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Contents at a Glance:

Editor's Note
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1. Publication Schedule

Due to the participation of staff members in the European Union's Civil Society dialogue in Brussels last week, publication of last week's INVEST-SD News Bulletin was delayed. The next scheduled edition of the Bulletin is slated for week's end.

Negotiations Watch:
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2. US Pressures Korea to Drop Cultural Policy in Return for Bilateral Investment Treaty,

By Luke Eric Peterson

For months now, the South Korean press has been rife with debate over US demands that the nation abandon its long-standing protection for the domestic film industry, in return for a bilateral investment treaty with the US.

At issue is a rule which requires that local theaters show domestic films for a minimum of 146 days (40%) of the year. Advocates of the policy suggest that in little over a decade it has helped the Korean film industry expand from a 15% market share at home to more than 40%, and enabled the SK industry to grow into a regional powerhouse.

However, the US, at the behest of the Motion Pictures Association, has called for abolition of the quota system, so as to encourage greater market access for American films; more recently, US negotiators have signaled a willingness to settle for a significant reduction in the quota, rather than its complete abolition.

In January of this year, Korea inked a bilateral investment treaty with Japan, but this treaty did not prejudice Korea's film quota system; US demands for a more far-reaching treaty have led to fierce disagreement within the Korean Government.

Culture Minister Lee Chang-dong, a renowned film director himself, has pledged to defend the quota system, while his counterparts at the Finance Ministry have argued that concessions by the film industry would be more than off-set by some $3.2 billion in new investment which a bilateral investment treaty would bring.

Other press reports have pegged the potential benefit of a US-Korea BIT at closer to $4 billion dollars, based upon a recent report of the Korea Institute for International Economy. Inquiries to the Korean Institute for further information about this report were made last month, but had not been answered as of press time.

Suggestions that a US-Korea BIT would stimulate billions in new investment would seem to contradict the findings of two recent reports prepared by the World Bank, including its Global Economic Prospects and the Developing Countries 2003 report.

That report cites a study of 20 years of data undertaken by Mary Hallward- Driemeier, which found that "creating new protections was not strongly associated with increased investment flows".

Despite growing doubts about the efficacy of these investment treaties as guarantors of increased investment flows, lately the treaties have been pushed by the US government as a prerequisite to the negotiation of broader free-trade pacts between the US and a given nation.

At the present time, the US is currently engaged in negotiating BITs with a number of nations, including several in the Middle East, in advance of possible free trade talks.

Sources:

"Film fight", By B.J. Lee, South China Morning Post, June 20, 2003

"For Some, Screen Quota is About More than Money", Korea Times, June 20, 2003

"Screen Quota Should be Abolished: DPM", Korea Times, June 16, 2003

"Ministries Spar on Screen Quota", By Sim Sung-tae, The Korea Herald, June 13, 2003

"Screen Quota System Hinders Foreign Investment to Korea", Korea Times, May 24, 2003

"US Chamber of Commerce Calls for Korea's Steady Deregulation", Asia Pulse, March 26, 2003

World Bank, Global Economic Prospects and the Developing Countries 2003, available at: http://www.worldbank.org/prospects/gep2003/

3. South Africa's Black Economic Empowerment Plans an Obstacle to a US FTA?,

By Luke Eric Peterson

US business groups are questioning whether South African proposals for Black Economic Empowerment will pose obstacles to greater US investment into the country - and to a potential free trade agreement between the two nations.

As reported in INVEST-SD News Bulletin, earlier legislation covering the mining sector caused widespread alarm in the industry. Targets for divestment of equity stakes were set at 51% in a draft proposal, but following industry outcry, these requirements were watered down considerably. The final targets set for the mining sector were for firms to have 15% black ownership in 5 years and 26% in 10 years.

Following its plans for the mining sector, the South African government is currently working to implement a broader plan for economic empowerment of excluded groups across the entire economy.

It is these plans which have alarmed officials with the US-South Africa Business Council, according to reports in Inside US Trade (a Washington-based trade newsletter).

Although the government may not impose industry-specific charters - and binding divestment targets - on all sectors of the economy, the government is proposing to create "scorecards" which would track the commitment to diversity of firms which seek to bid for government contracts, apply for licenses and concessions, or to bid for stakes in privatizations.

Firms dealing with government in a variety of capacities would be compared and contrasted depending upon their track record on black economic empowerment. Points would be awarded on a "scorecard" for progress in areas such as: the appointment of black executives to company boards of directors; establishing supplier relationships with local black firms; and to promote employment equity within the firm.

These requirements have been criticized by officials with the US-South African business Council, insofar as they seem to run counter to the investment rules in recent US free trade agreements with Chile and Singapore (which may offer a template for any US-South Africa FTA)

In investment law parlance, it is arguable that some of these scorecard conditions mooted by the South African Government might be construed by investors to be illegal "performance requirements".

For example, under the US-Chile FTA, it is forbidden for a host government to require foreign investors "to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory."

Although trade and investment treaties concluded by the US tend to accord greater latitude to host governments to impose certain performance requirements, on firms bidding for government contracts, it is less clear that such requirements could be imposed as a condition for receiving a license to operate in a given industry.

Much might depend, of course, upon the flexibility of the various scorecard items - for example to source materials from local black suppliers - when assessing whether the South African Government's proposed policy would run afoul of standard investment treaty rules on performance requirements.

In recent comments, SA Government officials have stressed that the overall score of firms - rather than their compliance with specific elements of any Black Economic Empowerment scorecard - would be an overriding priority.

Nevertheless, officials with the US-South Africa Business Council have expressed fears that the imposition of various BEE criteria could "terrify" US businesses considering investing in South Africa, according to a report in Inside US Trade

In addition to plans for an economy-wide program of black economic empowerment, the government is also proceeding with more exacting sector-specific charters, modeled on those applied to the mining sector.

A charter which would govern the financial services sector is expected to be released later this month. The London-based Financial Times (FT) has reported that pressure from white-owned banks and financial institutions has led to a watering down of initial proposals for the industry, with likely targets of 10% and 20% being set for divestment by 2008 and 2014 respectively.

However, more recent reports coming out of South Africa - citing sources familiar with the ongoing negotiations - suggest that the divestment targets could be more exacting than reported by the FT.

When concluded, the financial services charter will also set benchmarks for a variety of practices, including efforts to diversify ownership, management and lending practices. In particular, it is expected that funds would be earmarked by financial institutions for targeted "social investments" including to infrastructure, low-income housing, agriculture, development projects and small and medium-sized enterprises.

4. Financial Times Op-Ed Opposes Launch of WTO Investment Agreement

An opinion column written by Kavaljit Singh, of the India-based Public Interest Research Centre published in the Financial Times sets out several arguments against the launch of talks on investment at the World Trade Organization. The column is available online at:
http://www.wtowatch.org/news/index.cfm?ID=4555

A broader research paper upon which the column is based, is also available online at:

http://www.tradeobservatory.org/library/uploadedfiles/Multilateral_Investment_Agreement_in_the_WTO_I.pdf

5. Key Business Groups Hail NAFTA's Chapter 11 in Op-Ed

The Heads of key business groups in Canada, Mexico and the United States have hailed the utility of NAFTA's investment rules in an op-ed column published in the Canadian daily newspaper, the Financial Post in late May.

The column is available online at:
http://www.wtowatch.org/news/index.cfm?ID=4414

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