

ENERGY SERVICES UNDER THE GATS

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Topics

- 1. Energy services: starting point**
- 2. Energy services under the GATS: classification, relevance of modes of supply, etc.**
- 3. GATS commitments on energy services**
- 4. Concluding remarks**

1. Energy services: starting point

Energy services: starting point

- No energy-specific negotiations during the Uruguay Round
 - No separate classification
- Traditional market structure: vertically integrated state companies taking charge of the entire production and distribution chain
- Trends towards privatization and liberalization in gas and electricity sectors
- A range of different services are involved all along the energy chain.
 - The supply chain involves a range of services related to exploration, extraction, production, generation, transformation, transmission, distribution and marketing

Drawing the line between goods and services

- Production on a company's own account – i.e. by a company which owns the raw material – is not a service under the GATS.
- The question whether production on a fee or contract basis should be treated as a service was discussed inconclusively by Members.
- Related question: how to distinguish production itself from services which are related to production?
 - There are diverging views as to whether activities such as drilling, extraction, oil refining, gas liquefaction and re-gasification, amount to the production of a good or to a service.

2. Energy services under the GATS: classification, relevance of modes of supply, etc.

Classification under the GATS

- No separate energy sector in the Services Sectoral Classification List W/120
 - 3 sub-sectors directly refer to energy
- But important energy-related activities are spread over a broad range of sectors
 - Transport, distribution, construction, consultancy, engineering, etc.
- Remember: classification does not determine the scope of the GATS!

Sub-sectors referring to energy in W/120

- **1.F (h): Services incidental to mining**
 - ▶ CPC 883 + 5115
- **1.F (j): Services incidental to energy distribution**
 - ▶ CPC 887
- **11.G (a): Pipeline transportation of fuels**
 - ▶ CPC 7131

Services incidental to mining (CPC 883 + 5115)

(i) Services incidental to mining (CPC 883)

Services rendered on a fee or contract basis at oil and gas fields, e.g. drilling services, derrick building, repair and dismantling services, oil and gas well casings cementing services.

Exclusion: Mineral prospecting services, oil and gas field exploration and geophysical (e.g. seismic) and geological surveying services are classified in class 8675 (Engineering related scientific and technical consulting services).

(cont')

Services incidental to mining

(cont'd)

(ii) Site preparation work for mining (CPC 5115)

Tunnelling, overburden removal and other development and preparation work of mineral properties and sites, except for mining oil and gas.
Exclusion: Construction services incidental to oil and gas mining are classified in subclass 88300 (Services incidental to mining).

Services incidental to energy distribution (CPC 887)

Transmission and distribution services on a fee or contract basis of electricity, gaseous fuels and steam and hot water to household, industrial, commercial and other users.

Exclusion: Transport services via pipeline on a fee or contract basis of petroleum and natural gas are classified in subclass 71310.

Pipeline Transport (CPC 713)

Transportation of Petroleum and Natural Gas (CPC 7131)

Transportation via pipeline of crude or refined petroleum products and of natural gas

... and other sectors

- **Business Services**
 - Engineering Services (CPC 8672-8673), technical analysis and testing services (CPC 8676), Related scientific and technical consulting services (CPC 8675), etc.
- **Construction (CPC 513)**
 - Construction of long distance pipelines and power lines, construction for mining, etc.
- **Distribution (CPC 62271 and 63297)**
 - Wholesale trade services of solid, liquid and gaseous fuels, retail services of fuel oil, bottled gas, coal and wood, etc.
- **Transport (CPC 7422)**
 - Bulk storage and warehousing services of liquids or gases

Relevance of the four modes of supply for energy services (1)

- Mode 1:
 - Increasing relevance thanks to electronic transactions
 - Examples: analysis of geological data, monitoring of wind turbines and pipelines.
- Mode 2:
 - Limited application in situations involving the actual movement of the consumer
 - Example: repair of energy equipment abroad.
 - More relevance if mode 2 is also deemed to cover electronic transactions.
- Mode 4
 - Can contribute to facilitating the temporary transfer of intra-corporate specialists and managers working for energy companies.
 - However, mode 4 commitments are normally taken horizontally.

Relevance of the four modes of supply for energy services (2)

- Mode 3
 - Covers any type of business or professional establishment, including through the creation of a new establishment or the acquisition of a new one.
 - Mode 3 may also grant the right to invest in an existing monopoly.
- Covers pre- and post- establishment
 - The difference stems from the nature of the obligation.

Relevance of the four modes of supply for energy services (3)

- There are several important differences between obligations under mode 3 and BITs or even investment chapters in some PTAs
 - GATS covers only investment in services.
 - The definition of “investment” under the GATS is narrower.
 - GATS does not provide for an investor-state dispute settlement mechanism nor for investment protection obligations, such as minimum standards of protection of compensation in case of expropriation.
 - But, BITs tend to focus on post-establishment and do not offer guarantees for market access.

Examples of measures falling under specific commitments

- Market access:
 - Restrictions on foreign capital participation
 - Restrictions on the legal form of doing business
 - Economic needs tests (including unspecified ones)
 - Restrictions on the entry and temporary stay of foreign specialists and professionals
- National treatment
 - Nationality and residency requirements
 - Discriminatory tax treatment
 - Technology transfer requirements

Disciplines for monopolies and exclusive suppliers

- Members must ensure that monopolies – public or private - “behave” correctly
 - Monopoly suppliers of a service must, in the supply of the monopoly service in the relevant market, act in a manner consistent with the MFN obligations and specific commitments.
 - Monopolies (and exclusive service suppliers) must not abuse their monopoly position when supplying services in a sector outside the scope of their monopoly rights.
 - For instance, through control of energy transport networks
- These rules do not address anti-competitive practices affecting energy networks, such as access to and use of energy-transport facilities.

Government procurement is outside the scope of specific commitments and MFN

- MFN obligation and MA/NT specific commitments do not apply to government procurement.
 - GATS Art. XIII
- Definition: “procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale”.
- The case of BOTs, concessions and other forms of public/private partnership?

The question of ownership of natural resources

- The GATS is silent on this issue.
- In the WTO, Members have consistently expressed the view that the issue of ownership of natural resources is outside the scope of the negotiations.
- The GATS applies to energy service providers, *i.e.* entities which normally do not have proprietary title to the resource.

3. GATS commitments on energy services

GATS commitments: Services incidental to mining

- Relevant commitments in 45 schedules:
 - Several limitations restrict coverage to consultancy activities, excluding e.g. prospection, exploration, and exploitation
 - MA and NT mostly liberal, including for modes 1 and 3
- Questions arising in relation to CPC definition
- Working definition in *Scheduling Guide* (JOB03/89)

Example (1)

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
<p>F. <u>Other Business Services</u></p> <p>h. Services incidental to mining, incl. oilfield drilling (CPC 883 +5115)</p>	<p>1) None</p> <p>2) None</p> <p>3) Foreign equity limited to 51%</p> <p>4) Unbound, except as indicated in the horizontal section</p>	<p>1) None</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound except as indicated in the horizontal section</p>	

Example (2)

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
<p><u>F. Other Business Services</u></p> <p>h. Advisory and consulting services relating to mining</p> <p>(CPC 883**)</p>	<p>1) None</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound, except as indicated in the horizontal section</p>	<p>1) None</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound except as indicated in the horizontal section</p>	

GATS commitments: Services incidental to energy distribution

- Relevant commitments in 18 schedules
 - Coverage in several cases confined to consultancy services and distribution of gas
 - MA and NT liberal, mainly for mode 3, but also modes 1 and 2
- Questions arising in relation to CPC definition
 - Discrepancy between heading and definition?

Example (1)

Sector or subsector	Limitations on market access	Limitations on national treatment	Add. comm.
<p>F. <u>Other Business Services</u></p> <p>j. Services incidental to energy distribution (CPC 887**) Covers consultancy services related to transmission and distribution of electricity, gaseous fuels, and steam and hot water to households, industrial, commercial and other users.</p>	<p>1) None</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound, except as indicated in the horizontal section</p>	<p>1) None</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound except as indicated in the horizontal section</p>	

Example (2)

Sector or subsector	Limitations on market access	Limitations on national treatment	Add. comm.
<p>F. <u>Other Business Services</u></p> <p>j. Services incidental to energy distribution – for gas only (CPC 887**)</p>	<p>1) None</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound, except as indicated in the horizontal section</p>	<p>1) None</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound except as indicated in the horizontal section</p>	

GATS commitments – Pipeline transportation of fuels

- Relevant commitments in 12 schedules
 - Full sectoral coverage
 - MA and NT quite liberal: most commitments on modes 1, 2 and 3 are without limitations. Some schedules require concessions

Example (1)

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
G. <u>Pipeline transport</u> a. Transportation of fuels (CPC 7131)	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	

Example (2)

Sector or subsector	Limitations on market access	Limitations on national treatment	Add. comm.
<p>G. <u>Pipeline transport</u></p> <p>a. Transportation of fuels (CPC 7131)</p>	<p>1) Services must be provided through a contract of concession granted by the State on case-by- cases basis.</p> <p>2) None</p> <p>3) Services must be provided through a contract of concession granted by the State on case-by- cases basis.</p> <p>4) Unbound except as ...</p>	<p>1) None</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound except as ...</p>	

Example (3)

Sector or subsector	Limitations on market access	Limitations on national treatment	Add. comm.
<p>G. <u>Pipeline transport</u></p> <p>a. Transportation of fuels (CPC 7131)</p> <p>b. Transportation of other goods (CPC 7139)</p>	<p>1) None</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound except as ...</p>	<p>1) None</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound except as ...</p>	<p>Ukraine commits itself to ...</p> <p>Ukraine undertakes to ensure ...</p>

Ukraine's additional commitment on pipeline transportation

“Ukraine commits itself to provide full transparency in the formulation, adoption and application of measures affecting access to and trade in services of pipeline transportation.”

“Ukraine undertakes to ensure adherence to the principles of non-discriminatory treatment in access to and use of pipeline networks under its jurisdiction, within the technical capacities of these networks, with regard to the origin, destination or ownership of product transported, without imposing any unjustified delays, restrictions or charges, as well as without discriminatory pricing based on the differences in origin, destination or ownership.”

Example (4)

Sector or subsector	Limitations on market access	Limitations on national treatment	Add. comm.
<p>11.G <u>Pipeline transport</u></p> <p>a. Offshore upstream pipeline transportation of petroleum and natural gas. Central network control and monitoring services exempted (parts of CPC 71310)</p>	<p>1) None</p> <p>2) None</p> <p>3) License required to build and own upstream pipelines for transportation of oil and natural gas</p> <p>4) Unbound except as ...</p>	<p>1) None</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound except as ...</p>	

Accession commitments vs. total number of commitments

	Total number of commitments	Accession commitments
Services incidental to mining	45	18
Services incidental to energy distribution	18	12
Pipeline transportation	12	9

Gulf countries: existing GATS commitments

Members	Services incidental to mining	Services incidental to energy distribution	Pipeline transportation of fuels
Bahrain	--	--	--
Kuwait	--	--	--
Oman	Mode 1: none Mode 3: none	Mode 1: none Mode 3: none	--
Qatar	--	--	--
Saudi Arabia	Mode 1: none Mode 3: none	Mode 1: none Mode 3: none	Mode 1: none Mode 3: none
United Arab Emirates	--	--	--

Professional services

Engineering

Sector or subsector	Limitations on market access	Limitations on national treatment	Add. comm.
<p>1.A. PROFESSIONAL SERVICES</p> <p>1.A.f</p> <p>- Integrated engineering services for energy services</p>	<p>1) None</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound except as indicated in the horizontal section</p>	<p>1) None</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound except as indicated in the horizontal section</p>	

Business services – Related scientific and technical consulting services

Sector or subsector	Limitations on market access	Limitations on national treatment	Add. comm.
<p>m. Related scientific and technical consulting services (CPC 8675)</p> <p>- Offshore oil-field geological, geophysical and other scientific prospecting services (CPC 86751)</p>	<p>1) None</p> <p>2) None</p> <p>3) Only in the form of petroleum exploitation in cooperation with national partners</p> <p>4) Unbound except as...</p>	<p>1) None</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound except as...</p>	

Construction services

Sector or subsector	Limitations on market access	Limitations on national treatment	Add. comm.
<p>3. CONSTRUCTION...</p> <p>B. <u>General Construction Work for Civil Engineering</u></p> <p>- Construction for long distance pipelines (CPC 51340)</p> <p>- Construction for local pipelines and cables; ancillary work (CPC 51350)</p>	<p>1) Unbound*</p> <p>2) Unbound*</p> <p>3) None</p> <p>4) Unbound except as indicated in the horizontal section</p>	<p>1) Unbound*</p> <p>2) Unbound*</p> <p>3) None</p> <p>4) Unbound except as indicated in the horizontal section</p>	

Commercialization of energy

Sector or subsector	Limitations on market access	Limitations on national treatment	Add. comm.
<p>4. DISTRIBUTION SERVICES</p> <p>4.A</p> <p>Trading and brokering for energy, energy products and fuels</p> <p>- Commission agents' services, including sales of fuels (CPC 62113) and electricity</p>	<p>1) None, except unbound for electricity</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound except as indicated in the horizontal section</p>	<p>1) None, except unbound for electricity</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound except as indicated in the horizontal section</p>	

Commercialization of energy

(cont')

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
4. DISTRIBUTION SERVICES			
4.B			
- Wholesale trade services of electricity	1) Unbound 2) None	1) Unbound 2) None	
4.C			
- Retailing services of electricity	3) None 4) Unbound except as indicated in the horizontal section, and [...]	3) None 4) Unbound except as indicated in the horizontal section, and [...]	

Storage services

Sector or subsector	Limitations on market access	Limitations on national treatment	Add. comm.
<p>11 TRANSPORT SERVICES</p> <p>11.H Services auxiliary to all modes of transport</p> <p>b. Storage and warehouse services</p> <p>Bulk storage services of natural gas (CPC 74220**)</p>	<p>1) Unbound*</p> <p>2) Unbound*</p> <p>3) None</p> <p>4) Unbound except as indicated in the horizontal section</p>	<p>1) Unbound*</p> <p>2) Unbound*</p> <p>3) None</p> <p>4) Unbound except as indicated in the horizontal section</p>	

4. Concluding remarks

Concluding remarks

- Lack of energy chapter in W/120 is not a real obstacle to GATS commitments
- The GATS offers flexibility to define the sectoral scope of energy commitments
- Before undertaking GATS commitments:
 - Evaluate their consistency with existing or planned legislation, in particular:
 - Do current restrictions fall under Art. XVI or XVII?
 - Are reforms being contemplated?

Thank you

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