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Negotiations Watch:

1. Countries Still Split Over WTO Investment Talks; Rumblings of Discontent in UK Gov't,
By Trineesh Biswas and Luke Eric Peterson

Discussions surrounding a multilateral investment framework in the World Trade Organisation are becoming more heated in the run-up to the body's September Ministerial Conference in Cancun. The EU, Canada and Japan are pushing the hardest for negotiations on the Singapore issues to commence after the conference, in the face of vociferous opposition from several developing country members, including India and Egypt.

On July 8, twelve developing countries* made a submission to the WTO's General Council criticizing another recent communication from the European Commission

(Europe's executive arm) on investment, competition, transparency in government procurement and trade facilitation.

The dozen developing countries argue, contrary to the European position, that explicit consensus on modalities is a pre-condition for the start of negotiations. They emphasise that each member has the right to prevent negotiations from proceeding at the Cancun Ministerial. Moreover, they insist that the four so-called Singapore issues - so named because they were first tabled at a WTO Conference in Singapore - should be dealt with on an individual basis.

The bloc of developing countries alleges that the EC is obscuring the debate over "modalities." According to the bloc, WTO practice demands that "modalities" include specifics about "the nature and direction of obligations" that could result from any agreement. The EC paper, however, speaks of a "common set" of broad and flexible "options for modalities" for the four issues. According to the grouping of developing countries, the EU is attempting to replace the required decision on modalities with one on "elements of modalities" (i.e. seeking consensus on ill-defined procedural aspects of the Singapore issues rather than on explicit definitions and commitments)

The group of developing countries is concerned that if they agree to a series of loose modalities, they could find themselves forced to negotiate a much more ambitious agreement down the road. However, not all developing countries appear adverse to the WTO as a forum for investment talks (see next story below).

Although a July 3 resolution adopted by the European Parliament has declared its support for the EU preference for negotiations on the Singapore issues - citing "the economic interest for EU operators, as well as the potential development benefits" of multilateral agreements in those areas - tiny cracks may be appearing in the European façade at the national level.

Recent press reports in the UK indicate that officials within the UK Government are expressing some misgivings about the EU's enthusiasm for negotiations on the Singapore issues. This comes on the heels of a critical report of the UK Parliament's Committee on International Development. In its report, the Committee warns:

"We are not persuaded that an agreement on investment would be a driver for development or that the WTO is the right place to conclude an investment agreement, especially as part of a development round."

Campaigners in the UK have seized upon the committee's report - and upon suggestions reported in the Guardian newspaper that UK officials secretly admit that "Britain no longer wants talks on investment and competition but is unable to break ranks with Brussels".

One UK-based development agency, ActionAid has recently called upon UK and EU officials to demonstrate how an investment agreement would benefit the poor.

"This agreement could be devastating for poor people in developing countries," says ActionAid's Pushendra Kumar Singh in a press release, "It is time for the UK government and EU to prove how an investment agreement at the WTO will help combat poverty in developing countries. If it cannot, it should stop pressurising us to support an agreement that we do not want."

Sources:

"Global trade talks could end in disaster, MPs warn", The Guardian, By Charlotte Denny, July 15, 2003

"MPs attack WTO investment talks", The Guardian, By Matthew Tempest and agencies, July 14, 2003

"Comments on the EC Communication (Wt/GC/W/491) on the Modalities for the Singapore Issues," Communication from Bangladesh, Cuba, Egypt, India, Indonesia, Kenya, Malaysia, Nigeria, Pakistan, Venezuela, Zambia and Zimbabwe, WT/GC/W/501, July 8, 2003

"WTO challenge India and China team up", The Guardian, By Charlotte Denny, July 1, 2003

"Poor Countries Must Not be Bulldozed into Accepting New WTO Investment Agreement", ActionAid press release, July 7, 2003, available at: <http://www.actionaid.org/newsandmedia/bulldozed.shtml>

Inside US Trade June 27, 2003 and July 11, 2003

"Singapore Issues - The Question of Modalities," Communication from the European Communities, WT/GC/W/491, February 27, 2003

European Parliament, "European Parliament resolution on preparations for the 5th World Trade Organisation Ministerial Conference (Cancun, Mexico, 10-14 September 2003)," OE 333.844, adopted July 3, 2003, by 297 votes to 93; available online at http://trade-info.cec.eu.int/doclib/docs/2003/july/tradoc_113234.pdf

*Bangladesh, Cuba, Egypt, India, Indonesia, Kenya, Malaysia, Nigeria, Pakistan, Venezuela, Zambia and Zimbabwe

2. FTAA Investment Talks to be Scaled Down?,
By Luke Eric Peterson

Progress on a Free-Trade Area of the Americas appears to be slowing, as signs are emerging that key players in the region are re-orienting their political and economic focus away from the United State and towards the European and Multilateral stages.

This week, a US trade official complained to Reuters that progress in the FTAA talks has been slowed by the reluctance of some governments, including Brazil and Argentina to table overdue market access offers in key areas such as services, investment or government procurement.

At a mini-ministerial meeting held last month, officials representing the Mercosur trading bloc (Brazil, Argentina, Paraguay and Uruguay) advocated a "thinning" of the proposed FTAA, with more ambitious commitments in sensitive areas (including investment) to be worked out at the multilateral level, rather than in regional forums like the proposed FTAA.

According to the Washington-based Inside US Trade Newsletter, a "thinning" might see FTAA commitments on investment made at the so-called post-establishment phase only (i.e. rules apply only once an investment has been cleared for approval, and then established, in a given territory).

The United States and Canada, are understood to be key demandeurs for more far-reaching investment commitments, which would follow the pattern of recent US and Canadian bilateral rules, by opening up rights for investor to enter markets on the most favorable terms accorded to nationals of the host government (or the terms enjoyed by the host government's most favored trading partners).

While the FTAA Negotiating Group on Investment - which also met last month - has continued to discuss market access offers in the area of investment, its work has been overshadowed by the continued reluctance of some countries to table offers in this area.

At the same time that FTAA talks are sailing into choppy waters, a concerted push appears to be under way to accelerate talks on an EU-Mercosur pact which would link up the E.U. with the 4 members of Mercosur. As part of a broader political and economic association agreement, which has been under discussion, since 1999, the two sides would enter into reciprocal commitments on trade, services and investment. Another ministerial meeting will be scheduled some time in the second half of 2003, in an effort to give a final push to talks.

It is not clear if prospective EU-Mercosur investment rules would reach past the post-establishment stage, in order to carve out new market access openings. The standard practice in bilateral investment treaties concluded by the EU is to limit investor protection to the post-establishment stage. And demands for anything more ambitious have been rebuffed by Mercosur nations in the parallel FTAA talks.

Sources:

"US - Americas trade pact still lacks 'common vision", Reuters, July 17, 2003

"Latin America woos Europe as counterbalance to US", The Financial Times, By Richard Lapper, July 17, 2003

EU website devoted to EU-Mercosur negotiations:

http://europa.eu.int/comm/trade/issues/bilateral/regions/mercosur/index_en.htm

FTAA Negotiating Group on Investment: http://www.ftaa-alca.org/ngroups/nginve_e.asp

FTAA Countries Explore Lesser Commitments as Option to Scaling Back FTAA, Inside US Trade: June 20, 2003

3. US FTAs with Chile and Singapore Reviewed by Congress; USTR Secrecy Condemned, By Luke Eric Peterson

Despite earlier veiled threats from US government officials that a Free Trade Agreement with Chile could suffer as a result of Chile's failure to back the US-led war on Iraq, the agreement has joined its Singaporean counterpart in wending its way through the congressional approval process in Washington.

This week the US-Chile agreement cleared another hurdle, along with the US-Singapore Agreement, as implementing legislation for both pacts was approved by the relevant committees of the US Senate and House of Representatives.

It is unclear whether the US-Chile and the US-Singapore FTA - which both contain state-of-the-art investment rules - will pass both the House and Senate before the August recess, however, the agreements are on track to be implemented this year, and will enter into force on Jan.1, 2004.

While retaliation against Chile for its position on Iraq has not yet hampered that agreement's progress through Congress, some members have vented broader criticisms about the conduct of the US Trade Representative during the Chile-Singapore process.

According to the Washington-based Inside US Trade newsletter, some Democratic Congressmen have expressed dissatisfaction with the Administration's criteria used to select trading partners - noting that neither the Chile nor the Singapore pact can be expected to have much impact for the US economy. Concerns have also been raised about the secrecy which has surrounded negotiations of these trade and investment agreements. (See also "Industry Decries Cumbersome Review of FTAs; Enviro Groups Offer Initial Comments Based on First Public Summary of Text", INVEST-SD News Bulletin, March 7, 2003)

In recent months, the Bush Administration has indicated that it will use the pretext of national security in its ongoing effort to clamp down on the flow of information related to its international trade negotiations.

Late last year, environmental groups brought a successful lawsuit under the Freedom of Information Act (FOIA), forcing the US Trade Representative to disclose various negotiating texts and proposals which had been tabled in negotiations with Chile. (See "US Government Declines to Appeal Court Order Mandating Greater Transparency", INVEST-SD News Bulletin, Jan.31, 2003)

The Administration declined to appeal the decision but has responded by adopting a new policy whereby trade negotiation documents will be classified for reasons of "national security", which will continue to exempt them from the reach of freedom of information laws.

At an April news conference, Chris Padilla, an Assistant US Trade Representative conceded that the documents may not necessarily pertain to national security, but that the DC District Court ruling left the Administration no other avenue for keeping the documents out of public circulation. According to Inside U.S. Trade, the move is "part of an overall policy tightening the flow of information between the executive branch and the private sector".

Under the Administration's preferred policy, only cleared business advisors will be privy to texts and proposals related to ongoing trade negotiations, while the press and other groups will not enjoy access to such information. Padilla told Inside U.S. Trade, "The text is classified, and we're just not able to show it to anybody who walks in and has an interest."

Recently, US Trade Representative Robert Zoellick has defended this practice on the grounds that public disclosure of such negotiating documents would serve to reveal strategies and "bottom lines" to the nations with whom the US is negotiating.

Sources:

"House Panel Okays US Trade Deals With Chile, Singapore", Dow Jones, July 17, 2003

"US-Chile Free Trade Accord Passes Key House Committee", the Associated Press, July 16, 2003

"Trade Committees Approve Chile FTA Bill, Differ on Singapore Deal", Inside US Trade, July 11, 2003

"Court Decision Leads to New USTR Strategy of Classifying Documents", Inside US Trade, April 25, 2003

4. Oxfam Fears Impact of WTO Investment Rules on Extractive Investments

Oxfam America, a development charity, has released a report calling upon WTO member-states to abandon efforts to launch negotiations on a multilateral agreement on investment, and to consider the negative impact of current investments in the extractive industries throughout the developing world.

In their report, "Investing in Destruction", the organization expresses fears that a WTO agreement would further restrict the capacity of host governments to regulate incoming investors in the public interest, and for "pro-poor" ends. Particular concerns are raised about proposed rules mandating national treatment, as well as prohibitions on certain performance requirements. In addition, Oxfam expresses fears that negotiations might broaden to encompass other more controversial rules, such as those mandating compensation in the event of an unclear category of "indirect" forms of expropriation.

The charity cautions that the proportion of people living on less than \$1 a day in those nations which export minerals, has actually increased over the past two decades from 61% in 1981, to 82% in 1999. While conceding that extractive industries might be harnessed to efforts to promote economic growth and poverty reduction, Oxfam argues that investment rules - as currently couched - hold out little promise of attaining these ends.

A full PDF version of the report is available on-line at:
http://www.oxfamamerica.org/pdfs/bp1_destruction.pdf

Arbitration Watch:

5. Canada's "National" Newspaper Examines Recent Loewen Award

Following the resolution of a long-standing NAFTA claim brought by the Loewen Group against the United States, the Globe and Mail newspaper has examined the implications of the case for the wider debate over the controversial NAFTA Chapter 11. (On the Loewen ruling see: "NAFTA Tribunal Dismisses Loewen Claim against United States", INVEST-SD News Bulletin, June 27, 2003)

While lauding the Loewen tribunal for declining to open a "Pandora's box" by allowing the claimant to pursue an international claim under NAFTA before exhausting all domestic legal avenues, the newspaper's editorial board does warn that this "sensible conclusion does nothing to ease concerns that the investor arbitration rights conferred by Chapter 11 have turned out to be much broader than politicians may have intended."

In particular, the paper points to instances where foreign investors have used Chapter 11 "effectively to challenge Canadian and Mexican environmental and health regulations that impinged on the complainants' business plans."

While noting that the NAFTA treaty was an imperfect compromise between three negotiating parties (Canada, US and Mexico), the paper warns that "There is room to improve Chapter 11, to ensure it does not usurp the proper role of politicians and the courts while still protecting the basic rights of foreign investors."

Sources:

"How NAFTA Fared in the Loewen Ruling", the Globe and Mail, July 12, 2003, available at:
www.globeandmail.com/servlet/ArticleNews/TPStory/LAC/20030712/ENAF12

INVEST-SD Bulletin is edited in Boston, Massachusetts by Luke Eric Peterson for IISD. Subscribers may submit news articles, notices of events, press releases, analyses, questions and requests for information to lpeterson@iisd.ca

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