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The Fate of Competition Policy in Cancun: Politics or Substance?

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In Cancun, at the WTO Ministerial Meeting, developing countries refused to agree to negotiations on competition policy because of a range of issues that were politically based, rather than because of technical objections to a multilateral framework for competition policy in the WTO. While most developing countries' governments do have arguments to support a view that there could be harmful effects to their economies resulting from a WTO regime on competition policy, it is my view that this analysis was not pivotal in the decision-making process. In some cases, it may not have been taken into account at all.

There were three fundamental reasons why developing countries refused to agree to negotiations on competition policy. The first, and most obvious, is because it was linked to the so-called Singapore issues, that is, Competition Policy, Investment, Government Procurement, and Trade Facilitation, as a single undertaking. Investment and Government Procurement triggered even more adverse reactions than Competition Policy. The Singapore issues were just not acceptable to developing countries as a single undertaking. Yet the negotiators on the European side were uncompromising until the eleventh hour and, in the process, read the mood on the other side incorrectly.

The second reason why developing countries were so opposed to undertaking negotiations on the Singapore issues and, by extension to competition policy, was because they were determined not to increase the burden of trade negotiations more than they had undertaken already. Caribbean, African and Pacific (ACP) countries are currently negotiating the Cotonou Agreement agenda, in addition to WTO negotiations. Caribbean and Latin American countries are in the final stages of negotiating the Free Trade Area of the Americas (FTAA) Agreement, which has a very ambitious scope and nine negotiating groups. There is little capacity in these countries to undertake further negotiations in completely new areas where there is little technical expertise.

A third reason why developing countries refused to agree to negotiations on

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the Singapore issues was because of the hard line taken by the Europeans and Americans on agricultural export subsidies and domestic support affecting trade, including the intransigence of the US on the cotton issue. In the view of many developing countries, the tactic employed in the last session at Cancun was a deliberate manoeuvre to cause the negotiations to collapse over the Singapore issues rather than agricultural subsidies. It was the developing countries' understanding that, when the plenary re-convened, the item on the agenda was agriculture. However, to their surprise, the Singapore issues were put on the table, de-coupled and limited to only Trade Facilitation as a concession, without any linkages to concessions in agriculture. This occurred despite the insistence by the Group of 21, supported by other developing countries, that they were not entertaining the Singapore issues under any conditions. Then, to the even greater surprise of all delegations, the chair closed the meeting on the basis that consensus was not possible. Most delegations viewed this as a premature decision. The fact that the EU and the US refused to negotiate on agricultural subsidies did not make the headlines. It was the sub-script. However, it was the developing countries' refusal to negotiate the Singapore issues that did make the headlines, leaving the intransigence of the developed world relatively free from initial critical analysis.

Presumably, the intention was to lay the blame on developing countries for failure. It worked in quite the opposite way since it gave a boost to the confidence of developing countries. For the first time since the 1970s, a level of unity emerged amongst them that allowed them to flex their muscles. No one wanted the collapse of negotiations in Cancun. The Europeans and Americans are amongst the most informed and skilful of negotiators in the international arena. In negotiations, there has to be a level of understanding of the opponent's bottom line, beyond which the negotiations would inevitably collapse. In my view, the Europeans and the US did not expect the unity and resolution of the Group of 21 (developing countries), with support by all other developing countries. They expected collapse in the eleventh hour and held out on concessions, thinking that they could outwit the developing countries as the pressure built up towards the end of the negotiations. Why not? This strategy has been successful over the last two decades.

Returning to the table with only Trade Facilitation, and before discussion of agricultural subsidies, seemed to the developed countries to be a great concession and may have worked in prior times. However, they did not anticipate two things: firstly, the capacity of developing countries to withstand the pressure to break ranks and accept crumbs, because of a supposed fear of the consequences of a failure of the Cancun negotiations; and secondly, the loss of the critical last hours of the negotiations when many a giant has crumpled in the face of the pressures of negotiations. In fact, by calling off the negotiations, the Mexican Chair deprived the EU and its supporters of the most critical negotiating period at which time they could have turned up the pressure on the developing countries. Small wonder, then, that they were furious with the

Chair for closing the meeting so abruptly.

On the technical dimensions of competition policy, there were very contradictory debates occurring in the NGO community in Cancun. Some panels were very supportive of the benefits to consumers of having a multilateral framework on competition policy. Such were the panels organized by Consumer Unity Trust Society of India, in coordination with Consumers International, and by the International Centre for Sustainable Development Law of McGill University in Canada. By contrast, a highly rated Third World publisher and research institution's briefing on competition policy was very negative about the benefits to consumers. What was disturbing about this presentation was that it was based on misinformation and fed to a large gathering of NGO representatives (about one hundred and fifty) who absorbed and accepted it as a credible analysis.

This presenter claimed that, under the proposed multilateral framework:

1. Developing countries were required to adopt competition law. She did not explain that what was proposed was only the proscription of hard core cartels and that other types of anti-competitive agreements, abuse of a dominant market position and merger control regulation, were not part of the package;
2. The multilateral framework on competition policy would lead to market access that could wipe out local firms. She did not explain that competition law applies only within the border, like intellectual property law, and only to firm conduct. Government policies on market entry at the border are a separate matter. They can only be affected by the competition regime through advocacy of the domestic competition authority, that is, the competition authority persuading other government institutions that it would be better to have a more pro-competitive regime. No attempt was made to explain that what was proposed was only one dimension of competition law, and not competition policy, which could, indeed, include market entry policies.
3. No mention was made of the fact that, if there is a domestic competition law, it offers the possibility of disciplining resident multinational corporations.
4. The core principle of national treatment, included in the proposed WTO multilateral framework on competition policy, was shown to be a threat to any pro-domestic industrial policy and condemned small firms to demise. The presenter totally ignored all the technical discussion available in the recent literature on the application of national treatment in a competition regime within a trade agreement, and that the definition of national treatment has to be subject to negotiations. It can be defined to apply solely to de jure discrimination and the implementation and enforcement of the law, including access to the courts and to the competition authority, as is the case in the Draft Chapter on Competition Policy in the FTAA. There

is consensus in the FTAA draft chapter on de jure non-discrimination. There are issues within even this interpretation that need to be explored, but the facts should have been stated truthfully. Further, it puzzles me that developing countries would want to punish local firms if they misbehave, but not punish foreign firms that misbehave in the local markets.

5. While it is proposed that countries may have exceptions and exclusions to their law, nothing in the proposed framework indicated what exceptions and exclusions would be allowed. The presenter totally missed the point that a country has the sovereign prerogative to choose what it wants to exclude or exempt from its national competition law, based on its developmental needs. Indeed, the issue for developing countries to examine is the fact that national treatment may apply to exclusions and exemptions, and this may negate the protective intent of such measures.
6. The presenter failed to mention the damaging effects of international cartels on developing countries' economies and that there is still no means by which developing countries can discipline these cartels. In my view, the real issue for developing countries in a multilateral framework on competition policy is the level of cooperation that they can extract from developed countries in dealing effectively with international cartels.

When challenged by this author, the presenter's only response was that, if developed countries were serious about eliminating international cartels, they would have supported and implemented the United Nations Multilaterally Agreed Set of Principles on Restrictive Business Practices developed in UNCTAD. This is very true. A correspondingly moot question is why did developing countries struggle so hard to negotiate and gain international acceptance of rules to deal with anticompetitive business practices by multinational corporations during the 1970s, but now refuse to consider a much lesser regime in the WTO? There are valid arguments for being concerned about a proposed WTO regime compared to the implementation of the UN Set, I am sure, but these need to be rigorously investigated and honestly argued. It is not sufficient for a Third World research institution to present only half the picture and thereby create a distorted analysis. Indeed, I almost hope that this was a deliberate and skilful attempt to subsume the more rigorous and technical arguments in preference for half-truths, in order to support the political objective.

There is also a serious contradiction between the positions being put forward by the EU and others. They propose that a multilateral framework on competition policy could be beneficial to developing countries. However, the framework that they proposed purportedly to derive those benefits would not be effective. On the one hand, they argued that international cartels are targeting developing countries for their price-fixing and bid-rigging agreements, amongst others, and quote the seminal work of Evenett et al to show that some US$81.7 billion of goods imported into developing countries in 1997 were

affected by cartel pricing. On the other hand, the modalities for cooperation in the proposed framework would hardly allow developing countries to effectively prosecute hardcore international cartels. One only has to examine the complex procedures involved in investigating cartels to know that the anticipated benefits of a multilateral framework would not materialize without deeper cooperation modalities than those offered. This is amply demonstrated in the famous video of the Lysine Cartel that was investigated by the US Department of Justice (DOJ). Moreover, the strength of the Leniency Programme in the US is based primarily on the ability of the antitrust authorities to inspire fear in the culprits. One has to question the capacity of developing countries to emulate this example. In fact, for developing countries to be able to discipline multinational corporations (MNCs) which are engaging in anti-competitive conduct that adversely affect their markets, there must be a willingness on the part of the developed countries, which are usually the home countries of the MNCs, to assist in investigations even if there are no effects in their domestic markets.

Without a doubt, there are serious technical issues that need to be ironed out and negotiated. The developed countries must show more willingness to follow through with genuine concrete measures that could effectively curb the activities of international cartels globally, and not just as they affect their domestic markets. By the same token, developing countries have much to gain from a multilateral agreement on competition policy in the WTO and, once the dust settles and the issue is de-politicized, one hopes for a higher level of debate from some influential NGO communities.