



Sustainable Development Opportunities and Challenges of Trade in Energy Services in the WTO and beyond

Informal Roundtable

20 April 2007, International Environment House 2, Room Inn

12:00 – 15:00

Background reading: The WTO and Energy¹

Energy services constitute an integral part of the energy production chain and encompass the exploration, development, drilling, extraction, construction, engineering, production, processing, refining, generation, transportation, transmission, distribution, storage, marketing, etc. (Zarrilli, 2003).

The negotiating context

Within the WTO, energy services were not negotiated as a separate sector during the Uruguay Round. As a result, specific commitments in energy-related services only exist for a few WTO Member for pipeline distribution of fuels (a sub sector of transportation services), services incidental to energy distribution and services incidental to mining, while the vast majority of the global energy services industry is not covered by specific commitments under the GATS. The current negotiations on energy services are included in the new services negotiations, which began January 2000.

WTO Members have undertaken limited commitments in the area of energy services. This might be due to several reasons. Firstly, energy sector, being a strategic sector for national security, has traditionally been dominated by state companies. These companies are unwilling to give up market power their monopoly position provides them with and resist any liberalisation efforts. Secondly, there is no single definition or clear notion of what is understood under energy services. This lack of definition additionally contributed to the delay in energy services liberalisation, as some governments made development of classification a precondition to undertaking any further commitments in the sector.

Core and non-core, production and non-production related services

WTO services classification (hereinafter W/120)ⁱ does not include a special section for energy services, but three separate sub-sectors that are related to energy activities: 1) “services incidental to mining, rendered on a fee or contract basis at oil and gas fields”, 2) “services incidental to energy distribution” in “Business services” and 3) “transportation via pipeline

¹ ICTSD, forthcoming, April 2007 (draft, not for quotation)

of crude or refined petroleum and petroleum products and of natural gas” in “Transport services”. Moreover, some energy-related activities, not exclusive to the energy sector, such as construction, consulting, business, communications, financial services, and engineering are covered by other sections.ⁱⁱ

Several WTO Members were of the view that W/120 was not adapted to the present conditions of the energy services market and suggested that classification of energy services should be carried out. In case of creation of a special section on energy services, there is however a risk of imbalance vis-à-vis other services sectors.

There are several problems that are associated with definition of the energy services. Firstly, some energy products can be considered either a good or a service (e.g. electricity).ⁱⁱⁱ Furthermore, many services that form part of the energy production chain are in fact not core energy services. Examples of such services are construction, engineering, consulting, etc. There were discussions of merits to distinguish between core and non-core services.^{iv} An activity would be considered as “core” if the service was an essential part of the chain of supply of the sector, i.e. without that service the sector would not be able to function (Tacoa-Vielma, 2003). Non-core services simply support the chain and are closely connected to the process. The problem with this distinction is where to draw the line between the two categories. What makes service “essential” part of the energy production chain?

There is a question of where to draw the line between production-related services, which would fall under the GATS, and production itself, which would not be covered by the GATS. There are some parts of the energy production processes that are closely associated with services activities, for instance, refining of oil, or liquefaction and gasification. Although these manufacturing activities are closely related to production of energy, they are not covered by the GATS unless supplied on a “fee or contract basis”. The drawline between services activities and similar production processes seems to be in whether the activity is performed by an entity which owns (or has a right to access) the raw material. In this case it would not fall under the GATS.

Source and technology neutrality

Some WTO Members favour a source-neutral classification for energy services applying to all energy sources, except where an activity was related to a specific source (e.g. frequency control is related to electricity), making distinction inevitable. Other Members think that a classification based on energy sources would better reflect domestic market structure and regulatory distinctions pertaining to different energy types.

Some Members suggested that, in order to promote technology development, market access commitments should be technologically neutral, i.e. should be made without regard for the technology used to provide energy services.^v It was felt however that concept was too far-reaching and implied that countries would not be able to require use of a specific technology when granting access to service providers.

Negotiators seemed to be in agreement over two issues. Firstly, the ownership of natural resources should not be questioned. Second, the right of governments to regulate should be retained in order to ensure security of supply, establish performance and quality controls,

maintain public service obligations, protect consumer interests and environment, and promote conservation of natural resources.

Investment, commercial presence and restrictive business practices

Energy services are mainly supplied through commercial presence, cross-border trade and movement of natural persons. Barriers characteristic of the energy services sector include market access and national treatment restrictions similar to those in other sectors, including nationality and residency requirements, restrictions on foreign investment, economic needs tests, the existence of exclusive rights and monopolies, inability to provide cross-border electronic information and transactions, discriminatory treatment of foreign providers, restrictions on the legal forms of doing business, arbitrary business and licensing requirements, and an opaque regulatory framework. Furthermore, restrictions (duties, requirements of local procurement) for the entry of equipment and material necessary for the supply of energy services constituted a major barrier to energy services trade.^{vi}

Market access commitments alone might however be insufficient to ensure liberalisation. Trade in energy is often obstructed by difficulties in getting access to transportation and distribution networks. Access on reasonable terms to storage, transport and distribution networks is necessary for the liberalisation of cross-border energy trade. Also, non-transparency of regulation constitutes an important barrier. The problem with creation of third-party access^{vii} provisions is that transportation networks are controlled by powerful companies, and not by governments that undertake respective obligations under international treaties. These companies can claim lack of capacity and charge transportation fees that by far exceed the cost of services rendered. Some competitive safeguards are thus needed in order to ensure access to the transportation networks.

The GATS contains limited provisions that deal with the conduct of the private entities such as monopolies and exclusive service suppliers. Restrictive business practices by incumbent operators are subject to Article VIII^{viii} and Article IX. Article VIII is especially relevant to gas transportation and distribution services. Article VIII requires Members to ensure that the incumbent natural monopolist in the transportation and distribution market does not act in a manner inconsistent with the MFN principle and with the Member's specific commitments. In addition, if such monopoly supplier competes in the supply of a service outside the scope of its monopoly rights, the Member has to ensure that the incumbent monopoly does not abuse its position subject to the Member's specific commitments. The problem is however that most WTO Members undertook relatively limited commitments on energy services.

Reference Paper for energy services

The United States and Norway proposed to devise a Reference Paper for energy services, modeled on the Reference Paper to the GATS Agreement on Basic Telecommunications Services and to develop a set of rules for cross-border energy trade.^{ix} The purpose of the Reference Paper would be to ensure transparency in the formulation and implementation of rules, as well as non-discriminatory third-party access to and interconnection with energy networks and grids, non-discriminatory objective and timely procedures for the transportation and transmission of energy, and requirements preventing certain anti-competitive practices for energy services in general. The negotiations did not however receive impetus.

Although the idea of development of a Reference Paper in the energy sector is very pertinent, despite similarities between the telecommunications and energy sectors (highly regulated markets for network services characterised by large incumbent suppliers and regulation), there are important differences between telecoms and energy that need to be taken into account. Energy sector requires more sophisticated regulation due to possible impacts on the environment or issues related to energy efficiency and security of supply (including non-interruption of energy flows).

Key issues for energy services trade

Horizontal issues

- Supply of Energy-Related services
- Classification (value chain approach)
- Export and Import (Supply and Consumption) Interests
- Security of Supply and Demand
- Renewable energy targets

GATS-specific issues

- Doha Round “Collective Request”
- Taking a Reference Paper approach in the energy services sector (related to the subject of competition in network-bound energy markets)
- GATS and trade in renewable energy certificates

Regional/bilateral agreements specific issues

- Investment and performance requirements
- Export restrictions
- List approaches
- Renewable energy targets

Questions for discussion

1. How does trade in energy services affect sustainable development goals? Are there particular energy services that advance sustainable development objectives?
2. Assuming trade in energy services can make a positive contribution to countries' sustainable development agendas, can the existing GATS system be used to advance these interests?
3. Where the existing system falls short, what improvements or clarifications should be made to enable countries to facilitate use of the system to advance their interests in the energy sector consistent with overall public policy and sustainable development goals.
4. Is there merit in trying to distinguish between core and non-core energy services? If so, how should this be achieved?

5. Where to draw the line between production-related services, which would fall under the GATS, and production itself, which would not be covered by the GATS?
6. Does a commitment on services related to energy entail a right to access the natural resource?
7. What does a GATS commitment on pipeline transportation services cover? Does a commitment on pipeline transportation services entail a right to build a pipeline or to be granted a right-of-way for a pipeline?
8. Would it be desirable and what would be possible contents of a reference paper for energy services?
9. What does "technological neutrality" mean in the context of a mode 3 commitment, and how would it relate to other GATS disciplines, in particular domestic regulation?
10. How would a "technology neutral" approach affect certain national policy targets on specific energy technologies (e.g. 20 percent of renewable energy by 2020 in the EU, 35 billion gallons in 2017 in the US)?
11. What are the implications of a "technology neutral" approach on "policy space" in defining technological choices?

ⁱ Services Sectoral Classification List, MTN.GNS/W/120.

ⁱⁱ See, for instance, the communication of the United States to the Committee on Specific Commitments, the S/CSC/W/27, May 18, 2000.

ⁱⁱⁱ See Energy Services, Background Note by the WTO Secretariat, S/C/W/52, September 9, 1998, at 2.

^{iv} See Communication from Venezuela, Negotiating Proposal on Energy Services, S/CSS/W/69, March 29, 2001.

^v Communication from the United States, Energy Services, S/CSS/W/24, December 18, 2000.

^{vi} See Background Note by WTO Secretariat, *supra* note iii, as well as Zarrilli (2003), 42-43.

^{vii} Third-party access (TPA) means that third parties, often competitors of the generation, supply and distribution of the transmission facility owner, are entitled to use such facilities, either only for unused capacity, or on the basis of fair sharing of existing capacity, against a reasonable fee and on practical technical conditions.

^{viii} Article VIII applies also to cases of exclusive service suppliers, when a Member authorizes or establishes a small number of service suppliers and substantially prevents competition among those suppliers.

^{ix} Communication from the United States, Energy Services, S/CSS/W/27, May 18, 2000; Communication from Norway, S/CSS/W/59, March 21, 2001.

References

Selivanova, Y. (forthcoming 2007) "The WTO Rules and Agreements and their Relevance to the Energy Sector". *Trade and Sustainable Energy Series*. ICTSD.

Tacoa-Vielma, J. (2003) Defining Energy Services for the GATS: An Issue under Discussion, in *Energy and Environmental Services: Negotiating Objectives and Development Priorities*. UNCTAD. United Nations. New York and Geneva.

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