



## International Trade and Competition – Siamese Twins: Need for a Multilateral Framework on Competition?

*A recurring theme in international trade circles is the interface between international trade and competition. Effective arguments have been made both in favour of and against including discussions on competition in international trade forums. Round one was won by those against discussing competition issues when the subject was dropped from Doha work programme. However, competition negotiations made a back-door entry by being included in the regional trade agreements. This shows one can like or hate but cannot ignore the importance of competition issues in international trade. This paper studies arguments for and against multilateral competition framework with a focus on agriculture and commodity markets sector and discovers that chief losers from absence of a multilateral competition framework are consumers around the world. It further attempts to suggest a workable way forward by taking into account concerns of differing parties and stresses the need to re-start negotiations on competition issues at international forums, before it is too late.*

### Introduction

Interaction between trade and competition is imperative and has been a continuous phenomenon. Various scholars have pondered on this from time to time. Adam Smith, in *Wealth of Nations* also dealt with international trade and discussed trading monopolies.<sup>1</sup> With the advent of international trade and its exponential increase in a more than ever globalised world, the issues relating to interface between competition and international trade have ignited interests and debates around the world. These issues range from market access to spill-overs of anticompetitive practices beyond borders.<sup>2</sup>

### Revisiting History

Competition exists where discrimination amongst trading entities is absent. The General Agreement on Tariffs and Trade, 1947 adopted the principles of non-discrimination and fair market access to all its members into the markets of other members. Non-discrimination is also one of the basic principles of the World

Trade Organisation *acquis*. The Agreement on Trade Related Aspects of Intellectual Property Rights, 1994 allows members to take appropriate actions in order to prevent abuse of intellectual property rights which unreasonably restrain trade. The General Agreement on Trade in Services, 1995 obliges members to ensure that any monopoly supplier of a service does not act in a manner inconsistent with members' obligations and commitments. In addition, the Agreement on Safeguards, the Agreement on Subsidies and Countervailing Measures and the Agreement on Agriculture also deal with competition related issues such as export subsidies and export restraints.

The United Nations Conference on Trade and Development also adopted Principles and Rules on Competition in 1980.<sup>3</sup> The objectives of UN Principles include ensuring that restrictive business practices do not impede or negate the realisation of benefits that should arise from the liberalisation of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries. The UN Principles further

recognise the need of collaboration between governments at bilateral and multilateral level to facilitate the control of restrictive business practices. The UN Principles advocate adoption of preferential or differential treatment of developing countries in order to promote domestic industries and economic development.

Although being sub-consciously dealt with at broad-principle level, the interface between trade and competition policy emerged as an area of interest in the Uruguay Round of WTO negotiations. A Working Group on the Interaction between Trade and Competition Policy was set up at the first Ministerial Conference of the WTO members, held in Singapore in December 1996.

The Doha Ministerial Declaration of the WTO members outlined the work of Working Group – that it will “focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building.”<sup>4</sup> In addition, the Doha Declaration recognised “the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area.”<sup>5</sup>

Based on the work of the Working Group, the Draft Ministerial Text of the WTO members at the Cancun Ministerial Conference stated that, “The objective of the negotiations shall be to establish an agreement to secure better and more equitable conditions for international trade, by facilitating effective voluntary cooperation on anticompetitive practices which adversely affect international trade, in particular hardcore cartels which have an impact on developing and least-developed countries’ economies, and assisting WTO Members in the establishment, implementation and enforcement of competition rules within their respective jurisdictions.”<sup>6</sup>

However, at the July 2004 General Council meeting of the WTO Members, a consensus couldn’t be reached to discuss a multilateral agreement on issues relating to interaction between trade and competition policy, along

with issues of interaction between trade and investment policy and transparency in government procurement. Consequently, it was decided to exclude these issues from the Doha work programme.

### *Why a Consensus Couldn’t Be Reached in 2004?*

Major opponents of discussions on multilateral agreement on trade and competition policy were developing and least developed countries. It was argued that many developing countries and LDCs did not have domestic competition laws and they were not in a position to implement multilaterally agreed rules and disciplines on this subject. It was also argued that “having no domestic competition law” means there was no appetite on the part of LDCs countries to agree to a multilateral agreement on trade and competition policy. This argument was stretched further to argue that a multilateral agreement on trade and competition policy would be a luxury for the LDCs. Some other apprehensions of developing countries and the LDCs were<sup>7</sup>:

- The multilateral agreement is likely to tilt the balance in favour of the developed countries and disadvantage the developing ones. For instance, the inclusion of non-discrimination principles would mean no special restrictions on foreign investments and hence in effect will work to the detriment of the domestic companies who are not on equal footing to compete with foreign firms. Further, different standards may not be possible in mergers amongst domestic entities as against mergers between a domestic and a foreign entity.
- Likely concentration of market power with multi-national entities and the inability of domestic competition authorities to deal with explicit and implicit anticompetitive practices arising out of capital account liberalisation.
- Suspicion on WTO being the right forum to host the multilateral agreement. It was argued that in the past, most agreements forged within the WTO framework have served to benefit the developed country members and WTO has been accused of setting standards and rules in a “one size fits all” manner. Therefore there is apprehension that negotiations for a multilateral competition agreement would focus more on

market access rather than curbing abusive practices that affect social welfare and long-term sustainable development.

In addition, developing countries and LDCs felt that there was lack of clarity on a multilateral agreement being an effective mechanism to deal with cross-border anticompetitive practices such as export cartels. Many LDCs rely mainly on export earnings as a major source of income generation. Operation of export cartels in such LDCs contribute in promoting national growth and development. Any prohibition on export

cartels *per se* under a multilateral agreement would be detrimental to LDCs.

However, if welfare-reducing export cartels (operated in developed countries) are exempt, developing countries and LDCs would have to continue to pay overcharges. Effective dealing by a multilateral agreement with issues of unfair competition and cross-border violations of intellectual property rights<sup>8</sup> and anti-dumping actions, especially those adopted against developing country exports, was also an area of concern.

### Box 1: Arguments against Multilateral Competition Agreement

- Absence of competition laws in developing countries and LDCs.
- MCA is likely to tilt balance in favour of developed countries.
- Likely concentration of market power with multinationals.
- WTO not being the right forum to host MCA.
- MCA may not be an effective mechanism to deal with:
  - cross-border anticompetitive practices;
  - cross-border violations of IPRs; and
  - anti-dumping actions adopted against developing countries.

*Source:* Pradeep Mehta, *Towards a multilateral framework on competition policy*, International Centre for Trade and Sustainable Development, December 2011.

## Need for Multilateral Cooperation

### *Post-2004 Developments*

The issue of a multilateral agreement on trade and competition policy was put in back-burner in 2004. Lot of water has flown under the bridge since then. More than 130 countries<sup>9</sup> (developing as well as LDCs) have now adopted competition laws as against only 35 countries which had a competition law in 1995 when the WTO came into being; some of them have amended their competition laws to make them compatible with other WTO agreements.

However, even with the presence of well-articulated trade policies and competition laws in a large number of countries, it is now observed that the international trading system is increasingly witnessing instances of trade-related competition distortions (such as export cartels) and competition-related trade distortions (such as export restrictions). Further, existing WTO mechanisms to address trade and competition interface issues, specifically in the areas of food exports, are proving to be futile, and interests of net food importing countries and LDCs could be getting compromised.

Interestingly, while the interface between trade and competition policy is not being discussed at the multilateral level, yet it is a subject of negotiation in many bilateral/regional free trade agreements. For example, competition policy is part of the economic partnership agreement negotiations between the European Union and the Africa-Caribbean-Pacific group of countries. It is also a part of negotiations on South African Development Community-Common Market for Eastern and Southern Africa-East African Community Tripartite Treaty.

Interactions between trade and competition are intimately linked in a fast integrating global economy where trade is severely subject to a variety of anticompetitive practices, investment rules and intellectual property related issues. Many cross-border trade measures that have significant implications on competition cannot be addressed in isolation. Global problems call for global solutions and much of a correct policy response can be hoped to emanate from a forceful multilateral agreement.

In order to understand relationship between international trade and competition better, the following section analyses certain case studies in agriculture and commodity market sector. These case studies highlight the challenges faced by international trade in absence of competition and thus form the basis of identifying possible solutions to the current scenario.

### ***The Agriculture and Commodity Market Sector***

Linkages between international trade and competition came under graver scrutiny following the commodity price spikes of 2007-08 and the more recent rise in world commodity prices in early 2011 (the latter exceeding the peak of 2008). Commodity and agricultural sectors are often considered to be very sensitive for developing and developed countries alike and evidence of government intervention in these sectors can be found more easily than in other sectors. Government intervention can be found in the form of price support policies, subsidies of various forms, and the wide range of non-tariff as well as tariff measures that apply to imports and exports. Governments have also directed manipulated market structure to meet policy aims.<sup>10</sup>

A notable example of a state-sanctioned cartel that currently exists is in a market which is closely tied to recent events on world agricultural markets, specifically the world fertiliser market, is the global potash fertiliser export cartel (Refer to **Box 2**). It is intriguing to note that due to their agricultural production needs and reliance on fertiliser imports, countries such as India, China, Brazil and Australia have to buy fertilisers from trans-national companies despite the high international prices set by them. Since potash and phosphate are essential fertilisers for agricultural production, most countries such as India, Brazil, China and others that are import reliant on potash have no option but to pay the high monopoly rents of the supplier cartel. In India, major proportions of the subsidies are doled out to fertilisers. Unfortunately, these fertiliser subsidy bills do not translate into a proportionately high volume of fertiliser use. During 2002-07, 88 percent of the reported increase in subsidies was due to the sharp rise in international fertiliser prices while only 12 percent was a result of enhanced consumption of fertilisers.<sup>11</sup>

#### **Box 2: The Global Potash Cartel**

The world potash market is dominated by a small number of players, with the world's potash reserves being mainly found in Canada and the former Soviet Union. In this context, Canada has sanctioned a potash export cartel, Canpotex Ltd, whose membership comprises of three companies (Potash Corp, Mosaic and Agrium) and controls about 40 percent of global trade in potash. Canpotex Ltd was used to set prices for foreign potash buyers and control supply. It further coordinates with Belarusian Potash Co and PhosChem, a US based export cartel to together control about 70 percent of the world trade in two key fertilisers: potash and phosphate. Interestingly, Canpotex has an explicit exemption pursuant to section 45(5) of the Competition Act (1985) of Canada.

Recent attention on the role of Canpotex arose when BHP Billiton Limited launched a hostile bid for Potash Corp, with the expectation that the export cartel would not survive if the BHP bid was successful and that production capacity would be expanded and world potash prices would subsequently fall. The Canadian government blocked the takeover bid arguing that the deal would not benefit the country. The legal status of this cartel has raised issues about the links between cartels and the food crisis.

*Source: Steve McCorrison, Commodity Prices, Government Policies and Competition, Trade, Competition and Pricing of the Commodities, Centre for Economic Policy and Research, 2012*

A recent study has highlighted the overcharge paid by India due to anticompetitive practices in the global potash market. Under a competitive scenario, the price of potash would decline from US\$574 per tonne in 2011 to US\$217 by 2015, and subsequently increase to US\$488 by 2020.

However, in the continuing presence of fertiliser cartels, the price of potash would steadily increase from US\$574 per tonne in 2011 to US\$734 in 2020. The resulting overcharge for India and China, two of the largest buyers of

potash amounts to more than a billion US\$ per year per country.<sup>12</sup>

Another interesting recent example is of Vitamin C cartel by Chinese companies (Refer to **Box 3**). The companies had the full support of Chinese

government and within days of the jury verdict against the companies, the Chinese government publicly denounced it, suggesting that the court decision would result in negative global repercussions and result in disputes adverse to US interests.<sup>13</sup>

### Box 3: The Vitamin C Cartel

In March 2013, a US jury found two Chinese companies (Hebei Welcome Pharmaceutical Company Ltd and North China Pharmaceutical Group Corp.) liable for conspiring to fix the global prices charged for Vitamin C, resulting in a damages award of US\$162mn. The defendants were two of the world's largest producers of Vitamin C. Interestingly, the companies did not deny price-fixing. Instead, they argued that the Chinese government directed them to align with competitors on pricing and supply output.

The seldom-invoked foreign sovereign compulsion doctrine is intended to protect defendants who are compelled by their own government to break US laws. The China's Ministry of Commerce came forward on behalf of defendants, filing an amicus brief in support of the defendants. The Ministry stated that the government had indeed created a regime under which defendants risked incurring penalties or loss of the right to export Vitamin C if they failed to coordinate pricing. It argued that it had supervised the price-fixing as part of its effort to “play a central role in China’s shift from a command economy to a market economy” and in order to mitigate the exposure Chinese companies faced in potential antidumping investigations. The court determined that Chinese law did not compel the defendants' conduct but the defendant companies were allowed to present this defence to the jury. The jury rejected the defence and awarded a US\$54mn verdict, which was tripled pursuant to US antitrust laws.

*Source: Nossaman LLP, US Jury Finds Chinese Companies Liable for Price-Fixing, Fined US\$162mn, JD Supra Law News, March 2013.*

As can be deduced from the case studies, exports cartels backed by the developed nations have resulted in detriment to consumers around the world. Attempts to break such cartels have often been dissuaded by the states under the veil of national legislations.

#### ***Case for a Multilateral Competition Agreement***

Competition authorities in the countries of origin of the export cartels do not act against them because export cartels do not affect the domestic markets of the cartelists. Competition authorities in the victimised countries may not have statutory powers (lack of extra-territorial jurisdiction) to act against the export cartels, or the means to gather the evidence they would need to convict the perpetrators even if they have jurisdiction. Competition authorities in such countries may also be under pressure from their government not to act against export cartels so as not to expose the country to retaliations endangering its own economy and state supported export cartels. To

top it up, the existing WTO disciplines are weak to deal with export cartels.

In addition to welfare reducing export cartels, governments tend to levy taxes on products in which the country has the ability to influence world prices. For instance, export taxes imposed by the Russian Federation on natural gas substantially benefits Russia.<sup>14</sup> Exporters in various countries get state supports in form of subsidies and tax benefits, resulting in uneven playing field between such entities and entities in importing countries.<sup>15</sup>

Excessive concentration within input markets (such as seeds and agrochemicals) and output markets (trading, processing, manufacturing and retailing) can also work against the interests of small producers in developing countries, either by creating barriers to market entry, or by worsening the terms on which they engage in trade. Monopoly power of providers of inputs and/or monopsony power on the part of buyers (trading

companies; retailers) lower domestic farm gate prices and/or results in retail prices that are higher than they would be if the relevant markets were characterised by greater competition.<sup>16</sup>

Such situations need immediate attention and redressal. Only a multilateral framework on competition has the capability to provide platform to discuss such problems and possible solutions.

Concerns have also arisen in past in relation to vertical market restraint practices, such as arrangements that link firms at successive levels of product distribution chain; exclusive dealing requirements; tied selling; loyalty or sales rebates; exclusive territory agreements and distributor boycotts, preclude market access for foreign firms. Import cartels formed by domestic buyers and sectors controlled by state owned enterprises can also have an adverse impact on market access for imports. Domestic competition authorities may not have the will power to act against such practices.

In addition to export and import cartels, instances of international cartels involved in anticompetitive practices such as price fixing, market allocations, bid-rigging, have also increased at an alarming rate. It is argued that an international watchdog with appropriate mandate could be the way forward to deal with such cartels.<sup>17</sup>

Competition concerns also arise in mergers between worldwide dominant firms in the markets where such firms conduct business and the effects of possible dominance may occur in all such countries. Regulation of such mergers has international spillovers, as different regimes view mergers with different approaches leading to multiplicity of jurisdiction in accordance with the effects doctrine. A multilateral arrangement of competition is a possible solution to such concerns, wherein a mechanism may be devised to deal with international mergers.<sup>18</sup>

## **Suggested Framework**

### ***Alleviation of Concerns of Developing Countries and LDCs***

As discussed earlier, developing countries and LDCs have certain valid concerns in relation to effectiveness of a multilateral competition agreement. In order to alleviate such concerns, a

multilateral competition agreement needs to be crafted in a fashion that it realises maximum benefits for developing countries and consumers.

An option to address issues regarding adopting of WTO principles of non-discrimination may be to provide special and differential treatment to developing countries and LDCs 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. There is therefore need for a tailor made approach as opposed to a one size fits all approach. Making public interest an inherent component in the enforcement in the multilateral competition agreement would help to strike a balance between economic interests (such as market access, merger issues) and social interests of developing countries and the LDCs.<sup>19</sup>

Further, cooperation and information sharing between countries could be one of the core principles of the multilateral competition agreement. This would enable the domestic competition authorities to gather evidence against multi-national entities indulging in anticompetitive practices and act against them. Cooperation between different regimes could also help to check the spillover effects of international mergers.

In relation to doubts on WTO being the right forum to host such agreement, it is recommended that a joint venture of WTO and UNCTAD hosts such an agreement. It must be recognised that since the principles of competition are already built into the WTO agreements and an initiative has previously been undertaken to address the interface between trade and competition principles, WTO has the desired level of experience and negotiating history to effect such an agreement. UNCTAD also has a significant history and experience in this area. The UN Principles are evidence to this effect.<sup>20</sup> Thus, a joint forum could be the answer to concerns of developing countries and the LDCs.

### ***Conclusion***

Most countries have now adopted domestic competition regimes and many have included discussions on trade and competition policy as a subject matter in bilateral/regional free trade agreements. Bilateral/regional approaches can, at

the most, act as a building block toward a multilaterally agreed system to make the functioning of the global markets maximise welfare in the economy.

Dealing with issues arising out of interface between trade and competition policy and addressing valid concerns of trading partners 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 multilateral competition agreement. Such body would also need to do a careful examination of implications of core principles of WTO and the suggested tailor made approach that adopts special and different treatment to certain countries.<sup>21</sup>

It is needless to say that such provisions would require intensive effort and negotiation which is a challenge that developed, developing and least developed countries will be faced with. A joint forum promoted by WTO and UNCTAD could be up for it and the right place to start.

<sup>1</sup> Consumers International, *Multilateral Competition Policy and the WTO: Technical Report*, March 2003, “He found that exclusive trading monopolies such as the British and Dutch East Indies Companies both drove down the prices paid to impoverished inhabitants of the developing countries they dealt with and also overcharged consumers in Europe.”

<sup>2</sup> Pradeep Mehta, *Towards a multilateral framework on competition policy*, International Centre for Trade and Sustainable Development, December 2011.

<sup>3</sup> Also known as “The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.”

<sup>4</sup> Paragraph 25 of the Doha Ministerial declaration dated 14 November 2001.

<sup>5</sup> Paragraph 23 of the Doha Ministerial declaration dated 14 November 2001.

<sup>6</sup> Annex E on the Interaction between Trade and Competition Policy dated 23 August 2003 in annexures to Draft Cancun Ministerial Text.

<sup>7</sup> Pradeep Mehta, *Towards a multilateral framework on competition policy*, International Centre for Trade and Sustainable Development, December 2011.

<sup>8</sup> The WTO Agreement on TRIPS refers member states to their national laws to take necessary action, upon violation of intellectual property rights. However, absence of national competition laws inhibits redressal of anticompetitive practices.

<sup>9</sup> CUTS International, *UNCTAD Inter-governmental group of experts*, 2012, and CUTS International, *Competition Regimes in the World – A civil society report*, 2006.

<sup>10</sup> Steve McCorrison, *Commodity Prices, Government Policies and Competition, Trade, Competition and Pricing of the Commodities*, Centre for Economic Policy and Research, 2012.

<sup>11</sup> Steve McCorrison, *Commodity Prices, Government Policies and Competition, Trade, Competition and Pricing of the Commodities*, Centre for Economic Policy and Research, 2012.

<sup>12</sup> Frederic Jenny, *Global Potash Trade & Competition*, Economic Times, November 2010.

<sup>13</sup> Nossaman LLP, *US Jury Finds Chinese Companies Liable for Price-Fixing, Fined \$162 Million*, JDSupra Law News, March 2013.

<sup>14</sup> Tarr, D., *Export Restraints on Russian Natural Gas and Raw Timber: What are the Economic Impacts?*, World Bank Policy Research Working Paper 5195, 2010.

<sup>15</sup> Organisation for Economic Co-operation and Development, *Agricultural policy monitoring and evaluation 2011: OECD countries and emerging economies*, 2011.

<sup>16</sup> DFID, Fox and Vorley, *Concentration in food supply and retail chains*, 2004.

<sup>17</sup> CUTS – CITEE, *Trade, Competition and Multilateral Competition Policy*, Briefing Paper No. 9/2000.

<sup>18</sup> CUTS – CITEE, *Trade, Competition and Multilateral Competition Policy*, Briefing Paper No. 9/2000.

<sup>19</sup> Pradeep Mehta, *Towards a multilateral framework on competition policy*, International Centre for Trade and Sustainable Development, December 2011.

<sup>20</sup> Pradeep Mehta, *Towards a multilateral framework on competition policy*, International Centre for Trade and Sustainable Development, December 2011.

<sup>21</sup> Pradeep Mehta, *Towards a multilateral framework on competition policy*, International Centre for Trade and Sustainable Development, December 2011.

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