MULTILATERALISM OF COMPETITION POLICY: AN UNASSAILABLE PEDESTAL FOR A WORLD OF FREE TRADE[1]

Abstract:

The article delves to gain an insight into the relationship between trade and competition policy. With the failure of various attempts been made by various Ministerial Declarations in Singapore, Seattle, Doha and Cancun, and Organizations like the UNCTAD and OECD; a need is now felt to negotiate a multilateral agreement on an international competition policy. Considering the effects of anti-competitive measures crossing the borders, the article analyses the benefits of multilateralism as an unassailable pedestrian to an international competition policy. Though various Agreements such as the TRIPS, GATS, TRIMS and the Agreements on Safeguards; and provisions across the GATT-WTO, namely: Articles II: 4, III, X, XI, XVII, XX(d), XXIII(1)(b) and (c); have acknowledged the effect of anti-trust policies on trade across the border, it does not suffice; and the utility of multilateralism under the auspices of the WTO is now being felt. The aim of both the WTO and competition policy being to provide market access to all sans barriers, marked the birth of the Working Group on the Interaction between Trade and Competition Policy (WGTCP) established in the Singapore Ministerial Declaration in 1996, made its first attempt under the auspices of the WTO. It is recognized that globalization cannot merely be achieved by checking the governmental measures in the form of tariff and non tariff barriers; anti-competitive behavior by various private enterprises is what now constitutes a hurdle to liberalization to trade. Primarily, anti-competitive behavior in the form of horizontal and vertical restraints, abuse of dominant position/monopolization and mergers for the thrust of targeted actions must be banned. Hence, multilateralism will incorporate the best practices of the WTO such as the National Treatment, Most Favored Nation Treatment and the Transparency provisions may form the base of the negotiations. A truly international forum of dispute settlement is also predicted to be more trusted as a dispute resolver. It will make clear the practices that are considered anti-competitive and the market players that are subject to jurisdiction apart from exemptions, if any.

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Introduction:

The advent of globalization has witnessed growing interactions by several countries relating to development, trade, financial and economic policies. Any restrictive trade practice in one country impacts adversely the trade of another. With the establishment of the World Trade Organization (WTO)[2] being the only global international organization having an imperative role in ensuring free trade and economic escalation by removing and lowering barriers to trade, any impediment to the objective of ensuring free and fair trade could undermine the goal of the WTO; thereby creating a hindrance to the growing needs of the international economic community; for the growth of a global economy depends on the trade policy decisions each country makes.

While on one hand, the agreements of the multilateral trading system[3] guarantee important trading rights to member states, they also ensure a vast choice of goods: whether they are raw materials, components or finished goods, and services to consumers; at the same time opening foreign markets to a copious number of exporters.[4] Liberalization of trade not only increases the level of competition, but at the same time ensures the economic welfare of all with higher levels of specialization and competition; thereby leading to product and process innovations in various sectors.

Any country is free to evaluate its economic or trade policies, but at the same time ensuring the same does not in any way hamper the economic policies of another country, creating a link between domestic and international policy decisions; by ensuring adherence to multilaterally agreed rules and policies in that regard.

The WTO: a good ground on multilateralism of an International Competition Policy?

[2] The WTO was established by the Marrakesh agreement and consists of a Preamble, XVI Articles, Four Annexure and Declarations, Decisions and Understanding. The agreements cover goods, services and intellectual property; with underlying principles of liberalization, commitments to lower customs tariffs and other trade barriers, also containing certain permitted exceptions.

[3] The multilateral trading system being the legal ground-rules for international commerce consists of the WTO's agreements, negotiated and signed by a large majority of the world's trading nations, and ratified in their parliaments.

[4] www.wto.org visited on 9th February, 2011.

With the International Trade Organization created by the draft of the Havana Charter in 1948, being the first to address concerns of a competition policy within a trade framework being rejected by the US senate, all that remained was the GATT[5] that was superseded by the WTO in 1995, apart from the GATS[6] and several specialized agreements to imbibe the competition policy concerns.

While the endeavors of both the WTO[7] and the competition policy[8] being to liberalize trade sans barriers to all without discrimination on tariff or non tariff barriers, this paper delves to consider the scope of a multilateral agreement to renounce any anti-competitive practice considering the extent to which private anti – competitive practices block access to foreign markets with the impact of reducing the benefits of the goals of international trade and liberalization. While the GATT-WTO aims at barring all governmental measures by declaring illegal the use of import and export quotas[9], or discrimination between 'like' products[10], non application of taxes, charges, laws and regulations so as to afford protection to domestic products[11], imposing anti-dumping duties on dumped items;[12] the GATT- WTO now aspire to also combat other trade restrictive practices engaged by private firms in the form of price fixing or illegal arrangements to gain market controls to name a few.

It is stated that the superlative method to check this illegal behavior of private firm would be to incorporate provisions of national competition laws[13] so as to encompass the barriers created by both – governmental and private firms. It is also argued that the goals of the WTO would be

[5] The General Agreement on Tariff in Trade 1994.
[6] The General Agreement on Trade in Services 1994.
[7] The GATT- WTO aims at achieving the goal of liberalizing trade and reducing prices across the globe: to hence ensure the movement of goods and services across the globe smoothly.
[8] The term "*competition policy*" means to achieve the goals of competition law; i.e. effective drafting, implementation and enforcement of the competition law.
[9] See Article XI of the GATT 1994 (General Elimination of Quantitative Restrictions).
[10] The Report of the Working Party on *Border Tax Adjustments* has often been followed to determine the term "likeness" by following four general criteria: a) the property, nature and quality of the products; b) the end uses of the product; c) consumer tastes and habits and d) tariff classification of the products. Hence, the physical properties, the extent to which the product may be perceived as serving the same end use, the extent to which consumers perceive and treat the products as an alternative and the international classification of the products for tariff purposes is what ought to be taken into account; See, Appellate Body Report, European Communities – Measures affecting Asbestos and Asbestos containing products, WT/DS145/AB/R, Para. 102 (adopted March 12, 2001).
[11] See Article III of the GATT 1994 (National treatment Principle).
[12] See Ibid, Article VI (Anti Dumping Agreement).
[13] Competition law is that law that prevents and checks anti-competitive practices and is divided chiefly into four areas: horizontal restraints (eg price fixing); vertical restraints (eg: agreements between manufactures and distributors on resale price maintenance; mergers and acquisitions and unlawful monopolizations.

outshined if a multi-lateral agreement be negotiated to incorporate the principles of competition law.[14]

Previous efforts to negotiate multilateral agreements on the scope and need for an International Competition Law:

The Havana Charter: With promises to reduce and subsequently eliminate all government barriers to trade, there is also a growing concern as to the negative impacts of anti-competitive measures[15] by private enterprises which were first felt at an international level in the Havana Charter, 1996. The Charter makes it obligatory for each Member to not only take measures but also co-operate with the Organization in taking action whenever any business practice by a private or public commercial enterprise has a harmful effect on the expansion or production or trade so as to restrain competition, limit access to markets or foster a monopolistic control.[16] The Charter however failed in its attempt to create a multilateral pedestrian to an international competition policy to the efforts of developed countries, who considered the effort to be an encroachment to their (national) sovereignty.

The Singapore Ministerial Conference: with the establishment of the Working Group on the Interaction between Trade and Competition Policy (WGTCP) at the Singapore Ministerial Conference in December, 1996; there was a rising need of a multilateral agreement considering the interface between trade and competition, the impact of monopolization on trade liberalization; the impact of anti- competitive practices on trade related aspects of intellectual property;[17] the relevance of National treatment and Most favored nation treatments to competition policies to name a few;[18] which was opposed to by various developing countries. Albeit the fact that the Doha Ministerial Declaration, in 2001, did try to give technical assistance for the developing countries to understand the impact of anti-competitive measures on trade, the

[14] Initially, competition law entails to secure smaller corporations from the pressure created by larger corporations. However, by incorporating principles of competition law into the WTO, other countries may now help their corporations to compete with local firms by making use of the principle of national treatment (at least as well as or better than locals) of the GATT-WTO.

[15] The following were some of the anti-competitive measures considered by the Charter: fixing prices, terms or conditions to purchase, sale or lease, allocating or dividing the markets for business purposes, use of production quotas or discrimination against some enterprises.

[16] See Article 46 of the Havana Charter, 1996.

[17] See, WTO "Working group set up by Singapore Ministerial on Trade and Competition Policy Report (1997).

[18] See Ibid, the Working Group Report (1999).

WTO General Council considered it better not to have any negotiation on a multilateral agreement during the Doha Rounds[19].

The UNCTAD[20]: The UNCTAD realized the need to incorporate a multilateral agreement on an international competition policy, considering the fact that domestic laws are ineffective when anti-trust measures cross borders. This lead to the "Set of Multilaterally agreed Equitable Principles and Rules for the Control of Restrictive Business Practices". The Set primarily aims at creating competitive markets in order to hail the concept of free and fair trade by making aware various governments about the anti-competitive practices and RBP's apart from encouraging bilateral consultations between governments to resolve issues pertaining to RBP's. However, the set is merely recommendatory in nature making it wholly unenforceable.

The OECD[21] Committee on Competition Law and Policy: The Committee considers the interaction between Competition Policy and trade and the possibility to converge various national competition policies into a set of multilaterally agreed rules on International Competition Law.

The aspirations of both: the WTO and competition law run parallel to each other: the aim of both being to ensure markets are open to all without there being any unfair discrimination; apart from providing for a transparent rule base and non discriminatory system. Trade and liberalization are complimentary to each other in a variety of ways, for example, there may be collusion between domestic and foreign producers to prevent the import of certain goods.[22] Trade and competition policy both bearing on the same principle: to elevate economic efficiency[23]. Competition law may also enrich the investments of a host country, by being complimentary to liberalization of

[19] Popularly known as the "2004 July Decision."

[20] The United Nations Conference on Trade and Development was established in 1964 as a permanent intergovernmental body to maximize trade, investment and development facilities to developing countries.

[21] The Organisation for Economic Co-operation and Development was founded in 1961 to stimulate economic progress and world trade.

[22] See CR Frischtak with B Hadjimichael and U Zacau, *Competition policies for Industrializing Economies* (Washington: World Bank (Policy and Research Series – 7), 1989) 9-10 for examples.

[23] OCED, *Interim Report on Convergence of Competition Policy* (Paris: OCED GD (94/64), 1994. See also, OCED, *Competition and Trade policies: Their Interaction* (Paris OCED, 1984) at 11.

foreign direct investment.[24] Also, inspite of elimination of trade barriers by the various WTO agreements, competition may still be limited due to language, transportation costs, limited imports, need for face to face delivery of some services.[25] Hence, whilst trade policies seek to eliminate tariff and non tariff barriers,[26] effective competition laws ensure that private firms comply with these laws, by reacting against those private firms that price their goods and services that normally prevail in competitive markets so as to promote international trade and liberalization[27].

With a vast majority of Competition laws over the globe seeking to address four types of behavior primarily being horizontal restraints,[28] vertical restraints,[29] abuse of dominant position/unlawful monopolization[30] and mergers;[31] it is believed that a multilateral agreement on

[24] See UNCTAD, *World Investment Report, 1997: Transnational Corporations, Market Structure and Competition Policy* (New York and Geneva: United Nations, 1997) at 210-2.

[25] See Chris Noonan, *The Emerging Principles of international Economic Law* (1st Edn, Oxford: University Press, 2008) at 144-145.

[26] The Annual Report of the WTO (1999) states that that the eight multilateral trade negotiation rounds by the GATT, 1947 have aimed at reducing tariff and non tariff barriers in goods and services, apart from technological innovations, investments, lowering of prices in good and services.

[27] Firms normally charge higher prices when they have a high market power; thereby reducing and eliminating trade barriers inturn reduces the firm's market power.

[28] Broadly, horizontal restraints are those that occur among direct competitors in the same level in a particular industry; may it be between manufactures, dealers or retailers: being within the same group. Internationally, however (horizontal) restraints in the price fixing and export and import cartels seem to be of a greater concern making them illegal *per se*.
Price fixing is condemned in most of the markets as it aims to control the demand and supply in a given situation by fixing the prices of a product or service, so as not only to push prices as high as possible but also to discount or fix prices. However, even reasonable prices that are fixed are considered unlawful, so as to avoid inquiries as to whether a certain fixed price has subsequently become unreasonable, saving the enforcing Governments of much burden.

[29] As opposed to horizontal restraints, vertical restraints are those that occur amongst competitors in different levels; i.e. between manufacturers, retailers and dealers for example; thereby increasing the possibility to increase prices while lowering the quality and quantity of products. Vertical restraints are mostly typically in the nature of *resale price maintenance agreements* and *vertical non price restraint agreements*. The former is a practice wherein the distributor sells the product at the price dictated by the supplier; the latter being a practice of an agreement signed between distributors and suppliers to limit the sale in some territories, *exclusive dealing*, or refusal to deal with goods of the competitor while dealing with goods and products of the supplier; *tie in sales*: making the purchase of one product conditional on the other; *full line forcing* so as to compel the dealer to stock the entire range of the manufacture's products or *slotting fees*: so as to pay a fee to get the product stocked.

[30] The practice of abusing the dominant position and engaging in unlawful monopolization is forbidden in most jurisdictions. Hence, unfair and discriminatory conditions in purchase and sale of goods; or prices of goods (including *predatory pricing* or the pricing *below* cost of production of goods to eliminate competition) so as to limit or restrain production of goods or services, scientific or technical development; denial of market access to others: so as to operate independently of competitive forces operating in the relevant market (or the market comprising the products/services that are interchangeable or substitutable). However, in the United States, merely being a monopolist is not prohibited by the Sherman Act; what are punishable are the practices undertaken to achieve a

International Competition would well solve the issues of anti-competitive behavior internationally.[32]

Both liberal trade and competition policies are akin to the extent that they seek to achieve economy in productive, allocative and dynamic efficiency;[33] by ensuring the lowest cost of output[34] is then exchanged and distributed to meet varying demands;[35] which inturn leads to innovations in technology in products and processes.[36]

While at one point of time, both competition law and trade policy strive to ensure easy access to goods and services, the former promoting competition and curtailing concentration of market power in private firms, the latter entails to throw open the market sans discrimination leading to free trade in goods and services.

Competition and trade policy are also seen to be in stark contrast in certain aspects. For example, competition policies operate largely "behind the border"; whereas trade policies operate largely internationally when it comes to movement of goods and/or services from one country to the other. Competition policies of various legislations may also be at discord with trade policies when they fail to regulate or prohibit export or import cartels.[37]

While the relevance of having a competition policy incorporated in the WTO agreement seems to be in a state of flux, several advantages of a multilateral agreement on the same have also been traced as that of privatization and sector specific regulatory reforms, liberalization and foreign

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monopoly status. In the European Union, abuse of dominant position is expressly prohibited by the E.U Courts by virtue of Article 82 of the EU Treaty.

[31] As the rate of mergers and acquisitions continue to rise annually, these increased activities have been of immense concerns especially when merged firms begin to occupy a dominant position not only in countries of their merger, but also internationally. Merged firms acquire a huge market share so as to acquire a monopoly status, being a threat to smaller suppliers; making it the need of the hour to review their activities by various competition authorities.

[32] See WTO, "Annual Report for 1997, Special Study for Trade and Competition Policy" 12-14 (1997); *Creating a Culture of Competition*, see para. 4.046, n. 83 at 2.

[33] See WTO, *"Working Group on interaction between Trade and Competition Policy, report to the General Council"* Wt/WGTCP/2 at 36 (Dec 8, 1998).

[34] Productive efficiency ensures the lowest cost of output.

[35] Allocative efficiency is achieved when varying demands of the consumers is met.

[36] This leads to dynamic efficiency.

[37] A *cartel* is an agreement among competing firms to fix prices, markets and production. An *export cartel* is an agreement between firms to charge a fixed export price or divide export markets. Export cartels are exempt from the laws of many jurisdictions, subject to certain conditions. For example, the United States, Germany, Japan, France and the United Kingdom authorize export cartels. See Ulrich Immenga, *"Export Cartels and Voluntary export restraints between Trade and Competition Policy"*, In Antitrust: A New Remedy? 93 (John O. Haley and Hiroshi Iyori eds, 1995).

investment regimes[38] thereby leading to a favourable economic environment, promoting efficient allocation of resources,[39] protecting welfare of consumers,[40] addressing anti-competitive practices of enterprises (including multinational enterprises) that have a trade dimension, and that (possibly) impact particularly on developing countries[41] on the other hand, as the rate of mergers and acquisitions continue to mount increasing concerns about concentration of market power, bilateral efforts of competition policy in the WTO regime need to be replaced by multilateral co-operation. The wide membership of the WTO consisting of developed, developing and emerging economies also makes it the appropriate forum to enforce a multilateral regime on a competition policy in the WTO.[42]

Existing efforts to 'wipe out' anti-competitive practices in a world of free trade:

The GATT, 1994 may be seen as the first in its attempt to incorporate provisions relating to anti-competitive practices between Member States in its exchange of goods and services with each other. Albeit the fact that the GATT, 1994 primarily deals with restrictive trade practices, it also aims at striking down practices that are anti-competitive by private business houses. Articles II: 4, III, X, XI, XVII, XX(d), XXIII: 1(b) and XXVIII 1(c) are the relevant Articles in the GATT, 1947 that aim to address anti competitive practices on an international level.

- Article II: 4 of the GATT addresses concerns relating to behind the border practices that afford protection in the form of monopoly on importation of products in excess to that provided for in the Schedule.
- Article III is a non discrimination principle to avoid all sorts of protectionism on the application of internal taxes and regulatory measures, so as not to afford protect to domestic products; ensuring a level playing field for imported and domestic goods; hence not subjecting any imported product (directly or indirectly) to internal taxes or other internal charges in excess to

[38] See WTO, "Working Group on Interaction Between Trade and Competition Policy", a Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth WT/WGTCP/W/80 at 3-4, para 6.
[39] Ibid, para 9 at 4.
[40] Ibid, para 10 at 5.
[41] Ibid, para 12 at 5.
[42] While the WTO seems to the most appropriate forum for a multilateral regime on a competition policy, the failure of the MAI fiasco cannot be undermined; wherein if a small group of developing countries could not reach an agreement on foreign investment, the laws not being very diverse to that of others, the doubt of a successful competition policy within the WTO, increases; See UNCTAD, "Lessons learnt from MAI" (1999).

those applied to like domestic products.[43] At the same time, like imported goods must also be accorded like treatment as that to domestic products when it comes to the application of laws, regulations and requirements affecting internal sale, offering for sale, purchase, transportation, distribution or use.[44]

- Article VI reviles the sale of like exported products at prices below those at the home market price or the cost of production[45], by leaving it to the importing country to impose an anti dumping duty, "not greater in amount than the margin of dumping".[46]
- The noble aspirations of any agreement can never be acquired unless the system ensures transparency, predictability and uniformity of the measures adopted by the members, by making the members aware of the policy decisions and predilections. It ensures that the governments and traders are acquainted to the laws, regulations, judicial decisions and administrative decisions[47] unless the disclosure of the same prejudices public interest or the legitimate commercial interests of private and public enterprises.[48] Trade laws must also be applied by all GATT members in an impartial and reasonable manner also calling forth the institution of tribunals.[49]
- Quantitative restrictions in the form of quotas, import and export licenses or other measures[50] that promote protectionism are forbidden, unless they are in the form of taxes, duties or charges that can be negotiated; on the importation or exportation of any product as the case may be.[51]

[43] See Article III: 1 of the GATT, 1947.
[44] See Ibid, Article III: 4.
[45] In *Egypt — Steel Rebar*, the Panel noted that the cost of production is to be calculated based on the actual books and records maintained by the company in question so long as these are in keeping with generally accepted accounting principles and the costs to be included are those that reasonably reflect the costs *associated with* the production and sale of the product under consideration; See, "Report of the Panel, *Egypt – Definitive anti-Dumping Measures on Steel Rebar from Turkey*" WT/DS211/R (adopted on Aug. 8, 2002).

[46] Article VI: 1(a) of the GATT, 1994 states that the dumping margin can is the difference between the foreign and domestic market prices. Hence, the dumping value shall be the difference between the Normal Value (the price the exporter charges for the foreign like product in its home market) and the Export Price (the price the exporter charges in the importing country for the merchandise). So, incase the Normal Value is more than the Export Price, the product is said to be dumped.
[47] In the *Restrictions on Imports of Apples*, the panel held that public notice of the allocation of quotas two months after the quota period had begun by the EEC was a breach of the principle laid down in Article X. See, "Report of the GATT Panel, *EEC- Restrictions on the Import of Apple*s", BISD, 36th Supp. 135, 166-67, Paras. 5.20 – 5.23).
[48] See Article X: 1 of the GATT, 1947.
[49] See Ibid, Article X: 3.
[50] In the *Japan Semi Conductors case*, the Panel held that article XI, unlike other provisions of the GATT applies broadly to measures as against merely laws or regulations. See "*Report Of the GATT Panel, Japan – Trade in Semiconductors*", BISD, 35th Supp. 116, 153-55, paras. 104-09 (adopted on May, 1988)
[51] See Article XI of the GATT, 1947.

- The underlying principles of non discrimination is also upheld in Article XVII that commits government owned or government controlled state trading monopolies to act in a non discriminatory manner in all its purchases or sales, involving either imports or exports.[52]
- The chapter of Article XX prohibits the application of measures in an arbitrary or unjustifiable manner between countries where the same conditions prevail, or a disguised restriction on international trade; such measures being excepted from the obligations of GATT only to secure compliance of those laws and regulations not inconsistent with the (GATT) Agreement.[53]
- Should any of the benefits accruing[54] directly or indirectly be nullified, the Contracting Party is free to bring a complaint, thereby improving the competitiveness between parties b y providing the right to redressal.[55]
- Article XXIII:1(c) also provides that in cases where the benefit accruing has been nullified or impaired as a result of the existence of any situation, a Panel proceeding may be initiated; to enable the panel to circulate its report to the WTO members. It was held in the *Kodak – Fuji Film Dispute* that Japans attempt to engage in vertical restraints in the form of exclusive agreements with the distributors to bind them to Fujifilm; offering rebates to distributors and stores that carry the product, thereby restricting market access to Kodak was a nullification of a benefit 'as a result of the existence of a situation'. [56]

With the negotiations of the Uruguay Rounds and the birth of the WTO, various provisions were incorporated in the TRIPS,[57] GATS,[58] the TRIMS[59] and Safeguard Agreements;[60] to address concerns relating to anti-competitive practices.

[52] In the *Thailand- Restrictions on Importation of and internal taxes on Cigarettes*, it was help that the monopoly, price and retail availability of cigarettes, provided it does not accord imported cigarettes less favorable treatment than domestic cigarettes. See, "Report on the GATT Panel, *Thailand- Restrictions on Importation of and internal taxes on Cigarettes"*, BISD, 37th Supp. 200,226, para. 80 (adopted Nov. 7, 1990)
[53] See Article XX (d) of the GATT, 1947.
[54] It is necessary to prove that the benefit accruing has been impaired: without the measure *per se* being violative of any of the GATT provisions. (See *EEC – Oilseeds*; para. 3.026, n.42, at 128 – 129, paras. 114, 148).
The member must be denied some or all of the market access for concessions it made to other WTO members.
[55] See Article XXIII: 1(b) of the GATT, 1947.
[56] "Report of the WTO Panel, Japan – measures affecting Consumer Photographic Film and Paper". WT/DS44/R (adopted Apr. 22, 1998).
[57] The Agreement on Trade Related Aspects of intellectual Property Rights that sets out the minimum standards of protection to be provided by each Member; and is the most comprehensive agreement on intellectual property protection.
[58] The General Agreement on Trade in Services was entered into force in January 1995; having the same objectives as its counterpart (GATT).

As the major concerns of the TRIPS agreement shall be to adopt measures for the promotion of technological innovation, leading to socio-economic welfare; it becomes imperative to tackle anti-competitive practices in doing the same. Article 40 of the Agreement[61] recognizes the fact that certain licensing practices or conditions may have an adverse impact on trade by restraining competition; giving a right to Members adopt measures to curtail any such anti-competitive practice in the form of challenges to validity or coercive package licensing or exclusive grantback conditions.[62] The subject matter of a patent may also be used by the appropriate Government or a third party authorized by the Government by means of a compulsory license which are found to be anti-competitive.[63] Hence, compulsory licensing may be resorted to by the appropriate Government to curb anti-competitive practices. In to ensure competitive markets, the provisions relating to trademarks also ensure that there is no likelihood of confusion, hence prohibiting the use of similar of identical trademarks on goods and services without the consent of the owner.[64]

The provisions of the GATS agreement make it obligatory for each Member to ensure that any monopoly service provider does not engage in practices that discriminate Foreign Service providers;[65] even when the monopoly supplier competes directly of through an affiliated company, in the supply of its service outside its monopoly rights.[66] Members shall also enter into

[59] The Agreement on Trade Related Investment Measures is one of Agreements covered under Annex IA to the Marrakech Agreement and addresses investment measures that are trade related.
[60] The Agreement on Safeguards sets forth the rules for application of safeguard measures pursuant to Article XIX of GATT 1994.

[61] Article 40 of the TRIPS Agreement states: "Control of anti-competitive practices in contractual licences: 1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology. 2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member…"

[62] See Ibid, Article 40.2.
[63] See Ibid, Article 31 (c).

[64] See Ibid, Article 16.
[65] See Article VIII: 1 of the GATS.
[66] See Ibid, Article VIII: 2.

consultations at the request of any other Member to eliminate restrictive business practices (RBP's) that restrain competition and thereby restrict-trade in services.[67]

An attempt has also been made in the TRIMS Agreement to curb RBP's regardless of the absence of specific provisions in that regard; by providing opportunities of free trade in countries other than that of production. Hence, all measures that require the purchase or use of domestic goods (i.e. local content requirement),[68] or limits the purchase or use of imported products by volume or value (i.e. trade balancing requirements),[69] or tie access to foreign exchange to an investors foreign exchange earning (i.e. foreign exchange balancing restriction) are prohibited so as to be considered as RBP's.[70]

Considering the fact that the European Union has played a pivotal role in pressing for multilaterally agreed negotiations on an international competition policy ever since the WTO Seattle Ministerial Conference in 1999 due to deep disagreements with developing countries who were satisfied with the working of the WGTCP and did not consider the need to any multilateral negotiations on the same; the significance of a multilateralism on competition policy can never be undermined.

Some aspects that are inevitably taken into consideration while negotiating a multilateral agreement:

As seen previously, some provisions of the GATT, 1994 along with provisions of the WTO Agreements already recognize the harm of anti-competitive markets and RBP's thereby making them illegal and open to challenge before the Panel. The *raison d'être* behind the WTO as the best ground for multilateralism is its universal membership by both developed and developing countries, giving each an equal right of representation. The benefits of harmonization can never be undermined. This uniformity would probably be established by including some essentials of the national competition laws addressing concerns on RBP's; thereby removing divergences that exist amongst various jurisdiction as to areas of vertical restraint, what constitutes abuse of dominant position and mergers and acquisitions and their possible effects on the market.

[67] See Ibid, Article IX: 1 and 2.
[68] See 2 (a) of Annex 1 to the TRIMS Agreement.
[69] See Ibid; 2 (b).
[70] See Ibid; 2 (c).

Secondly, multilateralism would ensure non-discrimination based on the grandfathering principles of National Treatment and MFN so as to hail the due process of law by providing on one hand large and small firms to compete equally and on the other, ensuring both *de jure* and *de facto* non discrimination between firms of developing countries; thereby accelerating the growth of market economy.[71] Thirdly, submission of disputes concerning anti-trust issues to an international forum would serve as a platform to remove doubts as a result of dispute settlement to national authorities by universal application of the principles of positive and negative comity.[72] The principle of transparency provides an important impetus for a sound international competition policy. As reflected in the various WTO agreements, Members are under the obligation to publish, or at least make publicly available, all relevant laws, regulations, judicial decisions and administrative rulings of general application and provisions on the notification of various forms of governmental action to the WTO and other Members; and, not to apply or enforce them until this has been done.[73] The rationale behind this obligation is to ensure that persons subject to this jurisdiction have at the least had a chance to be familiar with the rules. In this way useful information is also provided to the economic actors to take advantage of the opportunities created by the WTO. Adjudication of the disputes by an impartial tribunal ensures compliance of the rules and hence avoids future disputes.[74] To this end, laws and regulations on RBP's horizontal and vertical restraints, abuse of dominant position and mergers would become transparent to make known the enforcement mechanism apart from infusing uniformity in the international policy. With this the exemption criteria will be published and market players in the

[71] It may however be preferable that these principles are adopted to the specific needs of competition policy as in the case of GATS, TRIPS as the like; See "Comments of the representative of Switzerland" Reported in WT/WGTCP/M/5, Para. 78 and WT/WGTCP/M/6, Para. 103.

[72] Positive comity is the method by which competition authorities conduct an inquiry into the complaints of anti-competitive behavior by firms in their jurisdiction that encroach upon the rights of parties in other jurisdictions. It constitutes active co-operation by both jurisdictions in cases of breaches of laws concerning anti-competitive behavior; primarily bound by bilateral agreements.

Negative comity is notification by one country to another in case an investigation or proceeding affects the interests of the other country; and is encouraged strongly by the OCED 1995 Recommendation on Co-operation between Member Countries on Anti-Competitive Practices affecting International Trade.

[73] Article X of the GATT, including the GATS (in particular Article VI), the TRIPS Agreement (in particular Articles 41-42 and 62) and in various Annex IA Agreements, such as those on Subsidies and Countervailing Measures, Anti-Dumping Measures, Customs Valuation, Import Licensing Procedures and Pre-Shipment Inspection also contains provisions on the uniform, impartial and reasonable administration of trade measures and the right of review of action taken pursuant to them.

[74] See, "A Background Note on the Fundamental WTO Principles of National Treatment, Most-Favored-Nation Treatment and Transparency" WT/WGTCP/W/114 at 14-16.

form of various industries and sectors shall be identified. Adjudication by a trusted international enforcement mechanism may raise goose bumps at the outset as to the intrusion of national sovereignty, but it promises uniformity in the decision making process along with predictability and accountability.

Concluding remarks:

Successive attempts have been seen in the Singapore, Seattle, Doha and Cancun Ministerial Conferences respectively in 1996, 1999, 2001 and 2003; to consider the importance of rising anti-competitive measures by private enterprises and its treat to global international trade. As the GATT-WTO promised limitation of governmental measures in the form of tariff and non tariff barriers, need was now felt to shift attention to anti-competitive practices, thus forming the impetus behind the WGTCP to study the interface between trade and competition policy and possible efforts for multilateral negotiations on the same. Since then, the efforts have being constantly being eclipsed by the developing countries. Previous efforts by various organizations like the UNCTAD, OECD have also not been very fruitful, but cannot miss mention.

The GATT-WTO, in its endeavor to liberalize trade; has also incorporated provisions in various Articles and Agreements to guarantee free and fair movement of goods, services and products across the borders; for without healthy competition, one cannot envision liberalization of trade and consequently, globalization. However, provisions in the Agreement are not all that it takes when it comes to combating anti-competitive practices. The need of the hour would be to negotiate an unassailable multilateral agreement between member states, making unsurpassed use of the grandfathering principles of the National treatment, MFN and Transparency clauses. Till, then, plurilateral and bilateral agreements between interested member states as done in the Tokyo Round Codes[75] and between the United States and Canada respectively; may be entered into.

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[75] See, U.S. International Trade Communication, The Year in Trade 1993: Operation of the Trade Agreements Program (USITC Pub. 2769 1994) 43-45 for the list of signatories to the Tokyo Round Codes.

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