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Trade and Investment Rules for Energy

World Energy Council 2009

Promoting the sustainable supply and use of energy for the greatest benefit of all

Trade and Investment Rules for Energy

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Foreword

Rules that govern energy trade is an issue that has generated increasing concern everywhere, from the standpoint of both the security of supply for consumers and security of demand for suppliers. This concern reflects the importance of rules that comprehensively address the needs from supply and demand point of view and integrate the international fabric of energy trade. The GATT and the WTO Agreement define trans-border movement of energy but leave many aspects unclear, particularly as efforts accelerate to control carbon emissions.

This timely report by a WEC Task Force of experts with legal standing in the energy business identifies the most pressing issues relating to energy trade and suggests actions and measures which, if implemented, would provide clarity and answer many questions. More importantly, these measures would strengthen the WTO and coming rounds of negotiations.

I want to thank and commend the Task Force for its meticulous and profitable work, and especially its Chair Timothy Richards and Lawrence Herman, its Director. Their work will benefit everyone.

C.P. Jain, Chair
WEC Studies Committee

Introduction

The World Energy Council appointed a Task Force in early 2008 to examine Trade and Investment Rules for Energy, following approval of its Terms of Reference by the WEC Studies Committee the previous November. The mandate of the Task Force was to review developments in the WTO, the Doha Round and elsewhere and, where desirable, to make recommendations for trade rules governing energy goods, services and investments.

The Task Force held several meetings during 2008, in person and by telephone, including a meeting during the WEC Executive Assembly in Mexico City, on 4-5 November. This was followed by a Task Force meeting in Geneva on 11 February 2009, to which a number of outside experts were invited to provide their insights and assistance. The present report is based on these deliberations.

The Task Force decided at the outset to focus attention on five critical issues facing the energy industry. These are: (1) Border measures and WTO/GATT rules; (2) Investment rules and transborder energy; (3) Trade in energy services; (4) Trade in environmentally-friendly goods and services; and (5) Cross-border movement of energy sector personnel.

The work has proceeded while the global financial crisis deepened. Taking stock of the global downturn and the challenges all countries were facing in restoring confidence in the financial markets, it was recognized that a robust and vibrant energy sector is one of the necessary elements for emerging from this crisis. With this in mind, the Task Force proceeded with its examination of the five priority topics it had identified earlier. The following Executive Summary distils the conclusions reached in this examination.

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Executive Summary

As evidenced by the extraordinary March 2009 meeting of the G-20 in London, the world is facing an economic crisis of historic proportions, the solutions to which are both complex and long term. The consensus reached in London is that governments must not resort to protectionism nor retreat from efforts to maintain open markets in goods and services, and that the availability of capital is critical as part of the economic stimulus measures being implemented by governments.

Energy is an essential element in these efforts. Maintaining and enhancing the flow of energy in international markets is therefore critical. As the WEC Task Force states in this first report, barriers and impediments to energy goods, services and personnel, as well as to capital flows for energy investments, will inhibit rather than help global revitalization efforts currently underway.

Taking these factors into account, the Task Force has developed a series of recommendations on: (1) maintaining open markets for energy trade; (2) promoting energy-related investments; (3) aiding the movement and delivery of energy services; (4) promoting trade and investment in environmentally friendly energy goods and services; and (5) facilitating cross-border movement of energy services personnel. The central conclusion is that governments must maintain open energy markets, seek ways to expand international cooperation, and apply measures affecting energy trade, investments, and movement of persons that are fully consistent with the rules set out in the General Agreement on Tariffs and Trade (GATT) and other parts of the World Trade Organization Agreement.

As part of its analysis, the Task Force has carefully considered international efforts to deal with climate change and to reduce greenhouse gas emissions, with particular attention to the impending discussions of the Conference of Parties of the U.N. Framework Convention on Climate Change (UNFCCC) to be held in Copenhagen later in 2009. Without detracting from the importance of such efforts, the Task Force believes that environmental policy should not be applied contrary to rules established in the GATT and the WTO Agreement to the detriment of the energy sector.

Having analyzed these five priority areas, the Task Force presents its analyses and findings for each of the five subjects in the body of this report, together with the recommendations resulting from this review. These recommendations are set out below.

Maintaining open Markets – Border Measures and Energy Trade

Trade in energy, both primary forms and energy-related goods and services, is critical to global economic development and international energy security.

Trade-inhibiting border taxes and other border restrictions affecting energy would be counterproductive to economic development, and to efforts to stabilize the global financial system and restart and stimulate economic growth, all of which are matters of universal concern.

Governments should therefore adhere to the principle that any border measures affecting energy

trade must comply with the open market objectives and legal obligations in the GATT and the WTO Agreement. To this end, all like forms of energy and energy products, whether imported or domestic, must be accorded equivalent treatment and equal competitive opportunities in the importing country in accordance with the requirements of the GATT and the WTO Agreement.

In pursuing greenhouse gas (GHG) reduction efforts, governments should not circumvent otherwise applicable GATT and WTO Agreement obligations respecting energy trade through improper or unwarranted recourse to the exceptions in GATT Article XX. Recourse to these exceptions should only be invoked where demonstrably justified and should not be discriminatory or disguised trade restrictions.

Governments should therefore fully respect all GATT and WTO Agreement rules and disciplines in pursuing measures to reduce GHG emissions, including efforts to implement the UNFCCC and the Kyoto Protocol in the post-2012 period. Governments should also agree that environmental concerns, including the implementation of GHG reduction measures, should be addressed through means other than the use of trade measures.

Governments should take steps to apply the foregoing recommendations, as appropriate, in future WTO negotiations and at the meeting of the UNFCCC Conference of Parties (COP) in Copenhagen in December 2009, and in future COP meetings.

Promoting Energy-related Investments

It is recognized that energy related investments entail long-term commitments of capital, with extensive up-front planning, including preparations for and participation in environmental assessments, infrastructure development, and a range of other matters preliminary to the actual energy investment.

Governments should commit to ensuring full protection for energy investors and investments in accordance with broadly recognized international standards for “direct” energy investments as well as “indirect” investments that, while not an integral part of the capital project, may be materially related to the core investment activity.

The pre-investment phase is an important first step in energy development. Recognizing that circumstances differ from project to project, governments should consider developing benchmarks to assist in identifying pre-investment activity that is a legitimate part of an energy investment and entitled to protection under accepted international standards.

Given the long-term nature of energy investments, governments should commit to fair and equitable treatment in accordance with international standards over the entire investment period, including, where appropriate, in the pre-investment phase. To this end, governments should ensure that all measures and polices governing energy are based on accepted international norms, including full disclosure, transparency, and non-arbitrary treatment.

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Governments should also recognize that GATT type standards of non-discrimination, both national treatment and Most Favoured Nation (MFN) treatment, are vital components of stable and reliable energy investment regimes. In applying these obligations, special care should be taken to ensure that the “like circumstances” requirement does not open avenues of discriminatory treatment to foreign-based energy investors and investments.

Governments, in consultation with the energy industry, should also consider ways to make international dispute settlement mechanisms more flexible, less costly, more efficient, and more effective to the benefit of both host States and the energy industry at large.

Recognizing that States have sovereign rights to regulate their own economies, and taking into account the legitimate need for GHG emission reduction policies, governments should work with WEC to establish guidelines for distinguishing measures that cross the line from legitimate regulation to “creeping” or de facto expropriation.

As the global community grapples with climate change, including the post-2012 regime under the UNFCCC and the Kyoto Protocol, governments should ensure that carbon emission reduction measures do not discriminate against foreign energy investments. In this respect, national GHG reduction measures should not be applied in a differential or discriminatory manner to foreign energy investments or investors, and national treatment requirements should be fully respected.

Aiding the Movement and Delivery of Energy Services

Whether or not the Doha Round is reactivated, governments should accord special consideration to improved terms for the delivery of energy services as an integral component of international economic development, particularly for emerging economies and for developing countries in general.

Taking the foregoing into account, governments should commit to current levels of market access and agree to a standstill on new trade restricting measures in energy related sectors and subsectors where WTO members have not made specific commitments under the General Agreement on Trade in Services (GATS).

In negotiating bilateral or regional free trade agreements, governments should consider including these same levels of market access and standstill commitments covering energy services.

Implementation of the UNFCCC and any other regime governing carbon emission reductions in the post-2012 era should ensure that energy services are accorded non-discriminatory market access and other treatment in accordance with the principles of non-discrimination and national treatment under the GATT and the WTO Agreement.

The global energy industry, under the leadership of WEC, should develop an agreed energy services list, taking into account the plurilateral requests made in the Doha Round. As part of this exercise, the efficacy of these requests in removing and

eliminating the most serious trade barriers and market impediments faced by the energy sector should be assessed.

The energy industry, under WEC's guidance, should also examine where domestic laws, regulations, and policies (such as competition laws) restrict modes of supply and impede delivery of trans-boundary energy services. This could include an assessment of competition policies and practices that inhibit the growth of open service markets.

Finally, governments should recognize that the foregoing requires balancing of State sovereignty over natural resources and the exclusive rights of governments to legislate in the public interest with the need for clear, fair, and transparent treatment of all energy service providers in accordance with the rule of law.

Promoting Trade in environmental Goods and Services

Governments should support efforts to reach consensus on rules for improving market access for Environmental Goods and Services (EGS), whether inside or outside the WTO framework. To this end, governments should, as a priority, work toward agreement based on proposals tabled in the Doha Round for reducing market barriers for these goods and services.

In light of these proposals and to maintain momentum in the WTO negotiations, WEC should promote the inclusion of energy goods and services on an agreed services classification list as part of renewed efforts to achieve either multilateral or plurilateral agreement on EGS.

Efforts to reach agreement on this list should be initiated as soon as possible, irrespective of whether the Doha Round is reactivated. Without prejudice to the final form of such agreement, it could then be adopted either within or outside revived Doha Round negotiations, as appropriate.

Facilitating Cross-border Movement of Energy Services Personnel

Pending a resumption of WTO negotiations, governments should endorse the objective of facilitating trans-boundary movement of Energy Services Personnel (ESP). These efforts should balance the twofold need to respect reasonable and acceptable national security requirements along with speeding the approval of cross border movement of ESP.

To further these objectives, governments should expand linkages between and among regions and States through arrangements, understandings, and protocols governing conditions of entry. Developing these linkages should take into account current regional initiatives as useful models in the energy sector for facilitating cross-border movement of personnel.

Means to minimize differences among national and regional approaches should be pursued through the development of jointly agreed security protocols, understandings, and arrangements for background checks, screening, documentation, and other State security matters.

As a further step, ways to link with other national and regional programs and initiatives to enlarge the network of ESP entry arrangements should be explored. All of the above should be geared to the special needs of the energy sector.

Following is the Task Force's full report on each of the five subjects. It contains a background section and an analysis of the subject matter in each area, leading to the set of recommendations outlined above. In offering these recommendations, the Task Force hopes that industry and government can work together to implement these ideas, with the ultimate objective of ensuring that the global economy once again flourishes and that energy trade, in all its manifestations, continues to play its central part.

I. Maintaining open Markets – Border Measures and Energy Trade

Issues and Challenges

Governments appear to be moving toward legislation that would establish a "price" on GHG emissions and apply some form of Border Tax Adjustment (BTA) on imported goods as part of broader environmental measures. As this report is being written, comprehensive U.S. climate change legislation (the Waxman-Markey bill) has passed the House of Representatives and is under active consideration in the U.S. Senate. The current version of the bill will apply border taxes on carbon intensive imports from countries that do not have comparable carbon reduction laws in force.

The rationale behind the Waxman-Markey bill and proposals in other jurisdictions is that these kinds of border measures: (a) will level the playing field by equalizing the treatment of imports from countries who have failed to implement GHG reduction policies and whose industries do not bear the same burden as industries already subject to domestic carbon reduction obligations; and (b) eliminate or reduce the transfers of GHG emissions from regulated to unregulated jurisdictions (the "carbon leak" phenomenon).

Notwithstanding the objective of combating climate change, taxing carbon intensive imports and their production processes entails potentially deleterious impacts on international trade, particularly for energy and energy-related products. Curtailing energy trade, in turn, will retard economic development and exacerbate the current economic crisis. The Task Force therefore sees a need to balance environmental concerns with ensuring economic revival and a return to global prosperity through the continued availability of the energy resources needed to accomplish these objectives.

Together with economic considerations, the use of BTAs on carbon emitting goods and processes raises legal issues involving the GATT and the WTO Agreement. Whether such border measures are legal has never been tested before a GATT or WTO dispute settlement panel. Their introduction would almost certainly result in protracted trade litigation, causing additional uncertainty for global trade at a time when ensuring the free flow of goods and services is essential for global economic recovery.

With these immediate issues before it, the Task Force concluded that it was both necessary and timely for WEC to set out its views on the possible use and application of border measures related to CO_2 emissions. Agreeing that urgent international action is needed on climate change, the Task Force believes that, at the same time, national CO2 reduction policies must be carefully crafted to be fully consistent with the GATT and the WTO Agreement and avoid disrupting markets for energy and energy products.

Background

Trade and Climate Change

Both the UNFCCC and the 1997 Kyoto Protocol recognize the interplay between open markets and the commitments to reduce GHG emissions. The UNFCCC states in Article 3 that Parties "should cooperate to promote a supportive and open international economic system that would lead to

sustainable economic growth." Importantly, the Kyoto Protocol provides that Parties "shall strive to implement policies and measures . . . in such a way as to minimize adverse effects, including . . . effects on international trade . . ." (Article 2, paragraph 2). The Task Force interprets these provisions as exhorting governments to maintain open markets and adhere to basic GATT rules as they implement national climate change policies.

The 192 States that ratified the UNFCCC meet annually in the Conference of Parties (COP) to agree on measures to implement the emission reduction targets under the Convention. At COP-13 in 2007, Parties adopted the Bali Action Plan, which sets out a negotiating process to achieve agreement on the next phase under the UNFCCC, following the expiration of the initial Kyoto implementation period in 2012. The next UNFCCC milestone will be COP-15, to be held in Copenhagen in November and December of 2009, with the objective of reaching international agreement on a post-2012 climate change agenda.

Border Measures under Consideration

The idea of using BTAs to deal with carbon emissions has been gaining momentum over the last number of years. A proposal to use border taxes as part of European GHG reduction measures had been passed by the European Parliament in 2007. While that proposal was not included in the E.U. Council's recent decision of 6 April 2009 on the revised European climate energy package, it illustrates the currency of various kinds of border tax measures under consideration in dealing with climate change issues.

Major climate change bills had been debated in the U.S. Congress, pre-dating the current Waxman-Market bill. The previous Lieberman-Warner bill was the most comprehensive of these and would have created a cap-and-trade system and required importers of goods from countries without a "comparable" system to purchase emission allowances at the American border. The bill failed to secure enough support in the Senate to ensure its passage, and it and similar proposals died with the end of the last session of the Congress in early 2009.

Under the new Congress, the situation has changed. The Waxman–Markey bill (the "American Clean Energy and Security Act of 2009") passed the House of Representatives in June 2009 and is now proceeding through the Senate. Under this bill, border taxes in the form of "import allowances", at some future point, will be applied to carbon-intensive imports into the U.S. that are not subject to similar measures in the exporting country. The rationale is to counter "carbon leakage" – that is, production moving from jurisdictions that impose CO_2 reduction measures to jurisdictions that do not have these requirements or whose laws are less stringent. However, these measures are as much aimed at international competitiveness concerns facing American industries that bear internal carbon reduction obligations versus those foreign competitors that do not bear the same burdens.

Whatever the motivations, knowledgeable experts have concluded that BTAs along the lines discussed in the E.U. and the U.S. (and in other jurisdictions) could contravene treaty obligations under the GATT and the WTO Agreement. Given

these concerns, and given the unsettling effect of potentially protracted trade litigation in the WTO, such measures could further hinder the international flow of energy and energy-related goods.

Analysis

GATT Limitations and Restrictions on the Use of BTAs

Article II, paragraph 2 of the GATT governs the use of BTAs. That provision allows the use of border taxes (in addition to bound customs duties) subject to the requirement that an equivalent domestic tax is applied to a "like" domestic good, and that the measure does not favour domestic products by protecting them from international competition. This BTA provision has historically been used in narrow circumstances, notably for application of Goods and Services Taxes (GST), Value-Added Taxes (VAT), excise taxes and other like measures on imported goods – but always with the proviso that such taxes are equivalent in every respect to taxes applied internally to the same or similar domestic product.

Some of the legal literature and discussions in international organizations have suggested that the BTA rule in Article II has broader application, and can be part of the armament governments can use in the battle against climate change. These proponents argue that BTAs can be used to tax environmentally "unfriendly" goods as well as carbon related Production and Process Methods (PPM) used to make those goods. A series of GATT and WTO cases are frequently cited in support of these arguments, including the 1987 Superfund case, the 1998 Shrimp-Turtles case, and the 2001 Canada-E.U. Asbestos case.

Notwithstanding these arguments, the Task Force finds no GATT or WTO decision that directly addresses the use of BTAs in relation to climate change or GHG reduction policies. Contrary to some of the foregoing arguments, none of the oft cited GATT and WTO panel decisions addresses the applicability of BTAs to deal with GHG reduction, either by taxing the goods or the production methods or PPMs used to make those goods. Thus, the Task Force concludes that jurisprudence offers doubtful support for the proposition that unilateral border taxes are consistent with GATT Article II when applied as part of national GHG reduction implementation measures.

A review of Article II in the context of the GATT as a whole reinforces this conclusion.

- Article II was intended for specific cases – to equalize manufacturing, excise and value-added-type taxes applied internally to goods entering the country. Use of BTAs for purposes of carbon reduction stretches these GATT provisions beyond their intended scope.

- Moreover, BTAs are only allowed if they meet the non-discrimination requirements of the GATT. If a border tax is applied to carbon related imports and not to the same or similar domestic goods in exactly the same manner, or if the tax has a heavier

commercial effect than a tax applied to like domestic goods, it would contravene Article II.

- Similarly, if a border tax were not applied to the same imported products from all sources in equal fashion – that is, if it discriminates between goods from different countries on the basis of their domestic GHG reduction policies or measures – it would offend the "Most Favoured Nation" (MFN) principle under GATT Article I.

- While Article II allows BTAs as a charge equivalent to an internal tax on the same kind of product, there is a difference between that and the PPMs used to make that product. On its face, Article II only allows BTAs on imported "products" and makes no reference to taxes that reach down to the production process used to make those products.

- Domestic cap-and-trade systems, such as in the Waxman-Markey bill and the E.U. Emissions Trading System, are arguably not "taxation" measures. It is therefore unlikely that these would fall within Article II as an internal "tax" that can justify a tax adjustment on imports. It is even less likely that border taxes on imports from countries where cap-and-trade systems do not exist would be legal under GATT.

In addition to these legal uncertainties, national GHG emission policies that extend beyond the border – for example, internal restrictions on use, sale or distribution of the goods after importation – have to meet the national treatment obligations under GATT Article III, including the requirement that no measure can be applied that denies imports "equal competitive opportunities" to those accorded to domestic products. That rule is found throughout GATT and WTO case law. The Task Force does not need to cite these cases here. However, it is useful to refer to one of many pronouncements on this issue from the well-known Japan - Alcoholic Beverages case (1996) in the WTO, where the panel said,

"The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures . . . Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. The intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given."

The conclusion is that imported goods with the same or similar physical and other characteristics, end uses and, importantly, that compete in the same markets as domestic goods, must be given fully equivalent treatment by the importing country. Equality of treatment means full and undiminished application of both MFN and national treatment as set out in the General Agreement. It also means that imports cannot be denied the same "competitive opportunities" accorded to domestic goods in the local market. Any BTA or other measure that failed to respect this fundamental rule would be contrary to the GATT and the WTO Agreement.

The "General Exceptions"

Tariff bindings and non-discrimination treatment of imports are fundamental treaty obligations under the GATT and the WTO Agreement. The question is whether WTO members can override these obligations and tax carbon on imports through recourse to certain GATT provisions that allow "exceptions" to otherwise applicable treaty obligations.

These exceptions are contained in GATT Article XX and can be invoked by WTO members under very narrow circumstances, the most relevant being to apply laws or other measures "(b) necessary to protect human, animal or plant life or health" and "(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." Importantly, these exceptions require not only that the measure meet these specific criteria, but also that it not be a disguised trade restriction or applied in a discriminatory manner otherwise contrary to the GATT. The Article XX exceptions are the focus of debate in the context of climate change and carbon reduction measures that apply at the border.

There is a vast amount of GATT and WTO case law regarding these exceptions. Generally speaking, because they allow departures from treaty obligations, dispute settlement panels have applied stringent conditions to their use. These conditions prevent the abuse of these exceptions and the frustration of the liberalized trade foundations of the GATT and the WTO Agreement.

As stated by the WTO Appellate Body in the 1996 United States-Gasoline case,

". . . while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement."

Successive panel rulings have consistently followed this doctrine and held that governments bear the burden of justifying any measure taken under these exceptions, and demonstrating that the measure is both necessary and directly connected with the need to protect human life or health or truly is a conservation measure. An important illustration of this approach is the recent decision of the WTO Appellate Body in the case of Retreaded Tires (the E.U. versus Brazil in 2007), where the Appellate Body elaborated on the kind of scientific and other evidence required to justify an exceptional trade restriction under Article XX directed to protecting human life or health.

Even with this jurisprudence, the case law leaves several questions involving these exceptions unanswered, particularly in the context of the Kyoto Protocol or other national GHG reduction measures. Until the jurisprudence evolves or some form of international consensus emerges, these points remain unsettled. Even when a case is decided, all aspects of the issue may not be resolved. In the meantime, there is a danger that governments may be enacting measures of one sort or another in the context of the UNFCCC and the Kyoto Protocol and the

COP-15 Copenhagen meeting in 2009 that may have negative effects on energy trade.

GATT and WTO Parties Can Rely on Their Treaty Rights

While membership in the WTO and the GATT is close to universal with some 153 members, a more restricted number of States are parties to the UNFCCC and the Kyoto Protocol. As a matter of treaty law, legal obligations under these climate change treaties are not binding on non-parties. Thus, should BTAs be used to implement carbon reduction obligations by Kyoto Protocol parties, those measures could not apply to States outside the Kyoto system. Those States, if members of the WTO, would be entitled to rely on their GATT rights should BTAs be applied that were inconsistent with GATT/WTO obligations. Moreover, all WTO members, whether party to the Kyoto Protocol or not, would be entitled to challenge impermissible BTAs in the WTO Dispute Settlement Body under the same circumstances.

Recommendations

Given concerns of the energy sector over improper or unwarranted use of border measures, and given areas of uncertainty surrounding the degree to which the GATT exceptions can be invoked to support their use, the Task Force has developed a set of recommendations aimed at assisting both industry and governments in addressing climate change issues while at the same time ensuring the continued flow of transborder energy trade under applicable WTO rules and disciplines.

- Trade in energy, both primary forms and energy-related goods and services, is critical to global economic development and international energy security.
- Trade-inhibiting border taxes and other border restrictions affecting energy would be counterproductive to economic development, and to efforts to stabilize the global financial system and restart and stimulate economic growth, all of which are matters of universal concern.
- Governments should therefore adhere to the principle that any border measures affecting energy trade must comply with the open market objectives and legal obligations in the GATT and the WTO Agreement. To this end, all like forms of energy and energy products, whether imported or domestic, must be accorded equivalent treatment and equal competitive opportunities in the importing country in accordance with the requirements of the GATT and the WTO Agreement.
- In pursuing GHG reduction efforts, governments should not circumvent otherwise applicable GATT and WTO Agreement obligations respecting energy trade through improper or unwarranted recourse to the exceptions in GATT Article XX. Recourse to these exceptions should only be invoked where demonstrably justified and should not be discriminatory or disguised trade restrictions.
- Governments should therefore fully respect all GATT and WTO Agreement rules and disciplines in pursuing measures to reduce GHG emissions, including efforts to implement the UNFCCC and the Kyoto Protocol in the post-2012 period. Governments should also agree that environmental concerns, including the implementation of GHG reduction measures, should be addressed through means other than the use of trade measures.
- Governments should take steps to apply the foregoing recommendations, as appropriate, in future WTO negotiations and at the meeting of the UNFCCC Conference of Parties (COP) in Copenhagen in December 2009, and in future COP meetings.

II. Promoting Energy-related Investments

Issues and Challenges

Economic activity is energy dependent. It requires capacity to create energy and generate sufficient power to meet industrial development objectives as well as human and social needs. Power generation and supply, whether traditional or newer green forms, however, are capital intensive. Access to capital is critical both to maintain existing projects and, more importantly, to getting new projects underway.

Capital pools are assembled through a variety of vehicles, including private sources in combination with public and State-sponsored investment funds. Private capital, in turn, requires mobilization at the lowest cost, frequently through recourse to foreign sources. Ensuring availability of adequate cross-border capital raises a number of interrelated issues pertinent to the energy sector, including assurances of uniformly fair and equitable treatment, respect for the rule of law, assurances of due process, and non-discriminatory treatment of foreign investments by host States.

It is axiomatic that States have full sovereignty over their natural resources, a principle enshrined in U.N. General Assembly Resolution 1803 of 1962. However, State sovereignty must be balanced against guarantees of treatment of external energy investors and investments under generally accepted international rules and norms. The issue for WEC and for the energy sector generally is to tailor those rules and norms to facilitate capital formation and investments for international, national, regional, and local projects, whatever their dimension.

This is all the more urgent given the current global recession, with officials from the International Energy Agency commenting recently that upstream investments in the oil and gas sector are expected to decline globally by some 21% in 2009 over 2008 levels. Some form of guidelines on host State treatment in the energy sector could be a factor in rehabilitating that investment climate.

Background

Guidance in formulating investment protection criteria pertinent to the energy sector can be gleaned from several international precedents. Some are relatively recent; others go back many years. Some of the more prominent include the following.

- The North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT) each contain investment protection and dispute settlement provisions applied on a region-wide basis. Each is noteworthy in recognizing the right of private investors to invoke binding arbitration directly with host States.

- The 1993 Colonia Protocol, concluded under the umbrella of Mercusor, extends protection to investors from Mercusor member States. The 1994 Buenos Aires Protocol further expands these safeguards by adopting provisions similar to the investment protection provisions of NAFTA.

- ASEAN members adopted a Framework Agreement on the ASEAN Investment Area (AIA) in 1998. The AIA seeks to liberalize

investment flows among ASEAN members and, to that end, obliges governments to apply rules of non-discrimination, transparency, and open investment markets, subject to some important exceptions and reservations in favour of host States.

- The 1966 Convention for the Settlement of Investment Disputes (ICSID) is a multilateral treaty under the auspices of the World Bank. It facilitates investment dispute resolution through recourse to the ICSID arbitration process. ICSID arbitration awards provide an important body of jurisprudence in this area.

- The WTO Agreement on Trade-Related Investment Measures (TRIMS Agreement), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), and the General Agreement on Trade in Services (GATS) contain investment-type provisions, although limited to the specific subject matter of those agreements. There are, however, no over-arching rules governing treatment of foreign investment in the WTO Agreement.

- Together with these multilateral precedents, over 2,500 Bilateral Investment Treaties (BIT) and Foreign Investment Protection Agreements (FIPA) are in force around the globe. These take many forms and contain a variety of provisions but, at the same time, contain common elements that can also help inform future work in this area.

- The OECD attempted to draft a Multilateral Agreement on Investment (MAI) in the 1990s. The initiative encountered vocal opposition from representatives of NGOs and other civil society bodies, and eventually was suspended. Nevertheless, the OECD deliberations and draft MAI texts offer useful source material.

Other sources are found in policy guidelines and voluntary standards formulated by international governmental bodies, such as the OECD cited above. A number of NGO studies on international investment issues can also assist in the task. These various materials will help in devising principles governing investment protection that can be harnessed for the energy sector.

Analysis

In dealing with energy investments, several factors predominate, viz., the length of the planning process, the long-term life of energy infrastructure, the required length of the payback period on invested capital. All of this points to the need for a stable, long-term and transparent regulatory climate over the life of those investments. As part of these endeavours, the following elements merit special attention.

The Meaning of "Energy Investment"

The upfront investment phase of energy projects may involve significant commitments in terms of time, effort, and money, notwithstanding that the actual decision to fully commit capital may have not yet been made. Recognizing that circumstances differ from project to project, the Task Force

believes it could be desirable to formulate a set of non-binding benchmarks to better ensure that legitimate preparatory financial commitments and expenditures in the "pre-investment" phase of energy projects are fairly and equitably treated by host States.

At the same time, there should be some way to determine when other kinds of activity (such as exploratory meetings and prospective investigations) are not truly related to pre-investment activity and so are outside the scope of investment protection rules. A particular issue for consideration is foreign-sourced or foreign-financed research and development activity in the host State that may or may not be related to a subsequent investment activity by the enterprise concerned.

Fair and Equitable Treatment and Full Protection and Security

Terms such as "fair and equitable treatment," etc., are widely used in international agreements; however, they are not always used consistently or with the same intent and have been interpreted differently by arbitration tribunals. Some international instruments imply that the meanings are interchangeable or substantively close, while others distinguish between the two. Given this divergence, it seems appropriate for governments to explore ways of better defining their meaning and scope.

Non-Discrimination – National Treatment

A central underpinning of bilateral investment agreements is to ensure that qualified energy investments and investors are treated the same as domestic investors in "like circumstances." The primary obligation of the host State under these treaties is to accord standards of national treatment (subject only to special rules allowing exceptions in specific circumstances). Ensuring respect for the national treatment rule is critical for the energy sector.

One of the more challenging issues regarding national treatment is to determine when a foreign investor or an investment is in "like circumstances" to a domestic investor or investment. How "like" must the investment or the investor be? Can there be different or "unlike" circumstances depending on the size of the investment or some differences in technology between the local investment project and the foreign-invested project? These matters also merit clarification.

In the trade area, several GATT and WTO panels have concluded that breaching national treatment requirements is not confined to cases of de jure discrimination. Discrimination can equally exist where there is less favourable de facto treatment, whereby a foreign good or service is not accorded equality of commercial opportunities in the domestic market vis-à-vis a local product. This doctrine has been applied in numerous investor State arbitration awards. It is recognized that an analogy to the GATT/WTO national treatment obligations in the context of investments is not perfect and should be used with a degree of caution. Nevertheless, GATT/WTO jurisprudence offers a useful reference point in clarifying the standard of national treatment for energy investments.

Non-Discrimination – Most Favoured Nation Treatment

There are hidden complexities in ensuring MFN treatment where the host State has entered into different investment protection agreements with a variety of States. Because the level of investor treatment in these agreements may differ, it becomes a challenge to determine how to apply the MFN obligation across a spectrum of different treaties and to avoid preferences being accorded to one foreign source of capital over another.

Expropriation and Nationalization

A sine qua non for energy investors is a guaranty against unfair, discriminatory, or improper seizure of assets by governments, and assuring those investors that their rights to open procedures and the rule of law will be respected, including unfettered access to impartial judicial processes and effective and expeditious compensation.

Experience in the application of BITs and FIPAs shows that cases of direct expropriation are normally not difficult to determine. More difficulty lies in determining when governmental action leads to “indirect” expropriation. Indirect expropriation, often called “creeping” expropriation, can take many forms, including disguised or opaque regulations and policies that have the effect of removing or depreciating the value of an investment.

By the same token, many domestic regulations and policy changes are totally legitimate as acts of State and fall outside the realm of expropriation. Because international jurisprudence has been inconsistent and because of the desirability for greater precision, it would be valuable to define those elements that can determine what would amount to an indirect expropriation through a regulatory “taking” in energy investment situations. These rules would build on emerging jurisprudence in this area.

Movement of Capital

An essential component of investment security is the right to move capital in and out of host States. The Task Force believes there is value in setting down some form of nonbinding guidelines respecting rights over the movement of capital and the repatriation of profits specific to the energy sector. Numerous BITs and FIPAs contain model provisions that can be used for this purpose.

Transparency and Related Issues

Modern BITs and FIPAs contain obligations ensuring that investment related regulations are public and subject to open and transparent procedures. While details vary, transparency obligations and corresponding rights of investors to challenge failures of governments to meet these obligations are fairly standard, but vary in terminology and scope from agreement to agreement. Because of concerns over arbitrary and non-transparent regulations affecting the energy sector, it may be useful to consider ways in which these obligations can be made more precise.

Role of State-Owned Enterprises

State-owned companies can be important players in the energy sector. Their role varies from country to country, reflecting the fact that natural resources are sovereign assets and frequently under the administration of State agencies. These government-owned or controlled entities are frequently main or major participators in the development, generation, distribution, and delivery of energy goods and services.

The Task Force sees value in ensuring that governments respect standards of non-discrimination in respect of energy investments made by State-owned corporations. By the same token, it is important to ensure that management of State-owned corporations respect these same rules, and that governments not use these enterprises as surrogates to accomplish indirectly what would be impermissible if done by governments directly.

Under the GATT, State Trading Enterprises (STE) are required to act consistently with the non-discrimination and other requirements of the agreement in their purchases and sales. STEs are specific kinds of enterprises and cannot subsume all types of State-owned corporations. The question for consideration is the extent to which GATT obligations respecting the conduct of STEs can or should be made applicable to State-owned or controlled entities in the energy sector.

Exceptions and Safeguards

Exceptions to the application of investment rules, similar to those in the GATT, have been widely used in BITs and FIPAs. The terms vary, but it is common to provide States with the right to control the entry and establishment of foreign investments, to exempt whole sectors of the economy from coverage, and to exclude obligations for purposes of host State regulation of the economy or with respect to health, social benefits, and other areas of public policy.

To the extent that the host State decides not to include all or portions of the energy sector in their bilateral agreements, little can be done. Otherwise, given the importance of energy to global development, it would be useful for governments to agree on some form of guiding principles to limit exclusions, reservations, or exceptions of energy investments covered in these kinds of treaties.

Other Issues – Effective and Efficient Dispute Resolution

International dispute settlement is becoming more procedurally complex and increasingly costly, even when seemingly straightforward factual situations are involved. Increasing attention has been given in international legal circles on ways to simplify the arbitration process (where used) to reduce length and cost for participants, while at the same time taking into account that certain disputes require arbitrators with special expertise. The goal is to make it more predictable and efficient and, ultimately, less lengthy and less costly for all stakeholders.

Recommendations

Given the critical role of energy investments in global economic development, the following list of principles should be considered by governments for follow-up action as appropriate.

- It is recognized that energy-related investments entail long-term commitments of capital, with extensive upfront planning including preparations for and participation in environmental assessments, infrastructure development, and a range of other matters preliminary to the actual energy investment.
- Governments should commit to ensuring full protection for energy investors and investments in accordance with broadly recognized international standards for "direct" energy investments as well as "indirect" investments that, while not an integral part of the capital project, may be materially related to the core investment activity.
- The pre-investment phase is an important first step in energy development. Recognizing that circumstances differ from project to project, governments should consider developing benchmarks to assist in identifying pre-investment activity that is a legitimate part of an energy investment and entitled to protection under accepted international standards.
- Given the long-term nature of energy investments, governments should commit to fair and equitable treatment in accordance with international standards over the entire investment period, including, where appropriate, in the pre-investment phase. To this end, governments should ensure that all measures and polices governing energy are based on accepted international norms, including full disclosure, transparency, and non-arbitrary treatment.
- Governments should also recognize that GATT type standards of non-discrimination, both national treatment and Most Favoured Nation (MFN) treatment, are vital components of stable and reliable energy investment regimes. In applying these obligations, special care should be taken to ensure that the "like circumstances" requirement does not open avenues of discriminatory treatment to foreign-based energy investors and investments.
- Governments, in consultation with the energy industry, should also consider ways to make international dispute settlement mechanisms more flexible, less costly, more efficient, and more effective to the benefit of both host States and the energy industry at large.

- Recognizing that States have sovereign rights to regulate their own economies, and taking into account the legitimate need for GHG emission reduction policies, governments should work with WEC to establish guidelines for distinguishing measures that cross the line from legitimate regulation to “creeping” or de facto expropriation.

- As the global community grapples with climate change, including the post-2012 regime under the UNFCCC and the Kyoto Protocol, governments should ensure that carbon emission reduction measures do not discriminate against foreign energy investments. In this respect, national GHG reduction measures should not be applied in a differential or discriminatory manner to foreign energy investments or investors, and national treatment requirements should be fully respected.

III. Aiding the Movement and Delivery of Energy Services

Issues and Challenges

Services are an increasingly important element of international business. The World Trade Report 2008 (WTO, Geneva) states that services trade rose by 18% in 2007 to U.S. $3.3 trillion, versus only a 5.5% growth in merchandise trade. While merchandise is much greater in absolute value, the services data reflect their growing importance to the world economy.

Growth in services trade underscores the value of generally accepted multilateral rules and disciplines in this important element of global economic growth. As part of this effort, the Doha Round gave priority attention to expansion of coverage of the General Agreement on Trade in Services (GATS) so as to generally improve market access for specified sectors. A number of regional and bilateral initiatives have also sought to expand market access for services. Such efforts are particularly relevant to the energy sector, where services are increasingly integrated into the sale, transportation, distribution, delivery, maintenance, repair and upgrading of energy products.

While some advances were made in the GATS negotiations, it remains uncertain at this time whether the Doha Round will be reactivated. Whatever transpires in the WTO, the Task Force believes that WEC can make a useful contribution to continuing these efforts by helping to formulate voluntary guidelines limiting, or even eliminating, unfair, arbitrary or discriminatory measures that inhibit energy services trade. This effort could help in the search for an international consensus on these issues in post-Doha Round discussions, whether in the WTO or elsewhere.

The Task Force also believes that services relating to international trading of emission (or carbon) credits require consideration. Carbon credit trading markets have developed regionally and multilaterally under the framework of the Kyoto Protocol, and are gaining momentum in the private sector ahead of international agreements and arrangements. As private carbon trading moves ahead, liberalizing the services component of carbon trading represents a new and important challenge for the international community. WEC can make a worthy contribution to these efforts.

Background

The GATS is the key multilateral instrument for liberalizing trade in services. It is a “bottom-up” agreement, i.e., it requires specific commitments by member States set out in separate schedules as opposed to applying universally to all services and subject only to defined exceptions (that is, “top down”). However, the GATS currently incorporates few direct energy related commitments by member States.

Under the Doha Development Declaration, the mandate of the negotiators was to open up the GATS and to achieve “progressively higher levels of liberalization with no a priori exclusion of any service sector or mode of supply,” giving special attention to sectors and modes of supply of interest to developing countries. While energy was not singled out in the Declaration, several energy-

related proposals were tabled by like-minded governments. Overall, however, GATS negotiations suffered because of a lack of progress in agriculture and Non-Agricultural Market Access (NAMA). A further limitation was the "offer-request formula" in the GATS, which has proven to be complex, inefficient, and cumbersome.

An additional stumbling block in the Doha Round was the absence of the listing of energy services in the WTO Services Sectoral Classification List (Document W/120), or in the U.N. Central Product Classification list (CPC). That meant that energy services were discussed under a variety of different headings in the GATS negotiations instead of being addressed in a comprehensive manner. Nevertheless, advances in the GATS agenda were made on several fronts, and even though agreement in the Doha Round has not yet been achieved, the general acceptance of the need to expand trade in energy services indicates the growing importance that WTO members attach to this issue. The various proposals tabled in the Doha Round can therefore provide a point of departure for further examination of this issue by WEC.

Settling on specified norms or standards for expanding energy services trade seems all the more critical given the current global economic crisis and the need to reactivate international business activity. The question is how to repackage and expand some of the more acceptable Doha Round proposals in a way that effectively commends them for action by governments and by the private sector.

Analysis

The following paragraphs review points for attention by WEC and by the broader international community, taking into account the Doha Round and various regional developments.

Definitional Questions

The Task Force believes that an important first step is to define "energy services" and to provide appropriate categorization and sub-classifications to supplement the existing WTO and U.N. classification lists. Work done in the Doha Round, notably by the informal Friends of Energy Services group, represents a useful starting point. Classification efforts by the WTO Secretariat and by international organizations, NGOs, and other experts offer additional useful reference tools.

List of Market Access Barriers

A parallel effort could be to identify the most egregious impediments to market access faced by energy service providers. Examples include outright prohibitions of specific services; local supply requirements; purchase obligations; local hiring conditions; ownership restrictions; restrictions on modes of delivery (i.e., cross-border supply and commercial presence); restrictions on the entry of personnel; and limitations of or conditions for access to transit, transportation, and distribution networks.

The identification of these barriers, categorized and supported by specific examples, could provide a

departure point in developing possible voluntary guidelines for governments. The effort, it should be noted, is not to name individual countries or devise some sort of blacklist. Rather, the idea is to survey the barriers that most directly impede the delivery of energy services as a reference tool for further action.

Market Access Guidelines

Having defined and categorized energy services and listed the most serious barriers to trade and investment, the next step could be to consider voluntary guidelines or principles of host State behaviour in removing and preventing the adoption of services barriers. While numerous FIPAs and BITs contain obligations on services trade in general terms, there are few examples of State obligations tailored specifically to the energy sector.

It is recognized that disciplines on market access can best be settled in the multilateral context. At the present time, however, with Doha negotiations suspended, efforts by WEC to propose a set of guidelines tailored to the needs of the energy sector could assist in post-Doha Round consideration by governments in both the WTO context and in bilateral negotiations.

Competition, Domestic Regulation, and Internal Market Reform

While border measures can constrain and prevent entry of energy services or foreign service providers, post-entry regulation, anti-competitive policies, lack of transparency, arbitrary and opaque application of rules, and preferential treatment of State-owned or controlled entities are equally potent de facto entry barriers.

The Task Force recognizes that proposing guidelines or norms in this area is sensitive and faces issues of sovereignty, resource ownership, and national jurisdiction over internal economic organization and regulation. The challenge is to find the right balance between international norms of behaviour and the sovereign right and duty of governments to legislate in the public interest.

An additional factor worthy of examination is the relationship between services trade and domestic competition policy. The OECD has been actively examining this within the framework of its Joint Group on Trade and Competition, producing a useful report that isolates the competition provisions in Regional Trade Agreements (RTA). There are divergent approaches in these RTAs, running the gamut from fairly vague language on anticompetitive behaviour to provisions obliging governments to enact specific legislation.

Noteworthy regional agreements and arrangements also include the E.U.'s single electricity market (beginning with Community Directive 96/92), setting out the E.U.'s policy objectives of increased competitiveness, improved environmental protection, and security of energy supply. The E.U. market system has important elements to free up energy services trade among member states and is considered an important source of ideas by the Task Force. Other regional agreements of significance are the Energy Charter Treaty (ECT) and the North American Free Trade

Agreement (NAFTA). Trade in energy services has also been under examination in ASEAN and APEC.

The Task Force concludes that a common thread runs through these agreements, enshrining treaty obligations covering non-discrimination, transparency, and due process in relation to energy services trade and investment.

Energy Services and Climate Change

Emissions trading schemes emerging under the UNFCCC, the Kyoto Protocol, and elsewhere raise other issues respecting cross-border services. While emission credit trading is a subject that extends beyond the scope of this report, efforts at international agreements to facilitate the expansion of the services associated with emissions trading is highly relevant to the energy services subject in general.

Recommendations

Based on a review of the work done in this area, including in the WTO and by other governmental and non-governmental bodies and by recognized experts in the field, the Task Force recommends the following for consideration by governments.

- Whether or not the Doha Round is re-activated, governments should accord special consideration to improved terms for the delivery of energy services as an integral component of economic development, particularly for emerging economies and developing countries in general.
- Taking the preceding into account, governments should commit to current levels of market access and agree to a standstill on new trade restricting measures in energy related sectors and sub-sectors where WTO members have not made specific commitments under the General Agreement on Trade in Services (GATS).
- In negotiating bilateral or regional free trade agreements, governments should consider including these same levels of market access and standstill commitments for energy services.
- Implementation of the UNFCCC and any other regime governing carbon emission reductions in the post-2012 era should ensure that energy services are accorded non-discriminatory market access and other treatment in accordance with the principles of non-discrimination and national treatment under the GATT and the WTO Agreement.
- The global energy industry, under the leadership of WEC, should develop an agreed energy services list, taking into account the plurilateral requests made in the Doha Round. As part of this exercise, the efficacy of these requests in removing and eliminating the most serious trade barriers and market impediments faced by the energy sector should be assessed.
- The energy industry, under WEC's guidance, should also examine where domestic laws, regulations, and policies (such as competition laws) restrict modes of supply and impede delivery of trans-boundary energy services. This could include an assessment of competition policies and practices that inhibit the growth of open service markets.
- Finally, governments should recognize that the foregoing requires balancing State sovereignty over natural resources and the exclusive rights of governments to legislate in the public interest with the need for clear, fair, and transparent treatment of all energy service providers in accordance with the rule of law.

IV. Promoting Trade in environmental Goods and Services

Issues and Challenges

The Task Force defines Environmental Goods and Services (EGS) as those goods and services that offer a cleaner or less energy intensive process or final product as opposed to methods and technologies currently used. In general, all technologies and processes that make new and substantial contributions to reductions in GHG emissions could be included under the EGS umbrella. The Task Force believes that the elimination of government imposed barriers to trade in EGS, reducing their cost and thereby spurring their utilization, is one means of contributing to international GHG reduction objectives.

In parallel with the lead-in to COP-15 later in 2009, a particular challenge is how and to what extent agreement on improved market access for EGS can be realized, including the prospects of action ahead of any new round of WTO negotiations. Among the options considered below is the possibility of a more limited or "plurilateral" type of agreement on EGS (i.e., agreement that is less than the full WTO membership), possibly using the Information Technology Agreement as a model.

The Task Force notes that, notwithstanding global efforts to deal with GHG emissions, governments continue to maintain tariffs and other market access barriers limiting expansion of EGS trade, which in turn inhibit the deployment of enhanced clean energy technologies. This runs counter to the broader objective of coordinated international efforts to effectively deal with climate change. The Task Force believes that reducing or eliminating such barriers would help stimulate new and innovative technological development, in turn reducing the deleterious impact of carbon emissions and ultimately assisting in the realization of these broader environmental goals.

Background

Doha Round Developments

Paragraph 31 of the Doha Declaration gave a mandate to negotiators "[w]ith a view to enhancing the mutual supportiveness of trade and environment" . . . to seek "(iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services." In the course of negotiations under paragraph 31, various proposals were tabled on EGS classification. The WTO Secretariat prepared a summary of these as of mid-2005, dividing them into: (a) the environmental project approach; (b) the establishment of a multilaterally agreed list of environmental goods; and (c) the integrated approach. The Secretariat paper lists a total of 480 products proposed as meeting the EGS definition.

In the course of events, the Doha Round negotiations encountered difficulty in agreement on reduced tariff treatment for EGS and on other EGS market access measures. While a number of the foregoing proposals ere in play when the negotiations were suspended in July 2008, governments had not yet agreed on EGS as a separate category. However, a number of these documents can be harnessed as a basis for further work in this area.

- A proposal was tabled by a number of like-minded countries to divide EGS into: (a) low-carbon fuels, such as ethanol and biodiesel; (b) goods produced for renewable energy, such as solar cells or wind turbines; and (c) environmentally preferable products, such as energy-efficient refrigerators and appliances.

- An UNCTAD study (based on work done in the OECD) broke down EGS into: (a) equipment (such as for water supply and delivery, waste water treatment, waste handling, air pollution control, laboratory testing, and waste prevention technology); (b) services (such as engineering design, construction and management of utilities, collection and treatment of waste waters, waste collection and processing, hazardous waste management; remediation services, etc.); and (c) resources (such as water, recovered minerals, and renewable energy).

- An April 2007 proposal by Japan, the E.U., the U.S., Canada, and other countries listed 153 products that could qualify as EGS, including air pollution control technologies, renewable energy technologies, and equipment for wastewater treatment.

- Reports issued by the World Bank Group, U.N. Energy and other agencies within and outside the U.N. system (many of which are collected in WEC's companion document, *Phase One Report: Inventory of Current Trade and Investment Activities, 2007)* provide additional ideas for dealing with EGS.

Non-WTO Developments

- A joint E.U.-U.S. proposal (November 2007) outside the Doha Round called for Tariff and Non-Tariff Barrier (NTB) reductions for a wide array of climate friendly technologies and services, laying the basis for an eventual separate agreement on EGS outside the Doha Round structure. The value of trade covered by the E.U.-U.S. proposal was estimated (in 2006) at U.S. $613 billion.

- At the July 2008 G-8 Summit in Hokkaido, Japan, the leaders called for the lowering of tariffs and other trade barriers to environmentally friendly energy goods and services. The communiqué read in part:

  "Efforts in the WTO negotiations to eliminate tariffs and non-tariff barriers to environmental goods and services should be enhanced with a view to disseminating clean technology and skills. Additionally, consideration should be given to the reduction or elimination of trade barriers on a voluntary basis on goods and services directly linked to addressing climate change."

- APEC members proposed special treatment and improved terms of market access for EGS in the Sydney Declaration of September 2007, stating that trade liberalization for EGS would "advance the climate and security goals" of member countries.

Each of the above, along with others, can assist WEC in moving the matter forward irrespective of whether the Doha Round is reactivated.

Analysis

Whatever transpires in the WTO, the Task Force believes that agreement on a list of goods and services to be subsumed under the EGS umbrella would be a positive step forward toward a comprehensive agreement in this area. As noted, some measure of consensus on EGS had emerged in the Doha Round, given the heightened international concern over climate change and related environmental issues. At the same time, the WTO negotiations have been fraught with complexities linked to movement on NAMA and agriculture, making it difficult to move ahead on the EGS front.

Recognizing the hurdles in restarting Doha Round negotiations, it would seem propitious for interested parties – governments and international organizations – to maintain the initiative on EGS, outside the WTO framework if necessary, until such time as multilateral negotiations are resumed. This effort could begin through informal talks to capture consensus on an agreed EGS package.

The Task Force appreciates that moving forward on EGS alone at this point, even in terms of seeking consensus on a list of goods and technology, faces challenges. Several important WTO governments take the position that resolving the modalities for NAMA and agriculture in the WTO is an essential precondition to restarting negotiations on any of these other issues.

However, this makes resumption of the Doha Round under the original 2001 mandate increasingly unlikely. Added to this is the ongoing global financial and credit crisis with no clear end in sight. This has taken the attention of governments off of the WTO agenda as they grapple with huge challenges in the global capital and credit markets.

While not minimizing these challenges, the Task Force has concluded that circumstances warrant a WEC initiative on EGS trade. An important element is that EGS as a category has gained a large measure of acceptance as a separate category with its unique set of issues. The EGS concept has been endorsed by the G-8, with regional organizations such as APEC voicing support in principle. Achieving some form of consensus on the classification and treatment of EGS should be achievable, and could be a positive development in moving the WTO and UNFCCC negotiating processes forward.

The advantages of consensus on EGS are clear. It could speed deployment of cleaner technologies, give developing countries access to these technologies at reduced cost, and move the global community one step further on a wider path to free trade in energy products. It will narrow the cost differential between the more expensive, cleaner technology and the more polluting, traditional sources of energy. It will help create economies of scale, further reducing sector-wide costs. It could lead to increased investment flows into high technology manufacturing and research in lower cost countries.

Recommendations

The Task Force recommends the following for governments to consider, whether or not the Doha Round is reactivated.

- Governments should support efforts to reach consensus on rules for improving market access for Environmental Goods and Services (EGS). To this end, governments should, as a priority, work toward agreement based on proposals tabled in the Doha Round for reducing market barriers for these goods and services.
- In light of these proposals, and to maintain momentum in the WTO negotiations, WEC should promote the inclusion of energy goods and services on an agreed services classification list as part of renewed efforts to achieve either multilateral or plurilateral agreement on EGS.
- Efforts to reach agreement on this list should be initiated as soon as possible, irrespective of whether the Doha Round is reactivated. Without prejudice to the final form of such agreement, it could then be adopted either within or outside revived Doha Round negotiations as appropriate.

V. Facilitating Cross-border Movement of Energy Services Personnel

Issues and Challenges

For purposes of this report, the Task Force defines Energy Services Personnel (ESP) as those highly trained specialists who supervise and conduct the installation, maintenance, repair, and upgrade of energy infrastructure in the areas of fuels, power generation, and electricity transmission and distribution. Increased integration and bundling of energy services means that the international deployment of such personnel takes on growing importance. For companies involved in large and small projects, this can be essential in the planning and development phase and, importantly, in project implementation and operation. On a daily basis, it is critical to be able to rapidly deploy ESP to foreign jurisdictions for repair, maintenance, or emergency action, often with only a few hours notice.

The multinational pool of energy expertise drawn from a multitude of jurisdictions complicates lead-time requirements in obtaining coordinated and timely entry and admission approvals for these personnel. A common difficulty for the industry is the increasingly complex, time consuming, and varied entry requirements applied by host States. Visa applications and work permits can require lead times of several weeks or even months. In contrast, action to deal with emergencies in the energy business often requires foreign experts to be on site in a matter of hours.

Some of these issues have been addressed in the Doha Round services negotiations, and aimed at expanding the GATS to cover cross-border movement of personnel (known as “Mode 4”). With continuing uncertainty over the future of the Doha Round, however, the development of some form of broad multilateral consensus on the Mode 4 issue seems more elusive than ever.

Background

Efforts in the WTO

GATS Mode 4 deals with services supplied by a WTO Member through the presence of natural persons in the territory of another Member. Among the factors in limiting Mode 4 is that, as matters stand, coverage is confined to those specific services in individual WTO Member’s current commitments under GATS. There is no obligation to admit service personnel for activities outside those specifically listed services by the government concerned. Coverage is further limited by exceptions, reservations, and qualifications within each member’s GATS commitment schedules. More than 100 countries have filed limitations on their horizontal commitments under Mode 4.

The result is that admission of persons is highly conditional and access is significantly restricted. The GATS is thereby unable to provide a commonly accepted framework regulating the movement of personnel between Member States. Because of the negative effect on international trade, the Doha Declaration mandated governments to negotiate an expansion of their existing Mode 4 commitments.

One of the issues addressed in the Doha Round was the lack of distinction under the GATS between temporary entry and permanent immigration. This results in restrictions applied to

short-term services personnel that are designed for normal immigration processing. In a document tabled during the negotiations, for example, Japan recognized that "WTO Members tend to feel that any discussion on liberalization in Mode 4 will ultimately challenge their long-term immigration policy."

Another shortcoming is that the GATS does not deal with issues such as access to information by temporary services personnel. Lack of access often frustrates cross-border movement because restrictions on project information and data – often geared to security concerns of the host State – can negate the very services foreign experts are called on to provide.

On the administrative side, shortcomings include the lack of provisions on the length of processing approvals, on transparency obligations such as where a request is in the approval chain, and providing information on its status. To help remedy this, the United States WTO delegation proposed that Members address the lack of access to "laws and regulations relevant to entry, stay, and work authorization of natural persons, including relevant terms and condition . . . procedures and application materials." India recommended "introducing a special GATS visa for categories of personnel covered by horizontal and sectoral commitments undertaken by a Member in Mode 4 under GATS or through a special subset of Administrative Rules and Procedures within the overall immigration policy framework." While this "GATS visa" idea gained some traction, there were negotiating obstacles to such a visa emerging from WTO efforts.

The result is that even if the Doha Round resumes, an enormous effort will be needed to bridge the differences on Mode 4 to the point of achieving a broad based, multilateral consensus. The likelihood of this seems uncertain at best. It appears to the Task Force that efforts now will be concentrated at the national, bilateral, and regional levels. The following summarizes some of the more noteworthy national and regional initiatives that the Task Force considers helpful in formulating WEC recommendations in this area.

Developments in APEC

- The APEC's Business Mobility Group (BMG) is a working group of the APEC Committee on Trade and Investment (CTI). Members include government representatives from departments responsible for immigration and consular affairs from the 21 member economies of APEC. The group meets three times each year at the APEC senior officials meetings. The role of the BMG is to enhance the mobility of business people to facilitate trade and investment activity in the APEC region.

- In 1997, the BMG introduced a product known as the APEC Business Travel Card (ABTC). This is an identification card that acts as a short-term visa to the 18 fully participating economies. Its relevant features include: (a) one standard application for the ABTC. All participating nations must screen the application. Each applicant must be endorsed by his or her business. Processing time for the ABTC is up to six months; (b) the card is valid as a short-term, multiple entry visa for 3 years.

Travelers are authorized to stay in the host nation for as long as 59 to 90 days, depending on the participating economy's regulations; (c) fast-track entry and exit privileges are available through special APEC lanes at major airports.

Developments within the European Union

- Discussions are ongoing in the E.U. on procedures for the entry, temporary stay, and residence of intra-corporate transferees (ICTs) into the E.U. area. The goal is to provide guidelines to mitigate these problems. Aspects under consideration include:

  (a) Standardization of admission criteria and definition of ICTs to include minimum employment standards of three months or less, professional qualifications of employment by a group of authorized companies, normalizing salary requirements, and eliminating the labour market test.

  (b) Standardization of the application process into a single permit for individual third-country ICTs with a streamlined and transparent process as well as a defined turnaround time. In addition, legislation may mandate proportionate fees, alignment of supporting documents, and a single permit combining a work permit, visa, and residence permit valid for 12 months and renewable with a clear process.

  (c) Identification of the scope of the work permit and visa. Legislation may support the transferability of a work permit granted in one country to all of the E.U. Member States. In addition, this work permit may allow the ICT to work at both the location of the company and client sites. Furthermore, the ICT may be able to re-enter the E.U. if the person needs to divide work between the home country outside the E.U. and the host country within the European Union.

- Final E.U. regulations may support the harmonization of procedures to issue one single permit for ICT spouses or partners here the spouse or partner would be granted access to the labour markets of all E.U. Member States during the validity of the work permit of the spouse or partner.

Developments in the United States

- The Visa Waiver Program allows visa-free travel to the United States. Under the program, the U.S. allows citizens of 34 countries to enter without a visa for up to 90 days for tourism or business purposes. To be eligible, foreign persons must possess a valid passport from their home State and must register online through the U.S. Electronic System for Travel Authorization (ESTA).

The foregoing is a sampling of the regional and national efforts currently underway to facilitate entry of experts for purposes of work in the services area. These efforts plus others have

assisted the Task Force in its analysis of possible approaches for WEC in this important area.

Analysis

The Task Force recognizes that a multilateral solution to the Mode 4 issue within the WTO would provide the most comprehensive and uniform approach to facilitating the cross-border movement of energy services personnel. Because of the political complications in the Doha Round together with diverse national security and employment concerns, expansion of Mode 4 coverage within the WTO seems unlikely. Thus, more limited initiatives on a regional basis may offer a more practical means of achieving freer movement and entry of energy services personnel.

The Task Force considers it desirable that such initiatives be rooted in accepted guidelines on national security and on screening processes that can be individually verified by governments participating in the scheme, consistent with their own national security requirements. With this proviso in mind, a number of developments lend support to the proposition that progress is achievable.

As a starting point, existing approaches such as the APEC Business Travel Card, currently operational among the 20 APEC member States, could be expanded to other countries and other regions. Critical to the success of the ABTC has been that each State has the ability to accept or reject an individual's application. Consequently, the participating economies maintain accountability of who is authorized to travel in and out of their country. Each applicant also must receive endorsement from a legitimate business or government agency in order to participate.

Other approaches are found in the E.U. program to standardize movement of ICTs (covering 27 E.U. member States). Progress on its deployment should be monitored by WEC to ensure that the measures adequately address the needs of the energy industry. Offering a further reference mode, the U.S. Visa Waiver Program applies waivers to a total of 34 registered countries.

With APEC, E.U. and U.S. measures in place, agreements on facilitating cross-border personnel movement are emerging that, in aggregate, cover a wide geographic area. Each will facilitate trade through the simplified process of moving business personnel. As governments look for ways to stimulate economic growth, these discrete regional solutions provide a step in the right direction. The next step would be to create links between these various regional measures to facilitate movement of ESP through a broader geographic range.

Recommendations

To consolidate various regional efforts and to move toward a broader consensus pending reactivation of the Doha Round, the Task Force has developed a number of recommendations as part of broader trade enhancing initiatives for the energy sector.

- Pending a resumption of WTO negotiations, governments should endorse the objective of facilitating trans-boundary movement of energy services personnel. These efforts should balance the twofold need to respect reasonable and acceptable national security requirements while at the same time speeding the approval of cross-border movement of ESP.
- To further these objectives, governments should expand linkages between and among regions and States through arrangements, understandings, and protocols governing conditions of entry. Developing these linkages should take into account current regional initiatives as useful models in the energy sector for facilitating cross-border movement of personnel.
- Means to minimize differences among national and regional approaches should be pursued through the development of jointly agreed security protocols, understandings, and arrangements for background checks, screening, documentation, and other State security matters.
- As a further step, ways to link with other national and regional programs and initiatives to enlarge the network of ESP entry arrangements should be explored. All of the above should be geared to the special needs of the energy sector.

VI. Conclusions

The revitalization of the global economy requires concerted efforts to ensure that markets remain open to energy goods, services, investments, and movement of personnel. These efforts should not be impeded by border taxes or other discriminatory measures that fail to abide by requirements of the GATT and other rules in the WTO Agreement.

Measures are currently in force or are under active consideration by governments to reduce GHG emissions to limit the effects of climate change. These measures may be pursuant to the obligations that some States have subscribed to under the UNFCCC and the Kyoto Protocol. Whatever the efficacy of these measures, these should be applied in a manner consistent with the rules laid down in the GATT and the WTO Agreement.

Because there is lack of precision in these GATT based rules, the Task Force has developed recommendations to reduce areas of uncertainty in energy trade to benefit the global community. The recommendations present ideas for governments to consider, and are not aimed at devising new multilateral rules or pre-empting either the WTO negotiating process or WTO dispute settlement.

The Task Force identified five areas of energy trade and investment, recognizing that other areas of importance to the energy sector, such as rules respecting transfer of energy technology, intellectual property protection, and other subjects are also vital. These are matters that the Task Force believes could be addressed in any subsequent phase of its work, as may be directed by the Studies Committee and Officers' Council.

The Task Force is prepared to continue with such efforts as appropriate.

It is appreciated by the Task Force that consensus on many of the matters covered in this report faces challenges. It is also recognized that reactivating the Doha Round or any new set of multilateral negotiations will depend on a multitude of political and other factors, many of which remain in a state of flux. That being the case, the Task Force is of the view that the recommendations in this report, if given fair and full consideration by governments, can assist in maintaining open markets to the benefit of the energy industry specifically, and to the international community at large.

Appendix I

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Appendix II

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