

THE SERVICES RELATED TO THE ELECTRIC
INDUSTRY UNDER THE GATS.
IS THERE A NEED FOR NEW PROVISIONS
AT THE MULTILATERAL LEVEL
FOR THESE SERVICES?

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ABSTRACT

This document is the result of an investigation about the services related to the electric industry and how these were regulated in the General Agreement on Trade in Services GATS.

To write this article it was necessary to analyze the provision of the GATS, the commitments of the GATS members in energy services and some articles related to the topic. The purpose of this article is to analyze how the energy services were regulated in the GATS, in particular, the distribution and transmission of electric power. Furthermore, the article tries to establish whether the particularities of the transmission and distribution services could lead to the introduction of additional disciplines in the GATS.

*Fecha de recepción: 30 de septiembre de 2008
Fecha de aceptación: 15 de octubre de 2008*

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The conclusion of this article is that the energy services, in particular, those related to the electric industry do not have and adequate regulation in the multilateral level.

Key words: Electric services, General Agreement on Trade in Services, Transmission and distribution of electricity, Natural monopoly, Third party access

LOS SERVICIOS RELACIONADOS CON LA INDUSTRIA ELÉCTRICA Y SU REGULACIÓN EN EL AGCS. ¿EXISTE LA NECESIDAD DE CREAR NUEVAS NORMAS A NIVEL MULTILATERAL PARA ESOS SERVICIOS?

RESUMEN

El presente documento es producto de una investigación sobre la forma como los servicios energéticos fueron regulados por el Acuerdo General para el Comercio de Servicios AGCS.

El objetivo fundamental del escrito es analizar la forma como se regularon los servicios energéticos en el AGCS, en particular la transmisión y distribución de energía eléctrica. Así mismo, determinar si es necesario dadas las particularidades de los servicios de transmisión y distribución de energía, contar o proponer una regulación adicional a la que se encuentra contenida en el AGCS.

La principal conclusión obtenida con la elaboración de este artículo fue que los denominados servicios energéticos, en especial, los relacionados con la industria eléctrica no tienen una adecuada regulación a nivel multilateral. Así mismo, las particularidades de estos servicios hacen necesario pensar en introducir una regulación adicional a la que esta contenida en el AGCS.

La metodología utilizada consistió en estudiar el contenido del AGCS sus normas y los compromisos asumidos por los miembros en relación con los servicios energéticos. Además, se analizó la posición que diversos doctrinantes en la materia tienen respecto a los servicios eléctricos y su regulación.

Palabras clave: *Servicios Eléctricos, Transmisión y distribución de electricidad, Acuerdo General para el Comercio de Servicios, Monopolio Natural, Acceso a terceros a la red.*

Sumario: Introduction.- I. The Schedule of Commitments in the Electric Service Sector.-II. The Transmission and Distribution Services in the Electric Market.- III. Third Party Access to the Network in the Electric Industry.- Conclusions.- Bibliography.

INTRODUCTION

By the time of the Uruguay round¹, the electric market was in control of the States. Electricity was provided directly by the Countries through State owned utilities which were vertically integrated and performed all energy related economic activities. Accordingly, GATS negotiators did not pay much attention to energy services. This particular situation is reflected in the absence of a specific Energy chapter in the services sectoral classification list (document W/120) and in the fact that only a few GATS members have specific commitments in electric services, in particular, in the transmission and distribution of energy power. The first part of this article discusses how the schedules of commitments in the services sectors

1 In the Uruguay round the WTO members negotiated the General Agreement on Trade in Services GATS. Each member presented a schedule that included all the sectors that it was willing to open and in what conditions.

are made by countries, the difficulties to do it in the electric industry and the future changes proposed by some countries².

The electric industry is a network industry; therefore, the supply of the final product (Electric power) to the consumers relies upon a network. This kind of industries combines activities that are potentially competitive, such as generation of electricity, with ones that are naturally monopolistic, such as transmission and distribution of electricity. The second part of the article analyzes the particular characteristic of the services of transmission and distribution of electricity and how these characteristics can affect the regulation of these services in the multilateral level.

Finally, WTO Covered Agreements focuses specially on the elimination of barriers and restrictions to the free trade of goods and the progressive liberalization of the trade in services. However, there are some service sectors, like those related to electric industry, where commitments in market access and national treatment are not enough to have a free market. The third part of this article analyzes what additional regulation aside what it is include in the GATS is needed in the services of transmission and distribution of electricity.

I. THE SCHEDULE OF COMMITMENTS IN THE ELECTRIC SERVICE³ SECTOR

The General Agreement on Trade in Services (GATS) establishes a multilateral framework of principles and rules for trade in services. The main objective of the GATS is the expansion of trade services under conditions of transparency and progressive liberalization.

According to the GATS, these principles and rules apply to services which are supplied in four modes. Article I status:

2 United States of America and Venezuela.

3 For the purpose of this article the electric services are those services related to the electric industry such as transmission and distribution of energy, retail of electric power, energy audit services, operating and maintaining distribution and transmission lines, trading and brokering of energy among others.

“For the purposes of this Agreement, trade in services is defined as the supply of a service:

- (a) From the territory of one Member into the territory of any other Member
- (b) In the territory of one Member to the service consumer of any other Member;
- (c) By a service supplier of one Member, through commercial presence in the territory of any other Member;
- (d) By a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.”

It is clear that Article I(2) of GATS defines “trade in services” in terms of a product’s mode of supply:

“Products that are traded across borders (mode 1), the consumer travels to another member’s territory to receive the product (mode 2), products are supplied by the “commercial presence” of the service supplier within the member’s territory (mode 3), or there is movement of “natural persons” to another member in order to supply the product (mode 4)”⁴.

The emphasis is placed on the way in which the product is traded rather than on its inherent characteristics.

In the case of the electric industry, the most relevant services are transmission, distribution and retailing⁵. The trade of these three services is usually made under the modes 1 and 3.

4 Fiona Smith & Lorna Woods, *A distinction without a difference: exploring the boundary between goods and services in the world trade organization and the European Union*, *Columbia Journal of European Law* (2005).

5 Transmission: It is the transportation of electric power from the generation plants to the distribution companies and large industrial consumers through high voltage mains. This activity includes the transportation of electric power between electric networks or countries. Distribution: It is the supply of electricity to the final consumers. Retail: It is the supply of electricity to the final consumers. The retail is a service that includes the acquisition of electric power to the generator, the transmission and distribution through the grids, the metering and the billing of the electricity.

Under the GATS architecture each member state has the obligation to present a schedule that includes services sectors they want to open. The schedules that contain specific commitments of each party of the GATS are elaborated under the positive list approach which basically means that the parties establish their commitments, indicating what services sectors they want to open and under what conditions (National treatment and Market accesses⁶). Schedules are drawn up in a pattern of four columns (Graphic No. 1). In the first column each member specify the service sector or sub sector, in the second column the restrictions that want to impose in market access, in the third column the restrictions in national treatment and in the final column the additional commitments of the member State.

6 Accordingly to the GATS structure its rules are divided into “general obligations and disciplines” and “specific commitments”. The General Obligations and Disciplines (Part II of the GATS) contains the unconditional obligations; those undertakings that apply to all WTO Members regardless of whether they have scheduled commitments in specific services sectors. These obligations apply automatically and independently of the commitments of each country. The most important obligation is the duty to provide most-favoured nation (MFN) treatment to services and service suppliers of other Members. Likewise, there are other fundamental duties such as transparency, security exceptions, subsidies, monopoly, and exclusive suppliers. Specific commitments are the conditional obligations of the GATS, which only apply to services sectors in which a member has undertaken specific commitments. The first of these obligations is the provision on market access restrictions found in Article XVI. This provision prohibits a Member from, for instance, placing quotas on the number of foreign services suppliers, limiting the total value of foreign services transactions, or restricting the number of foreign persons that may be employed in a particular services sector. The second specific provision is the national treatment or non-discrimination obligation of Article XVII of the GATS. According to this provision WTO members should give to foreign services and service suppliers a treatment no less favourable than the stipulate in its schedule.

GRAPHIC 1 EXAMPLE OF A SCHEDULE

Mode of supply: 1. cross border supply; 2. consumption abroad; 3. Commercial presence; 4. Presence of natural persons.

Sector	Market access Limitations	National Treatment Limitations	Additional commitments
F. Other Bussines Services.	1) None 2) None 3) None	1) None 2) None 3) None	
J. Services Incidental to Energy distribution.	4) Unbound	4) Unbound	

To elaborate these schedules the member state use two documents: a) The services Sectoral Classification List (document MTN.GNS/W/120)⁷ and b) The United Nations Provisional Central Product Classification⁸ (UNCPC). These two documents are only reference documents which mean their use are not mandatory to the parties of the GATS during the elaboration of the schedules. Due to this particular situation, it could be difficult to identify the scope of the commitments of each country when they do not use the two documents, because the description of the sector in the MNT.GNS/W/120 is way open, and in many cases, the UNCPC clarifies and gives specific content to the commitment assumed by a country.

In the electric services sector, the problems when trying to identify the commitments are bigger because the MNT.GNS/W/120 and the reference made to the UNCPC do not include a separate comprehensive entry for electric services; therefore, it is necessary

7 This document is elaborated by the WTO and address the list of 12 service sectors and 160 sub sectors that may be negotiated under the GATS.

8 This document is elaborated by the United Nations Statistics Division and constitutes a comprehensive classification of all goods and services.

to look at other services sectors to try to identify the entry of these. In the case of transmission and distribution of electricity, the only reference in the document MNT.GNS/W/120 is found in the “*Other Business Sector*”, *sub sector j. Services incidental to energy distribution*”. The reference to the UNCPD in this entry is to the classification number 88700. However, neither the document MNT.GNS/W/120 nor the UNCPD establish a definition of what is meant by transmission and distribution of energy.

This lack of definition can cause problems. For instance, a company can argue that the distribution of electricity includes the retail of it even if the retail had not been included in the schedule. Furthermore, energy sector is an interrelated chain of activities a company can provide a service but there are other activities that have a close relation with this service. In the case of the transmission and distribution is important that the provider of the service at the same time can provide consultancy services to its clients of transmission services.

In the last years, the UNCPD has suffered important changes. For example, the entry 88700 has been divided in 4 new entries (classes) now with a particular entry for services incidental to electricity. This entry is divided in 2 sub classes: transmission and distribution of electricity on a fee or contract basis. Nevertheless, the new explanatory note only holds that these subclasses do not include transmission and distribution services in own account⁹, but no definition was included.

After analyzing the schedules of GATS members, only fifteen have specific commitments in services incidental to energy distribution¹⁰. Two¹¹ of these members specify that the entry covers

9 Central Product Classification CPC Version 1.1. <http://unstats.un.org/unsd/statcom/doc02/cpc.pdf>

10 Australia, Cambodia, Croatia, Dominican Republic, Gambia, Hungary, Kyrgyz Republic, Lithuania, Latvia, Sultanate of Oman, Nicaragua, Sierra Leone, Slovenia, Saudi Arabia and the United States.

11 Cambodia and Hungary .

only consultancy services incidental to the distribution of energy, the core distribution and transmission services remaining unbound. Other two¹² establish that the entry also cover consultancy services incidental to the distribution of energy. The other eleven Members do not specify the coverage of the entry. Ten¹³ of these eleven Members have referred to the relevant UNCPC number (887). If the UNCPC explanatory note is relied upon rather than the literal meaning of the words, those commitments might be read as including the core distribution and transmission activities. One Member specifies that the commitments cover only distribution of gas.

In the case of the retail of electricity to final consumers, this service is not included in the document MNT.GNS/W/120. The retail implies the acquisition of electric power to the generator; the transmission and distribution through the grids and the metering and billing of the electricity to the final consumer. The retail of electricity is one of the biggest businesses in the countries where the electric market has had reforms because it is one of the activities in which free competition is allowed.

There are another services related to the electricity that are difficult to find or are not included in the classification list (document MNT.GNS/W/120). For instance, operating and maintaining transmission and distribution networks, trading bulk electricity, installation of lines to existing and new customers, trading and brokering of energy and other wholesale intermediation among buyers and sellers of energy sources, metering and billing for energy, data collection services, energy audit services and customer call-out services.

Many of these services are not incorporated in the document MNT.GNS/W/120 because

“When W/120 was written, much of the energy industry was dominated by state-owned enterprises operating mostly within home markets as vertically integrated companies with monopoly positions. Most service functions

12 Australia and Lithuania.

13 Australia, Dominican Republic, Gambia, Hungary, Nicaragua and Slovenia.

were performed ‘in-house’ by oil companies and power generation utilities that controlled the whole production and distribution chain”¹⁴.

Today, governments have reformed the electric industry, leading to a significant unbundling of various energy services.

The lack of an adequate classification of the electricity services make difficult to understand what part of the market is open and what part is not. Due to this it could be interesting to analyze the possibility of including a new specific sector for the electric services that allows the parties clarify the scope of their commitments and includes new services. Moreover, a new classification according to the reality of the electric industry is going to allocate that many activities which do not even appear in the classification list can be included in the schedules of many countries, helping the liberalization of the trade of services. Under the provision contained in the article XIX of the GATS and the Doha Ministerial declaration¹⁵, new negotiations for the trade in services are being carried out.

In these new negotiations, the importance of establishing a new classification for the energy sector has been discussed by some members¹⁶.

14 United States of America documentS/CSC/W/27. www.wto.org/spanish/tratop_s/serv_s/energy_s/energy_s.htm

15. The negotiations on trade in services shall be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least-developed countries. We recognize the work already undertaken in the negotiations, initiated in January 2000 under Article XIX of the General Agreement on Trade in Services, and the large number of proposals submitted by members on a wide range of sectors and several horizontal issues, as well as on movement of natural persons. We reaffirm the Guidelines and Procedures for the Negotiations adopted by the Council for Trade in Services on 28 March 2001 as the basis for continuing the negotiations, with a view to achieving the objectives of the General Agreement on Trade in Services, as stipulated in the Preamble, Article IV and Article XIX of that Agreement. Participants shall submit initial requests for specific commitments by 30 June 2002 and initial offers by 31 March 2003. Doha WTO Ministerial Declaration November 14 2001. www.wro.org/english/thewto_e/minist_e/min01_e

16 United States of America, European Union, Venezuela and Chile.

A. PROPOSALS FOR THE ELECTRIC SECTOR OF USA AND VENEZUELA

Written into the General Agreement on Trade in Services GATS is a commitment by WTO government members to progressively liberalize trade in services. Article XIX (paragraph 1)¹⁷ committed them to start a new round in 2000.

As a consequence of this commitment, many countries have presented their proposals for the trade on services. Some of these proposals make a specific reference to the energy sector which includes the industries of electricity, gas, oil, coal etc.

Some of the most relevant proposals in the energy sector were presented by the USA and Venezuela.

1. THE UNITED STATES' PROPOSAL

The US proposal focuses on the importance to establish a new comprehensive classification for the energy sector. The classification list (document W/120) used during the Uruguay round by the US and the other WTO members has two basic problems:

- “a) A number of specific energy services do not appear to be specifically included in the W/120 classification. This means that most countries, that as a practical matter rely on W/120 as a reference point in scheduling market access commitments, have not considered scheduling commitments for these energy-specific services, many of which represent new activities.
- b) A number of other related energy services are to be found in the W/120 classification. However, these services are spread throughout the classification system. As a result, an energy service provider has no

17 Article XIX. 1. In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.

guarantee that, even if assured of a market access commitment for a specific energy service, such as supply of energy to customers, he would also enjoy market access to provide related services, such as consultancy services which require specific knowledge of energy. Because the energy sector is an interrelated chain of activities, effective market access appears to require scheduling market access commitments not only for a specific energy service, but for related areas as well¹⁸.

In order to solve these problems, the US proposes that the first step is to create a new comprehensive classification that reflects current market realities for the energy sector by including the many different activities that constitute the entire chain of energy services. In addition, the US in its proposal considers that the development of a new distinct and *comprehensive listing of energy services would provide service providers and WTO members the realistic opportunity to assess whether existing GATS rules are sufficient to address the needs of the energy service sector, or whether additional rules, perhaps rules akin to those in the Telecom Sector's Reference Paper, would be desirable*¹⁹.

Finally, the US also believes that a new classification would contribute to have significant and meaningful market access commitments for energy services. This new service classification could also provide services suppliers with greater certainty over which of their activities have been scheduled in a country's commitments. Besides, a new classification could provide the basis for developing a Reference Paper similar to the one written to the Telecom Sector. This reference paper would address specific issues related to the energy services sector, such as access rights to transmission networks and consumer freedom of choice to select power suppliers.

18 United States proposal for energy services document S/CSC/W/27 18 May 2000.

19 Ibid No 16.

2. VENEZUELA'S PROPOSAL

Venezuela considers that it would be in the interests of developing countries if these negotiations were approached with a wider focus than a merely trade-based perspective.

In its document, Venezuela proposes as overall objectives of the negotiations that:

- The negotiations should ensure the access to energy services as many people and industries as possible, in order to improve their standard of living and to promote economic growth.
- The market-opening should help to increase the energy supply capacities of all Members.
- The negotiations should help developing countries to achieve improved access to technology.
- The negotiations should facilitate countries which use the supply of energy services as an instrument for boosting their development and as a means of diversifying their economy to continue to pursue these policies.

In order to achieve these overall objectives, Venezuela considers essential to introduce a series of basis for the negotiation. These basis are:

- The developing countries should have the right to regulate the supply of energy services within their territories in order to meet national policy objectives and to facilitate their increasing participation in international trade in these services.
- The negotiations should guarantee to put into practice the provisions of GATS Article IV and should not impair the right of governments to determine conditions of access to their markets and to set obligations with regard to public services.

- The developing countries should have the flexibility to open fewer sectors, liberalize fewer types of transactions and progressively extend market access in line with their development situation, in accordance with Article XIX of the GATS.
- The negotiation should respect the right of the developing countries to implement public policies in order to improve the capacity of national small and medium-sized energy service suppliers.
- The ownership and rights of access to and use of natural resources are issues that should not be addressed in these negotiations.

Finally, the proposal of Venezuela is quite different from the US proposal. Venezuela emphasizes the right of the developing countries to regulate the supply of energy services in order to maintain national public policies objectives and to open fewer sectors and liberalize fewer types of transactions. Meanwhile, the focus of the US proposal is to create a new classification which includes all the services that are involved in the energy industry and promote the liberalization of the sector.

In conclusion, the lack of an appropriate classification makes it difficult to establish commitments in the electric services sector. It is necessary to develop a new classification for the services sector that allow the countries to include more services related to the electric industry and thus ensure the opening of this market. However, that classification may not be sufficient to obtain the opening of the electric sector. It is also important to understand the particular characteristics of some services related to this industry and try to regulate in order to achieve a truly open market.

II. THE TRANSMISSION AND DISTRIBUTION SERVICES IN THE ELECTRIC MARKET

The electric industry can be classified as a network industry. Usually this kind of industries combines activities that are potentially competitive, such as generation of electricity, with ones that are naturally monopolistic, such as transmission and distribution of electricity²⁰. This particular combination produces a situation where the competition rules and the regulatory framework should try to maximize the benefits of the liberalization and to control any tendencies to monopolistic abuse.

The Network Industries are characterized by a number of common features. First, the supply of the final product (Electric power) relies upon a network such as the transmission and distribution grid in the electric business. Second, the network or grid constitutes a natural monopoly. Competition in the supply of network services would be inefficient. The duplication of this kind of facilities is totally absurd in an economic point of view. Third, the final services provided by the industry are potentially competitive.

In conclusion, in network industries such as the electric industry the use and access to the grid become fundamental for the adequate run of the business. The transmission and distribution grids are the central core of the industry because without them the supply of energy to the final consumer and the international trade of electricity are impossible.

A. PARTICULAR CHARACTERISTICS OF THE TRANSMISSION AND DISTRIBUTION OF ELECTRICITY

The transmission and distribution of electric power are the soul of the electricity business, the utilities which operate these services have in

20 Ibid. No. 4 pag 454.

their hands the opportunity of guarantying competition through the whole industry. The access to the grid in a not discriminatory way is the key to ensure free competition.

However, the transmission and distribution services have two particular features which make its regulation and legal framework in the multilateral and local level a primary issue for governments. An adequate regulation maximizes the benefits of competition (lower prices) and assures the access to the energy to all the members of the society (public policies). These characteristics are being natural monopolies and being considered public services.

1. PUBLIC SERVICE

There are some services whose access is fundamental for the improvement of life conditions. Such services are water and energy supply, health care, education etc. Usually, these services are called public services . The concept of public services can have different meanings which can lead to confusion.

“The term sometimes refers to the fact that a service is offered to the general public, it sometimes highlights that a service has been assigned a specific role in the public interest, and it sometimes refers to the ownership or status of the entity providing the service”²¹.

The best term to identify those services is or could be “services of general interest”²² . Those services are fundamental for increasing quality life conditions in people’s lives. Due to the importance of these services, their access and regulation is always a matter of public policy. Governments want to regulate these services in order to

21 Commission of the European Communities, *Green Paper on Services of General Interest*. Bruselas, 2003. http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0270en01.pdf.

22 This concept is adopted by the European Union in the document *Green Paper on Services of General Interest*.

achieve access in fair and affordable prices and obtaining a quality service.

The transmission and distribution of electricity are services of general interest because without them the final supply of electricity to the final consumer is impossible. The access to these services guaranties that people can have electricity and the benefits of it.

Finally, the close relation between the services of general interest and the public policies produces that many governments not include commitments in this kind of services in multilateral agreements such as the GATS.

2. NATURAL MONOPOLIES

In simple words a “natural monopoly” is defined in Economics as an industry where the fixed cost of the capital goods is so high that it is not profitable for a second company to enter and compete²³. It would be very costly to build a second set of grids to carry electricity.

The big problem with undertakings, which provides services as monopolies, is how their behaviour can affect the whole industry. In the case of the electric industry there are undertakings that own the transmission and distribution grid and develop activities of retail of energy. These companies may refuse to provide the service of transmission of energy to other retailing undertakings that compete in the same market affecting the free competition and sometimes the price of the electricity.

This special quality of the transmission and distribution services makes necessary a specific regulation for these services. In the multilateral level the GATS regulates the trade of services and includes provisions related to services provide by monopolies.

23 <http://www.progress.org/fold74.htm> February 1 2008.

The article VIII²⁴ of the GATS institute provisions apply directly to monopolies. These provisions focus on ensuring compliance with the Most Favored Nation principle, as well as with specific commitments in areas where the monopolist acts as a competitor²⁵. However, the article does not cover monopolies that arise without government interference, including the so-called natural monopolies²⁶. The fact that the natural monopolies escape of the scope of the article VIII of the GATS and the particularities of the electric services of distribution and transmission have made to think about the necessity to create a set of rules similar to those include in the telecommunications reference paper²⁷, in order to introduce some

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- 24 Article VIII *Monopolies and Exclusive Service Suppliers*. 1. Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments. 2. Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments. 3. The Council for Trade in Services may, at the request of a Member which has a reason to believe that a monopoly supplier of a service of any other Member is acting in a manner inconsistent with paragraph 1 or 2, request the Member establishing, maintaining or authorizing such supplier to provide specific information concerning the relevant operations. 4. If, after the date of entry into force of the WTO Agreement, a Member grants monopoly rights regarding the supply of a service covered by its specific commitments, that Member shall notify the Council for Trade in Services no later than three months before the intended implementation of the grant of monopoly rights and the provisions of paragraphs 2, 3 and 4 of Article XXI shall apply. 5. The provisions of this Article shall also apply to cases of exclusive service suppliers, where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory.
- 25 Rudolf Adlung, *Public services and the GATS*, *Journal of International Economic Law*, No. 9 473 (2003).
- 26 The definition of a monopoly supplier in Article XXVIII(h) *covers any public or private person which in the relevant market ... is authorized or established formally or in effect by that Member as the sole supplier of that service*'.
- 27 The reference paper in telecommunications contains specific provisions governing access to and use of public telecommunications networks.

competence principles that rule the electric industry in specific the transmission and distribution services.

In conclusion, the nature of these services makes difficult that foreign companies compete in the transmission and distribution services in a specific market. New utilities could compete in the construction and operation of new networks, in those cases the market access and national treatment commitments in the GATS are fundamental for the new suppliers of transmission and distribution services. However, the access to the existing network in fair conditions is fundamental to the retail service industry and to other services related to the electric industry where the competition is possible. Such services are trading and brokering of energy and other wholesale intermediation among buyers and sellers of energy sources; Metering and billing of energy. The current rules of GATS do not include any provision that guarantees the access to the existing network.

III. THIRD PARTY ACCESS TO THE NETWORK IN THE ELECTRIC INDUSTRY

WTO agreements focused specially on the elimination of barriers and restrictions to the free trade of goods and the progressive liberalization of the trade in services. However, these agreements never include provisions related to some competence issues. There are some economic sectors where the merely elimination of barriers or the inclusion of commitments to open the market are not enough to achieve liberalized trade.

These sectors usually faced a transition from monopolies to free market. For instance, until 1990, the electric sector in many countries was dominated by state owned vertically integrated utilities, acting as monopolies. The introduction of legal reforms in this sector endorsed the entrance of new competitors in particular in the retail business. However, the former monopolies have continued acting in the market in a dominant position because they still control the network of transmission and distribution.

In the electric industry, the transmission and distribution grids are fundamental for its functioning because without the network it is impossible to supply the final consumers with electricity. Furthermore, these activities are considered natural monopolies, which means that the utilities that control the network can affect the whole liberalization of the market.

Existing operators of the networks are in general vertically integrated companies, which mean that they not only participate in the transport of electricity, but also, in the generation or retail (supply) to final consumers. This particular situation makes that these utilities try to deny the access to the network to other competitors, claiming lack of access or charging excessive transport fees²⁸.

Therefore, open access to networks for suppliers (generators, trading and retailing companies) is one of the prerequisites for effective competition in the electricity sector²⁹. This open access to the grid is commonly known as Third Party Access TPA. TPA as a regulatory tool constitutes the key to the liberalization of the electricity market, including the trade of electric services (trade and supply of electricity) and the trade of Electricity³⁰. Professor Thomas Walde³¹ held that:

“Third-party access (TPA) is hence an essential condition for creating competitive national energy markets and for creating a competitive cross-border energy markets. Without TPA, existing energy monopolies operate in effect a necessary toll-gate for market entry; the benefits of new supplies and competition go to existing operators rather than to consumers and the economy at large”.

28 Thomas Walde, *Access to energy networks: A precondition for cross-border and energy services trade*, July 2001. <http://www.dundee.ac.uk/cepmlp/journal/html/vol9/vol9-2.html>.

29 Palasthy, *Third party access in the electricity sector: EC competition law and sector-specific regulation*, *Journal of Energy and Natural Resources Law*, No. 20, 27 (2002).

30 The electricity regards its particularity is consider a good. The trade of electricity is under the provisions of the GATT.

31 *Ibid* No. 23.

However, this principle of open access to the grid is not an absolute one. There are some situations where the owner of the network can refuse the access to it, for instance technical matters (Lack of Capacity).

The TPA has its legal base in the competence law and the concept of essential facilities. The American antitrust law (Sherman Act) introduced (St Louis Railroad case) the idea of third-party access to essential facilities. The concept has later been applied by the EU (Commission and European Court of Justice) using the article 86 of the EC treaty.

The Third party access implies that, an Undertaking which owned and essential facility (a Facility or infrastructure, without which access competitors can not provide services to their costumers) can not refuses other companies access to that facility without objective justification. If the undertaking refuses or grant access on terms less favourable than those which it gives to its own services its conduct can be consider an abuse of a dominant position.

There is not in the international law, an agreement or international treaty that has included the TPA. In the GATS there is no reference to the concept.

The General Agreement on trade in services GATS look forward to a progressive liberalization of trade in services by the elimination of the existence barriers and obstacles to this trade, especially through the inclusion of commitments in market access and national treatment by the parties of the agreement. Nevertheless, in the case of the electric industry and the electric services these commitments can be short to achieve the truly liberalization of the sector. A country can have commitments in market access, national treatment and allocate foreign providers to supply electric services, but if those providers can not have access to the transmission and distribution grid or the tariff to access is to high, it could be impossible for them to compete in that market. Thus, it is necessary to include new disciplines in the GATS, such as TPA in order to accomplish a real liberalization market.

In conclusion, the TPA is the only tool that guarantees a truly liberalization of the electric market. However, the form of how this access is regulated is also an important issue for the liberalization of the market. Usually the TPA can be achieved under two different forms: 1. Regulated TPA. 2) Negotiated TPA.

A. FORMS TO ESTABLISH THE THIRD PARTY ACCESS TO THE NETWORKS

1. REGULATED TPA

Under this system governments give to the companies the right to access the network in the conditions and terms that were established by a public authority. The independence of this authority is an essential element, because if the regulator can be influenced by the transmission and distribution utilities (in some countries remain public) or by the politicians for instance, the access to the network can be use as a tool to deprive the liberalization of the market.

Finally, in this system is also fundamental the methodology used to determinate the cost to access the network and the right of the participants of the market to challenge the methodology, if they are not agree with it.

2. NEGOTIATED TPA

In this system the utilities can negotiate with the operator of the networks the terms and conditions of its access. This system is not often used; the most relevant example of the use of this kind of TPA is Germany³².

One of the problems with this system is the lack of framework for the negotiations. It is not always clear for the parties what is

32 Achim Borner, *Negotiated Third party access in Germany: Electricity and Gas*, *Journal of Energy and Natural Resources Law*, No. 20, 27-39 (2002).

going to be negotiated or what are the general conditions of the negotiation. Besides, there are a multitude of technical problems which can arise in the discussion.

In the case of Germany the industry tried to solve this problem creating the “*Associations Agreement on TPA*” (Verbandvereinbarung) in order to regulated some aspect of the TPA negotiations³³.

The other problem of the NTPA is that in many countries the former monopolies still participated in the market and not only in the transmission and distribution services, in many cases, they continue vertically integrated, which means that they also develop activities of generation and supply. This particular position could produce in practice that the incumbent network owner may use a number of tactics in order to foreclose the market and avoid competition³⁴.

Finally, in the NTPA system is basic to institute an authority that can solve the problems when there is no agreement between the parties. This authority should solve this kind of problems in a short period of time.

B. ELEMENTS OF THE THIRD PARTY ACCESS:

Regardless of the system adopted to grant TPA, there are some general points that have to be included in the establishment of the system. These particular issues are:

33 Ines Zenke, *Germany's Electricity and Gas Markets Stand Alone: Negotiate Third Party Access*, *Journal of Energy and Natural Resources Law*, No. 21 143-152 (2003).

34 That was the case in the gas sector in the UK. The company British Gas not only owns the network but also participate in the supply of gas. British Gas used tactics trying to foreclose the market and made that the NTPA system fail. The United Kingdom government finally abandoned negotiated access. Non-discriminatory access to the British Gas network was produced by a combination of regulated access and vertical separation. Carlos Lapuerta, *Network industries, third party access and competition law in the European Union*, *Northwestern journal of international law & [and] business*. Vol 19 (1999).

1. **The use-of-system charges:** The access to the network is not free. It is necessary to institute a methodology in order to settle on a tariff for the use of the network. The owner of the network only can give access again adequate remuneration.

It is necessary to determine whether the methodology is going to be cost based pricing or is going to include monopoly profits. In the cost base pricing the networks owner's total access revenues are no higher than what is needed to cover costs. The notion of cost naturally includes an appropriate return on the capital employed.

2. **Condition of the access:** The access should be granted for the network operators at conditions no less favourable than those imposed in fact or in calculation for affiliated or associated undertakings and in a non- discriminatory basis.
3. **Dispute settlement:** In order to ensure an adequate system for TPA. It is necessary to have an independent domestic body to resolve disputes regarding appropriate terms, conditions and rates for access within a reasonable period of time.
4. **Refuse access:** The TPA is not an absolute principle; the owner of the network can refuse the access. However that refuses can only be in particular and specific situations specially related with technical matters (lack of capacity).
In order to avoid the abuses of the incumbent of the network, it is basic to set a group of rules that government these situations. For instance in the case of lack of capacity this has to be real and not produced as consequence of the sign of reservation agreements³⁵.

35 In some cases the owner of the network and the user can agreed granted access to a higher capacity of what is truly needed.

C. THE REGULATION OF THIRD PARTY ACCESS AND THE INDIRECT EXPROPRIATION

When TPA is introduced as an instrument for the achievement of a truly free electric market, the argument of expropriation sometimes arises. The owner of an infrastructure constructed at enormous cost, with huge risk to serve its business will not sympathise at all with the idea that a competitor should have “easy access” to its infrastructure, without going through the trouble of investment and risk³⁶. Expropriation is always claimed by incumbent network owners when TPA is imposed to them.

Customary international law, domestic law and treaty base international law (Bilateral investment treaties, free trade agreement which include investment chapters) protect the property against regulatory action taking by governments that is equivalent to expropriation (regulatory takings).

However, not all regulation can be considering a regulatory taking. There are differences between regulation and expropriation. In his separate opinion in the case *SD Myers vs. Canada* (NAFTA case) Dr. B Schwartz emphasized three main differences between expropriation and regulation:

“First, expropriation tend to be severe deprivations of ownership rights; regulation tend to amount to much less interference. Secondly, expropriations tend to deprive the owner and to enrich –by a corresponding amount- the public authority or the third party to whom the property is given. There is both unfair deprivation and unjust enrichment when an expropriation is carried out with compensation. By contrast, regulatory action tends to prevent an owner from using property in a way that unjustly enriches the owner. Finally, expropriations without compensation tend to upset an owner’s reasonable expectations concerning what belongs to him,

36 Thomas Walde, *Access to energy networks: A precondition for cross-border and energy services trade*, July 2001. <http://www.dundee.ac.uk/cepmlp/journal/html/vol9/vol9-2.html>.

in law and in fairness. Regulation is something that owners ought to reasonably to expect. It generally does not amount to an unfair surprise”³⁷.

Regulating owner’s use of their own property is the gist of police power. Government has a fundamental function “*in defining how far an owner may go in using its own property in relation to the rights and interest of other members of the community. Such limitations are permissible and necessary*”³⁸.

In the case of the TPA when the governments issue this kind of regulation the main objective is to intervene in the economy in order to keep or make it competitive. Competition guarantees to the consumer, access to more goods and services at better prices and conditions.

Furthermore, as is stated by professor Thomas Walde the contra argument for those who believes that TPA is an expropriation is that:

“Competition law as part of the economic police powers of the state circumscribes the usage of ownership, and so limitations on use of private property in order to introduce competition and combat abuse of dominant positions are not excessive regulation amounting to a taking, but rather a legitimate and moderate use of state regulatory powers”³⁹.

In conclusion, the regulation of TPA can not be considering a regulatory taking. The Government has the faculty to limit the use of the property when is necessary to protect the rights and interest of the community and to prevent the abuse in the use of the property by the owner.

37 Campbell McLachlan; Lawrence Shore; Matthew Weiniger and Loukas Mistelis, *International Investment Arbitration Substantive Principles*, 307 (First edition. Oxford University Press, 2007).

38 William P Barr.; Henry Weissman; John P Frantz. *The Gild that is killing the Lily: confusion over regulatory takings doctrine is undermining the core protections of the takings clause*, *The George Washington Law Review*, 2005 No. 73, 470 (2005).

39 Ibid No. 31.

CONCLUSIONS

- By the time of the Uruguay Round the process of liberalisation of energy markets was at an early stage. Accordingly, negotiators did not pay much attention to energy services, which is reflected in the absence of a specific Energy chapter in the W/120 services sectoral classification list. A number of specific energy services were not included in the W/120 classification.
- Only a few members States of the GATS have commitments in services related to the electric industry. In order to increase the commitments in electric services a new classification list is needed.
- The services of transmission and distribution of electricity have the particularity of being natural monopolies and being considered public services. However, the GATS disciplines related to monopolies (Article VIII) do not apply to natural monopolies.
- The transmission and distribution services are the central core of the electric business, utilities which operate these services have in its hands the opportunity of guarantee the competition in the whole industry.
- The WTO agreements focused specially in the elimination of barriers and restrictions to the free trade of goods and services. However, these agreements never include provisions related to competence issues.
- In the electric industry the access to the network is essential to achieve a truly free industry and avoid the abuse of dominant positions. The access to the grid is known as Third Party Access TPA. The GATS does not include provision in this area, the access to the network is not an obligation under the GATS

system. The suppliers of transmission and distribution services may refuse to provide the service.

- The electric service industry has many particularities that go beyond the disciplines include in the GATS. Therefore, the introduction of a new document containing the necessary disciplines to regulate the special characteristics of the sector is needed.

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