



Treatment of Energy-Related Services under the SADC Protocol on Trade in Services

SADC TNF meeting, Johannesburg, 11 March 2014



Outline

- **Classification of energy services in CPC prov. & CPC 2 – problems & advantages**
 - **Production and production-related services**
 - **Production on a fee or contract basis**
 - **Treatment of manufacturing services in CPC vers. 2**
 - **Services “incidental” to energy production**
- **Public procurement projects and energy services**
- **Practical consequences for SADC negotiators**



Suggested approach to classifying energy services in SADC negotiations

- Positive list approach as preference => need for a checklist
- Specific indication needed - what commitments and in which sector
- Use of CPC vers. 2 is suggested
 - WTO uses a list based on CPC
 - Vers. 2 is better organised for scheduling energy services commitments
- General reference to CPC vers. 2 and explanatory notes would be included in the schedules
- Interpretative notes could be added – if doubts remain as to the coverage



Treatment of manufacturing services in CPC prov.

Three categories related to energy services specifically:

- Services incidental to mining (in Other business services)
- Services incidental to energy distribution (in Other business services)
- Pipeline transportation/Transportation of fuels (in Transport services)

Services incidental to mining (CPC prov. 883 + 5115)



- Rendered on a fee or contract basis at oil & gas fields (drilling, derrick building, repair & dismantling, oil and gas well casings cementing services)
- Includes 'site preparation work for mining'
- Some related services are covered elsewhere (geological, exploration and mineral prospecting)

Problems:

- Explanatory note to CPC prov. 883 – not very clear (e.g. what about activities in coal mining?)
- What's the difference between mining and services incidental to mining?



Services incidental to energy distribution (CPC prov. 887)

- Transmission & distribution services on a fee/contract basis of electricity, gas, steam, hot water
- Transport services via pipeline on a fee/contract basis of petroleum/gas – not covered
- Use of ‘Incidental to’ in heading – controversial
- WTO suggested transmission and distribution *per se* are covered
- WTO Members hold different views as to coverage of transmission & distribution of electricity



Transportation of petroleum and natural gas (CPC prov. 71310)

- Only pipeline transportation is covered for:
 - petroleum and petroleum products
 - natural gas
- Likely covered activities related to operation of a pipeline
- Electricity is outside the scope
- Delineation between transportation of fuels and distribution of fuels is not clear (upstream vs downstream)



Production and production-related services

- Some aspects of energy production – similar to services activities (oil refining, gas liquefaction)
- Different views in WTO with respect to production-related activities

Two major criteria:

- If owner of energy resources performs an activity – it is not subject to GATS
- When carried out on a fee or contract basis – subject to GATS



Production on a fee or contract basis

- “Services incidental to manufacturing” (CPC 884)
- Manufacturing processes classified as services when performed on a fee or contract basis
- Ownership of raw materials processed – major criteria
- Includes assembly, maintenance and repair services
- Same activities if performed by manufacturers on their own account - are not considered services



Services “incidental” to energy production

- What are “services incidental to mining” & do they include mining itself?
- Concept of substantial transformation
- Services rendered on a fee or contract basis at oil and gas fields (Example: drilling can be or not classified as a services)



Treatment of manufacturing services in CPC vers. 2

- More detailed explanation regarding coverage of energy services
- Special section “manufacturing services on physical inputs owned by others”
- Special class on petroleum (884)
- Services performed “on physical inputs owned by units other than the units providing the services”
- Explicit reference to outsourcing
- Controversial category of “incidental” - replaced with “support” services + detailed list of such services



Classification of energy services under CPC vers. 2

Improved classification:

- Transportation via pipeline of crude or refined petroleum & gas
- Transportation via pipeline of other chemical products – coal slurry
- Support services to electricity, gas and water distribution
- Support services to oil and gas extraction + other mining
- + many classes in CPC 2 refer to energy-related activities
- Report identified services relevant to the energy sector – see **checklist**



Energy services in WTO

- Inconclusive discussions on definitional and classification issues
- Lack of classification does not exclude any services from GATS coverage
- However renders negotiations based on “positive list” difficult
- Using later CPC versions suggested
- In WTO context - certain commitments would refer to previous versions, while new commitments to new CPC
- BUT in regional - including SADC context – using CPC 2 is not a problem



Public Procurement Projects and energy services

- Exclusion of GP =>
 - (1) supplies of energy services – outside of horizontal obligations of Protocol
 - (2) excluded from specific commitments
- Government procurement – enormous role in energy sector => high potential for discrimination
- Takes place at all stages of energy project cycle
- Procurement rules – defined by national law
- National legislation on GP procurement differs from country to country

Public Procurement Projects and energy services (cont.)



- Important to clarify coverage of national laws on GP in SADC members
- Uncertainties as to which entities are covered? (esp. utilities with different degree of state ownership)
- Are local & municipal entities covered?
- Are state-owned enterprises covered? (energy companies are entrusted purchases for energy projects)
- GPA – no definition of government procurement
- BUT applies to central and sub-central governmental entities + other entities controlled by government in their procurement



Public Procurement Projects and energy services (cont.)

- Controversial – privately-owned utilities
 - If covered – SADC services commitments will be substantially reduced
 - Difference in GP laws => disparity in coverage
 - Services and GP have direct impact on each other
 - Access to GP – impact on services suppliers
 - Rights of establishment under services
 - Protocol – influence participation in GP
- => Exclusion of GP might undermine services commitments

Government procurement in energy services in SADC context



- Important to ensure the coverage is well known
- Entities covered by national procurement laws in SADC members – to be identified
- Reminder – to send responses to the government procurement questionnaire circulated in November 2013
- Long-run – framework for GP is important => Ensure non-discriminatory, transparent and fair competition in energy procurement



Conclusions

- Transparency on government procurement is necessary – not to undermine services commitments
- The coverage of GP exclusion should be made clear
- Lack of services definition and energy services classification DO NOT imply energy services are outside Services Protocol =>
- Classification issues do not impact the sectorial scope of GATS/Services Protocol
- Horizontal disciplines & MFN applicable to all sectors
- In network industries, competitive safeguards may be necessary (e.g. to ensure access to networks)



Conclusions (cont.)

- For positive list approach – a detailed menu of energy is key
- Important to decide if ‘manufacturing on a fee or contract basis’ is to be covered (recommended)
- Important to include a wide range of ‘support’ services
- CPC vers. 2 is a much better basis than other classification systems
 - WTO uses a list based on CPC
 - Vers. 2 is better organised for scheduling energy services commitments
- General reference to CPC vers. 2 and explanatory notes would be included in the schedules
- Interpretative notes could be added – if doubts remain as to the coverage