GATS, LIBERALISATION AND PRIVATISATION OF THE POWER SECTOR IN COLOMBIA

THE ENDESA CASE

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1. COLOMBIA AND ENERGY SERVICES WITHIN THE GATS

1.1. Current situation of energy services in GATS

By 1995, when the GATS agreement came in force, some Members had made a few commitments in energy-related services, but most of energy services were not covered by specific commitments within GATS. By making commitments, WTO members specified in lists ("schedules") which services they were willing to liberalise and subject to GATS rules (see below). Three of these services were in WTO's W/120 list, which is the Services Sectoral Classification List, namely fuel transport via oil pipes, energy distribution services and mining services. Other services such as: crude oil transport, refined oil transport, transport of oil derivative products or natural gas via pipelines; non-specific energy distribution services; mining services such as well drilling, derrick construction, repair and dismantling; oil and gas well closure; research and development services; energy-related technical and scientific consultancy; administrative consultancy; personnel supply, among others, were in the UNCPC list of achieved commitments by WTO Members[i], through bilateral negotiations.

At the start of a new negotiation round of the GATS in 2000, energy services were included as a niche, separated sector. Since, the USA, the EU, Canada, Norway, Venezuela and Chile have submitted general papers with proposals on how to negotiate on energy services within the GATS in 2001[ii].

The submitted proposal from the USA strongly emphasizes the changes the energy industry and energy trade underwent after the Uruguay Round of negotiations, consisting of changes from a vertical and monopolistic scheme of public property to an ever more important role by private participation and liberalisation to encourage competition. Based on these ideas, the USA recommend:

- the adoption of an extensive list of energy services based on the already existing sectors in the WTO list (W/120), adding other services that were not specific previously;
- the negotiation on access to markets as extensive as possible and commitments to national treatment for the energy services included in the list, under the principles of technological neutrality, temporary entry of equipment and tools needed for trade, temporary entry for important numbers of specialised people to provide the services, the unrestricted flow of electronic information and equally unrestricted transactions.

The European Union (EU) submitted an alternative list of energy services grouped in specific sectors and sub-sectors, not based on the previously included sectors of the GATS. In its proposal, the convenience of reducing barriers for trade in energy services

for the EU is noticeable, and the section of the USA proposal related to unrestricted temporal movement of natural persons to provide specific services is echoed.

Canada, in its proposal, considers that all sectors related to oil and gas are already included in the W/120 list and proposes some additional energy services to be included in generic sectors such as engineering, construction, analysis, etc., not including services for the power sector. Canada observes that liberalisation does not imply deregulation and that the governments would keep regulation and ensure quality in the provision of services, in order to protect consumers and environment. For this reason, Canada supports a wide-ranging liberalisation.

Finally, Venezuela proposes the revision of energy services classification, since it considers that the W/120 list does not reflect the reality of these services. The country also supports liberalisation of the access to energy services markets, acknowledging that developing countries can benefit from trade opportunities in these services, as long as energy services providers in these countries become stronger. Furthermore, Venezuela asked the WTO Council for Trade in Services to evaluate how much developing countries can benefit from their higher participation in energy services market once they have implemented specific articles of the GATS. Considerations on the access to technology and on safeguard, subsidies and governmental management measures become important in this evaluation.

1.2. Colombia commitments within GATS

Energy liberalisation is carried out through GATS in the WTO and regional commercial agreements such as the Andean Pact and FTAA (Free Trade Area for the Americas), the latter having a deep impact nowadays. Regarding trade in services, Colombia, as a WTO Member, accepts that the GATS negotiations will promote the country’s economic growth and development. These are arguments expressed by developed countries that support the GATS agreement and which are reflected in the WTO Ministerial declaration of Doha (November 2001), which started a new round of negotiations for all WTO members.

As a signatory to the GATS in the WTO, Colombia is subject to general as well as specific obligations and disciplines, and has committed itself to liberalise specific service sectors with the aim of achieving progressive liberalisation in successive negotiation rounds. These GATS measures affect the four "modes" by which the GATS agreement defines trade in service:

1) "Cross-border supply" i.e. the service but not the service provider goes abroad e.g. advice on energy saving by e-mail,

2) "Consumption abroad", whereby the consumer goes abroad;

3) "Commercial presence", i.e. foreign direct investment or acquisition in e.g. energy distribution service, and

4) "Presence of natural persons" from another WTO member country, e.g. energy engineers.

The following are short descriptions of the articles referring to general and specific rules negotiated in GATS. Chapter 3 below includes wider explanations on them in relation with the researched sector, energy, and on the impact they can have on development.

General obligations and disciplines are to be applied to all service sectors by all WTO members, except when exemptions are made in GATS annexes or in GATS schedules. This is one way in which Colombia, as all signing countries, has committed itself to progressively liberalise services. The general obligations are especially:

- Article II. Treatment like the most favoured nation ("MFN obligation"): Colombia shall not discriminate among services and service providers of any WTO member, e.g. when granting privileges. Colombia, as other WTO member countries, was allowed to have measures that do not comply with this commitment for a transition period of maximum ten years starting in 1995. Also, Colombia maintains its right to participate in preferential agreements on trade in services, which can discriminate against services or service providers from other countries (Article V. Economic integration). Colombia has to ensure that any monopoly service supplier in its territory act so as not to undermine MFN treatment (Art. VIII.1.).
- Article III. Transparency obligations: Colombia has to promptly publish general measures that can affect the implementation of the GATS agreement. It has to inform the GATS Council of the WTO about certain changes in laws, regulations or administrative guidelines and must also establish at least one enquiry point to disseminate this information when requested.
- Art. VI.2. Review procedures: Colombia has to institute tribunals and procedures in its country to review decisions in case affected foreign service suppliers complain and to provide remedies where "justified".

Colombia has also made specific commitments under GATS to liberalise certain sectors. These sectors are specified in its national commitments lists or "GATS schedule" which is attached to the GATS agreement. Colombia has made commitments to liberalise in sectors such as construction, distribution and tourism services. Colombia also made specific commitments in 42 activities within financial and basic telecommunications service sectors (negotiated in 1997). Furthermore, it has participated in negotiations on movement of natural persons and maritime transport.

For those sectors in which Colombia has made specific liberalisation commitments in its schedules, Colombia has to apply amongst others the following GATS rules to those services sectors:

- Articles VI.1., VI.3., VI.5., VI.6. relate to domestic regulation: Colombia has to ensure that trade in committed services sectors is not affected by unreasonable or impartial administration of domestic measures, or by qualification and requirements and national technical standards that are e.g. more burdensome than necessary to ensure the quality of the service.

Also, the foreign service provider has the right to know how its application is handled.

- Art. XVI. obligations related to market access: the article describes certain quantitative restrictions, limitations on forms of legal entity and limitations on foreign equity participation that Colombia should not apply to the services of foreign companies except if it has specified in its schedules that it wants to use one or more of these measures.
- Art. XVII. national treatment: Colombia cannot treat a service or service supplier from any WTO member state less favourably than Colombian services or service providers
- Art. XI. Payments and Transfers: Colombia must not apply restrictions to international payments and transfers for transactions relating to services or services suppliers in sectors for which it made commitments. However, Colombia can restrict such international payments and transfers, or even the trade in a service sector on which it has taken specific commitments, in case of balance of payments problems. Such restrictions need to meet the conditions set out in Art. XII
- Article VIII.2. Monopolies and exclusive service providers: Colombia's government must ensure that when an exclusive or monopolistic service supplier operates in other sector than in the one it has monopoly rights, this supplier does not undermine the specific commitments made by Colombia.

WTO members do not have to apply the obligations for MFN treatment, market access or national treatment for laws and regulations relating to government procurement, i.e. public contracts for public use (Art. XIII).

1.3. Current position of Colombia in the GATS negotiations

Colombia has committed to liberalise and reform its commercial policy within the framework of the declaration of the WTO Ministerial Conference in Doha (Qatar), signed in November 2001. That declaration included a timetable for the GATS negotiations that had already started in 2000. First, detailed lists by each WTO member state with requests to open up certain services markets in other WTO member countries ("requests") were to be submitted by 30th June 2002. Initial proposals in which each WTO member state offers to open up certain service markets ("offers") must be submitted by 31st March 2003.

Within the energy sector, Colombia has not yet submitted specific "requests" or "offers" during the current negotiations. The Ministry of Exterior Trade, where the Colombian position on the WTO is designed, has called for a consultancy process with the participation of various actors of the sector, such as the Ministry of Mines and Energy, the Regulation Commission on Energy and Gas, enterprises, universities and others, both private and public, with the aim of defining the orientation for preparing offer proposals in the current round of negotiations. This was to be done in the second semester of 2002

and to be finalised by 30th March 2003. The universities are responsible for the sector study, analysing the needs of the sector and the effects of the liberalisation.

By September 2002, the consultation exercise in the energy sector was still in progress, and therefore no decisions on the requests or offers for the negotiations had been taken. However, the Ministry of External Trade is aware of the advanced degree of liberalisation that already exists in this sector, as a result of the Constitutional reforms in 1991 and the Laws 142 and 143 of 1994. According to the Ministry, new GATS commitments would not make a big difference in energy services provision. The contribution from the new round of negotiations would be to make specific commitments for energy services within GATS.

This vision by the Ministry does not take into account the effects of privatising public service companies: once the privatised energy sector is committed it is very difficult to reverse privatisation under GATS, and the energy sector regulations would become subject to GATS Art. VI. on domestic regulation and Art. XVI on market access, which might be problematic as is explained later in this report.

The consultation process lead by the Ministry of Exterior Trade can be questioned for several reasons. The first has to do with the kind of social participation in the process of selecting the services to be liberalised. The Ministry considers that the participation of the already mentioned private and public stakeholders, as well as the universities that develop the sector study, is representative enough. However, it is evident that the arguments of many civil society groups that could be against privatisation and liberalisation are not taken into account. Similar processes undertaken by the Ministry in the past, such as those relating to the trade liberalisation in goods during Cesar Gaviria's Presidency did not take into account the precarious situation of many small-scale producers in several industry sectors. As a result, many small-scale producers went bankrupt due to the unequal advantageous conditions for their foreign competitors. The *Apertura* (Spanish for Opening) was carried out without appropriate preparation of the national industry, substantive support in the form of productive credit and training towards competitiveness and efficiency required in a competitive free market environment.

In the case of energy services, particularly those related to electricity as a public service, the opponents to liberalisation, represented by workers unions, NGOs and consumer associations, among others, are those who defend these services as a national property that should not be taken out of the public sector and being considered as business whose prime objective is profit. However, the representatives of the Government who decide what and how to liberalise have not heard their opinion. The officials are convinced that the investments attracted by free trade benefit development and do not question, even slightly, their weak social benefits in the absence of effective regulatory action of the Government. Serious failures in power supply after privatisations in several countries such as Argentina and New Zealand, among many others, are good examples of what can go wrong: in their restructuring process, power companies clearly tend to include drastic cuts in labour and maintenance costs, therefore putting in risk the reliability of the system in high power-demand events.

The position of the Ministry of Exterior Trade was clear in our interview with one of its officials who deals with the WTO negotiations. She stated that foreign investment in telecommunications services, for example, had brought indisputable benefits in generating employment. However, when we asked her whether an assessment was made of the possible detriment to working conditions and stability for workers, brought by increased labour flexibility, the official answered that this was not a problem of her Ministry and was not something that could be controlled within agreements on trade in services, but depended on the policies of each employer. That is to say, while there are new foreign capital investments in the country, it is not considered to be a problem whatsoever if working conditions worsen. This view goes clearly against the right to continuous improvement in the quality of life as defined in Art. 11 of the Covenant on Economic, Social and Cultural Rights (CESCR) and which governments have a duty to implement. This government's position is reflected in national laws, which focus on vehemently defending the rights of capital owners, but undermine the rights of the poor and the workers. This position could be extended to other aspects, such as the attitude of companies towards public services consumers, consumer discrimination based on the capacity to pay, unfair competition practices against small national companies, just to name a few. The policy would seem to be: as long as companies bring foreign investment, their unfair practices towards society are beyond doubt and are protected by law and the Constitution, even at the expense of the national population and the workers. Regulation has become, in this way, a feeble and permissive kind of control. GATS, however, aims at strengthening the policy environment to attract foreign service suppliers or to trade in services and leaves it to national regulations to offset any social or economic problems.

2. CORPORATE BEHAVIOUR – ENDESA IN COLOMBIA

2.1. Reforms in the electricity sector: new regulations and the privatisation process of the EEB

2.1.1. Reforms lead to new regulations in the electricity sector

The power sector in Colombia has undergone a process of deep transformation in the last decade, from a state-owned monopoly to a free market regulated by the Government.

According to 1991's National Constitution, the electricity service, as all other public domiciliary services, is a right of the Colombian people. This means that the national government is bound to guarantee the provision of such a service. The provider of this service, however, should not only be the National Government, but can also be organised by communities or private corporations. Regulation of public services remains in the hands of the government[iii].

The restructuring programme of the electricity sector started in 1992, by applying a number of measures. A financial restructuring process was started, and tariff distortions for electricity were reduced. With the aim of introducing competition in electricity supply, institutions as well as regulations were reformed. Furthermore, dependency on hydroelectric power, which in 1992 pushed the country to adjusting itself to extensive electricity rationing and black out periods (because of droughts due to the El Niño phenomenon) was reduced by investing in thermal generation, with the support of the private sector.

National laws 142 (public household services law) and 143 (electrical law) of 1994 boosted privatisation and free market competition, since they restructured the system in such a way that the national government was given new functions regarding public services and electricity. Previously, the government was the manager of macroeconomic variables that set out the course for the different sectors, and made decisions from basic planning to project execution. Now, the government's role is limited to planning and supervision functions, and is no longer that of service provider. The government now guarantees political, economical, institutional and safety conditions to attract and encourage foreign investment in the power sector.

The Commission for Energy and Gas Regulation (CREG, for its acronym in Spanish) was created with the aim of promoting competition in the power sector, inhibiting practices that restrict competition, setting guidelines for calculating tariffs, regulating licenses and supervising costs in order to ensure service provision at the lowest possible economic cost. Additionally, the *Superintendencia de Servicios Públicos Domiciliarios* (SSP) was created with the responsibility to prevent monopolistic practices and dumping, guarantee

that service providers offer access to the whole of the population based on the same prices, and oversee that all service providers observe regulations.

In order to initiate the privatisation process as expressed in 1994's Laws 142 and 143, the government decided an unbundling of the energy sector. This consisted of separating the financial management of the different activities, namely generation, transmission, distribution and supply. Previously, most of the state-owned companies integrated all the activities[iv]. After the reform, new companies are not able to carry out several activities of the power productive chain together, except supply. In this way, the same company cannot carry out power generation and distribution. Power transmission is not part of the privatisation process, since this activity is performed by the government, which owns around 80% of the shares of the national interconnection company, ISA, *Interconexión Eléctrica S.A.*

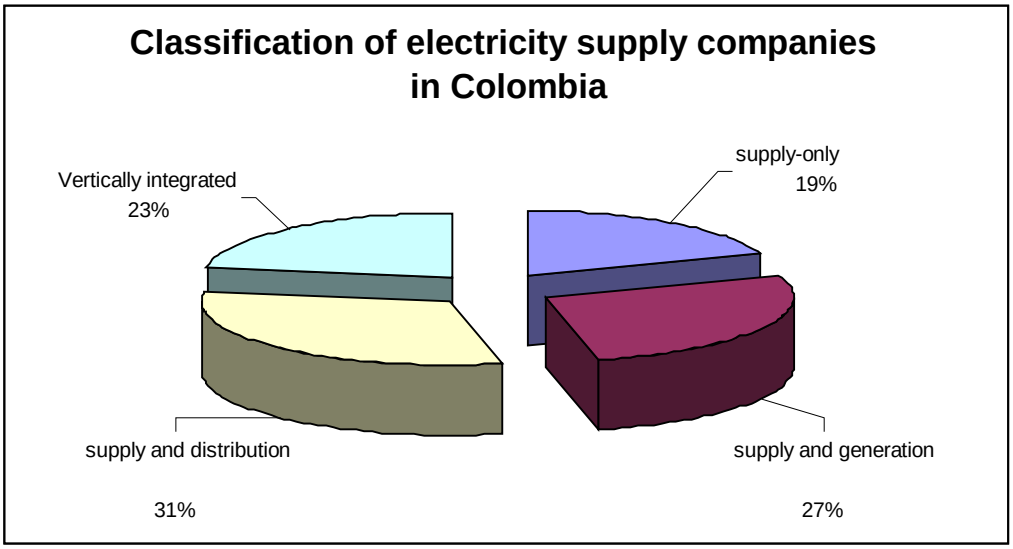


Figure 1. Classification of the supply companies in Colombia

Companies that perform power supply are the ones that have a direct relationship with the service consumers. There are 62 supply companies in Colombia, of which 14 are vertically integrated companies that have not yet been reformed, 17 are supply and generation companies[v], 18 carry out supply and distribution and 12 are supply-only companies, as it is observed in Figure 1.

Among the operations of the distribution and supply companies[vi] are not only the buying and selling of power, but also planning, building and performing maintenance of power distribution infrastructure works, since it is through these operations that power effectively reaches the consumers.

2.1.2. Characteristics of the unbundling and share-selling processes of EEB

Duplicating many other privatisation processes in Latin America, and in general in developing countries, the Colombian government justified a similar reform and selling of

the previously state-owned power companies, such as Bogotá's Power Company *Empresa de Energía de Bogotá (EEB)*, with the following arguments[vii]:

- Obsolescence of their institutional structure.
- Lack of an official policy to integrally manage the country's energy resources.
- Insufficiency, weakness and scattering of regulation and control tools by the government.
- Erratic behaviour and inappropriateness of the tariffs, as well as deficiencies in subsidy allocation.
- Administrative inefficiency of the companies.
- Generation system vulnerability, over-installation and dependency on mega projects.
- Extremely high debt of the sector, which was equivalent to nearly 50% of the country's total external debt. The development of mega projects such as El Guavio and Chivor hydroelectric power plants was an important factor in the dramatic increase of the debt with foreign banks. The construction of these plants was part of the power-infrastructure expansion plan encouraged by international financial institutions (IFIs), with the argument that the power sector had to be prepared for an expected growth in the economy that actually did not take place.

The poor management by the government in previous decades was the main cause for most of this deplorable situation in the power sector, since it was unable to tackle corruption within the companies, did not develop effective regulation and supervision measures and was a poor project designer and manager. Moreover, its poor management of exchange rates and the increase in costs for credits for mega projects by IFIs were the main causes of the increase in debt.

The government's attitude in favour of reform was characterised by a total disregard of its own responsibility for the deplorable situation of the companies. In stead of tackling the real causes it decided to implement the neo-liberal recommendations of the IFIs: promoting a free market, stimulating competition and acting just as a regulator of the market. Some of these recommendations, as it was explained above, consisted of the companies' conversion into private companies and the unbundling or separation into several companies to be sold.

In the EEB privatisation process, Bogotá's Capital District Administration was in charge of making decisions on how to carry out the proposed strategy. Bogotá's City Council, through its 1996's Agreement 001, defined the conditions to transform the EEB, firstly into a commercially operating company, and then into a share-owned company of the District. The Council approved the participation of private capital with a maximum of 49% of the shares, as well as the participation of the Capital District and its decentralised entities in the company. It also authorised the company to invest and created a supervisory commission to ensure that the Agreement would be respected and to avoid that the privatisation process would harm the employers' individual and collective

position. An important point of the Agreement was that the Council did not authorise to unbundle the EEB or to hand over the operative and administrative control of the company to private investors, since it should have been kept as a publicly-owned company.

When the EEB was transformed into a share-owned company on the 31st May 1996, the company's debt with the national government was sold, in the sense that the government exchanged the debt for shares in the company. The Capital District remained a major shareholder with 90% of the shares, followed by the Ministry of Finances, with 9.3%. The company workers received the equivalent of 0.00005% of the shares. This was not significant enough for the workers to have an effective influence on the decisions, but was important to have access to information in order to express their opinion on how the company's management developed and how supervision was implemented, and to take legal actions against the decisions made at shareholders' meetings when needed. At the shareholders' meeting, the workers expressed their opposition to the company's unbundling process and to the selling of more than 20% of the shares of the company.

In 1998, with the recently elected District mayor, Enrique Peñalosa, workers and consumers lost their representation in the shareholders' meeting by a single decision of the mayor. Also, the shareholders' meeting was given power by the mayor to bypass the City Council Agreement authorisations, despite the efforts by the supervisory commission to have the Agreement be respected. With this new decision-making power, in a meeting on 24th January 1997, the shareholders' meeting authorised:

- the unbundling of the power-related activities as defined in 1994 law 143, transforming the EEB in a main company for power transmission, and two subsidiary companies, namely Emgesa for power generation and Codensa, for distribution and supply.
- consequently, the transfer of the operative and administrative control of Emgesa and Codensa to private investors. Despite having the 51.5% of the shares, the Capital District accepted 14% of preferential shares, which do not confer the right to vote. The Capital District thus lost its majority power in the decision-making process. There are no strong reasons for this decision, apart from receiving an additional profit of US¢ 10 per action per year, that is, the equivalent to 1% extra profit per year.

According to the workers' union, this behaviour was abusive and against the law for the following reasons:

- Before the unbundling, EEB was governed according to public service law, not private law. Therefore, the shareholders' meeting made decisions that the City Council and the CREG should have had taken.
- The City Council 1996's agreement 001 had not authorised EEB's unbundling.
- In summary, the shareholders' meeting decisions violated the articles 6, 29, 115, 209, 287, 313-6, 365 of the National Constitution; the articles 8, 12-9, 38-10, 55, 115, 163, 164 of the Decree 1421 of 1993; the article 73-13 of Law 142 of 1994; the articles 3, 9, 31 of the Decree 3130 of 1968;

the articles 6, 8, 30 of the Decree 1050 of 1968; and the article 401 of the Trade Code.

The *Contraloría Distrital*, one of the social supervisory entities of the Capital District, supported the argument of the workers' union according to which the separation of the EEB had been taken against the 1996's agreement 001.

The shareholders' meeting decision on the company's unbundling was then sued before the *Tribunal Contencioso Administrativo de Cundinamarca* and the *Juzgado 28 Civil del Circuito*, with the aim of nullifying the decision and suspending the unbundling (or "restructuring", as called by the shareholders' meeting). The judge ordered the provisional suspension of the unbundling process. The shareholders appealed against this decision, with the aim of having the workers' claim rejected. The shareholders did not argue against the workers' claims, but it just alleged that the suspension of the unbundling process would affect the needed capital injection from investors for the company. As a result, the Judge revoked the order for provisional suspension of the unbundling process and the unbundling went ahead.

The conversion into shares, finished on 15th September 1997, had the following characteristics:

- The price the company was willing to accept for 48.5% of the shares of the subsidiary companies Emgesa and Codensa, and 11% of the shares of EEB was the minimum value recommended by the consulting firm Coopers & Lybrand. By choosing the minimum value the shareholders' meeting ensured that the selling of shares would be approved at the first opportunity. The valuation method was the Net Discounted Cash Flow method, whose results were as follows:

Company	**Price (US$ millions)**
Emgesa	610
Codensa	290
EEB	152
Total	**1052**

- The trade union expressed its dissatisfaction with these values and considered them to be extremely undervalued as a result of the variables used in the chosen calculation method. The union contracted CRA for an independent valuation and adopted the following values as fair for the calculating the price of the shares:

Area	Company actual value (US$ millions)	Expected value for conversion to shares (US$ millions)
Generation (equivalent to Emgesa)	1500rpm - 10kW	1130
Distribution and supply (equivalent to Codensa)	800	750
Transmission and other investments (equivalent to EEB)	500	275
Total	**2800**	**2155**

The actual company value estimated by CRA was thus 2.03 times the value accepted by the shareholders, although the expected value for conversion into shares, taking into account generation losses due to 4-year-in-advance power sales, was actually equivalent to 1.56 times the shareholders' value.

- The winning offers were presented by the Endesa (Chile and Spain) group, through the companies Capital Energía for generation and Luz de Bogotá for distribution and supply, with the following values:

Company	Winning offer value (US$ millions)
Emgesa	810
Codensa	1085
EEB	282
Total	**2177**

The winning offers were 1% higher than the company value suggested by the trade union for the three companies together, although there were significant differences for the value of each separated activity. In comparison with the union's valuation, the new investors undervalued the generation company, overvalued the distribution and supply company and properly valued the transmission company. Had the investors paid the amount as the shareholders' consultants recommended, the company's value in books would have been around half of its actual value which according to the *Contraloría Distrital*[viii], entity responsible for fiscal control in the Capital District, would have risked loss of property with significant loss of the expected benefits from selling the company's shares.

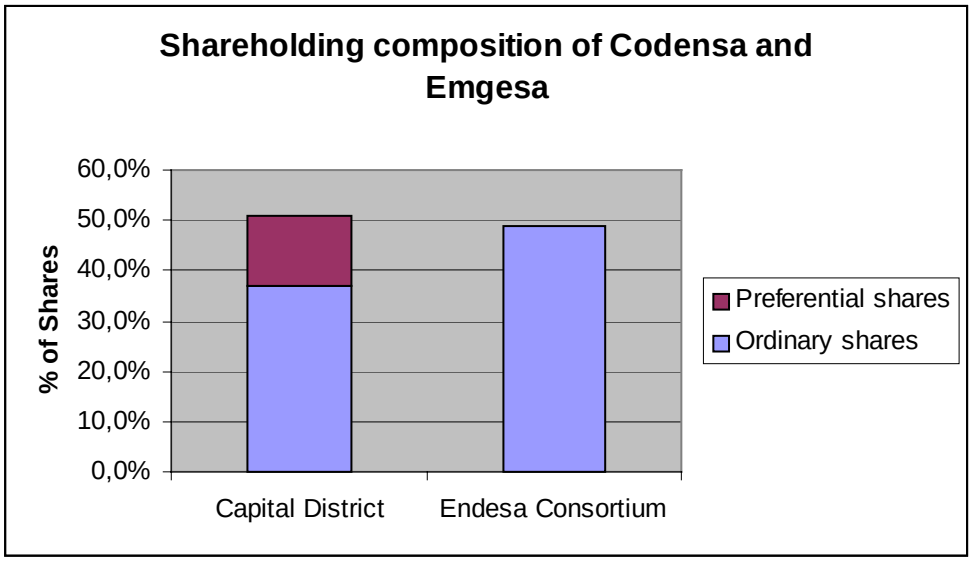


Figure 2. shows the shareholding composition of the subsidiary companies Emgesa and Codensa. As it is shown, the Capital District kept most of the shares, respecting the decision of the 1996's Agreement 001 to sell no more than 49% of the shares. However, in total disregard of Agreement 001, the operative and administrative control was handed over to private investors during the negotiations. Capital District accepted 14% of the shares as preferential shares that do not confer the right to vote at the shareholders' meeting. It so lost its majority decision-making power. The privatisation process went much further than foreseen and the government's role was transferred to the private sector.

Another problem with the process on how the privatisation process was implemented is the actual vertical integration of the energy business in the hands of the Endesa group. Law 143 (1994) states that a company is not allowed to own both generation and distribution businesses, although it would be allowed to own generation and supply or distribution and supply. Endesa, as the main decisive shareholder of the generation, distribution and supply companies, and participating of 11% of a transmission company (EEB) is in practice vertically integrating the business, something that the law was designed to avoid. The Endesa group owns the majority of the shares of the companies Capital Energía and Luz de Bogotá that won in the capitalisation process: Endesa used the names of different legal persons. The law does not allow compelling Endesa to sell the shares in one of the privatised companies because it does not respect the unbundling of companies in the privatisation process as the different legal persons as shareholders have the same owners. Therefore, the vertical integration in practice cannot be legally challenged. There should be legal tools available to act against this type of behaviour of both national and international companies that hide behind façade companies.

This use of many subsidiaries is a well-established practice by internationally operating services companies, which can challenge governmental policies and regulations in many ways. This problem needs to be considered at international level but is absent of the agenda of the current GATS negotiations.

Box : ***A corporate profile of Endesa, by SOMO***

Endesa is an internationally operating company headquartered in Spain. Endesa's main business is to produce, transmit, distribute and supply electricity mostly in Spain, Latin America and Southern Europe. Endesa is currently the world's third largest company by installed capacity and the second largest by number of customers[ix]. It served 20,4 million clients in the electricity market in September 2002 in 12 countries, half of which are in Spain where it has a dominant position[x]. Internationally, Endesa operates mainly in Latin America: Chile, Argentina, Brazil, Colombia and Peru.

The company has diversified to other than electricity business such as gas distribution, water utilities (e.g. distribution of potable water, waste treatment), information technology and telecommunication services, financial services and investment, production of renewable energy and recycling, and mining.

Endesa has an impressive network of companies which it fully or partly owns. Endesa's international business ("Endesa Internacional") covers more than 129 companies, excluding companies in other parts of its business based abroad. Endesa acquired participation in many energy service companies in Latin American countries, with a strong presence in Chile. Some Endesa companies are pure portfolio companies some of which are based in tax free heavens such as the Cayman Islands.
Endesa Internacional uses some of its companies to do acquisitions, as was the case in Colombia. Endesa Chile, an investee of Enersis and under Endesa Internacional, manages Endesa's generation activities in Latin America while Chilectra, another Enersis investee, manages the distribution activity[xi].

A. Structure of Endesa in Colombia

The acquisitions of Codensa and Emgesa in Colombia were done through the following constructions of Endesa related companies.

A.1. Codensa

Codensa is a distribution and supply company which had 1.5 million clients in Bogotá in 1997, i.e. about one third of the market of Bogotá, and 1.9 million in 2001.

Fourty-eight and a half percent of Codensa was sold to Luz de Bogotá which was owned by the following companies[xii]:

- 42.5 % by Endesa Desarollo (Endesar) legally based in Spain,
- 20% by Enersis, based in Chile, which is now owned by 65% by Endesa (Spain) and which is an investment company which partly or fully owns many electricity businesses in Latin America and is the largest private conglomerate in the electricity business in Latin America.(NB: In April 1999, Endesa Espana became the controlling stockholder of Enersis doubling its ownership to 64%)[xiii];
- 15% by Chilectra, a distribution and sale of electricity company in Santiago in Chile, which is now 98.2% owned by Endesa;
- 15 by Grupa Financiero Popular, based in Colombia;

- 7.5% by Fondelec, a North American investment Group.

By the way, Endesa also fully controls Chilectra Internacional, a portfolio company based in the Cayman Islands and has created a portfolio company Enersis Energía de Colombia, S.A. which it fully controls (100% voting rights, 65% dividends rights).

At the end of 2001, Endesa mentions that it has 48.48% voting rights in Codensa and 44.98% dividend rights (Endesa webside, international companies) and has 100% voting rights in Luz de Bogotá which Endesa describes as a portfolio company.

A.2. Emgesa

Emgesa generated 25% of Colombia's electricity at the time of privatisation[xiv]. Emgesa sold 48.5% of its shares to Capital Energía which was owned by the following companies:
- 49.5% by Endesa (Spain);
- 50.5% by (Central Hidroeélectrica) Betania, of which 75% is controlled by Endesa Chile in 1997 and 85.6% in 2001[xv];
At the end of 2001, Endesa mentions that it still controls 48,5% of Emgesa, with 36,3% dividend rights, fully controls "portfolio company" Capital de Energía based in Bogotá and controls 60% of Endesa Chile.
By the end of 2001, Endesa Chile had created: Endesa Chile International, a portfolio company which Endesa fully controls and which is based in the Cayman Islands; and Endesa de Colombia, S.A. a portfolio company fully controlled by Endesa and based in Neiva in Colombia[xvi].

A.3. EEB

Endesa aquired, most likely through Endesa Chile, 11% of EEB. At the end of 2001, Endesa mentions that it still controls 11% of EEB which it describes as a portfolio company while it is also a power transmission company.

A.4. Other Endesa businesses in Colombia

Apart from the above-mentioned companies, Endesa states that it also partly or fully owns the following companies (December 2001):

- Synapsis Colombia S.A., an IT services company fully controlled by Endesa;

- Cía. Americana de Multiserv. de Colombia (CAM Colombia), a company for technical calibration and measurement services based in Bogotá, in which Endesa has 99,9% voting rights;

- Inversiones Colombia, S.L, a portfolio company based in Madrid fully owned by Endesa;

- Inversora Eléctrica del Pacífico, a company made to tender for the bids in in the State of Medellín (Colombia) in which Endesa has 49,9% of voting and dividends rights.

A.5. Number of employees

By the end of 2001, Endesa had a total of 1421 employees in the country[xvii].

B. Expansion and huge debts

Endesa has expanded very rapidly from the nineties onwards. This resulted in an increasing debt up to Euro 25 billion in 2001. By the end of September 2002, Endesa's debt was lower by 4.5% to Euro 23.862 billion, of which Euro 10.03 billion was due by its Latin American electricity business[xviii]. Endesa's debt is huge compared with its main international rivals such as RWE or even Vivendi that has to sell more than Euro 10 bn to survive its Euro 19 bn debt. Endesa had to pay Euro 710 million interest costs in the first half 2002[xix]. Moreover, Endesa's operating income in Spain during the same period decreased by 19.5% .

The expansion of Endesa in Latin America has affected its income over the last two years due the economic problems such as the economic crisis in Argentina and devaluations of Argentinean and Brazilian currencies against the Euro. During the first nine months of 2002, the operating income of the Latin American electricity business decreased by 5.7% against the year before[xx]. For the same period, Colombia's operating income from electricity generation decreased by 3.1% (while the GWh generation increased by 3.6%) and from electricity distribution and transmission decreased by 13.2% (while the GWh distribution increased by 4.7%). Costs of purchasing and transporting energy and power had increased in the beginning of 2002[xxi].

Endesa has been using different strategies to repay its acquisitions and reduce its debts. One strategy it designed was to reduce labour costs to "improve its efficiency" by cutting the number of employees[xxii]. For instance, Endesa declared to investors in 2001 that it planned to cut the total number of its employees by 13,6% between 2001 and 2003[xxiii]. In Latin America, the company downsized its labour force by 6.8% between September 2000 and September 2001. The number of average workforce of Endesa's international electricity business was 10843 at the end of 2001, a decrease of 13% compared to 2000[xxiv]. Endesa claims that this has raised the productivity in its Latin American subsidiaries by decreasing the number of employees needed to produce a megawatt or by increasing the number customers per employee (73% more between 1998 and 2001[xxv])

Other strategies Endesa is using to handle its debt are amongst others increasing efficiency by lowering operating costs, arguing in many countries for higher prices to the consumer, and selling some of its activities in Spain and Enersis. As a result, Endesa declared a net income of Euro 1.1 billion for the first nine months of 2002 while the total financial results showed a net loss of Euro 1.6 billion[xxvi].

In 2002, Endesa's strategy was less focused on expansion but on strengthening its financial situation: it will continue its efficiency improvements and "organic growth" in core business and countries including by improving customer service and maintenance[xxvii]. In Latin America, the targets declared by Endesa in 2002 were the profitability of its investments in the region including by further cost cutting, the transfer of best practices to the affiliates, the financial restructuring and the "optimalisation of the relations with regulators"[xxviii]. The latter is related to Endesa's arguments against certain tax, low price and anti-trust regulations, which are undermining its profitability[xxix].

Beginning 2002, Enersis had to concede it had missed its business targets to reduce annual expenditures[xxx] and Endesa announced to reduce its planned investments in Spain and Latin America.

C. Social and environmental policies of Endesa

Only in 2001 did Endesa Internacional join the single personnel management system of Endesa which managed the human resources of 42 Endesa companies by the end of 2001. Still, many measures to deal with lay-offs, improve conditions and training of employees were only covering the Spanish employees[xxxi]. The 1st Collective Labour Agreement of Endesa on compensation and professional classification was also only completed in 2001, with many more issues such as the relation with trade unions still to be discussed in 2002. The Collective Labour Agreements covers 12,581 employees at 17 mostly Spanish companies; only 88 employees at Endesa Internacional are covered[xxxii]. In January 2002, Endesa, two Spanish trade unions and the International Federation of Chemical, Energy, Mine and General Workers' Unions institutionalised a dialogue at international level about issues such as union rights, health and safety, vocational training, industrial relations, company prospects and employment trends. All parties declared their interest to make Endesa's growth and financial success compatible with dignified working conditions, and to comply with basic ILO Conventions such as trade union freedoms and rights[xxxiii].

Endesa claims that it wants to operate in an environmental friendly way amongst others by a business division with companies for renewable energies, setting social and environmental conditions for suppliers, and writing an environmental report. However, electricity generation by Endesa controlled plants are based on dirty sources such as coal, nuclear and fossil-fuel[xxxiv]. In 2001, Endesa's generation capacity of electricity in Spain was based on plants consuming coal (31.7%), hydroelectric facilities (27.2%), nuclear plants (16%) and fuel-fired plants (25.1%). Due to shortage of rainfall, the source of electricity generation during the first months of 2002 in Spain was changed to 35.3% nuclear, 48.4% to coal, 9.6% to hydro, 4.5% to fuel-gas[xxxv].
Generating facilities controlled by Endesa in Latin America related to hydroelectric facilities (62.3%) and fossil-fuel plants (37.7%)[xxxvi].

Non-governmental groups have criticized some of the hydroelectric operations of Endesa in Latin America other than in Colombia. In Chile for instance, there were protest against the construction of a hydro-electric plant upstream the Bío Bío river because it would damage the river and drown the local Indian population's homes, burial grounds and forest and in effect destroy the Mapeche culture. The use of Chapo Lake to produce electricity lead to high fluctuations in the lake's water level, which resulted in collapsing shores.

In 2001, Endesa was in the process of preparing the 'Environmental Plan for Latin-American Distributors' and the 'Enersis Environmental Plan', which lays down guidelines for its subsidiaries[xxxvii].

2.1.3. Capital reduction in Codensa and Emgesa

The shareholders of Codensa, Emgesa and EEB decided at their meeting to carry out a capital reduction of the companies by Col$ 1000 billion (approx. US$500 million), Col$566 billion (approx. US$283 million) and Col$1.1895 billion (approx. $600 million) respectively. A capital reduction consists of taking money out of the companies' accounts to distribute it among shareholders avoiding capital to be taxed. According to the shareholders, the capital reduction was justified because the companies were over-capitalised. The capital was not invested because of law restrictions. This law aims at promoting competition by limiting the total participation of a single legal person to 25% of the national market in activities such as power generation and distribution. This was, practically, the part owned by Codensa, Emgesa and EEB in their corresponding activities. Therefore, they could not invest anymore on their expansion, since they had reached their participation limit in their corresponding markets.

The decision of the shareholders meetings were strongly criticised since it virtually reverted the private capital injection and was taken without full achievement of the privatisation objectives. For example, according to the city's ex-major Jaime Castro[xxxviii]:

- The external debt had only been partially repaid, while it was supposed to have been totally repaid, using part of the injected capital. In contrast, an US$150 million IADB credit contract, which was to be paid by December 1997, was renegotiated. Although the debt had to be totally covered by the money injected by privatisation in 1997, US$ 890 million were still to be paid in July 1998 (see Interview with Enrique Peñalosa, El Tiempo, 31st July 1998) but in case of a sudden change in exchange rates the equivalent to this figure in Colombian pesos could rise dangerously, jeopardizing again the company's economical stability. It was the EEB, and not the subsidiary companies, which had the responsibility to pay this debt, so it was actually the Capital District, and not the private investors, the main actor at risk, since it was the main shareholder in the EEB with 81.5%.
- The injected capital had not been used to pay for maintenance and expansion of the power system, needed to guarantee the service provision and quality. Management plans approved by the sector authorities and for which money was allocated, were badly affected with the capital reduction process.
- Neither investments in power infrastructure were made with the injected capital, nor the objective of promoting the use of new energy resources, such as natural gas, was met.
- In contrast, part of the capital was used to finance early retirement plans designed by the companies' management to reduce the personnel plant by 1756 employees (in a first stage), corresponding to 40% of the total of employees before privatization, although employees' retirement was not one of the objectives of the process.

According to Jaime Castro this capital reduction was a wrong move hidden from the public and harmful for the Capital District and the country. In order to gain access to

supporting documents for his statements, the ex-major had to take legal action before *Tribunal Superior de Bogotá* and *Tribunal Administrativo de Cundinamarca*, from which he received positive response. Otherwise, he would not have been able to obtain this vital information.

The ex-major Enrique Peñalosa, who was in office during the privatisation and subsequent capital reduction process, said the latter had benefited citizens of the Capital District because the money was spent to improve public spaces and transport systems such as cycling paths. Although these investments had a positive impact on the quality of life in the Capital District, they do not justify such transfer of company resources when the objectives of the capitalisation process having not yet been achieved.

Some supervisory bodies were critical of the privatisation and capital reduction processes of the EEB, Emgesa and Codensa. Summing up, their opinions and actions have been as follows:

- The *Superintendencia de Sociedades* denied in a first opportunity the capital reduction of the companies because it did not fulfill the requirements of the law. In a second opportunity, however, the entity approved its process.
- The *Contraloría Distrital* remarked that the capital reduction reduced the company's value and injected capital (US$2177 million) by nearly US$500 million. It stated that the previous public property should not have been subject to commercial procedures.
- The *Contraloría Distrital* took legal action against the lack of payment of the debt (which was the main reason for the privatisation) with the injected capital (only 27% of the debt was paid), as well as the new debt of Emgesa as a consequence of the "exceeding" capital reduction. The entity predicted that this new debt would invariably be reflected in tariff increments to consumers.
- Also the *Contraloría Distrital* could find no evidence of improvements in quality of the service provision, nor plans for expansion and maintenance of the infrastructure. It also said that new loans to accomplish these objectives would cause an increase in tariffs to consumers.
- As a result of the resistance against fiscal control of the companies, the *Contraloría Distrital* fined 12 different officials, including EEB's General Manager, the Legal Director and the Internal Control Director.
- The Ministry of Labour claimed that Codensa breached the contract with the Ministry to create an autonomous fund to cover the payment to 1964 pensioners of the company, leaving them at the risk of totally losing their social protection in the event of an economic collapse of the company (ANCOL, 2001-07-09).

2.2. Corporate behaviour – employment aspects

This chapter analyses some of the employment-related aspects of the restructuring process of EEB and the electricity in Colombia are analysed. Information comes amongst others from interviews with some workers who were dismissed by Codensa in the course of the last two years.

After the above described reform, the power sector was no longer considered as a public service and the companies that were transformed into share-owned companies were no longer covered by public law but by private law. This prepared the companies for the privatisation process and selling of their shares through which they were handed over to private operation. The process was thoroughly legal and constitutional, often by many changes in laws.

In the process, the government and companies developed strategies to deal with the employment aspects and to balance them with workers' union strategies[xxxix]. The Government and the companies started the restructuring process by pretending that workers and unions were participating through negotiations so the process seemed to be carried out by mutual agreement. During the late 80s and early 90s, the Power Sector Union had abandoned its opposition to the government and had accepted forms of participation through negotiation. It did not radically oppose to restructuring or privatisation as long as these did not affect collective working conditions and benefits guaranteed through many years of Union history. The governmental and companies first offered workers' participation through ownership of shares. This offer was poorly managed inside the Union, resulting in a weak integration of the workers in the process. Subsequently, the government and companies abandoned the democratic and negotiated strategy and started applying more authoritative methods. They offered voluntary retirement and early pension plans, as well as generalised outsourcing. The Union's power was subsequently reduced because of the decrease in membership.

2.2.1. Cutting jobs

According to some dismissed workers, the massive retirement and dismissal practices (more than 2000 retirements and dismissals) violated the Collective Labour Agreement. The unbundling of the Codensa and Emgesa and the selling of shares had not affected the Collective Agreement and workers kept receiving the agreed benefits. Workers who accepted the voluntary retirement plan were given an amount of money equivalent to US$ 15000 to US$ 25000. Neither the age nor the time of service to the company was taken into account to define this amount. Some workers, especially those with a longer history in the company, did not consider accepting the retirement plan, since they gave a higher value to benefits such as medical attention for them and their families, vacations, social benefits, among others. What they were not prepared for was the subsequent action of Codensa: the company virtually ignored the preponderance of the Collective Agreement's arrangements and dismissed many of these workers "without a fair cause", applying the company's right expressed in the Article 6 of 1990's Law 50. Codensa did not respect the conditions of the Collective Agreement by which dismissals have to be preceded by an examination of the cases by a workers committee. If it had, Codensa would have had few arguments for dismissal, since, according to the interviewed

workers, they had demonstrated for many years their efficiency, commitment and sense of belonging to the company, and were satisfied with the benefits they used to receive.

The unionised workers sued against these corporate practices before the Supreme Court, but only some of them managed to get their jobs back. Many workers' claims were rejected, leaving them redundant at an age that gives them little chances in the labour market. In this way, many workers became socially unprotected because they cannot find alternatives to ensure an income. In addition, if dismissed workers or their families face health problems, as was the case of one of the interviewees, they just lost the benefit to use the company's medical service. *This constitutes a clear violation of the right to decent living for workers and their families (Article 7.a.ii. of the International Covenant on Economic, Social and Cultural Rights, from now on referred to as "the Covenant") as well as the right to work (Article 6 of the Covenant).* By neglecting the conditions for dismissal agreed upon with the Union in the Collective Labour Agreement, Codensa acted against *the right of trade unions to function freely subject to no limitations other than those prescribed by law (Article 8c of the Covenant).*

It is worthwhile noting the weakness of the energy workers' Union to face the company's strategy in a united and consolidated manner, and the lack of preparation of union workers to respond to this situation. Many workers preferred accepting the early retirement plan rather than keeping their jobs. Some did not look for advice or support from the Union when they were put under pressure by the company's offer. Others just took the offer, without considering that their action would deeply undermine the Union and presumably harm the rights of the workers who decided not to accept the conditions of such a plan.

2.2.2. Worsening working conditions

As a result of the dismissals, the number of workers who still get the benefits of the Collective Labour Agreement (that is, workers who were engaged before the reform) has decreased significantly. Recently hired workers are not covered by the Collective Labour Agreement, for they are covered by 1990's Law 50, earning a so-called integral salary. According to the interviewees, Codensa has diminished their salary after they were hired. Such company practices decisions degrade workers' conditions and leave employees with very few guarantees of stability. This constitutes a *violation to the right to the continuous improvement of living conditions for the workers and their families (Article 11 of the Covenant). It is also a violation to the right to social security (Article 9 of the Covenant).*

In parallel to these processes of dismissal and hiring new employees under poorer conditions and guarantees, the number of outsourced service providers increased significantly and currently amounts to around 7000 people. The employment conditions offered to these workers are very well below those offered to direct employees.

According to the researcher Jairo Estrada Álvarez[xl], "outsourcing is generally introduced for some activities such as repairs and network maintenance, etc. based on the, not really proven, argument that it increases productivity and reduces costs. However outsourcing is a form of labour without collective bargaining, which reduces salaries and structurally

weakens unions as the reduction in direct employment rates decreases the number of workers joining unions. This undermines *the right to form trade unions as promoted in Article 8 of the Covenant"*.

Justifying outsourcing as an employment mode is part of a corporate strategy to reduce costs and social benefit payments in order to be competitive on the world market. Paradoxically, Codensa argues that the increased number of outsourced workers show its contribution to generating jobs and increasing productive employment in the Colombia.

2.2.3. The hidden social problems of outsourcing

Firstly, some dismissed workers have tried to offer their services as outsourcing providers for Codensa as their expertise and experience were competitive advantages compared to other providers. However, Codensa applied in several cases discriminatory practices against these workers, mainly against those who had unsuccessfully sued Codensa to claim their jobs back. This discrimination is a violation of the *right of the workers to the opportunity to gain their living by work (Article 6 of the Covenant). Such discrimination against unionised workers also undermines the right to join the trade union of once choice and the right of trade unions to function freely subject to no limitations other than those prescribed by law (Article 8 of the Covenant).*

A second problem with outsourcing by Codensa relates to quality. Although Codensa claims that outsourcing service providers must meet high quality standards, there are several proofs to the contrary. Codensa indeed considers the proposals by outsourcing service providers that have high technical standards, but in the end the decision is always based on economic criteria as is required by law (the lowest possible economic cost). Outsourcing service providers try to compete by offering very low prices in order to get the job, but such prices hardly cover the costs of a high technical quality service. As a consequence they work with poor equipment, below standard and non-expert personnel. Codensa first did not worry about this situation and even ignored reports and sanctions from the supervisors when outsourced service providers were breaching contract conditions, according to one interviewee. In some of the cases, when a supervisor fined the service provider, Codensa was able to reduce the penalty with no justification whatsoever, which can be seen as an indication of corruption. This attitude goes against *the right to the enjoyment of fair wages and equal remuneration, decent living for the workers and their families, and safe and healthy working conditions (Article 7 of the Covenant).* It also undercuts the efforts of the National Association of Electrical Engineers to promote optimum performance of the services requirements by the power sector companies. Moreover, Codensa prefers to import materials such as power wires and cables, buying from suppliers abroad which are part of their own business group, although this comes with higher prices according to interviewees.

Similarly, Codensa preferred engaging foreign engineering companies during the early stages of its operation despite the technical superiority demonstrated by Colombian engineering companies in public bids. Foreign engineering companies were initially contracted at lower prices than their Colombian counterparts, but when the contracts were

renewed the prices were much higher than the initial contract. This preference for foreign engineers who did not know the social environment and therefore made biased decisions were however unfavourable for Codensa with respect to its relations with the community (see below 2.3.2.)

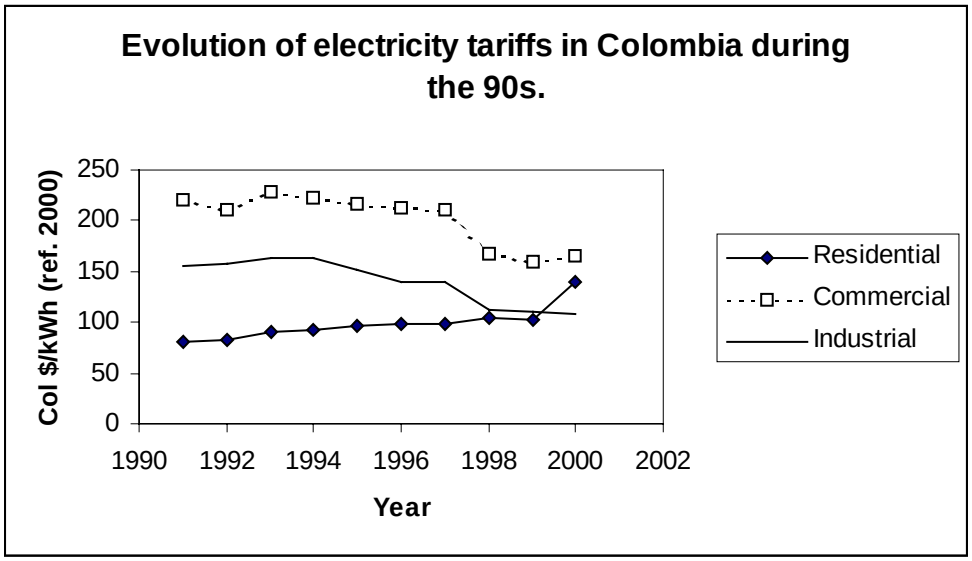
2.2.4. Pensions at stake

According to the Minister of Labour, Angelino Garzón, Codensa breached a contract with the Ministry to create an Autonomous Fund to cover the payments to 1964 pensioners, which leaves them socially unprotected. The Minister had foreseen the risks of negative social and employment effects of Codensa's capital reduction.

2.3. Corporate behaviour – Consumer related aspects

2.3.1. Electricity prices

Contrary to one of the main arguments of 1994's Laws 142 and 143, according to which the participation of foreign power service providers would result in a decrease in electricity prices, the trends have shown that the prices have actually increased for household consumers, covered by the regulated market. The lower-income populations classified in strata 1 and 2 are the worst-off. Subsidies on their power consumption are being lowered from 75% (before 1994's laws) to a maximum of 50% for stratum 1, 40% for stratum 2 and 15% for stratum 3, limits to be reached in December 2002. They will only be applied to the first 9kW of the subsistence consumption, not to the total consumption. The beneficiaries of the new scheme have been the biggest power consumers, those who buy electricity from the non-regulated market (the power market formed by big companies that buy electricity directly from generators, not from distributors or suppliers), as well as the high-income household consumers, classified in strata 5 and 6, who pay a decreasing contribution as a result of the decrease in subsidies:



they will pay a contribution to the subsidies of maximum 20% on top of their consumption (see below). The decrease in subsidies was decided by the government, with

the aim of promoting competition. The effect is shown in Figure 3, taken from the report "Ex-post analysis of the reform process of the power sector in Colombia and its macro-economic and sector impacts"[xli] by Hugo Mauricio Llanos. It is a clear example of the selective advantages offered to the high profit-making economic sectors by the new competitive scheme of the Power Pool market. Between 1991 and 2000, the average electricity price for industrial and commercial sectors, given by the non-regulated market, decreased by 30%. Meanwhile, average price for the household sector over the same period increased 85%.

The price rises were a result of national rules and directives established in 1994's Law 143 to achieve economic efficiency and financial sufficiency. Based on these concepts, the price must reflect the actual costs of energy and the inefficient costs should not be transferred to consumers through the price charged to them. According to the researcher on public services Claudia M. Buitrago, in a transition period, the objective of reflecting actual costs necessarily produces increments with respect to the previous calculation method, which did not include all the related costs. Subsequently, the increase in corporate efficiency should cause a reduction in tariffs.

Based on a study ordered by the *Superintendencia de Servicios Públicos Domiciliarios*[xlii], the increase in prices from 1999 onwards was caused by:

- The modification of the tariff calculation method, and the application of charges to use the National Transmission System (Sistema de Transmisión Nacional, STN) proposed by CREG through 1999 resolution 094.
- Additional costs related to the blowing up of transmission towers by terrorist acts: repair costs; the need to buy energy from thermal generation plants, which have higher production costs; or from plants further away, which increases transmission costs. Transmission tower blow up increases "restriction costs", which is reflected in increases in electricity prices. CREG, in its 1999's resolution 074, defined that the payment for restriction overcharges would be done 50% by generators and 50% by suppliers. The part paid by suppliers is directly reflected in the prices, within a three-month period, with a two-month delay. The part corresponding to generators is transferred indirectly to consumers in the 'generation cost' component of the tariff (G), although its effect is more delayed than the suppliers' effect. This overcharge, according to the same resolution, was applied only until June 2000, from when the totality of the "restriction" charge is paid by supply companies, which causes an even more direct and shorter-term effect on tariffs to consumers.

The Minister of labour, Angelino Garzón, argued that the capital reduction would cause prices to increase. The company's General Manager, Mauricio Llevenés replied that the capital structure of power companies did not affect the calculation of tariffs and that the capital reduction had not caused an increase in electricity prices, but that the latter was caused by other factors such as transmission towers blow up by guerrilla attacks[xliii].

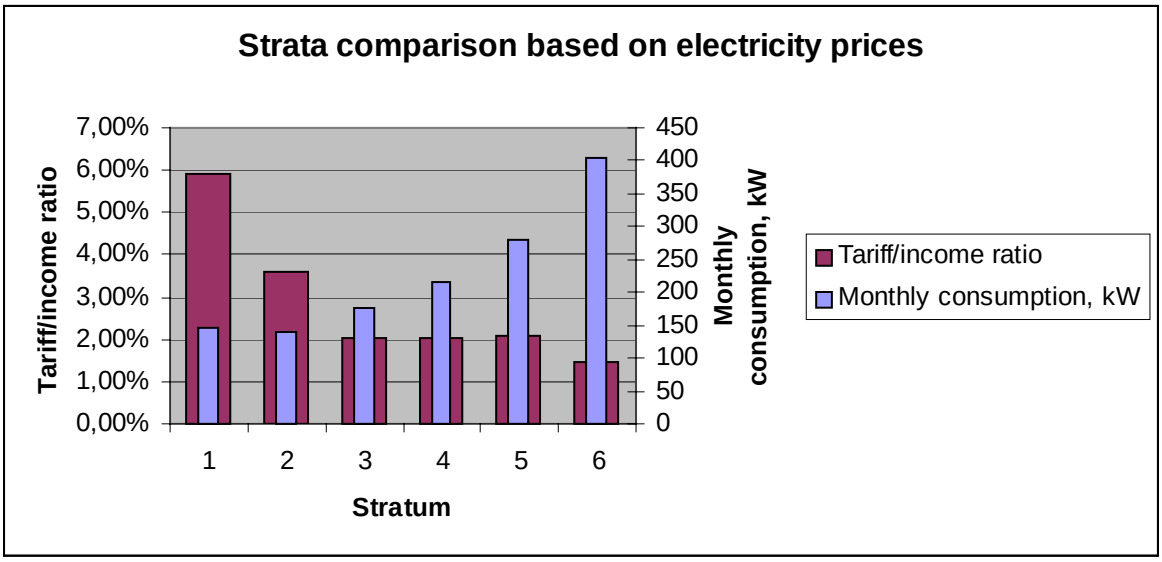
To our judgment, the regulations to reform the sector did not have a clear impact on competition. Consumers have neither a wide range of supplier options to choose from nor

the wide access to information about suppliers and the sector in general. This occurs because suppliers and distributors limit their operation to a rather small territory and not to several areas of the country. The market for a single distributor or supplier is captive in a small area, and has to compete with just one or two other suppliers. In the case of Codensa, for example, its distribution and supply activities are focused in the Bogotá and Cundinamarca areas, and its only large competitor is Empresas Públicas de Medellín. The only activity where competition has developed to a certain degree is power generation, since power is sold in the non-regulated market, which is based on the operation of the Power Pool, an energy market that works in a similar way to a Stock Exchange.

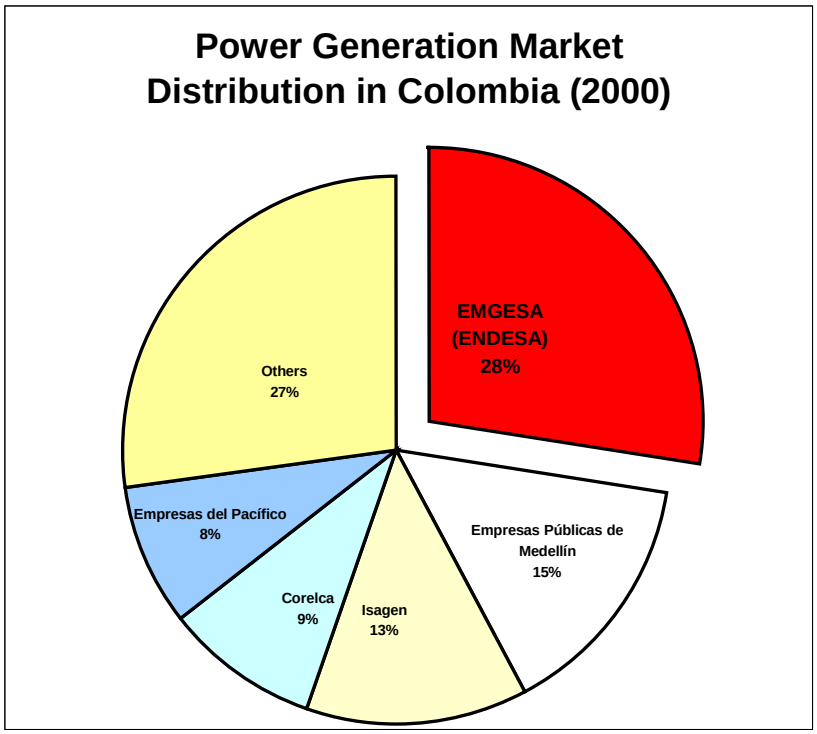
Regarding efficiency, Codensa has been effective in reducing operational losses and regularising areas to incorporate new customers to the service, as well as changing or revising meters. The average frequency of power cut-off has been decreased by 70% and the average cut-off time, by 79.1% since 1997[xliv].

A different analysis regarding prices has to do with the relationship between household tariff and income for different strata. For Codensa's case, Figure 5 shows the monthly power consumption in kWh and the tariff/income relationship for strata 1 to 6, being stratum 1 the lowest income stratum. The fraction of the income to pay electricity by strata 1 and 2 (which add up to 48% of the total population) is up to fourfold the fraction paid by higher strata, despite consuming between 30% and 85% of the electricity consumed by higher strata. All this occurs despite strata 1 and 2 receiving subsidies. In a few words: the less money people earn, the less electricity they consume, but the higher the fraction of their income they have to allocate to pay it. This occurs in other public services in a similar way.

The change in policy promoted by law 143 (1994) lead to a reduction in subsidies from 75% to 50% of subsistence consumption for the lowest income families (stratum 1), to 40% for stratum 2 and to 15% for stratum 3. The rich (strata 5 and 6), as well as commercial and industrial consumers pay a contribution which is 20% higher than their consumption, which is used to subsidize the poor. The situation is worsening as the abolishment of the subsidisation system, postponed since 2000, is finally taking place. The resulting tariffs changes will make both the rich and the poor pay 100% of their consumption. These changes make the poor to spend a higher fraction of their income on paying public service, which increases the gap between rich and poor.



The regulation activity for the power sector has been questioned for acting in favour of corporations, and not in favour of consumers. According to 1994's law 143, the regulation scheme must be reviewed every five years. The tariff calculation method was reviewed in the first quarter 2002, and it was then when some coincidences that may lead to some speculation regarding corporate influence were observed. On the 21st February 2002 a CREG resolution approving an increase in the internal return rate for supply companies from 9% to 14%, and then to 16%, was issued[xlv]. This increase is clearly beneficial for Emgesa, owned by Endesa group, since it controls nearly 22% of the country's market[xlvi]. The resolution was issued just three weeks after the visit of Endesa's President to Colombia, during which he met President Andrés Pastrana and the Minister of Mines and Energy, which may suggest some influence in CREGs decisions on prices, although such an influence is not feasible to be documented or proven. This mode of lobbying is not illegal, and this work does not aim to suggest that. But it is worthwhile to question the Government's permeability to this kind of influence. In a hypothetical case, Endesa's President would have given the Minister quite a number of reasons to support a higher increase in the internal return rate allowed to generators. With these reasons and arguments, the Minister could rather easily convince her partners the Minister of Treasury and the Director of the National Department of Planning, for supporting an increase to 16%. These three officials take part of the CREG, which also has five more expert members in energy issues, are designated by the President of the Republic. The Minister would only have to convince one of the experts to have a draw in the decision-making process within CREG, and this is what actually occurred when defining the price rise in question[xlvii]. In cases like this, it is the Minister of Mines and Energy herself who has the power to make the final decision, that is, the Minister has the equivalent to two votes. Curiously, this power was given in the same administration. The lobbying objective would therefore be met by following a legal mechanism within a very permeable group lead by the President of the Republic and the Minister of Mines and Energy.



Source: Proceedings of the National Congress, Ministry of Mines and Energy, 2001.

An important factor affecting people's lack of acceptance towards Codensa has been the increase in prices as explained above. In 2000, for example, the cost of 1 kWh, in real terms, increased from Col$130 to nearly Col$160. This sort of price rises remain easily and firmly in people's minds, and even though price rises in 2001 and 2002 have been below inflation, owing to the decision of buying power by contract in advance, the 2000 price rise is often taken as a reference to criticise Codensa's management of the business. Regarding the increase in price rises, the most important factors have been:

- CREG 1999's resolutions 094 and 096.
- CREG's authorisation for monthly tariff readjustment.
- Transmission tower blow up as a result of acts of terrorism.

2.3.2. Protests against meters replacement

The case of the meters replacement was one of the most disquieting events of Codensa's penetration as a power distributor and supplier in Bogotá and Cundinamarca. It resulted in protests, public demonstrations and a very high number of complaints against Codensa before the Superintendencia de Servicios Públicos Domiciliarios.

With the aim of reducing its operational losses in various areas of the city, Codensa started replacing household power meters, especially in low-income areas. The law orders a replacement either once the equipment finishes its service lifetime, when technical standards stop being met or when the meter security seals get broken. The problem for many of the consumers was the charges they had to pay for the meter

replacement. The replacement was compulsory by law, but there was no mention about who had to cover its cost, and Codensa charged it to the consumers. The charge was as high as Col$125000, set by Codensa. This is a considerable sum of money for low-income consumers, even if spread over several monthly payments. For this reason, and for not being properly informed, consumers were resistant to pay for the replacement. Codensa's approach was characterised by exerting pressure, threatening with legal actions and offending consumers. The foreign engineers in charge of the meter changes proved their lack of knowledge of Colombian culture and reality by adopting a repressive and intimidating approach. According to an interviewee, the engineer in charge threatened with suing against him for not accepting the meter replacement, even after several attempts by the consumer to explain that he did not have money to pay for it because he could hardly pay for his and his family's food and medicines. *By going as far as in this case, the meter replacement deprived poor customers from their right to an adequate standard of living (Article 11 of the Covenant) and the right to the highest standard of health (Art.12).*

The aggressive, repressive handling was changed to a conciliatory one when Codensa subsequently hired national engineers as service providers, resulting in better collaboration by citizens and benefits to the community that received lights in public parks and new small public libraries.

2.3.3. Customer complaints

Apart from the meter replacement issue, an important factor affecting people's lack of acceptance of Codensa was the increase in tariffs as explained above.

With the aim of improving its corporate image with its customers and expanding its business, Codensa has opted to initiate a new strategy consisting of offering a wide range of services, from 24-hour assistance for plumbing, electricity, locksmith and window installation to training for rational use of energy, power networks maintenance and illumination projects, insurance and internet shopping among others. A customer wanting to have the 24-hour assistance is charged fixed amount that Codensa adds monthly to the electricity bill.

This strategy of services diversification, however, may not be totally satisfactory as long as Codensa does not make a serious effort to continuously improve of its main business, i.e. electricity distribution and supply. Codensa was, after Empresa de Telecomunicaciones de Bogotá (the major telecommunications company in Bogotá), the public service provider with the highest number of customer complaints in 2000. Moreover, it was one of the companies penalised by the *Superintendencia de Servicios Públicos Domiciliarios* in 2001 for not promptly responding to complaints and petitions from customers. The fine was Col$11.4 millions[xlviii], for not responding to customers' complaints after having charged excessive prices to them or having cut them off, *therefore affecting their living conditions.*

2.4. Corporate behaviour – Market and competition aspects

Codensa has also been sued before the *Superintendencia de Servicios Públicos Domiciliarios* because of unfair competition. According to Dicel S.A. ESP, a power supply company in Bogotá, Codensa has not allowed customers claiming their right to choose Dicel as their power commercialising agent. Codensa claimed that it would not proceed with any request of the customers as long as the contract between the distributor (Codensa) and the supplier (Dicel) was not been adjusted. This attitude is against 1996's law 256, especially its article 7, since it is obstructing in an unjustified manner the right of consumers right to choose, as well as Dicel's right to compete. Also against the article 8 of the same law, by diverting the customers, since a group of consumers had already manifested their willingness to sign a contract with Dicel and Codensa unjustifiably obstructed them to change their supplier. Likewise, against the article 17 of the same law, since it tried to convince customers to breach their contract with Dicel, with the clear objective of undermining the competition of this service provider. And finally against article 18 of the same law, by violating CREG's resolution 070 and 1994's laws 142 and 143, since it did not guarantee free access to the distribution network to any supplier that needs it. The *Superintendencia de Servicios Públicos Domiciliarios* ordered Codensa to allow the customers to transfer their contract to Dicel as long as they were acting to legal conformity. It also ordered Dicel to pay an insurance policy to cover any possible harm to Codensa (*Superintendencia de Servicios Públicos Domiciliarios*, Resolution Number 16323 of 18th August 1999).

3. IMPLICATIONS OF GATS RULES

Not all GATS rules yet apply to the energy sector in Colombia. Based on findings of the case study about Endesa described in the previous chapter, this chapter wants to look in what way GATS rules address the reported problems or what possible effects future commitments by Colombia, and other developing countries, within the GATS framework may have on economical, social and cultural rights.

3.1. Article III. Transparency[xlix]

Art. III requires authorities to be transparent in their legislation and measures in relation to services:

1. "Each Member shall publish promptly […]all relevant measures of general application which pertain to or affect the operation of this Agreement […]
3. Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.
4. Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member shall also establish one or more enquiry points to provide specific information to other Members […]

In Art. III, the burden of being transparency falls on the official authorities of WTO member countries but there is no such obligation imposed on corporations which operate worldwide. There is no GATS rule that promotes corporate transparency e.g. by compelling governments to take measures to make corporations transparent about their international operations when they operate in their country e.g. to check whether international companies do not undermine national policy or compete unfairly with national companies.
GATS requires governments to publish information and inform the WTO Council for Trade in Services about all national rules that may affect trade in services. However, corporations are not covered by any commitment to give access to information that may affect the countries' public interests or breach national rules.
In the case study, for example, vertical integration of the companies from power generation to supply was not one of the aims of the privatisation process and law does not allow it. Nevertheless, vertical integration was the result, made possible by using 'façade' companies of a single corporate group so that they were not being discarded from the

bidding for different activities of the sector. Lack of transparency in Endesa's strategy could have been avoided by stronger national rules and control of the process. But like in many cases around the world, these rules were weak and susceptible to be bypassed by legal artifices. Finding the needed corporate information can be expensive and time consuming for governments. While GATS compels countries to set up and inquiry points about their legislation to make it easier for companies to access a market, GATS does not provide for enquiry points by, or about, internationally operating companies whose lack of transparency is a problem and can undermine national policy.

3.2. Article IV: Increasing the trade in services by developing countries[1]

Art. IV indicates that the capacity of many developing countries to participate in world trade is not the same of developed countries, which in fact means unequal competition. The measures mentioned in Art. IV can help developing countries to carefully prepare the conditions under which it may be possible to form professionals and develop strategies for offering services and improving the capacity to compete in both internal and external markets. In such a way, developing countries should be able to increase their world trade in services.

This study shows how difficult it is to strengthen the domestic service capacity and efficiency that respects the many interests at stake or to implement the privatisation process with foreign service providers in the way that was intended. Support to strengthen the domestic services capacity thus not only means access to technology on a commercial basis as mentioned in Art. IV.1.(b). However, art. IV is not about supporting developing countries on how to deal with increasing imports of services from a development perspective, although this study shows that this would be useful. It is worthwhile remembering that there has been the history of the economic “apertura” carried out in developing countries during the 1990s with the aim of opening barriers to trade in goods, which had a devastating effect over many small- and medium-scale farmers and over small- and medium-scale industry. This occurred because of the lack of tools during the preparation process for competition.

Art. IV is about the increase in trade in services, which does not only depend on the improvements in the preparation by developing countries but also - as Art. IV mentions- on access to markets, access to commercial distribution channels and information networks, and access to information about formalities in developed countries. However, many elements of Art. IV are not applied because they are not binding, i.e. can not be made compulsory on developed countries. The latter have not opened much sectors of interest to developing countries, nor offered the information to which Article IV refers. Not having access to such information might give developing countries service-providers an important disadvantage that impedes them of getting ahead in the competitive environment of world markets.

3.2.1. Article VI. set the conditions for domestic regulation

The aim of Article VI is to ensure that national regulations promote competition and do not affect trade or investments by foreign providers in services sectors in which Colombia has made specific commitments within GATS. In this way, Colombia shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner (Art. VI.1.). Colombia should not apply licensing and qualification requirements and technical standards that undermine specific sector commitments and has to use (a) objective and transparent criteria, (b) requirements that are not more burdensome than necessary to ensure the quality of the service and (c) licensing procedures that do not restrict the supply of the service (Art. VI.5 with reference to Art. VI.4). In addition, Colombia should provide for adequate procedures to verify the competence of professionals of any other Member (Art. VI.6). In other words, measures taken to regulate services, and trade in services, have to be done in a least trade restrictive way.

The case study in this report has shown that Colombia's domestic regulations and laws that were made to promote competition and a free market in the energy sector are very weak in:

i) diminishing social inequity as is reflected by the electricity prices and subsidies that disadvantage more the low-income populations;
ii) improving labour stability and social security: there are more jobs, but these are temporary, unstable and, in many cases, poorly qualified;
iii) unbundling companies, which was one of their main objectives. Some companies from power generation to supply are being controlled by Endesa in Colombia;
iv) creating conditions for real competition, another major objective of the domestic regulations. Markets in the regions are still under monopoly or oligopoly conditions, despite the increase in the number of companies at a national level.

GATS articles on domestic regulation favour foreign service providers and do not consider mechanisms to tackle the weaknesses of domestic rules to establish a domestic free -but fair for all- market with foreign players in international competition. On the contrary, according to Art. VI. 4. the WTO *Council for Trade in Services shall develop any necessary disciplines so that* licensing and qualification requirements, qualification procedures and technical standards *do not constitute unnecessary barriers to trade in services.* It is even not clear if such future disciplines will have apply to all services or to those which have been liberalised under GATS. In order to protect workers and consumers, GATS does not include disciplines, measures and flexibility in domestic regulation that explicitly ensure social equity, such as equal access for especially low-income populations- in essential services even if they are unprofitable. GATS rules allow countries to take measures for equal access or social objectives[li] but does not foresee in the case that trade in essential services is liberalised without sufficient national measures to protect the public interest. Citizens, workers and consumers are in such cases subject to the strategies of foreign service providers while the national government is not fulfilling its obligation to implement and promote the provisions of Economic, Social and Cultural Rights.

UNCTAD[lii] has called companies to accept *public services obligations*, although it warns that companies might unwilling to accept them in a scenario where developing countries compete to attract private investment and are weak in including such obligations in their investment agreements and deregulation policies.

Moreover, Art. VI.2. institutes GATS disciplines on how to deal with complaints from foreign service providers but not on how to deal with complaints from domestic consumers and workers about a foreign service provider, which might be difficult to deal with by national authorities. Art.IV.2. requires each WTO Member to have judicial, arbitral or administrative tribunals or procedures which should promptly review, at the request of an affected service supplier, administrative decisions affecting trade in services; "where justified" a WTO member should provide for "appropriate" remedies for its administrative decision. This means that a foreign service provider has the possibility to protest against administrative decisions (i.e. not laws etc.) which affect its profitability, even if these decisions are taken for the public interest. In case the tribunal acknowledges that the complaint of the foreign company is valid, the company gets compensation which is not defined in GATS but which could be an amount of money. If the foreign company would not be satisfied with how Colombia handles the procedure, it can convince its government to take Colombia before the WTO dispute settlement. The burden to defend administrative decisions is in all cases with the national government.
Art. VI.2. does not deal with the problems that are revealed in this case study report: administrative decisions are taken -wrongly- in favour of the foreign service provider. The GATS does not mandate special procedures to review such decisions to protect domestic public interest. This can be seen as discriminating in favour of foreign companies. The case study indicates that the national court system was under pressure to accept the decision for reason of foreign capital inflow, which might have been less the case with domestic companies.

Art. VI.3. gives a foreign service provider a guarantee that it shall be well informed about of the decision by the competent authorities concerning its application in case authorisation is required for the supply of a service[liii]. The GATS agreement does not foresee for international rules whereby the foreign services providers have the obligation to give all the necessary information that affect the national regulations - which might have been useful in the case of Emgesa and Codensa. Nor does the GATS compel national authorities to be transparent about decisions towards affected citizens (consumers, workers, etc.) which is a problem as is clearly described in this study.

3.3. Article IX. Business Practices.

1. "Members recognize that certain practices of service suppliers […] may restrain competition and thereby restrict trade in services."

"2. Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating practices referred to in paragraph 1. The Member addressed shall accord full and sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in

question. The Member addressed shall also provide other information available to the requesting Member, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Member."

Article IX acknowledges that some corporate practices limit competition and provides WTO members with some voluntary means to end such practices. However, as we observed in the case study, Endesa, which has penetrated the Colombian power market, has the benefit of very favourable conditions: through its competition-restricting practices it has virtually established a private monopoly in the Bogotá D.C. and Cundinamarca area, without this being seriously questioned by the supervisory authorities. The weakness of the regulatory framework, and the supervisory and judicial system, has allowed the company to integrate vertically, affecting clearly one of the main aims of the law, which is precisely promoting competition. The unfair competition practices carried out by the distribution and supply company Codensa, partly owned by Endesa, have been penalised by the supervisory body, the *Superintendencia de Servicios Públicos Domiciliarios*, and show what kind of restrictive business practices international companies use.

These aspects should be taken into account in the country's preparation for the GATS negotiations, for instance by strengthening both regulations and the legal system to demand transparency and fair practices from powerful corporations. But what is also needed is to promote discussions on the need for corporate transparency within GATS, so that home countries of multinational corporations commit themselves to monitor and investigate competition-restricting practices of their companies in all countries, especially in developing countries.

3.4. Article XVI institutes how to provide market access

Article XVI relates to certain obligations on how a WTO member country has to provide market access to all foreign services or service suppliers in those services sectors it has committed itself to liberalise in the schedules[liv]. This means that a country is not restricted by these obligations if it does commit to open up (certain) sectors in the schedules, which is the case of most energy services in Colombia.

Once a WTO member has granted market access in a particular sector and mode of supply in its schedules, that country is prohibited from using measures that limit:

- the number of service suppliers;
- the total value of transaction or assets;
- the total number of service operations or quantity of service output;
- the total number of natural persons employed in a service sector;
- the type of legal entity e.g. requiring joint ventures;
- the participation of foreign capital.

If a country wants nevertheless to use such measures in sectors listed in its schedules, it has to specify so in its schedule.

For the power sector in Colombia none of the limitations referred to by Art. XVI with respect to treatment to foreign services and service providers are being applied. The

penetration by Endesa into the power market of Colombia can thus be considered as a good example of the sort of effects that GATS liberalisation may cause.

The experience of Endesa's unlimited market access shows that the expansion of liberalisation and a GATS commitment to ban laws that restrict certain kind of business operations could contribute to further weakening trade unions and other social organisations in energy services, as well as in other sector services. Despite the positive effect in net employment figures, Endesa has started to degrade the quality of employment conditions, since labour flexibilisation mechanisms that normally accompany liberalisation and international competition, e.g. outsourcing, do not promote stability and do not guarantee social security for workers. In order to compete internationally, and to make enough profits to pay for its acquisitions such as in Colombia, Endesa's strategy clearly indicates that it cuts labour costs, amongst others by diminishing jobs. This was visible in Colombia in the EEB, Codensa and Emgesa cases when many employees were dismissed or would accept early retirement plans to the detriment of their quality of life and their right to work.

Endesa's labour strategy is typical for internationally competing service companies. More international competition might thus increase the downward pressure on labour.

GATS rules thus promote the rights for companies to unlimited access to new markets but do not deal with the problem of how workers will keep their economic rights when competition increases. GATS does not prevent countries to introduce strong regulations to fulfill their duty to respect, protect and implement Economic, Social and Cultural Human rights and to ensure that the weakest actors in the market do not unduely suffer. The case study, however, shows that the problem with increasing unlimited international competititon is that countries refrain from such measures in order to attract or keep foreign (service) investors. As other international bodies such as the ILO and UN Commission on Human Rights do not have the means to deal with such labour rights problems, the loosers are currently the workers.

Art. XVI.2. (f) prohibits countries to maintain or adopt *"limitations on the participation of foreign capital in terms of maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment."*
Colombian regulations do not have this kind of limitations on foreign capital participation. However, in this case study of Endesa, the Capital District decided in its 1996's Agreement 001 after capitalising the previously State-owned EEB to limit private shareholder participation to 49%, which aimed to keep operative and administrative control in the hands of the public shareholders.

As it was described in the previous chapter, the District administration transferred that control, by receiving 14% of preferential shares with 1% higher profitability but without the right to vote in decision-making processes within the shareholders meeting. This meant that the public shareholder lost its majority right to influence and reverse the economic and social rights problems resulting from the new way of operating the company: weakening of trade unions, flexibilisation of employment and outsourcing creating jobs without appropriate social security guarantees. In addition, the electricity prices to consumers increased to the detriment of living conditions of low-income

populations and contrary to Art.11 of the International Covenant on Economic, Social and Cultural Rights (Covenant).

Unlimited commitments in energy and other service sectors under GATS Article XVI.2.(f) would only widen the possibility of giving away public companies to private investors which breach human rights in the search for profit.

Many (local) governments countries use a majority or partial ownership of privatised public services companies as a way to influence the privatised company for the public interest. Prohibiting this measure under GATS market access obligations, with no exception for essential services, or targeting the exemption of this market obligation under successive rounds of GATS negotiations, might take away a means to guarantee public interest. Although GATS allows many regulations, one has to take into account that there is an important lack of democratic power to act in the above-described situations, which should be addressed when considering the liberalisation of trade in services. Countries need enough flexibility to use all possible ways to fulfil their obligations under the Covenant and ensure that energy services are supplied to poor consumers and in non-profitable areas. One needs to bear in mind that many limitations mentioned under Art. XVI. also play a key role in environmental policy making[lv] In case Colombia wishes to liberalise energy transmission during the current negotiations and thinks that it is not necessary, or is not aware of the necessity, to write limitations or conditions to its commitments on market access in its new schedule, than it will not be able to apply these restrictive measures even if they are in the public interest.

The United Nations Commission on Human Rights recommends that states need to have to modify and withdraw country-specific commitments to liberalize trade in services, taking into account the need for states to meet their human rights obligations[lvi].

3.5. Article XVII on national treatment for foreign companies

Art. XVII.1. compels a WTO member state to accord the services and service suppliers of any other Member in sectors inscribed in its schedule *"treatment no less favourable than that it accords to its own like services and service suppliers"* regarding *"all measures affecting the supply of services*[lvii]*"*. When a WTO member wants to make use of measures that do not respect national treatment, it has to write them in its schedules.

In the public services and power sector in Colombia, laws 142 and 143 do not impose special conditions on foreign service-providers. Therefore, these are already considered as national providers. In practice, such national treatment under the current legislation has even favoured the Endesa group as it was allowed to vertically integrate its business owing to ownership structures with different legal persons. This integration should not have occurred according to 1994's law 143 that promotes competition in a free market.

Legal tricks of foreign ownership can also be used in other sectors to go against the objectives of the law. In this way, making GATS commitments for national treatment can lead to dominant and abusive positions in the market by foreign service-providers that undermine labour rights and charge prices that affect lower income households. Even if GATS Art. XVII.2. allows national treatment to be formally different treatment between national and foreign services, in practice national laws might not be meticulous enough or

national governments might have to little capacity to handle such practices if many foreign service suppliers use them.

GATS rules should promote that national as well as foreign corporations will respect national rules such as those aiming at stimulating free competition in the power sector so that they do not will not vertically integrate their companies when the law aims to unbundle companies of the sector.

3.6. Progressive liberalisation

Article XIX on the negotiation of specific commitments states:
"2. The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV."
"3. For each round, negotiating guidelines and procedures shall be established. For the purposes of establishing such guidelines, the Council for Trade in Services shall carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of this Agreement, including those set out in paragraph 1 of Article IV. Negotiating guidelines shall establish modalities for the treatment of liberalization undertaken autonomously by Members since previous negotiations, as well as for the special treatment for least-developed country Members under the provisions of paragraph 3 of Article IV".

Article XIX suggests that the GATS agreement respects national policies and the development level of less-developed countries. However, it is these countries that have the weakest governments and are the most permeable to multinational corporate lobbying, as well as to recommendations of developed countries Members, reason for which they tend to liberalise quickly and deeply their economies to trade in services, just as it has occurred for trade in goods. The concept of flexibility mentioned by this Article then becomes a question mark, and indirect evidence is given by the leaked documents from the European Union, which aimed to recommend developing countries' officials a list of sectors to be liberalised in the shortest possible term, including energy services.

There is no real consideration within GATS regarding any measures to deal with probable unsuccessful liberalisation and privatisation processes, since it is assumed that progressive liberalisation will be "successful". However, if a country experiences that privatisation is not beneficial to its citizens, it will hardly be able to reverse the process under GATS that protects foreign services suppliers against such measures. Developing countries should thus assess how liberalised sectors need more flexibility to reverse liberalisation and privatisation processes, especially for essential services, within GATS Art. XXI.

The assessment of trade in energy services included in paragraph 3 of Article XIX has been looked at in different ways by developing and developed countries. The former, in some proposals during the current negotiations, have shown that an assessment reveals

negative impacts of liberalisation. The latter are reluctant to carry out such an assessment. In order to really know whether achieving the advantages and benefits that free competition in trade in energy services are supposed to bring to developing countries is possible, the assessment on trade in energy services is indisputably necessary. This would very likely help the countries to protect their people’s rights and living conditions.

4. CONCLUSIONS AND RECOMMENDATIONS

Colombia has not yet opened up the market for electricity supply under the GATS agreement. However, current liberalisation of the electricity market is close to the conditions of the GATS agreement:

- The government and institutions of Colombia have been extremely open to the directives and recommendations from the international financial institutions (IFIs) such as the World Bank, which support the free market. Therefore, Colombia's policy and regulations are in tune with the objectives of the GATS agreement that is very supportive to the interests of multinational corporations.
- Colombia has privatised and liberalized the power sector to a great extent. Making commitments in the GATS framework would just be a way to formalise, ratify and slightly extend current conditions to trade in the electricity sector. However, GATS rules make it very difficult and costly to reverse privatisation, in case things go wrong. Also, the GATS agreement imposes disciplines on measures taken by the government.

A commission coordinated by the Ministry of Exterior Trade is developing a sector analysis to make proposals to open up the energy market ("offers") during the current GATS negotiations and to request other countries to do so as well. This preparation is done without input from civil society. The case study, however, shows many problems accompanying the liberalisation of the electricity market from the perspective of Economic, Social and Cultural Human rights. The following problems and issues were highlighted during the research about the power sector restructuring process in Colombia, as well as the penetration of the energy multinational Endesa (which would be defined as mode 3 under the GATS agreement) as one of the main electricity service providers:

- **Changes in regulations uncritically followed the directives and recommendations given by IFIs.** The main objective of the reform process in the power sector was to promote competition, which was believed to automatically bring all the benefits of the free market. The reform started off the unbundling of the electricity sector in separate companies and restricted monopolies or abuses by market domination. New regulations tried to stimulate the free market, although the power sector is inherently a monopoly. Competition is still very limited. Only one or two companies have a captive market in a definite region. In other words, there are regional monopolies or oligopolies and consumers in search of lower prices cannot really choose their energy supplier.
- **Recommended models by the same IFIs in the past have failed:** The precarious administrative and financial situation of the *Empresa de Energia de Bogotá*, EEB, was caused by poor decisions and practices lead by a government that followed directives and recommendations by the IFIs to stimulate development. This was an ideal situation to justify private

foreign capital investment in the company as the only alternative to restore the company's financial viability.

- **Previous agreements on the character of the public service company were ignored:** In order to make the EEB attractive to foreign investors, its activities were unbundled in: a main company for power transmission (the EEB), and two subsidiary companies, Emgesa for power generation, and Codensa, for power distribution and supply. This unbundling process happened without the necessary approval of Bogotá's City Council who had signed an agreement about the conditions of the privatisation.
- **The public interest was shattered in order to create a free market:** Before the sale of the company it was sub-valued in order to make it attractive for participation by private capital. The winning bidders, however, recognised that the company had a higher value. The sub-valuation had put the public benefits of the company's sale at risk.
- **The operative and administrative control over former public assets was transferred to private investors, contrary to existing agreements:** Despite keeping the majority of the shares of the company, the Capital District transferred the operative and administrative control of the company by declaring 14% of its shares as 'preferential', with higher profitability but without the right to vote at the shareholders' meeting. This breached the agreement of 1996, which did not authorize the transfer of this control.
- **Endesa was allowed to vertically integrate its business, contrary to the law's objectives.** Through its nontransparent international structure of subsidiaries, Endesa managed to take large participations in all companies of the power productive chain: generation, transmission, distribution and supply. This undermined the unbundling process and violated the competition principle laid down in the free market regulations. The supervisory bodies took no action against this re-integration. The law remains too weak against Endesa's legal ownership constructions.
- **The objectives of privatising the EEB were not accomplished**: The private capital participation lead to devaluation of the company's property and worsening rights of the workers. The company's debt was only partially paid with a high risk of a financial debacle remaining. The company, however, has reduced its operational loss and has incorporated 360.000 new customers by regularising areas.
- **Workers' rights to form or join trade unions have been affected:** Early retirement plans and employee dismissals by the privatized companies ignored the Union's Collective Labour Agreement and weakened the workers Union. This is contrary to Artikel 6 of the International Covenant on Economic, Social and Cultural Rights (Covenant) on the right to work and Artikel 8 on the right of trade unions to function freely.

- **Workers' rights to continuously improve their working conditions and social security have not been respected:** In order to reduce costs, the privatised company developed an aggressive job flexibilisation strategy based on outsourcing. This has reduced social security guarantees for workers, undermined job stability and deteriorated employment conditions contrary to Article 7 of the Covenant.
- **Low-income consumers' rights have been ignored and supervisory institutions do not effectively defend consumers' rights:** Price rises have deeply affected low-income electricity users who must now use an ever-larger fraction of their income to pay for essential services. This has undermined their right to an adequate standard of living and continuous improvement of living conditions (Article 11 of the Covenant). The price increase has been mostly due to changes in the free market regulations that favour private service providers, commercial and industrial consumers, and high-income household consumers. Corporate lobbying of the Presidency of the Republic and the Ministry of Mines and Energy presumably affects regulations since the government is open to corporate arguments, even at the consumers' expense.

Developed countries want to convince developing countries to liberalise the energy sector under the GATS agreement. Based on the case study of commercial presence (mode 3 of the GATS definition of trade in services) of Endesa in Colombia, the following recommendations should be taken into account during GATS negotiations

- **There is a high need to demand commitments on transparency from corporations**, so that they respect policy objectives and rules that aim to protect consumers' and workers' rights in the host country. Corporations should give access to information about any measures that may affect workers or consumers' rights and about their international structure of operation. This should complement Article III of the agreement, which requires governments to be transparent about their laws and decisions affecting trade in services.
- **Article IV should be made binding and be expanded.** Article IV gives developing countries opportunities to have access to information and cooperation from developed countries in order to increase their export of services. Developing countries should also receive support (a) to deal with problems resulting from "import" of services including from commercial presence of foreign service providers, and (b) to prepare the process of liberalising sectors of their interest.
- The case study shows that **before making commitments under GATS for unlimited market access on essential services such as electricity provision, it is important to assess**:
    - the impact on economic, social and cultural rights of existing market access liberalization;

- the ways in which GATS articles VI.4-5, XVI and XVII, and liberalisation commitments (in a "schedule") might limit the flexibility of a government to implement its duty to protect the enjoyment of economic, social and cultural rights as well as prevent third parties from undermining these rights. For instance, *Art. XVI.2. (f)* prohibits countries to maintain or adopt *"limitations on the participation of foreign capital in terms of maximum percentage limit on foreign share-holding*" but many authorities want to keep control of the majority of share of utility companies in order to protect the public interest as was the case in Bogotá;

- the difficult conditions to reverse commitments in essential services under Article XXI.

- **Many essential services are related to the implementation of the International Covenant on Economic, Social and Cultural Rights and need careful regulation** to protect the poorer populations and workers. The GATS agreement acknowledges the right to regulate but ignores the lack of capacity by many countries such as Colombia to put all necessary regulations in place or to enforce them. Given the difficulties in regulating essential services, these services should be excluded from the GATS or receive special treatment to allow all necessary flexibility and autonomy to regulate and provide the services.

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[i] WTO Council for Trade in Services. Energy services: a background note by the Secretariat, September 9 1998.
[ii] WTO Council for Trade in Services. Special session, Negotiations proposals. December 2000 - March 2001.
[iii] Artículo 365. *"Los servicios públicos son inherentes a la finalidad social del Estado. Es deber del Estado asegurar su prestación eficiente a todos los habitantes del territorio nacional. Los servicios públicos estarán sometidos al régimen jurídico que fije la ley, podrán ser prestados por el Estado, directa o indirectamente, por comunidades organizadas, o por particulares. En todo caso, el Estado mantendrá la regulación, el control y la vigilancia de dichos servicios."*
"La ley fijará las competencias y responsabilidades relativas a la prestación de los servicios públicos domiciliarios, su cobertura, calidad y financiación, y el régimen tarifario que tendrá en cuenta además de los criterios de costos, los de solidaridad y redistribución de ingresos."
[iv] In the country there now remain: 14 companies which are vertically integrated, 4 that are in state hands, 7 that are of mixed nature, and 3 that are private companies.
v They are: CHB, Flores II, Flores III, Generar, Isagen, Merieléctrica, Ríogrande, Chivor, Corelca, Termocandelaria, Termocartagena, Proenca, Termopiedras, Termotasajero, Termovalle, Urrá y Emgesa. Source: Supercifras en kilovatios hora, in la Superintendencia de Servicios Públicos Domiciliarios, nr 5, 2001, Bogotá.
vi Distribution and supply companies in Colombia are: Enelar (departamento del Arauca), Edeq en Armenia (Quindío), EEBP (municipio de Puerto Asis del Putumauyo), Electrocaquetá (departamento del Caquetá), Emcartago (municipio de Cartago del Valle del Cauca), Caucasia (municipio de Caucasia en Antioquia), Cens (el departamento de Norte de Santander), Cesinú (municipio de Cereté (Córdoba)), Electrochocó (departamento del Chocó), Codensa (Bogotá), Electricaribe (departamentos de Atlántico, Magdalena, Guajira, y Cesar), Electrocosta (Bolívar, Sucre, Córdoba), Emsa (departamento del Meta), Electrohuila (departamento del Huila), Sibundoy, Empresa de Energía del Putumayo, Ruitoque, APL (islands of San Andrés y Porvidencia), and Eassa (departamento del Amazonas). Source: Ibid.
vii Luz Sindical. Edición No. 1. Publicación del Sindicato de Trabajadores del Sector Eléctrico de Colombia, SINTRAELECOL, Junta directiva Bogotá y Cundinamarca. Bogotá, Octobre 1998.
viii Ibidem.
[ix] Business Wire, 19th February 2002.
[x] http://www.endesa.es/english/index.html: in November 2002
[xi] Endesa, Annual Report 2001, p. 91.
[xii] Source: Cartas Económicas: 21/9/97: Ensdesa España: Transnacionalización y regionalización neuva forma del Mapa de la Extrema Riqueza
[xiii] Source: Enersis profile on www.latibex.com/ing/empresas/71861.htm

[xiv] Cartas Económicas: 21/9/97: Ensdesa España: Transnacionalización y regionalización neuva forma del Mapa de la Extrema Riqueza
[xv], Endesa, Annual Report 2001, p. 95
[xvi] see website of Endesa, "international companies"
[xvii] Endesa, Annual Report 2001, p. 95
[xviii] "Endesa's consolidated results for the first nine months 2002", Endesa press release, 29th October 2002, p. 11 point [2.1.].
[xix] 2002 First Half Results, 23rd July 2002: Endesa website, information to investors, p 13.
[xx] Endesa, "Endesa's consolidated results for the first nine months 2002", press release, 29th October 2002, p. 8 point 1.3.
[xxi] AFX European Focus, 3rd May 2002.
[xxii] "Endesa's consolidated results for the first nine months 2002", Endesa press release, 29th October 2002, p. 8 point 1.2.
[xxiii] Endesa, "Consolidated results nine months 2001", 7th November 2001.
[xxiv] Endesa, Annual Report 2001, p. 110.
[xxv] Idem, p. 92.
[xxvi] "Endesa's consolidated results for the first nine months 2002", Endesa press release, 29th October 2002, p. 1, 10.
[xxvii] see 2002 First Half Results, 23rd July 2002: Endesa website, information to investors, p. 20.
[xxviii] "Endesa reinforces its management structure in order to enhance its strategy, based on profitability, core business and customer focus", Endesa press release, Madrid, 2nd July 2002.
[xxix] See for instance: "Regulations, tax worries Enersis - Chile, Financial Times, 15th April 2002; "Spanish executives urge Chile to change policy, papers say", Bloomberg News, 12th April 2002)
[xxx] "Enersis, missing targets, extends its genesis restructuring effort to 2006", in Electric Utility Week, 29th April 2002.
[xxxi] Endesa, Annual report 2001, p. 111, 113-114.
[xxxii] Idem, p. 116.
[xxxiii] " 'Global Council' established at Endesa", in European Works Councils Bulletin, March -April 2002, p.2.
[xxxiv] Endesa, Annual report 2001, p. 80.
[xxxv] "Endesa's consolidated results for the first nine months 2002", p. 6.
[xxxvi] Endesa, Annual report 2001, p. 92.
[xxxvii] Idem, p. 107.
xxxviii Castro, Jaime. En: Luz Sindical. Edición No. 1. Publicación del Sindicato de Trabajadores del Sector Eléctrico de Colombia, SINTRAELECOL, Junta directiva Bogotá y Cundinamarca. Bogotá, Octubre de 1998.
xxxix see the analylis made by Estrada Álvarez, Jairo. Reestructuración capitalista y tendencias de regulación de las relaciones laborales en el sector eléctrico colombiano. En: Globalización, apertura económica y relaciones industriales en América Latina. Facultad de Ciencias Humanas UN, Colección CES. Bogotá, 1999.
xl Ibidem.
xli Llanos Beltrán, Hugo Mauricio. Análisis expost del proceso de reforma del Sector Eléctrico Colombiano y de sus impactos macroeconómicos y sectoriales. Maestría de Ciencias Económicas U.N. - Sede Bogotá (mauricio.llanos@correo.upme.gov.co.)
xlii Superintendencia de Servicios Públicos Domiciliarios, Delegada for Energía y Gas Combustible. Tarifas del sector eléctrico en el 2000. Bogotá, February, 2000.
[xliii] El Espectador, 29th June 2001.
[xliv] Information from the administration of Codensa 1997-2002.
xlv Germán Corredor, UNPeriódico, Tarifas de alta tensión, April 21st, 2002.
xlvi Supercifras, Superintendencia de Servicios Publicos, 2000
xlvii Personal account by Germán Corredor, Centro Nacional de Despacho, June, 2002.
[xlviii] La nota.com, 2001-04-11
[xlix] Art. III: *1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.*
2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.
3. Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.
4. *Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be*

established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the "WTO Agreement"). Appropriate flexibility with respect to the time limit within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations.

[l] Art. IV: *1. The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members pursuant to Parts III and IV of this Agreement, relating to:*
(a) the strengthening of their domestic services capacity and its efficiency and competitiveness, inter alia through access to technology on a commercial basis;
(b) the improvement of their access to distribution channels and information networks; and
(c) the liberalization of market access in sectors and modes of supply of export interest to them.
2. Developed country Members, and to the extent possible other Members, shall establish contact points within two years from the date of entry into force of the WTO Agreement to facilitate the access of developing country Members' service suppliers to information, related to their respective markets, concerning:
(a) commercial and technical aspects of the supply of services;
(b) registration, recognition and obtaining of professional qualifications; and
(c) the availability of services technology.
3. S*pecial priority shall be given to the least-developed country Members in the implementation of paragraphs 1 and 2. Particular account shall be taken of the serious difficulty of the least-developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.*

[li] "WTO Agreements & Public Health - A Joint Study by the WHO and WTO Secretariat", August 2002, p. 119.

[lii] United Nations Conference for Trade and Development. Energy Services in International Trade: Development implications. June 18th 2001.

[liii] Art. VI.3.*: Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application.*

[liv] Art. XVI.1.*" With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule"*

[lv] P. Fuchs, E. Tuerk, "The General Agreement on Trade in Services (GATS) and future GATS-Negotiations - Implications for Environmental Policy Makers", paper sponsored by the Umweltforschungsplan des Bundesministeriums für Umwelt, Naturschutz und Reaktorsicherheit (German Ministry for the Environment), Geneva-Berlin, November 2001, p. 28.

[lvi] UN Economic and Social Council, Commission on Human Rights, "Economic, Social and Cultural Rights - Liberalisation of trade in services and human rights - Report of the High Commissioner - Summary", 25th June 2002, p. 4.

[lvii] Art. XVII.2 and 3 qualify how national treatment can be accorded: *"A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers." "Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member."*