

# MULTILATERAL COMPETITION FRAMEWORK: WHERE AND HOW?

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## INTRODUCTION

The need for a multilateral approach to competition policy was recognised in the Havana Charter, which unsuccessfully tried to set up an International Trade Organisation (ITO) just after the Second World War. The General Agreement on Tariffs and Trade (GATT), which emerged instead, however, excluded competition issues from its purview. Time and again, these issues have come up for discussion at various international forums, without significant outcomes. Eventually, they were raised in the Uruguay Round negotiations and entered the WTO arena through the Singapore Ministerial Declaration in 1996.

There was further progress at Doha as the need for a multilateral framework on trade and competition was recognised in the resultant Ministerial Declaration. Tremendous pressure was launched by the EU *et al* to launch negotiations on the issue at the Fifth Ministerial held at Cancun in September 2003. However, many countries remained sceptical about the benefits of and rationale for such an agreement. The main objection of developing countries is that they do not have adequate experience and expertise. The Cancun Ministerial could not arrive at a conclusion but the issue is not yet dead.

With the opening up of domestic markets to foreign competition, countries have become increasingly susceptible to anti-competitive practices that originate outside their own territory. Transnational corporations (TNCs) have entered developing-country markets and/or increased their activity within these countries. The collapse at Cancun should not act as a bump on the road to a constructive dialogue on an international competition policy. There is a clear need to go on for a better understanding of the possible benefits of competition policy at both national and international levels. Against this backdrop, this viewpoint paper makes an attempt to critically look into the desirability of a multilateral competition framework (MCF) and particularly which would be the appropriate forum to host such a framework from a developing-world perspective.

### Cross-border Competition Issues – Who Loses?

With globalisation, the rate of cross-border competition concerns is increasing exponentially, posing serious implications for competitiveness, development as well as poverty reduction in developing countries. Some anecdotal evidence points to this fact.

### International cartels

Recently, there has been a sharp increase in the global cartel activity. A World Bank study has shown that in 1997 developing countries imported \$81.1bn of goods from industries in which price-fixing conspiracies had been discovered during the 1990s.

Other than causing some loss in consumer welfare, cartelisation also hampers the development of developing countries and growth of their firms in several ways. Some cartel members use their excess profits to engage in predatory pricing against newcomers, particularly from developing countries. For example, predatory pricing drove the independent local manufacturers of steel in Brazil to bankruptcy.

To date, only a handful of enforcement agencies in developed countries have taken action against these cartels. Among the developing countries only Brazil made an attempt to investigate and prosecute the companies involved in the infamous "vitamins cartel". In India, repeated requests by CUTS to the competition authority, government departments as well raising the

issue in the national parliament did not yield any results.

### Export cartels

Export cartels have generally been ignored or even encouraged as their activities affect other countries to the benefit of domestic producers. Dealing with such practices through the application of the "effects doctrine" is quite common in the developed world, but developing countries have not really used such options. Attempts by the competition authorities in India, South Africa and Venezuela to deal with the American Natural Soda Ash Corporation (ANSAC) cartel led to serious problems, including the threat by the US government to take "actions" in completely unrelated areas.

### M&As with international spillovers

Large companies merge in the developed world and consequently their subsidiaries and associates in developing countries too end up in new combinations. This can create positions of dominance, leaving the door open for subsequent abuse. Moreover, developing countries may also be affected by merger and acquisition (M&A) activities that take place outside their territory without any local presence. Because these companies operate in multiple markets, they can also adversely affect developing country markets.

### Cross-border predatory pricing

Cross-border predatory pricing can also lead to market distortions. Due to some striking similarities, cross-border predatory pricing is very often equated with dumping and thus action is taken under anti-dumping legislation. However, the principle underlying anti-dumping is different from that underlying competition law in that it seeks to protect competitors and not competition. However, in most developing countries, due to the small size of markets and low levels of market contestability, there would be more convergence between anti-dumping and anti-predation actions. But, ironically, until recently, the main users of anti-dumping laws were developed countries, though increasingly developing countries too are taking recourse to these laws.

### IPRs-related

Intellectual property rights (IPRs) may generate or contribute towards a position of market power. The IP holders typically engage in licensing arrangements with firms in different countries. The territorial nature of property rights in such agreements means that frequently national law enables them to be used by rights holders to prevent parallel imports. In many cases it has also been observed that cartels were built around patent cross licensing schemes and thereby foreclosed competition.

### Tackling Cross-border Competition Issues: The State of Affairs

The prevalence and damage of cross-border competition issues is almost a settled fact. However, how to go about tackling them is an unsettled question. A well-functioning national competition regime may be necessary but not sufficient. Developing country competition authorities, in general, do not have the resources or the experience to tackle international competition challenges. It is indeed almost impossible for a developing country to carry out the tedious casework, and conduct necessary investigations leading to prosecution.

Moreover, some of the international competition problems are essentially global in nature and there cannot be any local solution. Bilateral or regional agreements have been ventured to deal with such problems. However, regional competition regimes will mainly focus on cases of regional dimension. Needless to say that bilateral agreements will have very limited impact. The best option left, at the end of the day, is in an appropriate MCF.

The global community, as stated, has been discussing the issue of a possible MCF since the days of Havana Charter in the late 1940s. Besides UNCTAD with the 1980 'Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices', the issue has been discussed at the World Bank and the OECD as well.

Competition authorities across the world have come together to promote the International Competition Network (ICN). ICN is intended to encourage the dissemination of competition experience and best

practices, promote the advocacy role of competition agencies and seek to facilitate international cooperation. ICN has already adopted a common set of guiding principles for merger notification and review. Similar initiatives are likely to be taken in other areas of competition enforcement.

### The Way Ahead

There is, by and large, an overall consensus that there is a case for an MCF, but there is no agreement as to:

- What should be its scope and contours, and
- Where it should be situated.

Some suggest that UNCTAD already has a long history of dealing with competition issues and is a non-controversial forum. Hence it is the best place to anchor MCF. Some of course plug for the WTO. A third way has also been suggested, i.e. to have it in an independent forum away from the UNCTAD and the WTO. The WTO as an organisation is quite mercantilist in approach, focusing on market access issues and hence may not be the best platform for hosting an MCF.

The current proposals at the WTO focus mainly on standards for national competition rules and international cooperation for cross-border issues, whereas a global framework, that will promote development, competitiveness and poverty reduction in developing countries, needs to be globally rules-based.

People also question whether the proposed agreement at the WTO will have the desired effectiveness even if it is finally signed.

Firstly, because there is no proposal to have binding global rules, and the proposed commitment for cooperation is only voluntary.

Secondly, even if the agreement is signed, it will be an outcome of power politics and may lack the mutual trust among nations that is the primary requirement for meaningful co-operation to tackle cross-border competition issues.

It is understandable that at this stage it may not be possible to go beyond voluntary co-operation in this regard. This makes it all the more necessary to evolve a multilateral co-operation framework in careful and non-controversial manner.

Developing countries would find it difficult to commit to an agreement on competition at the WTO unless they are convinced of its benefits. This would be possible only if they have experience, which has been almost non-existent so far as regards bilateral or regional agreements. The best way forward would be to evolve a competition framework at a non-controversial forum.

A limited agreement on competition, involving market access issues, may be negotiated but only at a later date when there is an "explicit consensus". If members agree at any point of time, the proposed framework may also be transferred to the WTO. This can happen only if the WTO goes through drastic reforms to adopt a pro-development image.

However, the bottom line is that it should be done only if there is positive willingness and understanding among all members and not through pressure tactics.

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This Viewpoint Paper is written by Nitya Nanda and Alice Pham of and for CUTS Centre for Competition, Investment & Economic Regulation (CUTS-CCIER), D-218, Bhaskar Marg, Bani Park, Jaipur 302 016, India. Ph: 91.141.220 7482, Fx: 91.141.220 7486, Email [c-cier@cuts.org](mailto:c-cier@cuts.org), Web Site: [www.cuts-international.org](http://www.cuts-international.org).