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Contents at a Glance:

Editor's Note
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1. Delayed Publication

Due to technical problems, the INVEST-SD News Bulletin went on an unscheduled holiday over the past two weeks. Weekly production will now resume with this issue.

Negotiation Watch
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2. WTO Investment Group Fails to Find Consensus; African group and West remain at odds,
By Luke Eric Peterson and Trineesh Biswas

The Chair of the WTO Working Group on Trade and Investment will report back to the WTO's General Council that the Group has failed to reach consensus on whether to launch negotiations on a multilateral agreement on investment. Following a meeting of the Working Group on Friday August 22nd, it appears that the next draft Cancun declaration to be issued in a day's time will leave open the contentious issue of investment.

WTO member-states continue to remain far apart.

Recently, eleven African nations have come out against proposed negotiations. In an August 14 submission to the WTO General Council, 11 African countries* rejected negotiations on all four of the so-called Singapore issues of investment, competition policy, transparency in government procurement and trade facilitation, citing doubts about their value and their own lack of capacity to juggle new negotiations.

Pointing to the serious economic implications that the issues held for their economies, the countries said that the benefits of negotiating multilateral frameworks on each of them were "not evident" to "many developing country Members."

They also said that limited capacity and resources would leave many countries unable to meaningfully negotiate these issues. Concluding that there is no basis for starting negotiations on the Singapore issues, the proposals call for a continuation of the status quo, i.e., further clarification of each of the issues in the concerned WTO body.

The recent submission by the 11 African nations amplifies concerns expressed at several recent gatherings of developing country trade officials, where members of the African Union, the Least-Developed Countries, and the African and Caribbean Partnership groupings have expressed misgivings about proposed WTO talks on investment.

Meanwhile, the European Union has shown signs that it is willing to move towards clarifying and softening its demands for a multilateral agreement on investment in order to build consensus for such a pact.

The EU, which has pushed hard for the launch of WTO talks on investment, has now hinted that it might accept a "plurilateral" agreement, where only some countries would commit at the outset. This is the model used for WTO rules on government procurement negotiated during the earlier Uruguay Round of talks.

According to reports in International Trade Daily, an EU official has reported that it would allow dissenting countries to "opt out" of prospective WTO rules on investment, provided that a "critical mass" of

other countries would make commitments.

The official, speaking on condition of anonymity, told International Trade Daily that this offer was mooted at a recent mini-ministerial conference of the WTO in Montreal, in an effort to placate developing countries who argue that they lack the capacity and resources to mount investment negotiations.

More recently, the EU has also addressed criticisms that it seeks to push negotiations on a multilateral agreement without clarifying what that agreement might look like. In a submission tabled in Geneva this week, the EU along with Japan, South Korea, Switzerland and Taiwan have set out proposed substantive contents of an agreement. According to recent reports by the Third World Network (a development NGO), the EU document has the support of some 25 nations, many of them major trading powers.

The EU proposal nixes the inclusion of portfolio investment and an investor-state dispute settlement mechanism - to the chagrin of the United States which has pushed for such features - but endorses the inclusion of many of the provisions which were set out in the 2001 Doha Declaration for study and clarification by the WTO's Working Group on Trade and Investment, including: transparency, non-discrimination, selected pre-establishment commitments, balance of payment safeguards, protection for the right to regulate in the public interest, and clarification as to the relationship with other bilateral and regional agreements.

The document does not, however, go into any depth as to the precise formulation favored by the EU and its supporters.

Notably, the proposal sets out a date of June 30, 2004 for the conclusion of negotiations on such an agreement, although this date is bracketed in the text - indicating that it is subject to further discussion.

With the ambassadors in the WTO Working Group unable to reach consensus, however, a decision on multilateral investment talks looks increasingly likely to be left to world trade ministers who will convene in Cancun from Sept.9-14.

Sources:

* The 11 African nations who co-authored the recent WTO submission are: Benin, Botswana, Kenya, Mauritius, Nigeria, Senegal, Sierra Leone,

Tanzania, Uganda, Zambia and Zimbabwe

"Investment Chair Says No Consensus on Investment Issue", Third World Network (TWN) Info Service on WTO Issues, August 23, 2003

"EU, Japan propose specific goals for WTO Investment Negotiations", Inside US Trade, Aug. 22, 2003

"Modalities on a WTO Agreement in Investment", EU, Japan, South Korea, Taiwan and Switzerland, undated "room document" for informal WTO meeting, Aug.20, 2003

"Africa refuses new trade talks", BBC News Online, August 15, 2003

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"EU open to allowing countries to 'opt out' of WTO talks on investment, antitrust policy", International Trade Daily, August 11, 2003

3. Liberalization of capital flows a long-standing US trade policy,
By Luke Eric Peterson

Provisions designed to liberalize capital transfers in recent US Free trade Agreements have come in for sharp criticism from some commentators - particularly as US officials signal their intention of including similar provisions in future agreements - but less attention has been paid to the fact that similar commitments have been concluded in earlier US bilateral investment treaties with a range of developing nations.

Development economist Jagdish Bhagwati and Law Professor Daniel Tarullo have criticized the provisions of the US-Chile and US-Singapore FTAs in a March op-ed piece published in the Financial Times. The pair argues that "If controls were imposed, even in the midst of a financial crisis and with the approval of the IMF, American investors would have to be compensated. A decision on damages would be made by trade arbitrators, whose macroeconomic expertise is not exactly compelling."

The two authors also warned that the rules could lead to "a US foreign policy debacle":
"Imagine that a government imposes short-term capital controls in order

to manage financial problems. Compensation will ensue, but only for American investors. The citizens of the developing country will then see a rich US corporation or individual being indemnified while everyone else in the country suffers from the crisis. One would be hard-pressed to think of a better prescription for anti-American outrage."

Although Bhagwati and Tarullo did not mention earlier treaties concluded by the United States, other US trade and investment treaties also include provisions on capital transfers which appear to be at least as exacting as those under the Singapore and Chile FTAs.

For example, Article V of the 1994 US-Argentina BIT contains virtually identical provisions on capital transfers to the latest US FTAs. Moreover, the BIT mandates no 1-year waiting period for the submission of some forms of compensation claims, as is required under the Chile and Singapore FTA.

Other US BITs which have yet to enter into force also contain similar provisions to those found in the US-Argentine BIT. The US-El Salvador BIT, concluded in 1999, but not yet ratified by both parties, mirrors the Argentine BIT in liberalizing capital transfers and permitting investors to challenge the imposition of controls under international arbitration, and without any waiting periods.

Indeed, John B. Taylor, US undersecretary for international affairs at the Treasury Department, has used these earlier agreements in an effort to deflect criticisms that recent trade pacts with Chile and Singapore have charted new territory. In remarks to the Center for Strategic and International Studies (CSIS), earlier this month, Taylor indicated that the Bush Administration will seek similar provisions in future agreements.

Outside of the US treaty program it is somewhat more common to see safeguards inserted into treaties in order to limit monetary transfers during balance of payments crises - although this is by no means the norm.

A 1993 bilateral investment treaty concluded between Australia and Indonesia provides that each party shall provide for a right of free transfers "subject to its right in exceptional balance of payment difficulties to exercise equitably and in good faith powers conferred by its laws and regulations".

Also, a recent Free Trade Agreement concluded between Singapore and Australia devotes extensive space to carving out some minimal leeway for either party to impose capital controls - in line with the IMF Articles

of Agreement - in certain emergency circumstances.

However, efforts by Singapore and Chile to obtain comparable flexibility in their recent free trade agreements with the United States ran up against a wall of opposition from US business interests, particularly the financial services industry.

When the US finally hammered out tough new rules with the Chilean government in December of last year, the US Treasury Department issued a fact sheet trumpeting that the new rules will offer U.S. investors "substantially strengthened transfer rights over those available under the International Monetary Fund Articles of the Agreement, the General Agreement on Trade in Services and the General Agreement on Tariffs & Trade."

Critics such as Professor Bhagwati worry that such provisions may prevent the types of measures taken, for example, by Malaysia during the 1997-98 currency crisis.

Sources:

"Foreign Investment U.S. Will Push Capital Control Restrictions in Future Trade Pacts", By Christopher Rugaber, International Trade Daily, August 12, 2003

"A ban on capital controls is a bad trade-off", By Jagdish Bhagwati and Daniel Tarullo, The Financial Times, March 17 2003

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US-El Salvador BIT:
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US-Argentina BIT:
http://www.sice.oas.org/investment/BITSbycountry/usa_e.asp#Uni

Singapore-Australia FTA: http://www.dfat.gov.au/trade/negotiations/safta/

Australia-Indonesia BIT:
http://www.austlii.edu.au/au/other/dfat/treaties/1993/19.html

4. Business groups debate impact of investment pact on existing WTO rules on services,
By Trineesh Biswas

Proponents of a WTO agreement on investment might well find themselves facing opposition - or at least a push for a more limited agreement - from a rather unexpected quarter: some of the staunchest supporters of the existing WTO rules on trade (and investment) in services.

Inside US Trade (IUST), a Washington-based newsletter reports that US service providers have expressed fears that WTO investment negotiations could lead to a weakening of existing "commercial presence" rights spelled out in the WTO's General Agreement on Trade in Services (GATS).

On this view, a weak set of WTO investment rules - reaching across all sectors - would serve to rein in the existing investor rights written into the GATS, particularly in areas where new investment rules are not likely to be as far-reaching, such as the commitment to provide national treatment or market access.

However, concerns about the impact of an investment agreement on the GATS are not universally shared amongst business supporters of the GATS. Pascal Kerneis, Managing Director of the European Services Forum (ESF), a Brussels-based organisation representing EU services industries, dismisses these concerns as "a rumour in Washington that doesn't make any sense".

As matters now stand under the GATS, Mode 3 of the agreement - covering so-called commercial presence - establishes some rules protecting those foreign direct investments which are required for the provision of a given service across borders; these rules oblige host countries to extend 'national treatment' to foreign investors seeking to establish a commercial operation in order to provide services in sectors that the host country has decided to open to foreign competition.

Concerns expressed by the US services industry that these GATS rules might be watered down by a new multilateral agreement on investment covering both goods and services appear to be echoed in the comments of some governments involved in the WTO investment debate.

An April 2003 submission by Japan to the WTO Working Group on Trade and Investment observed that, "Since the GATS already covers FDI in effect, there is a potential tension between the GATS and the future investment rules... if the services sector is to be included in the future investment rules, one set of rules will apply across the board, to both services and non-services sectors... this approach may necessitate

revision of the GATS to avoid conflict or inconsistencies between the two disciplines..."

The reach of any investment negotiations will determine the extent to which the two agreements will need to be 'reconciled.' In other words, investment negotiations which covered all sectors (services and goods) would need to be reconciled to existing WTO rules on services.

Meanwhile, EU officials have insisted that any overlap can be avoided by restricting WTO investment talks to those sectors which are not currently covered by the GATS. The EU has called for investment rules governing long-term foreign direct investment in sectors such agriculture, fisheries, mineral extraction, and manufacturing.

However, Chilean WTO Ambassador Alejandro Jara, the Chairman of the Special Session of the WTO Council for Trade in Services (CTS), told IUST that EU expectations for such a narrowly tailored agreement are unrealistic, since it is often difficult to differentiate between manufacturing and services-related activities.

European businesses also appear skeptical of a narrowly-cast WTO investment agreement, which would leave the GATS rules untouched. In an interview with Invest-SD News Bulletin, Mr. Kerneis of the European Services Forum indicated that his organization would like to see WTO investment talks used in an effort to deepen commitments already made in the services sector under the GATS.

For example, members of his group are hopeful that a WTO investment agreement would provide explicit protections against expropriation which the GATS lacks. But unlike his counterparts in the American business community, Mr. Kerneis is not concerned that WTO investment talks could weaken - rather than strengthen - existing WTO rules governing services industries: "It has never been the intention of the EC (European Commission) or the ESF to have anything in GATS Mode 3 diminished. We will try to get more ambitious commitments."

By contrast, J. Robert Vastine, president of the US Coalition of Services Industries, told the 'International Trade Daily,' a Washington-based newsletter, that US service providers remain unconvinced that a WTO investment agreement will provide them with any real improvements over the protections they currently enjoy under the GATS and an array of US bilateral investment treaties. Vastine has expressed concern that WTO rules on investment might come to lower the bar across the board, by introducing low levels of commitments governing services and goods which might prejudice protections contained in existing BITs or the GATS

Mr. Kerneis of the ESF, however, dismisses such concerns. Even in the unlikely event that WTO protections are weakened as they are harmonized across the services and goods sectors, he expressed confidence that bilateral rules would remain inviolable:

"We (continue to) have the bilaterals; and the multilateral disciplines will be better than nothing for countries with no bilaterals."

Despite the lack of clarity as to the relationship between any new WTO rules on investment and the existing rules on services, Inside US Trade reports that the US and the EU have postponed discussions on the relationship between services commitments and the investment pact.

Despite its initial demand for an expansive investment agreement including even portfolio investments, the US has not yet made a final decision on whether it wants services covered in investment negotiations. Meanwhile, Japan, a demandeur on the investment issue from the start, is reportedly leaning towards excluding services from the investment negotiations.

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Daniel Pruzin, "US, EU Service Industry Groups Diverge on WTO Investment Pact," International Trade Daily, June 18, 2003

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World Trade Organisation, "The Relationship between the Future Multilateral Investment Rules and the GATS," Communication from Japan, Working Group on the Relationship between Trade and Investment, April 8, 2003, WT/WGTI/W/156

INVEST-SD Interviews

5. US Senate approve FTAs with Chile and Singapore,

By Luke Eric Peterson

The US Senate has voted to approve free trade agreements with Chile and Singapore, thus paving the way for the agreements to enter into force on January 1, 2004. With a vote of 66-31 in favor of the Chile pact, and one of 66-32 for the Singapore deal, the Senate displayed no inclination to penalize Chile for its opposition to a US-led war on Iraq. For several months, the US-Chile agreement appeared to be in jeopardy as politicians and administration officials hinted that Chile might be punished for its foreign policy stance.

The two agreements were pushed through the Senate in time for the August recess thanks to a much-reduced window for debate.

Under the 2002 trade promotion legislation which granted President Bush authority to negotiate free trade deals on a fast-track basis, the Senate agreed to limit debate on trade agreements to twenty hours.

However, in an effort to shepard the agreement through the Senate in time for the August vacation, this quota was reduced sharply.

Both agreements contain state-of-the-art provisions on investment liberalization and protection, and represent the first investment provisions to be written into free trade agreements since the Bush Administration obtained fast-track trade promotion authority.

According to the bargain struck between the Administration and Congress, any investment protections contained in such pacts must not accord greater rights to foreign investors than to US domestic investors.

The investment provisions also feature a number of innovations on the procedural side (For more background see: "US-Singapore FTA Text Released; Investment Provisions Reveal Many Changes", By Luke Eric Peterson, INVEST-SD News Bulletin, March 14, 2003). The pacts have also attracted controversy, particularly for imposing high standards of protection against government restrictions on capital transfers. (see previous story)

Sources:

US-Chile FTA: http://www.ustr.gov/new/fta/Chile/final/index.htm

US-Singapore FTA: http://www.ustr.gov/new/fta/Singapore/final.htm
"Senate approves Singapore, Chile FTAs, after passing energy bill",

Inside U.S. Trade, August 1, 2003

"Senate OKs Chile, Singapore trade pacts; Agreements seen as key part of administration's efforts to expand markets", By Jeffrey Sparshott, The Washington Times, August 1, 2003

"Statement of U.S. Trade Representative Robert B. Zoellick following Senate Approval of Chile and Singapore Free Trade Agreements", Press Release, Office of the US Trade Representative, July 31, 2003

"US-Singapore FTA Text Released; Investment Provisions Reveal Many Changes", By Luke Eric Peterson, INVEST-SD News Bulletin, March 14, 2003

Arbitration Watch

6.Canadian mining firm pursuing NAFTA arbitration against US Government, By Trineesh Biswas

A Canadian mining company is threatening to sue the state of California for "not less than $50 million" under Chapter 11 of the North American Free Trade Agreement. On July 21, Glamis Gold Ltd. Signaled its intent to pursue arbitration, alleging that a recently-adopted environmental and cultural regulation requiring the backfilling of metal mines in certain areas has rendered one of its proposed projects unprofitable.

The case could potentially set a precedent for the extent to which NAFTA dispute settlement will permit governments to restrict investment for cultural reasons.

The company's Nevada-based subsidiary, Glamis Imperial Corp., owns claims for several mine and mill sites on federal land in Imperial Valley, California. The dispute is over its Imperial Project, which foresaw the development of an open-pit gold mine with an estimated annual production of 130,000 ounces of gold.

Inside US Trade, a Washington, D.C.-based publication, reports that the Glamis mine site is within the boundaries of a desert protection area and is also on the ancestral lands of the Quechan nation, which has a reservation in the vicinity. The site is said to overlap part of the Quechan "Trail of Dreams," an area of spiritual significance.

The new legislation (SB 22), which came into force in April 2003,

prevents metallic mining operations from starting operations at sites "located on, or within one mile of, any Native American sacred site, as defined, and in an area of special concern, as defined" unless the plan provides for all excavation to be backfilled and graded to return the mined lands to their original contours.

Glamis contends that these requirements eliminate any profits that could have been had from the operation. "We made this investment in the beginning of 1987, spent $15 million on exploration, based on existing laws that would have allowed the mine to be built economically," said Charles Jeannes, Senior Vice President and General Counsel at Glamis, in an interview with INVEST-SD. "Subsequent legislation was introduced," he continued "that would make it unprofitable."

Glamis estimates the value of the site to be $60 million. Their notice of intent to seek arbitration accuses the United States of allowing the state of California to violate "sections 1105 and 1110 of NAFTA by expropriating Glamis Imperial's mining claims and mill sites... without compensating Glamis Imperial for the fair market value of its property interest."

Mr. Jeannes told Invest-SD that Glamis has not yet decided whether or not to pursue the NAFTA claim, and was also considering direct legal action under the state or federal court systems. He did not rule out the possibility of an out-of-court settlement.

Todd Weiler, a law professor at the University of Windsor specializing on Chapter 11 cases, told Inside US Trade that in light of Glamis' long-standing failure to get all the permits necessary to actually commence operations - notably because of questions about the project's impact on Native American lands - the legitimacy of the firm's expectation to operate the mine in the manner it wanted was questionable.

Mr. Jeannes disagreed with this characterization of Glamis' expected profits, saying that "the only denial we received was during the last days of the Clinton administration, and that was rescinded by the Department of the Interior of the new administration." Mr. Jeannes said that "we believe that but for the state legislation" -- California's initial "emergency regulation" requiring such mines to be backfilled and restored, made permanent by SB 22 - "we'd be in a position to receive the permits."

Environmentalists contend that the threat to seek arbitration is yet more evidence that Chapter 11 is dissuading local governments from approving certain environmental or health protections. They have also suggested that Glamis stands a better chance of winning compensation

under NAFTA than it would under domestic legal procedures, since US courts have often found that companies do not deserve to be compensated for reduced profits resulting from regulations that could have been reasonably anticipated.

Mr. Jeannes rejects such efforts to contrast NAFTA arbitration with domestic processes. He emphasizes that "the legal arguments used would be similar in either instance; the proofs would be the same, and the expectations were the same." He did allow that NAFTA was a more attractive venue than the domestic legal system for one reason: "it is an arbitration rather than a litigation - a much faster process."

Sources:

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Inside US Trade, August 8, 2003

Steve Lawrence, "Bill to require restoration of mine near Indian sacred site signed by Davis," Associated Press, April 7, 2003

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