's' experiences.

#### *Addressing the existing WTO agreements with anti-competitive effects*

##### a. Predatory Pricing Standards to Replace Antidumping Rules in the Agreement

A good way to accommodate the interests of less developed countries and their export led growth strategy could be to replace antidumping rules with predatory pricing standards in adjudicating trade disputes. The competition policy rule might permit export prices, consistent with rational price discrimination, to fall all the way to marginal cost and a price less than the home market price would not be construed automatically as a dumping price. This would enable them to make the best out of their export led growth strategies and sell at lower prices in export markets without attracting anti-dumping duties.

##### b. Negative effects of TRIPs

Anti-competitive effects arising from adherence to TRIPs can be subject to international challenge and review. The lessons learnt from the negative TRIPs experience could be brought into any new negotiations to ensure they are not repeated with increased concern for developing countries.

#### *Appropriate Forum to Host the Multilateral Competition Agreement.*

The only international trade organisation that is presently capable of governing an enforceable multilateral agreement is the WTO. WTO is a rules based institution and is therefore better capable of enforcing such an agreement. Given that principles of competition are already built into the WTO Agreements

and that an initiative was undertaken previously at the multilateral forum to address the interface between trade and competition principles, it has the desired level of experience and negotiating history to effect such an agreement. Having said that, certain concerns remain on part of the lesser developed countries that believe that WTO framework has been found to be more favourable towards the developed world. It is therefore recommended that a joint venture of the WTO and UNCTAD hosts such an agreement. It is important to note here that UNCTAD has significant history and experience in the relevant area. In fact a group of developing countries once promoted the idea of converting the UNCTAD Set of Multilaterally Equitable Agreed Principles and Rules for Control of Restrictive Business Practices (the set) to a binding instrument. Hence the participation of UNCTAD in such an initiative would win the comfort of the lesser developed countries that are apprehensive about such an agreement within the WTO forum alone.

## Conclusion

We have discussed briefly the need for a multilateral competition agreement as well as the challenges for the same. The appropriate forum for them to address should be a joint initiative between the WTO and UNCTAD. However all this requires a careful examination of the implications of the core principles of the WTO for a multilateral competition agreement and what is expected from such an agreement which would then decide how it is to be drafted in order to align such requirements in its scope and substance. This would then finally answer the question whether such an agreement in the WTO has the potential to serve the interests of the developing countries and provide them with adequate protections from the growing menace of cross-border anti-competitive practices without compromising on their development strategies. It is worth mentioning here that the success of the MCA would depend to a significant extent on whether it would be able to achieve the desired level of international cooperation between the developed and the developing countries as well as their competition authorities so as to be able to effectively curb cross-border anti-competitive practices and protect the developing countries from their menace.

---

Pradeep Mehta, Founder, secretary general of the Jaipur-based Consumer Unity & Trust Society (CUTS International)

[www.ictdsymposium.org](http://www.ictdsymposium.org)

Please note that this paper is in draft form. It will be revised and included in an e-book that ICTSD will publish shortly after the WTO ministerial conference.

The views expressed in this paper are those of the authors and do not necessarily represent those of ICTSD or SECO.