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Pushing the Renewable Energy Agenda Forward: Some Select Lessons from the GATS

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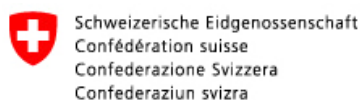
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ABSTRACT

World Trade Organization Members' understanding of what comprises a Sustainable Energy Services sector needs to be enhanced, whether through a new Trade in Services Agreement or through negotiations initiated under the WTO. While each member can nominate and inscribe services sectors or activities in its schedule of commitments according to its own, unilateral determination and description, it will be useful to have guidance provided through a negotiating proposal that defines or describes such services from one of the Members or group of Members. There is precedent in a number of General Agreement on Trade in Services Annexes and an Understanding specific to certain services sectors which provide such definitions. Further, these agreements also provide certain concepts and elements which can be usefully analyzed and, where appropriate, adapted into the context of Sustainable Energy Services. These concepts and elements may relate to, among others, the need for developing disciplines on domestic regulation as applied to the Sustainable Energy Services sector; the necessity of addressing inter-connectivity or inter-operability issues which another sector may have had to similarly confront in the past; or the imperative to resolve growth and financing issues peculiar to the Sustainable Energy Services sector. Provisions in other GATS agreements, or even other trade agreements, could also provide a wealth of elements and ideas that may well be worth surveying, analyzing, and adapting into the Sustainable Energy Services sector. The paper represents a simple first attempt at providing a snapshot of what may be possible.

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LIST OF ABBREVIATIONS

APEC	Asia Pacific Economic Cooperation
EU	European Union
GATS	General Agreement on Trade in Services
IEA	International Energy Agency
SETA	Sustainable Energy Trade Agreement
TISA	Trade in Services Agreement
WTO	World Trade Organization

INTRODUCTION

As the focus on the generation of power continues to veer towards renewable sources of energy, several pockets of influence in the international policy community increasingly seek various modalities through which the supply of renewable energy can be facilitated. In the context of international trade, initiatives such as the advocacy for a Sustainable Energy Trade Agreement (SETA), or the inclusion of renewable energy as a distinct services sector in the ongoing discussions for a new Trade in Services Agreement (TISA) have gained some support.¹ In a regional context, the Asia Pacific Economic Cooperation (APEC), for instance, hatched an agreement among participating member countries in 2012 to lower tariffs on a range of environmental goods, a substantial number of which relate to sustainable energy. Advocates of sustainable energy regard this as an initiative which could ripen into a SETA. In certain preferential trading arrangements, such as the one between the European Union (EU) and South Korea, the parties have incorporated the objective to “facilitate and promote trade and foreign direct investment in environmental goods and services, including environmental technologies, sustainable renewable energy, energy efficient products and services and eco-labelled goods, including through addressing related non-tariff barriers” (Article 13.6).² Similarly, the Japan-Switzerland (Free Trade Agreement (FTA) provides that the parties shall “encourage trade and dissemination of environmental products and environment-related services in order to facilitate access to technologies and products that support the environmental protection and development goals, such as improved sanitation, pollution prevention, sustainable promotion of renewable energy and climate-change-related goals” (Article 9).

To the extent that many in the policy community still view the World Trade Organization (WTO) as the most effective platform for pursuing enforceable commitments that compel trading partners to allow access for the supply of renewable energy and investment in it in their markets, it is said that the various initiatives and developments should dovetail into the WTO's work programme. Arguably, a TISA, which includes renewable energy as a services sector or sub-sector where participating member countries undertake liberalization commitments within the broader rubric of the WTO framework, represents an ideal scenario now. In the absence of that, a specific reference in the WTO 9th Ministerial Conference in Bali, Indonesia, for the need to pursue discussions in the renewable energy sector, akin to the specific mandate in paragraph 31 of the Doha Work Programme could have represented as good an outcome as can be expected at this point in time. Still, it may be argued that the above should be without prejudice to the assertion that the cited mandate, particularly sub-paragraph 31 (iii) on “the reduction or, as appropriate, elimination of tariff and

non-tariff barriers to environmental goods and services,” already includes the renewable energy sector, as has been recognized in the FTAs mentioned earlier. Indeed, perhaps all that is needed in the WTO is for a Member or group of Member countries to make the argument and table a negotiating proposal.

PROBLEM STATEMENT

Regardless of the modality pursued, the challenge will be daunting, that is, how will the anticipated liberalization or reforms be best implemented? In the case of a negotiating mandate, if any, one presupposes that a scoping exercise that helps Member countries better understand the coverage of products and activities that may be included in the sector will, as a matter of course, be a prerequisite. Several concerns will need to be addressed there, including the inseparability of certain goods and services where trade will need to be liberalized if the renewable energy sector is to be genuinely developed or optimized. Here, the same issues that have challenged WTO Members in negotiations to liberalize trade in environmental goods and services arise. The issue of “dual use,” for instance, will be further exacerbated in the renewable energy debate: Investments for the transmission, dispatch, and distribution of energy generated from renewable sources, apart from necessarily making use of equipment and goods which may be used for other industrial activities, may prove too limited if energy generated from fossil fuels were excluded from the use of such facilities.

For the purposes of the E15's agenda, large hydro power generation projects are excluded from this discussion. This is consistent with the core value of renewable energy as a driver of climate change mitigation and sustainable development. But this exclusion, in a sense, while simplifying the debate going forward, also implicitly provides a glimpse into the definitional and coverage issues that may prove sticky in negotiations. Which types of renewable sources of energy qualify for classification as sustainable energy? Should biofuel-sourced power generation facilities be included in the classification of sustainable energy? Extrapolating further, if the supply of transmission, dispatch, and distribution services cannot be conveniently

1 This presupposes that the supply of energy is a service, rather than a good. Notably, a number of WTO Member countries tabled negotiating proposals on “Energy Services” under the Doha Round of negotiations on services trade. On the other hand, rightly or wrongly, electricity appears to have been accepted by the parties and the Appellate Body in its ruling in *Canada – Certain Measures Affecting the Renewable Energy Generation Sector and Canada – Measures Relating to the Feed-in Tariff Program* (WT/DS412/AB/Rand WT/DS426/AB/R) as a good, rather than a service.

2 Art. 13.6, EU-South Korea FTA.

limited to renewable energy alone, should the coverage of proposed liberalization be targeted at power generation, notwithstanding that the activities referred to are direly needed, or in dire need of expansion, in many countries as well?

Additionally, there may be different thresholds among countries on what qualifies as renewable energy power generation. Where hybrid power generation plants are involved, some countries regard even a low 20 percent of power generated from renewable energy sources as qualifying a plant as a renewable energy facility. Should liberalization cover only investments or the supply of services pertaining to the 20 percent of renewable energy? Or is it unrealistic to make a distinction and bifurcate between the supply of services that are allowed and not allowed?

Offering a menu of possible discrete activities as items for liberalization—a checklist, as it were—that Member countries can cherry-pick through obviously redounds to a mitigated solution. The alternative of a “cluster approach,” which is more familiar to negotiators in the services context, although more likely to lead to comprehensive liberalization and growth in the renewable energy sector, did not gain much traction during the Doha Round because it was seen by many members, particularly developing countries, as being too encompassing and involving activities covered under other, more sensitive sectoral classifications. Further, it cannot be discounted that any discussions or negotiations in the renewable energy sector may be bogged down yet again by negotiating dynamics reflecting the more conventional perspective that the bulk of developing countries have limited offensive interests in the liberalization of this sector, and that they may be better off adopting a defensive stance with a view to parlaying any potential concessions in this sector into some advantage in another negotiating issue.

What creates further complications is that in many jurisdictions, government-owned or controlled entities continue to engage in power generation, transmission, dispatch and distribution, whether as monopolies or alongside private commercial enterprises. The extent to which these government-owned or controlled entities may be regarded as engaged in public procurement was a subject of discourse by the WTO Appellate Body in *Canada – Certain Measures Affecting the Renewable Energy Generation Sector and Canada – Measures Relating to the Feed-in Tariff Program*.

Apart from these definitional and coverage issues, domestic regulations may likewise prove a hindrance in the effective implementation of liberalization. In the context of the General Agreement on Trade in Services (GATS), domestic regulations are non-discriminatory measures that neither limit market access nor national treatment, and thus apply equally to foreign and local services suppliers. Domestic regulations may take the form of licensing requirements and procedures, qualification requirements and procedures, or technical standards. To the extent that these types of measures may be skewed against the optimal usage of

renewable energy, liberalization commitments may end up being stunted on the ground. For example, unduly lengthy periods with a myriad of requirements to obtain a service contract from the government for the provision of power and electricity in a particular territory can result in an unintended non-discriminatory trade barrier. Another concrete example would be where domestic regulation views the dispatch of power generated from renewable sources to the electricity grid as a lesser priority. Given the lack of “smart grids” in most countries,³ this measure acts as a disincentive to foreign service suppliers of renewable energy who may want to come in and invest in an otherwise liberalized sector.

Indeed, if a survey were undertaken of the different domestic regulatory measures in place in different jurisdictions, it may reveal a number of trade barriers whose damaging effects on the promotion of sustainable energy are equal to outright market access and national treatment limitations.⁴

SOME POSSIBLE RESPONSES

A number of useful papers have lent insights into and suggestions on how to resolve the issue of coverage of the renewable energy sector in Services. ICTSD’s recent publication *Sustainable Energy Services in a SETA* (2013) provides an overview of some of these and underlines that WTO Members are free to specify their commitments on related services across different sectors in their schedules within the current structure of classification (p. 20). Cossy (2011) argues that the absence of an appropriate classification should not prevent members from negotiating on climate change-related services (presumably including renewable energy services) and that what is more important is that each schedule be internally coherent and avoid overlapping with other sectors. Indeed, in the absence of an agreed classification, each Member, if so inclined, can unilaterally define the scope of its commitments by clearly and precisely describing the specific activities it wants to liberalize, including the conditions or criteria that must be met, if any, by service suppliers. Issues regarding “dual use” on account of possible non-renewable energy usage will be for each liberalizing member’s appreciation and delineation.

3 “Smart grids” are defined by the International Energy Agency (IEA) as “an electricity network that uses digital and other advanced technologies to monitor and manage the transport of electricity from all generation sources to meet the varying electricity demands of end-users;” http://www.iea.org/papers/2011/smartgrids_roadmap.pdf.

4 The OECD has conducted a series of studies on regulatory measures which effectively pose barriers to trade in different services sectors; see www.oecd.org.

Nonetheless, what will provide beneficial guidance is a negotiating proposal on Sustainable Energy Services by a Member or group of Members. This may be in the context of such Member(s) tabling the proposal in the TISA discussions or in the WTO Council for Trade in Services, assuming the mandate to negotiate is affirmed or exists. The document could set out all the different activities—or services subsectors—that will aid in the development and optimal usage of sustainable energy through their liberalization. The proponents could undertake the task after consultation with other technically knowledgeable agencies such as the International Energy Agency (IEA), similar international institutions, and Members' own local energy agencies. The document should outline the services sectors and the different sub-sectors or services activities contemplated within each main sector. The proposal would need to be more detailed in its description of the services activities that will contribute to the scaling up of supply and use of sustainable energy to more effectively capture the nuances that would differentiate services more particularly geared towards renewable energy. Further ideas that may be gleaned from the GATS or some GATS-derived agreements, and which could be built around or in parallel with the proposal, will be examined below.

With such a guide, WTO Members could at least come to a first step of understanding what the relevant services activities are and how they may incorporate these as a part of their liberalization commitments. Precisely because it is a negotiating guide or tool, Members would have the flexibility to adopt and adapt the proposed sectors/sub-sectors and descriptions in accordance with the peculiarities of their respective jurisdictions.

As mentioned, some elements from the GATS or agreements based on it may be worth adapting into the negotiating proposal or undertaken as parallel initiatives. For instance, as far as providing a description of certain services activities are concerned, the GATS Annexes on Air Transport, Financial Services and on Telecommunications, as well as the Understanding on Commitments in Financial Services, provide some illustrative value in terms of defining technical terms or service activities with specificity. In particular, the Telecommunications Annex's definitions of "Public telecommunications transport service;" "Public telecommunications transport network;" and "Intra-corporate communications" may resonate with the need to describe the transmission and distribution aspects of bringing renewable energy to end-users. On the other hand, the Understanding defines what a "new financial service" and a "non-resident supplier of financial services supplier" are. As technologies evolve in the field of renewable energy, it would arguably make sense to have an analogous definition of what "new renewable energy services" might entail for the sector.

Terms such as "services supplied in the exercise of governmental authority" and "public entity" in the context of the particular sector are also defined in the Annex on Financial Services. Given the relevance of these terms in

the renewable energy sector, as exemplified in the *Canada* disputes, it stands to reason that members may likewise want to define such terms themselves.

Assuming only certain WTO Members opt to make commitments, it may be more sensible to incorporate the definitions or description of renewable energy sectors and sub-sectors or activities within the schedule of commitments these members will offer. Otherwise, if at least a sufficient critical mass of members agrees to take on commitments, it would be reasonable to try and negotiate an agreement incorporating these definitions and descriptions reflecting the liberalizing members' understanding of the services activities they are making commitments on. This agreement could be akin to the Annexes to the GATS in the sense that they would apply to the entire membership and bind Members to the extent that they have made commitments in the renewable energy sector. Admittedly, there is a risk that should the negotiations on such an agreement be carried out by the entire membership, not only will the discussions likely drag on, but also the provisions may end up fairly limited in coverage and application.⁵ Since the definitional provisions will determine the precise nature and extent of commitments a Member will undertake, in the absence of concurrence by a Member, it may opt not to make a commitment on those services sub-sectors or activities with whose definitions it disagrees.

An agreement that may necessarily be multilaterally negotiated would be on possible disciplines on domestic regulatory measures. As earlier alluded to, non-discriminatory regulatory measures may result in inhibiting not only the supply, transmission, dispatch, and distribution of renewable energy, but- more relevant in the context of international trade- the foreign services suppliers who are intent on investing in and supplying those services.

A number of GATS agreements provide some elements that may be worth considering in this regard. The foremost example is the "Disciplines on Domestic Regulation in the Accountancy Sector," which was developed by the Council for Trade in Services' Working Party on Professional Services. The disciplines will apply to all WTO Members that have scheduled specific commitments for accountancy under the GATS, and is intended to be the first step in the development of GATS disciplines on the domestic regulation of services. Similar to the Accountancy Disciplines, the purpose of disciplines negotiated for Sustainable Energy Services will be to facilitate trade in that sector by ensuring that domestic regulations affecting trade meet the requirements of Article VI:4 of the GATS.⁶

5 | One school of thought is that definitions will not likely be diluted into general terms because Members inclined to liberalize would want to know with specificity what they are committing to; Members intent to "free ride" on these commitments would not want to dilute these either as it may lessen the extent to which they are able to do so.

Key to the disciplines must be the general requirement that measures taken for these purposes should not be more trade restrictive than is necessary to fulfill a legitimate objective. Examples of legitimate objectives specified in the Accountancy Disciplines are the protection of consumers (including all users of accounting services and the public generally), ensuring the quality of the service, ensuring professional competence, and ensuring the integrity of the profession. It stands to reason that a similar set of legitimate objectives could be drawn up in the case of the Sustainable Energy Sector.

The Accountancy Disciplines include a "standstill provision," effective immediately, under which all WTO Members, including those without GATS commitments in the accountancy sector, agree, to the fullest extent consistent with their existing legislation, not to take measures which would be inconsistent with them. In the sense that certain Members may not have liberalization commitments and yet participated in the negotiation of disciplines, this at the very least bars regression from the mean or what has been multilaterally agreed. Any future set of disciplines on the Sustainable Energy Services sector should incorporate a similar "standstill provision."

The Accountancy Disciplines likewise expand on the transparency obligations required on WTO Members under Article III of the GATS. Among others, the names and addresses of contact points which regulate the sector; the requirements and procedures to obtain, renew, or retain any licence or qualification; and the opportunity for comment and considering such comments before adoption of regulations are to be made available to other Members.

The Annex on Telecommunication Services may be even more in point with regard to transparency obligations. It provides that "(...) in the application of Article III of the Agreement, each Member shall ensure that relevant information on conditions affecting access to and use of public telecommunications transport networks and services is publicly available, including: tariffs and other terms and conditions of service; specifications of technical interfaces with such networks and services; information on bodies responsible for the preparation and adoption of standards affecting such access and use; conditions applying to attachment of terminal or other equipment; and notifications, registration, or licensing requirements, if any" (Section 4).

Again, these elements would logically be included in a parallel set of disciplines for the Sustainable Energy Services sector.

Basic tenets on facilitating trade and investments in the supply of a service are likewise provided for in the Accountancy Disciplines. While it may seem a matter of common sense, the Disciplines nonetheless spells out elements of good governance in implementing Members' respective licensing procedures.

"Licensing procedures (i.e. the procedures to be followed for the submission and processing of an application for an authorization to practice) shall be pre-established, publicly available and objective, and shall not in themselves constitute a restriction on the supply of the service.

Application procedures and the related documentation shall be not more burdensome than necessary to ensure that applicants fulfill qualification and licensing requirements. For example, competent authorities shall not require more documents than are strictly necessary for the purpose of licensing, and shall not impose unreasonable requirements regarding the format of documentation. Where minor errors are made in the completion of applications, applicants shall be given the opportunity to correct them. The establishment of the authenticity of documents shall be sought through the least burdensome procedure and, wherever possible, authenticated copies should be accepted in place of original documents.

Members shall ensure that the receipt of an application is acknowledged promptly by the competent authority, and that applicants are informed without undue delay in cases where the application is incomplete. The competent authority shall inform the applicant of the decision concerning the completed application within a reasonable time after receipt, in principle within six months, separate from any periods in respect of qualification procedures referred to below.

On request, an unsuccessful applicant shall be informed of the reasons for rejection of the application. An applicant shall be permitted, within reasonable limits, to resubmit applications for licensing.

A licence, once granted, shall enter into effect immediately, in accordance with the terms and conditions specified therein." (Section IX, Disciplines on Domestic Regulation in the Accountancy Sector)

The foregoing would seem to be too reasonable to be opposed in a set of disciplines applicable to the Sustainable Energy Services sector. The fact that the same has been previously agreed upon by WTO Members also augurs well for its adoption in another sector, especially one imbued with the urgency of helping address climate change.

6 Art. VI: 4 provides: "With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

- (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
- (b) not more burdensome than necessary to ensure the quality of the service;
- (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service."

Perhaps a little more controversial but worth considering would be provisions in the Understanding on Commitments on Financial Services stating, for instance, “Each Member shall grant financial service suppliers of any other Member the right to establish or expand within its territory, including through the acquisition of existing enterprises, a commercial presence” (Section B, para. 5), and further, that “(...)under terms and conditions that accord national treatment, each Member shall grant to financial service suppliers of any other Member established in its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business” (Section C, para. 1).

In the context of the Sustainable Energy Services sector, both provisions would appear relevant and useful, and take into account challenges faced by prospective foreign investors and service suppliers on the ground. The first allows an explicit opportunity for expanding and scaling up operations, thus making use of the advantages of economies of scale. As is well known, current supply of renewable energy in many countries, especially developing ones, do not necessarily occur in adjacent territorial areas and are generally of the mini- to small-scale variety of generation facilities. The aforementioned provision, as applied in the Sustainable Energy Services context, makes an initial investment on the current scale more attractive because it removes limits to growth.

On the other hand, Section C, para. 1 of the Understanding applied *mutatis mutandis* to a Sustainable Energy Services sector would expressly recognize fundamental issues critical to service suppliers' interest and the feasibility of operating in the sector. By analogy, access to payment and clearing systems could relate to and be adapted to take account of participation in feed-in tariff programmes, and automatic or preferred priority dispatch to the grid of electricity generated through renewable sources. Given that many countries maintain nationality or joint venture requirements for the supply of renewable energy services, and that proponents in developing countries tend to be small- and medium-sized enterprises, which need access to financing in partnership with foreign investors or service suppliers, a provision stipulating access to local funding or refinancing is a crucial condition.

CONCLUSION AND RECOMMENDATIONS

Whether through a new TISA or negotiations initiated under the WTO, Members' understanding of what comprises a Sustainable Energy Services sector would need to be enhanced. While each member can nominate and inscribe services sectors or activities in its schedule of commitments according to its own, unilateral determination and description, it will be useful to have guidance provided through a negotiating proposal that defines or describes such services from one of the Members or group of Members. There is precedent in a number of GATS Annexes and an Understanding specific to certain services sectors which provide such definitions. Further, these agreements also provide certain concepts and elements which can be usefully analyzed and, where appropriate, adapted into the context of Sustainable Energy Services. These concepts and elements may relate to, among others, the need for developing disciplines on domestic regulation as applied to the Sustainable Energy Services sector; the necessity of addressing inter-connectivity or inter-operability issues which another sector (telecommunications) may have had to similarly confront in the past; or the imperative to resolve growth and financing issues peculiar to the Sustainable Energy Services sector, which lie at the core of a viable operation.

Provisions in other GATS agreements, or even other trade agreements, could also provide a wealth of elements and ideas that may well be worth surveying, analyzing, and adapting into the Sustainable Energy Services sector. The foregoing represents a simple first attempt at providing a snapshot of what may be possible.

What must not be discounted in the end is the benefit of clearly and specifically setting out the rights and obligations of Members in the Sustainable Energy Services sector, such that a modicum of legal predictability and certainty will—hopefully—ensure Members make commitments in the sector.

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