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Implications of the General Agreement on Trade in Services (GATS) on the Sri Lankan Electricity Sector

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Implications of the General Agreement on Trade in Services (GATS) on the Sri Lankan Electricity Sector

**A study done for the
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by
Ananda Piyatilake**

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Executive Summary

General Agreement on Trade in Services (GATS) is considered to be one of the main achievements of the Uruguay Round of trade negotiations of the World Trade Organization (WTO). It is the first multinational agreement reached to cover the trade in services. Sri Lanka has been a member of the GATS from its inception in 1995.

The Sri Lankan electricity sector is facing many challenges such as providing electricity to the 25% of households who have not got access to it yet, reducing the high cost of generation and securing a proper and sustainable generation mix and raising finances for new generation, transmission and distribution projects. Electricity is one of the main infrastructure facilities vital for the development of the country. With the declared objective of gearing it up to meet the challenges, the government had planned sector reforms/restructuring. Certain legislative changes have also been made with the introduction of the Electricity Reform Act of 2002 etc. However, the failure to answer the very valid question of whether and how the planned changes would address and settle the sector issues has made the process stall.

In fact, electricity has not been a topic for the GATS negotiations so far. One of the main reasons may be the fact that most of the companies from the major players in WTO and GATS negotiations, namely the USA and the EU, have not taken much interest in the international markets since their bad experiences and consequent withdrawal from those markets. Yet, they are still committed to a deregulated model for the electricity sector and therefore, it is likely that electricity may be discussed prominently in the future GATS negotiations.

An important aspect with regard to the GATS negotiations is that there are no real 'negotiations' as such. It is the major players who take the decisions and come to agreements and the other member nations usually have to follow suit. Of late, there have been marked resistance from the developing member nations to this state of affairs. Yet that landscape also is changing with flag carriers like India increasingly assuming the role of a developed country and the possibility of countries like China also joining that band-wagon.

The debate whether electricity is a product or service is still going on. Even though transmission, distribution and retailing of electricity could be considered services, the fact that generation possesses most of the characteristics of a product has prompted some to classify it as part-product, part-service which the WTO has not favoured. The inadequacy of present classifications has been recognized and discussions still continue among countries as to how electricity should be classified.

If it is considered a service, the only possibility for it to be exempted from the GATS is if it falls within the category of a service supplied in the 'exercise of governmental authority'. Such services are the ones 'supplied neither on a commercial basis nor in competition with one or more service suppliers'. Widely accepted means of international treaty interpretation such as the Vienna Convention on the Law of Treaties do not shed much light on how these phrases of the GATS rules be interpreted to determine whether electricity falls under the rules of the GATS or not. As no disputes have been referred to the Dispute Settlement Body or the Appellate Body of the WTO, there have been no verdicts from them on electricity service yet.

What was to be achieved through electricity reforms in Sri Lanka, namely operating the sector entities on a commercial basis and introducing competition among them would have left no doubt whatsoever in the fact that the electricity service falls under the purview of the GATS.

That debate apart, it is apparent that the Sri Lankan electricity sector is not ready at least yet for opening up to international forces. However, there is a real risk of Sri Lanka being caught unawares, if commitments are made without careful and detailed study in the energy sector which may finally be interpreted to include electricity too. There are examples for such situations even from countries like USA.

The study revealed that there is very little knowledge about the GATS and its possible implications on the electricity sector among the stakeholders of the Sri Lankan electricity sector. Selected personnel from each stakeholder group have been consulted for the study.

If commitments are made with respect to electricity, there are many areas where there may be implications. To start with, the present legislative changes may not be possible without the consent of the WTO member states under the GATS Domestic Regulation rule. Present cross-subsidy to the poor in the domestic sector, and bilateral agreements for the development of the electricity sector with countries such as Japan, China, India and Germany also may be questioned. All in all, the freedom to decide what is best for the country on our own may not be possible any more without getting the consent of the other WTO members. Therefore, the country has to exercise maximum caution in making any commitment keeping in mind the fact that the commitments are irrevocable.

If the electricity sector is opened up to market forces, that may jeopardize the rural electrification projects which usually generate very poor return on investment and the community managed off-grid electricity systems which are supposed to play an important role in reaching the country's electrification targets.

Abbreviations

ADB	Asian Development Bank
CEB	Ceylon Electricity Board
DBT	Design, Build and Transfer
DGEU	Department of Government Electrical Undertakings
DSB	Dispute Settlement Body
EPC	Engineer, Procure and Contract
EU	European Union
FDI	Foreign Direct Investment
FIDIC	Federation Internationale des Ingenieurs Conseils – (International Consulting Engineers)
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GOSL	Government of Sri Lanka
JBIC	Japan Bank for International Corporation
LDC	Least Developed Country
LECO	Lanka Electricity Company
LTGEP	Long Term Generation Expansion Plan
MFN	Most Favoured Nation
MOU	Memorandum of Understanding
NAMA	Non-Agriculture Market Access
PC	Provincial Council
PPP	Public-Private Partnership
UN CPC	United Nations Central Product Classification
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
WCO HS	World Custom Organizaion Harmonized Commodity Description Coding System
WTO	World Trade Organization

1. Introduction

There is a very close correlation between the GDP growth and the growth of electricity demand in Sri Lanka. For every percentile growth in the GDP, the electricity demand records about 1.5% growth highlighting the importance of electricity for the economic development of the country. Electricity sector in Sri Lanka still remains to be mainly government owned even though generation was liberalized in 1998 with the introduction of Independent Power Producers. The main utility is the Ceylon Electricity Board (CEB) which remains to be vertically integrated handling generation, transmission and the major part of distribution. The Lanka Electricity Company (LECO) that owns the remaining part of distribution also is a fully state owned enterprise. Planned electricity reforms were to functionally un-bundle the sector, abolish both CEB and LECO and form nine public companies to take over their functions. An Act was passed in the Parliament to this effect in 2002, but the process stalled with pressure from some stake holders specially the employee trade unions and certain political fractions.

Out of the total 4.56 million households in Sri Lanka, only 75 % have been electrified yet, 72% by the national grid and 3% by community electricity schemes and non-conventional sources. The maximum demand for electricity in the country occurs during the night due to lighting load and the recorded highest is 1892 MW. There is about 1100 MW of thermal (550 CEB & 550 IPP) and 1200 MW of hydro generating capacity installed together with more than 100 MW of mini-hydro capacity that has been connected to the national grid.

Electricity prices are relatively high compared to the other countries in the region even though they do not reflect the true cost. At present 23% of the population in Sri Lanka lies below the national poverty line. This is one of the main reasons why the government is continuing with a tariff subsidy to the low electricity consumption group in the domestic sector. They are cross subsidized by the commercial consumers. With a view to mitigate wide ranging impacts to the economy, the government is still continuing with an overall subsidy to the electricity consumers as well which is coming in the form of below cost electricity rates.

The main reason for the high cost of generation is the overdependence on petroleum fuels for electricity generation which was as high as 61% in year 2005. This situation has prompted various fractions to propose different solutions ranging from the implementation of low cost generation plants to privatization of the utility. Securing investments required for power generation capacity enhancement which are the largest projects in the country has been highlighted as one of the major challenges the electricity sector is facing.

Although Sri Lanka has 'offered' to open up the telecommunication, tourism and financial services under the General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO), it has not made any 'offers' or received any 'requests' with regard to electricity yet. Given the irrevocable nature of the GATS commitments, it is of great importance to know the implications of the GATS on the Sri Lankan electricity sector so that possible measures could be taken in advance to mitigate any adverse impacts.

2. Objective

Practical Action South Asia has been initiating research and advocating policy from a pro poor perspective on attempts to reform the electricity and water sectors, as well as in studying the World Trade Organization (WTO) agreements with specific focus on General Agreement on Trade in Services (GATS) and its effects on services in Sri Lanka. As a further step this study was conducted with the objective of investigating and documenting the implications of the GATS on the Sri Lankan Electricity Sector through a process of stakeholder consultation.

2.1 Specific Objectives

1. To document various interpretations of the degree of coverage by GATS
2. To identify various interpretations of the degree of coverage of the Electricity Sector by GATS.
3. To identify important GATS rules that could bring implications on the Sri Lankan electricity sector through a process of relevant stakeholder consultation.
4. To identify the range of policies at national and provincial council level that could be under threat as barriers for trade through a process of stakeholder consultation.

3. Methodology

Various interpretations of the degree of coverage by GATS especially the degree of coverage of the Electricity Sector by GATS were studied through a literature survey. Published documents were referred together with information that could be accessed through the internet. To obtain updates on recent developments, Public Services International Research Unit, University of Greenwich, UK and Electricity Sector Activists in India were contacted.

A process of stakeholder consultations was used to,

- identify important GATS rules that could bring implications on the Sri Lankan electricity sector, and
- identify the range of policies at national and provincial council level that could be under threat as barriers for trade.

The consultations were done on a one to one basis by interviewing the selected stakeholders in person and/or over telephone using a guided and open ended questionnaire. The list of persons so consulted is given in Annex-1. What transpired at the interviews were used to deduce the conclusions stated in the end.

3.1 Selection of the stakeholders for consultation

The policy makers, electricity utilities, other energy related institutions, consumers, electricity producers, regulatory body and employees of the electricity sector were identified to be the main stakeholders. At least one person was selected from each category for consultation based on his/her involvement in the sector, experience and relevance to the topic and considering the possibility of having some knowledge about the GATS.

The Ministry of Power and Energy, the Department of National Planning in the Ministry of Finance and Planning and the Power Sector Reform Office were the policy makers identified for this purpose. The two electricity utilities in Sri Lanka are the Ceylon Electricity Board and the Lanka Electricity Company (Pvt) Ltd.. Energy Conservation Fund was selected in the category of other energy related institutions. There are several categories of consumers, namely industrial, commercial and domestic (or household) etc.. The electricity producer consulted was the Lanka Transformers Limited which owns several subsidiary companies in the field of electricity generation. Public Utilities Commission of Sri Lanka is the regulator to be for the electricity sector while several trade union leaders were selected on the basis of the category of employees they represent and how broad based their representation is.

4. Interpretations of the Degree of Coverage by GATS

4.1 What is GATS?

General Agreement on Trade in Services (GATS) was created in 1995 as the first multinational agreement to cover trade in services. It is considered to be one of the major achievements of the Uruguay round of trade negotiations (1986-1993) of the World Trade Organization (WTO). Its counterpart is the General Agreement on Tariffs and Trade (GATT) which came into force almost half a century before in 1947 to cover merchandise or goods trade.

The GATS agreement has two parts. The general rules are set out in the first part while the second part contains the national 'schedules' which list the individual countries' specific commitments on access to their domestic markets by foreign suppliers. The agreement is aimed at reducing barriers to trade and exposing services to competitive forces. It is expected that the prices to consumers would reduce because only the efficient businesses would survive.

The 'Ministerial Conferences' that must take place at least once every two years are the highest decision making body of the WTO. Below the Ministerial Council is the General Council which meets several times a year in the Geneva headquarter. It also meets as the Trade Policy Review Body and the Dispute Settlement Body and comprises of ambassadors and heads of delegations in Geneva. But sometimes officials are sent from member countries directly. The next level comprises of the Goods Council, Services Council and Intellectual Property Council all of which report to the General Council.

All members of the WTO are signatories to the GATS and have to assume the resulting obligations. The WTO says, regardless of their countries' policy stances, trade officials need to be familiar with this Agreement and its implications for trade and development which may be far more significant than available trade data suggest. The USA and EU (which represents all member states of the EU) have proved to be the most powerful members in the WTO. Sri Lanka has been a signatory to the GATS from its inception in 1995.

4.1.1. The four modes of providing supply

The following four modes have been identified under the GATS as the modes in which the services trade takes place between or among countries.

Mode 1 - Cross-border supply

This mode includes any service provided from the territory of one country into the territory of another country. Eg: Call Centers, telecommunications, financial services, e-commerce and internet services etc.

Mode 2 - Consumption abroad

In this mode, service consumers (not the service) cross national boundaries. Eg: tourism, students studying abroad, patients seeking medical treatment in another country etc.

Mode 3 - Commercial presence

This mode of service supply includes all foreign direct investment (FDI) in service providers. The effective incorporation of this mode makes GATS an investment rights agreement as much as a trade agreement. It can be seen as a multilateral agreement on investment as well.

Mode 4 - Presence of natural persons

In this mode, individuals travel to another country to provide a service on a temporary basis. Eg: Consultants, Engineers, Computer specialists, Doctors, Nurses, Housemaids, Labourers etc.

4.2 How GATS Works

The GATS is being implemented on a 'request-offer' basis. Requests are generally from one signatory to one or more other signatories, requesting an opening up of a specific sector. The request might be to add a new sector or to reduce restrictions on an already partly open sector. The process of 'requests' is a purely bilateral one between the requesting government(s) and the target government(s), about which the WTO is not usually informed or involved.

Requesting a market opening seems a largely cost-free exercise. If successful, it opens up an option for companies from the requesting nation. If there is any likelihood that a nation's companies might benefit from the opening up of another country's market, there seem to be no reason not to request the opening of a sector. A request commits the requesting country to nothing. By contrast an offer is a major commitment. As with requests, offers may open up a new sector or reduce trade restrictions on a sector that is already partly open. This represents a major obligation, although the offer does not become binding until it has been the subject of negotiations and has been incorporated in the offering country's schedule of commitments.

4.3 How Disputes are Settled

The official WTO website claims¹, 'the WTO procedure for resolving trade quarrels under the Dispute Settlement Understanding is vital for enforcing the rules and therefore for ensuring that trade flows smoothly.' A dispute arises when a member government believes another member government is violating an agreement or a commitment that it has made in the WTO. The authors of these agreements are the member governments themselves. The agreements are the outcome of negotiations among members. The ultimate responsibility for settling disputes also lies with member governments, through the Dispute Settlement Body (DSB). The DSB is made up of all member governments, usually represented by ambassadors or equivalent.

A permanent seven-member Appellate Body is set up by the DSB and broadly represents the range of WTO membership. The members of the Appellate Body have four-year terms. They have to be individuals with recognized standing in the field of law and international trade, not affiliated with any government.

4.3.1 Implications of the Decisions of the DSB

Dispute Settlement Board decisions may have an effect on the overall interpretation of rules or classifications of the GATS. A very commonly cited example is the Gambling Case² where the DSB decided against the USA and in favour of the complainants Antigua and Barbuda. USA had not foreseen the real implications of its commitment under 'other recreational services'. Though they maintained that gambling was not intended to be committed and it was prohibited according to three federal laws and four state laws, finally the Appellate Body decided to uphold the original decision given by the panel appointed by DSB for that purpose.

What is of importance note here are that,

- even a country like the USA with its wealth of resources got it wrong in its commitment.
- the ruling of the DSB was over and above federal and state laws of USA.
- a developing country like Sri Lanka would find it unaffordable to carry out the research work necessary prior to making an offer and a commitment.

Such decisions would be binding on all other member countries too. It will apply similarly to the electricity service as well if and when a decision is given by the DSB on a dispute arising between two member parties.

¹ www.wto.org

² 'United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services', Dispute DS285, Complainant-Antigua and Barbuda, Respondent-United States

4.4 The GATS and the Electricity Sector in Sri Lanka

There has been almost no real impact of GATS on the electricity services so far. The widespread liberalization and privatization of electricity services seen world over has in fact been caused by factors other than GATS. One of the main concerns about GATS is its possibility to have a legal binding on countries forcing them to liberalize and privatize. Any reversal to public ownership of services so liberalized is illegal or prohibitively costly especially to developing countries like Sri Lanka. The ability to regulate the electricity service as planned and to continue with the present subsidies or cross-subsidies also may get restricted.

This potential impact of GATS on the electricity sector depends on a number of issues of interpretation of key features of the agreement. These involve³:

- the extent of coverage of the sectoral classification
- the possibility of exemption of electricity services under various headings: the exemption for services provided under government authority, and the exclusion of government procurement rules
- distortions to public service provision as a result of the limitation on regulation to be 'not more burdensome than necessary', or the requirement to avoid subsidies which distort trade

4.5 Coverage of GATS

4.5.1 GATS classification; electricity - product or service

Whether electricity should be classified as a service or a good has been a long drawn debate. It is not totally intangible like the financial services, tourism or even telecommunications. Electricity is 'produced' (generated), 'transported' (transmitted) and then distributed. However, it does not have the character of goods like the agricultural produce, meat or computers.

The electricity industry can be divided into four main sectors,

- (a) generation (the production)
- (b) transmission (taking electricity from power plants to centres of demand using the high voltage network)
- (c) distribution (taking electricity from the transmission network to final consumers using the low voltage network) and
- (d) retailing (sale of electricity to final consumers including purchase of wholesale power, billing and metering)

In Sri Lanka, it is the first three that is clearly distinguishable at least as divisions of the utility, Ceylon Electricity Board (CEB). The fourth, retailing goes as part and parcel of distribution. Even the planned vertical unbundling talked about only those three⁴. (Reform Act of 2002). While there is not much argument about the latter three activities appearing to be services, generation carries more characteristics of a product.

In most of the countries, 'until about the last decade, electricity was generally supplied by a single monopoly company supplying a given territory or tightly linked companies with non-competitive supply arrangements. For example, in many countries, generation/transmission companies supplied distribution/retail companies on a monopoly basis so the industry was not easily divisible. The drafters of GATT assumed electricity should not be classified as a commodity because it was not storable. Energy goods were also regarded as outside the scope of GATT on grounds of the exception relating to the conservation of exhaustible natural resources (Article XX:9g)) and on the national security exception (Article XX1).'⁵

³ 'GATS and the Electricity and Water Sectors', by Stephen Thomas and David Hall, March 2006, pg 8

⁴ Electricity Reform Act, No.28 of 2002, Parliament of the Democratic Socialist Republic of Sri Lanka

⁵ 'GATS and the Electricity and Water Sectors', by Stephen Thomas and David Hall, March 2006, pg 8

The World Custom Organisation (WCO) Harmonised Commodity Description and Coding System (HS) classifies electrical energy as a product, although it is an optional heading in the WCO HS and WCO members are not required to classify it as a commodity for tariff purposes.

However, under the reforms in many countries, the electricity industry was being ‘unbundled’ into its four component parts with distribution and transmission remaining regulated monopolies, and generation and retail becoming competitive activities. This raises the possibility that parts of the electricity industry be classified as a service subject to GATS, while others would be regarded as a product subject to GATT.

The WTO, in its 1998 background note, was concerned that there would be problems if electricity was part-product, part-service. It says⁶:

It appears, however, that under the current WTO agreements the distinction between production (goods) and transmission/distribution (services) might create an imbalance in the application of multilateral trade rules to different liberalised segments of a previously vertically integrated market, especially with respect to establishment trade and restrictive business practices. The GATS provides legally binding rules (including MFN, national treatment, market access and domestic regulation) applying to the establishment of energy services suppliers, while at least for the time being there are no comprehensive rules on investment for goods. Moreover, the GATS also includes binding rules on monopolies and exclusive service suppliers and the legal framework to develop more regulatory disciplines touching upon important anti-trust issues, on the example of the telecommunications Reference Paper, while RBPs of goods manufacturers are currently out of the scope of the WTO Agreements.

The issue has not been solved yet. As noted in the chapter below, discussions continue between countries on how electricity should be classified.

4.5.2 Services Classification: electricity supply

The Services Sectoral Classification List of the WTO has been based on the United Nations original provisional Central Product Classification (UN CPC). There is no mention of the electricity sector in GATS classification which identifies twelve main service sectors and a number of sub-sectors and further sectors under them. The main service sector of ‘business services’ has six sub-sectors including ‘other business services’. The only mention about even the broader aspect of energy is the classification of ‘services incidental to energy distribution’ as one of the twenty further sectors under the sub-sector of ‘other business services’. During the Uruguay Round energy services have not been negotiated as a separate sector. The WTO has reported that the vast majority of the global energy services industry was not covered by GATS.

However, according to the legal text, GATS applies to ‘any service in any sector’ irrespective of any sectoral classification or restriction ‘except services supplied in the exercise of governmental authority’.⁷

The current version of the UN CPC has created a new heading covering electricity distribution services through mains and placed it under the broad category of Trade Services. It has placed ‘electricity distribution services (on a fee or contract basis)’. ‘Services incidental to electricity distribution’ has been assigned to a new broad category of ‘Business Services’. This appears to have created more confusion.

There have been discussions on the inadequacy of the services classification recently. EC has proposed to extend the classification to certain aspects of a service such as Public-Private Partnerships (PPPs) even though a service as a whole is not included in the classification.

⁶ ‘GATS and the Electricity and Water Sectors’, by Stephen Thomas and David Hall, March 2006, pg 8

⁷ Article 1:3, Annex 1B, GATS Legal Text

4.6 Possibility for Electricity to be Exempted from GATS

The legal text of GATS, PART I, SCOPE AND DEFINITION, *Article I, Scope and Definition*, states,

1. *This Agreement applies to measures by Members affecting trade in services.*
2. *For the purposes of this Agreement, trade in services is defined as the supply of a service:*
 - (a) *from the territory of one Member into the territory of any other Member;*
 - (b) *in the territory of one Member to the service consumer of any other Member;*
 - (c) *by a service supplier of one Member, through commercial presence in the territory of any other Member;*
 - (d) *by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.*
3. *For the purposes of this Agreement:*
 - (a) *"measures by Members" means measures taken by:*
 - (i) *central, regional or local governments and authorities; and*
 - (ii) *non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;*

In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;
 - (b) *"services" includes any service in any sector except services supplied in the exercise of governmental authority;*
 - (c) *"a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.*

Accordingly, it covers all services except those 'supplied in the exercise of governmental authority' which are further defined to be the ones 'supplied neither on a commercial basis, nor in competition with one or more service suppliers.'

As discussed above, the present classifications of services by GATS do not list electricity or the broader class of energy directly. Energy appears as a sub-category.

In trying to determine whether there is any possibility for electricity to be exempted, it is important to understand what services are eligible to be exempted according to the definition. There has been extensive discussion and debate over the issue. However, it has not yet gone before the Dispute Settlement Board (DSB) which is virtually the final decision maker of GATS. The reason being still no dispute has occurred in this respect. There have not been requests and offers in the area of electricity service among GATS countries so far.

4.7 Interpretation of Key Words and Phrases⁸

In this context the best available way is to try and interpret the definition to see whether electricity may be exempted. For it to qualify to be exempted electricity should be 'supplied in the exercise of governmental authority' which means it should be 'supplied neither on a commercial basis, nor in competition with one or more service suppliers'. There are several internationally accepted ways of interpreting public international law. Given below are some of the possible interpretations of the two key terms 'supply on a commercial basis' and 'supply in competition with one or more service suppliers'.

⁸ 'Public Services and the Scope of the General Agreement on Trade in Services (GATS)' a research paper written by Markus Krajewski for Center for International Environmental Law (CIEL), May 2001

4.7.1 Vienna Convention on the Law of Treaties⁹

Article 31, 'General rule of interpretation' and Article 32, 'Supplementary Means of Interpretation' of the Vienna Convention on the Law of Treaties spell out the rules on interpreting international treaties. These rules have been used in interpreting WTO law and it is generally agreed that they can be used to interpret any international treaty.

Article 31:1 of the Vienna Convention states the central norm of treaty interpretation as, 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objective and purpose.' The general interpretation takes into account the entire treaty including the agreement, annexes and decisions related to services. The supplementary means of interpretation goes beyond that to consider the preparatory work and the circumstances of conclusions as well for the purpose of confirmation of the meaning that result from the general interpretation or to determine the meaning when the first is ambiguous, obscure, absurd or unreasonable.

4.7.1.1 'Supply on a commercial basis'

According to Article 1:3(c) of the legal text, services supplied on a commercial basis are covered by the GATS. 'Commercial basis' could be broadly understood to mean any service not supplied free of charge. A narrow interpretation could be 'the services that are not supplied in return for a market price'.

'Commercial' according to the meaning given by dictionaries means the exchange of goods or services for money or a monetary equivalent. Then it may be argued that the services supplied free of charge should not be considered to be 'a service supplied on a commercial basis' because they are not supplied for money or a monetary equivalent.

However, whether the mere existence of a price should qualify a service to be 'commercial' is again a debatable issue. There are three possible scenarios. The price may be allowing the supplier to have a profit, to just cover the cost or may even be below the actual cost forcing the supplier to incur a loss. The supply of a service at a price below the cost or just covering the costs may or may not be called 'commercial' depending on how it is looked at and depending on other circumstances.

It is directly applicable to the present situation with regard to the electricity supply in Sri Lanka because overall the electricity is supplied below cost. However, it again is according to how the electricity tariff is set by the government. On the other hand the cost too has resulted from how the government decided or not decided to implement low cost power generating projects.

Another interpretation is possible when the entire phrase 'supplied on a commercial basis' is taken. Apart from the above consideration of whether the consumer pays a price or not, it could also be argued to be meaning the operational basis of the service supplier, namely, non-profit basis or commercial basis. However, the immediate meaning of a supply on a certain basis seems to be the individual act of supply and its modalities and does not have any specific reference to the service supplier. This understanding is supported by the other parts of GATS as well.

Even a look at the immediate context of the GATS legal text does not provide any further insight to clarify the meaning of the term 'commercial basis'.

⁹ Vienna Convention on the Law of Treaties, 1969, done at Vienna on 23 May 1969, entered into force on 27 January, 1980, United Nations Treaty Series, vol. 1155, p. 331

4.7.1.2 'supply in competition with one or more service suppliers'

According to Article 1:3(c) of GATS 'a service supplied in competition with one or more other service suppliers' is covered by the Agreement.

'competition' seems to be the key term to understand this phrase. According to the meaning given by dictionaries, competition refers to a situation when one supplier targets the same customers or market segments or tries to realize the same advantage as one or more other service suppliers.

To determine whether a service is supplied on a competitive basis first it should be seen if there is a situation where two or more service suppliers supply the same or a comparable service. Second test is to check whether the suppliers are able to substitute or only to complement each other. However, two or more service suppliers do not always compete with each other even though they may supply the same or a comparable service.

According to these considerations the exact scope of 'competition' as per Article 1:3(c) of GATS depends on the definition of whether two services are the same or comparable and how the target market is defined. It all depends on how the DSB will determine these issues if and when it is called upon to do so. In any case, the ordinary meaning of the said Article may well bring about a broad understanding of the relevant definitions meaning it would deem to have a wider coverage.

On the other hand, just being a monopoly supplier (who never operates in competition) cannot deem to be covered by Article 1:3(c). Otherwise, the supply of a service by any monopoly supplier on a non-commercial basis would have to be considered a service 'supplied in the exercise of governmental authority'. The notion of 'governmental authority' needs some public involvement and a private company having a monopoly that is neither established nor sanctioned by the government cannot be exercising government authority. Therefore, it can be argued that a private company operating in monopoly but without any public involvement cannot be covered by Article 1:3(c) of GATS. It has to be a company operating on a government mandate or the government itself.

4.7.1.3 Context of Article 1:3(b) & (c) of GATS

The 'context' of the terms is necessary to be considered in interpreting treaty provisions as stipulated in Article 31:1 of the Vienna Convention. The context of Article 1:3 (b) & (c) of GATS includes the Schedules of specific commitments and the Annexes of the Agreement.

(a) Schedules of Specific Commitments

According to Article XX:3 of GATS the members schedules of specific commitments form an integral part of GATS. However, the term 'services supplied in the exercise of governmental authority' or phrases to that effect have been used very rarely in any of the member schedules of specific commitments. Even though there is any such reference by a member, it could be argued that the meaning would only reflect the relevant member's understanding of Article 1:3(c) of GATS and not an 'agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty' or an 'instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty' as per Article 31:2 of the Vienna Convention.

(b) Annexes

Reference is sometimes made to the definition of 'services supplied under governmental authority' in the context of Article 1:3(b) of GATS provided in Article 1 (b) of the Annex on Financial Services. Because Article 1 (b) directly applies to financial services only, it can only be used indirectly to determine the scope of Article 1:3(b) of GATS for other services like electricity. However, a closer look would suggest that even such an application would not narrow the meaning of the provision extracted from the textual interpretation.

The activities covered in Paragraph 1 b) (i) of the Annex by definition cannot be conducted in competition with other service suppliers. And the activities given in (ii) and (iii) of the same Paragraph of the Annex can be conducted by more than one entity but are limited by Paragraph 1 c) of the Annex to the extent that they do not apply to activities conducted by financial service suppliers in competition. Therefore, the meaning of Paragraph 1 b) finally depends on the understanding of the term 'competition' as discussed above.

The Annex on Air Transport Services excludes traffic rights and services directly related to the exercise of traffic rights from the scope of GATS and it does not clarify the term 'services supplied in the exercise of governmental authority'. The Annex on Telecommunications defines only a very narrow aspect of services possibly supplied in the exercise of governmental authority and cannot be generalized to other services such as electricity.

4.7.1.4 Subsequent practice, subsequent agreements and preparatory work

Clarifications can be drawn from 'subsequent practice, subsequent agreements, other rules of international law' and 'preparatory work' according to Articles 31:3 and Article 32 of the Vienna Convention respectively. Following are brief descriptions of the outcome when the methods specified therein are applied.

(a) Subsequent practice, subsequent agreements and other rules of international law

According to Article 31:3 of the Vienna Convention, when interpreting a treaty, the subsequent practice in the application of the treaty and subsequent agreements regarding the interpretation shall be considered.

Even though certain statements interpretative or otherwise have been issued by the Secretariat, it cannot be considered an organ of the WTO. On the other hand, no such statements have been issued by the Ministerial Conference, the General Council, the Council for Trade in Services or any subsidiary body on Article 1:3 (b), (c) of GATS.

When looked at in a legal perspective, the protocols and agreements on financial services and basic telecommunications of the WTO members contain no reference to the scope of Article 1:3 (b), (c) of GATS.

The dispute settlement institutions too have not so far dealt with the exact meaning of the said GATS Article except the sentence in the Bananas-case "There is nothing in these provisions to suggest a limited scope of application of the scope of GATS" which indicates that the Appellate Body is assigning a broad coverage to GATS.

(b) Use of other rules of international law

Article 31:3(c) of the Vienna Convention holds that 'any relevant rules of international law applicable in the relations between the parties' shall also be taken into account together with the context in interpreting a treaty. This means that other rules applicable among the parties concerned can be used in interpreting a GATS rule in relation to a specific dispute among the parties even if those rules are not applicable to all members of WTO.

However, in interpreting a GATS rule as applicable to all members of WTO, only such rule of international law which is applicable to all members can be taken into account. Only likely ones would be general principles of international law or customary international law because there are almost no other international treaty with exactly the same members as WTO. Such a general rule applicable to all members does not exist even there because public services and ways of supplying them vary so much from country to country. That is the most likely reason for many different interpretations of Article 1:3(b) and (c) of GATS by WTO member countries as well.

(c) Preparatory Work and Circumstances of Conclusion

Article 32 of Vienna Convention 'Supplementary means of interpretation' states,

'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.'

Studies reveal that there are no records on discussions about Article 1:3(b) and (c) of GATS in publicly available documents of the Uruguay Round of the WTO negotiations or the negotiating history of GATS. But there are indications that the definition of 'governmental services' could still be an unresolved issue. The following request/appeal by the chairman of Negotiating Group on Services (GNS) in a statement issued in the last week of Uruguay Round clearly shows that there are unresolved issues about scope. It says, '...pending further clarification of this and other questions relating to the scope of the Agreement, that it is assumed that participants would refrain from taking issues arising in this area to dispute settlement but would try to settle them through bilateral consultations'.

4.7.1.5 Vienna Convention on Law of Treaties and GATS scope

Above discussion concludes that the interpretative methods spelt out in Vienna Convention on Law of Treaties does not shed a clear light on the scope of GATS. However, it is clear that the wording can be interpreted to give a narrow or broad meaning to Article 1:3(b) & (c). A good example is the meaning of 'commercial basis'. Whether the mere existence of a price qualifies a service to be in that category or should the price be sufficient to cover at least the cost.

Accordingly, one cannot be blamed for assigning a broad meaning to Article 1:3 (c) of GATS making most of the services fall within the scope of GATS and making the range of Article 1:3 (b) narrow thus leaving only a few services out of GATS.

4.7.1.6 Applying to the Sri Lankan scenario

Presently the Sri Lankan electricity sector is operating at a loss. The selling price of a unit of electricity is below the cost of generation and taking it to the consumer. Even though a price exists, in general terms it is not operating on a 'commercial basis'. The reforms and restructuring was supposed to make the sector entities, specially the CEB (or its successor companies) 'commercial ventures'. Going by that notion too, the sector was not operating 'on a commercial basis'. According to common terminology, a commercial venture should generate profit.

One important aspect that emanates from this discussion is the fact that the same wording may mean differently to different persons or in a different context. Therefore, in agreeing to treaties or other international rules, it would be vitally important to clearly define and clarify the meaning of words, phrases etc. There is a high risk of broader interpretations to a rule than what is intended at the time of making a commitment unless extreme care is exercised to spell out what is opened and more importantly, what is to be exempted. Internet Gambling Case is a good example to what may happen even to a country like the USA. Specially given the fact that the commitments are irrevocable, absolute care needs to be exercised in determining the sectors to 'offer' or what 'requests' to accept.

4.7.2 Other Interpretative Principles¹⁰

4.7.2.1 Restrictive Interpretation

In the restrictive interpretation, the principle is to take the meaning with less general restrictions on the sovereignty of a party. In at least one previous interpretation, the WTO Appellate Body has shown that this principle has some role even though there is no confirmation that it would apply to all WTO rules.

Applied to Article 1:3(b) and (c), this principle would require one to take the meaning of 'commercial' as the services supplied at a market price or at least covering the cost. And 'competition' could only exist if the suppliers are supplying the very same service and/or targeting the very same, identical market segments.

To be least restrictive on the sovereignty of states, it should be left to the individual governments to decide which services are supplied 'neither on a commercial basis nor in competition with one or more service suppliers'. There have been instances where the Appellate Body has held that exceptions have to be interpreted narrowly. However, this should not prevent it from interpreting Article 1:3 (b) broadly allowing certain public services to be excluded from coverage because Article 1:3 (b) and (c) is not an exception but the definition of the coverage of GATS.

4.7.2.2 Effective Interpretation

The principle here is that a treaty should be interpreted in such a way that its goals and objectives can be achieved effectively. It is also called the teleological approach. The basic rationale is to interpret a treaty provision in such a way that the treaty's general objectives are most effectively implemented. It therefore requires a look at the goals of the treaty.

From the preamble it could be gathered that the objectives of GATS are to,

- Liberalize trade in services and
 - Secure the sovereign right to regulate services
- with an equal emphasis on each of them.

If the objective of GATS to recognize the right of members to regulate services is upheld, then it appears that the interpretation would be similar to the restrictive interpretation discussed above. However, it should be noted that there is no obligation on the part of the Appellate Body to recognize that objective of GATS. On the other hand, even if it does then the other objective of liberalization would rather negate the effect and assign a broader meaning to Article 1:3 (c) of GATS because the emphasis on either objective has to be rather equal.

In the past the Appellate Body has at least once referred somewhat to the principles of effective interpretation when it argued that the interpretation should not render a certain clause meaningless.

¹⁰ 'Public Services and the Scope of the General Agreement on Trade in Services (GATS)' a research paper written by Markus Krajewski for Center for International Environmental Law (CIEL), May 2001

5. Important GATS Rules That Could Bring Implications on the Sri Lankan Electricity Sector

For electricity supply, it is the third mode of providing service which is of the greatest relevance, as it would allow the commercial presence in Sri Lanka of any multinational company in the electricity sector of any country in the world. The first category could be relevant for the supply of electricity across borders like the case of the proposed High Voltage Direct Current link between India and Sri Lanka. The fourth mode, the presence of natural persons also may come into the picture indirectly by way of exodus of skilled personnel including engineers creating a vacuum of local human resources in the sector. The involvement of foreign consultants in various aspects of the electricity sector which also falls under mode four is common practice even now. The second mode which is 'consumption abroad' is almost irrelevant in the case of electricity supply.

5.1 Important GATS Rules¹¹

5.1.1 Most-Favoured Nation (MFN) Treatment

The Article II, General Obligations and Disciplines requires that a member country accords immediately and unconditionally to services and service suppliers of any other member treatment no less favourable than that it accords to like services and service suppliers of any other country. This obligation has the practical effect of consolidating any commercialization, privatization or other market-opening measures involving foreign service providers. The GATS transparency rules stated under Article III require members to publish all measures of general application and international agreements which 'pertain to or affect the operation' of the treaty. That applies to 'introduction of any new, or any changes to existing, laws, regulations or administrative guidelines' as well.

5.1.2 Specific Commitments, Market Access and National Treatment

In addition to the General Obligations, GATS requires each member to submit a schedule of specific commitments that lists the sectors in which it grants Market Access and National Treatment. These schedules are to specify the extent of liberalization a member guarantees in designated sectors by indicating any limitations on Market Access and National Treatment with regard to each of the four modes of supply and optionally, any additional commitments.

In sectors where market-access commitments are undertaken, a member shall not limit the number of service suppliers, total value of service transactions or assets, total number of service operations, total number of natural persons or require an economic needs test according to Article XVI of GATS. It further disallows a member from maintaining or adopting measures which restrict or require specific types of legal entity or joint venture or limit the participation of foreign capital.

The National Treatment requires each member to 'accord to services and service suppliers of any other member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers'.

5.1.3 Domestic Regulation

Article VI:4 of GATS requires each member to ensure that 'measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services.' With a view to that the Council for Trade in Services shall develop any necessary disciplines to ensure such requirements are 'not

¹¹ GATS Legal Text

more burdensome than necessary to ensure quality of the service' and 'in the case of licensing procedures, not in themselves a restriction on the supply of the service'.

5.1.4 Government Procurement

Article XIII, Government Procurement stipulates that the provisions of the Most-Favoured Nation Treatment, Market Access and National Treatment 'shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.'

5.1.5 Subsidies

Article XV, Subsidies states, 'Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services.' Subsidies like all other measures affecting trade in services are subject to relevant GATS provisions such as MFN and in scheduled sectors, National Treatment. Paragraph 2 says, 'Any Member which considers that it is adversely affected by a subsidy of another Member may request consultations with that Member on such matters. Such requests shall be accorded sympathetic consideration.'

5.1.6 Article IV Increasing Participation of Developing Countries

The Article IV, Increasing Participation of Developing Countries, requires the facilitation of increasing participation of developing countries in world trade. This is to be achieved through strengthening their domestic services capacity and its efficiency and competitiveness, improvement of their access to distribution channels and information networks and the liberalization of market access in sectors and modes of supply of export interest to them.

5.1.7 Article XIX Negotiation of Specific Commitments

The Article XIX, Negotiation of Specific Commitments, spells out that the members shall enter into successive rounds of negotiations, with a view to achieving a progressively higher level of liberalization. The process is to promote the interests of all participants and to secure an overall balance of rights and obligations. The liberalization 'shall take place with due respect for national policy objectives and the level of development of individual Members.' Also, '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.' Accordingly, they are free to attach conditions to the foreign service suppliers. However, the Article also says, 'The process of progressive liberalization shall be advanced in each such round' 'directed towards increasing the general level of specific commitments undertaken by Members under this Agreement.'

5.1.8 Possible exemptions, restrictions on regulation and subsidies

In case electricity may be exempted under either heading 'services supplied in the exercise of governmental authority' or 'government procurement', then various restrictions on public policies in the GATS agreement would apply.

GATS may limit or eliminate the government's ability to vary the level of public and private involvement as appropriate at different steps of development. The 'irreversibility' or 'lock-in' nature of GATS rules threatens that freedom. Even though it takes nothing for a country to make a request, once committed it is almost impossible for a country to get out of a GATS agreement. The only path is by paying compensation to the affected party which may have to be extended to all member countries, if so decided. This situation is a huge disadvantage for a developing country like Sri Lanka.

6.0 Implications of the GATS Rules on the Sri Lankan Electricity Sector

6.1 Evolution of the Sri Lankan Electricity Sector and the policy framework applicable¹²

It was in 1882 that Sri Lanka saw the first electric lights when a German ship named SS Helios sailed to Colombo harbour. The first premises to be lit by an electric lamp was the Billiard Room in Bristol Hotel in Colombo in 1890. A private company named Boustead Bros. provided electricity to a few buildings in Colombo in 1895.

Electricity Ordinance No.5 was enacted to regulate Electricity Distribution in 1895. This was repealed in 1906 and Electricity Ordinance No.26 of 1906 was enacted facilitating and regulating the supply and use of electrical energy for lighting, traction and other purposes. Government took over the Colombo Electric Tramways and Lighting Company Ltd. (Boustead Bros.) for the purpose of running and maintaining the Colombo Electric Lighting System and Tram Service System.

In 1935 the Electricity Board (not CEB) was established by Ordinance No.35 of 1935 for the administration and control of Electrical Undertakings. This was dissolved in 1937 under Ordinance No.10 of 1937 and the regulatory body was named the Department of Government Electrical Undertakings (DGEU). The Department of Electrical Undertakings continued the generation and transmission to Colombo and suburbs and maintenance of electrical installations in government institutions.

In 1950 the first large scale hydro power station was commissioned in Laxapana (25 MW) and Act No. 19 of 1950 was enacted to regulate the generation, transmission, transformation, distribution, supply and use of electrical energy.

In 1969, by Act No.17 of 1969, the Ceylon Electricity Board (CEB) was established to develop and co-ordinate the generation, supply and distribution of electrical energy and to take over the functions of DGEU and in certain circumstances the electrical undertakings of the Local Authorities.

In 1983, Lanka Electricity Company Private Limited was established under the Companies Act to take over the Local Authority distribution networks. In 1988, the electrical undertakings of the other Local Authorities were handed over to the CEB under Act No.32 of 1988 to relieve them from the financial burden of accumulated arrears to be paid to CEB.

In 1996, the first Mini Hydro Project (0.96 MW) was connected to the National Grid at Dikoya. In 1998, the first Independent Power Project (IPP) (51 MW) was commissioned in Sapugaskanda and a standardized scheme was introduced by CEB to purchase power from small power producers (less than 10 MW).

The Electricity Reform Act No. 28 of 2002 was passed by the parliament to repeal the CEB and LECO and to establish nine independent companies to take over the functions of generation, transmission, distribution and other related functions.

In May 2005, following protests from various fronts mostly from the Trade Unions of the CEB, the Ministry of Power and Energy appointed a Committee on Power Sector Reforms to develop a new concept for electricity reforms. The report of this committee was published in July 2005 and was later approved by the Cabinet of Ministers.

Accordingly, the amendments to the Electricity Reform Act No.28 of 2002 and Ceylon Electricity Board Act No. 17 of 1969 were gazetted in April 2006 but were later stalled following a verdict by the Attorney General that certain provisions were unconstitutional. No

¹² 'Overview of Historical Power Sector Development, Evolution of the Sector', presentation by Mr. V.Rajendran, A.G.M.-Distribution Region 2, CEB, at seminar on 'Sri Lanka Power Sector Reforms: Issues and Challenges' at Waikkal, Sri Lanka, October 2004

attempts have since been made to amend such provisions and proceed apparently due to political reasons.

6.2 Importance of Electricity for Development of Sri Lanka

Electricity is one of the prime infrastructure facilities required to spur economic activity for the development of the country and enhance the quality of life of the people. There is a very close co-relation between the Gross Domestic Product and the electricity demand over the years.

This has been recognized by the government in its ten year development framework 2006-2016 that is being finalized by the Department of National Planning of the Ministry of Finance and Planning¹³. It says,

'Randora-Infrastructure Investment plan, envisages channelling a larger share of investment to developing the basic infrastructure and other services in the rural areas – electricity supply, telecommunication services,.....

The sectoral plan for electricity aims at a substantial expansion and diversification of generation capacity by implementing the long delayed coal power and hydro projects as well as new fuel based projects, development of renewable energy sources, rationalizing the tariff structure and increasing access to electricity by all consumers particularly covering the remote areas.....'

6.3 Challenges Faced by the Sri Lankan Electricity Sector

- (a) According to the latest statistics about 75% of the households in Sri Lanka have been electrified so far with 72% through the national grid and 3% through other means such as community electricity schemes and non-conventional sources etc. The government target is to raise this to 95% by year 2016 with 87% grid connected and 8% off grid supplies¹⁴.
- (b) Present electricity cost is very high. The reason is having too many diesel burning power plants due to delays in implementing the low cost generation options such as the Norochcholai Coal Power Plant and Upper Kothmale Hydro Power Plant planned by the CEB. In year 2005 the share of diesel power generation was as high as 61%. This has to be corrected so that the country would have a sustainable, secure and low cost generation mix of hydro and different thermal generation options such as coal and fuel oil.
- (c) Even though the electricity rates in Sri Lanka are among the highest in the region, still they do not recover the real costs even after the overall increase recently¹⁵ by approximately 28 %. The pricing decisions are taken by the government taking into consideration various other factors such as its influence on the overall cost of living, adverse effects on the industry and commerce etc. The political factors too play a vital role in this respect.
- (d) In this situation of high costs and non cost reflective prices, the government owned utility, CEB is incurring heavy losses. This loss making is attributed to various factors by different sections of the society, sometimes to their own advantage. Although about 70 % of the overall expenses of the utility is the cost of electricity generation, some fractions attribute the losses fully to internal inefficiencies of the CEB.
- (e) Based on such reasoning various solutions to the 'power crisis' are being proposed without really identifying the root causes. Reforms and restructuring is one such solution which may bring in more problems than relief. Although internal reforms/restructuring is widely accepted as a need of the hour, across the board irrevocable changes such as

¹³ Mahinda Chinthana-Vision for a new Sri Lanka

¹⁴ Mahinda Chinthana: Vision for a new Sri Lanka, A ten year horizon development framework 2006-2016, Department of National Planning, Ministry of Finance and Planning

¹⁵ Electricity rates were increased with effect from February 01, 2007 by extraordinary gazette No. 1477/3 of December 26, 2006

abolishing of CEB and forming nine (9) independent companies to operate a less than 2000 MW system is seen by many as highly unwarranted.

- (f) Sri Lanka has to build low cost generating plants according to a plan so that the required plants would be commissioned in time to meet the 7-8% annual growth in demand predicted over the next fifteen years. Caution should be exercised so that they neither get delayed nor advanced unnecessarily. Recently there were many news items in the media about negotiating or signing MOUs on a number of generating plants. CEB's Long Term Generation Expansion Plan (LTGEP) is prepared following an internationally accepted methodology. However, there are certain criticisms leveled against it as well. Due to that reason or other, during the last decade or so the LTGEP has not been implemented in a systematic manner.
- (g) Funding for generation projects is an issue even though electricity industry has an assured and growing market. Reluctance of the funding agencies to loan finance projects is mainly attributed to CEB's poor financial status. Probably the uncertainties created due to proposed power sector reforms and changing government policies also had an effect. For example, the Japanese Bank for International Cooperation (JBIC) had agreed to loan finance the Norochcholai Coal Power Project. But the then government decided not to proceed with the project and the JBIC was informed accordingly. Later when the government decided to proceed with it, having lost colossal sums of money due to its absence, there were hardly any lenders. This situation forced the GOSL to strike a bilateral agreement with China to procure a power plant without following any competitive tender process [said to be on Design, Build and Transfer (DBT) basis but really on Engineer, Procure and Contract (EPC) basis according to FIDIC (Federation Internationale des Ingenieurs Conseils – International Federation of Consulting Engineers) definitions].
- (h) Investments are required in the areas of transmission and distribution expansions as well as rehabilitation/repair/augmentation of existing system too.
- (i) The service and customer care also need improvement to be abreast with the present day high demands of the consumers. It has been established as a general truth that the service provided by the government owned utility is poor and below par. However, it may be worthwhile to conduct a scientific survey on a proper sample of consumers to verify this fact. Especially in the face of the poor service provided by even very reputed private companies operating in Sri Lanka. Some of them even though provided a good service when they had a small customer base, have failed to live up to expectations with their growth. Still most of them are having a much lower number compared to the 3.4 million consumers served by CEB. A survey conducted by the Citizens Trust in 2003¹⁶ to determine opinion of domestic consumers and public awareness regarding issues relating to the power crisis has revealed that most of the electricity consumers rate the service they receive as 'moderate' (neither 'good' nor 'poor'). This sentiment has been consistent across the consumer groups of low, medium and high electricity consumption.
- (j) It is widely accepted that bringing in an independent regulator would have a positive effect on the power sector and the electricity consumers.

6.4 How the GATS Interpretations affect the Sri Lankan Electricity Sector

From the above discussion it is evident that there is no clear, unambiguous interpretation of the Article 1:3(b) and (c) of GATS yet. This means the scope of coverage by GATS is not clearly defined. However, considering the fact that one of the two main objectives of GATS is the liberalization of trade in services, it is quite likely that GATS will assume a broad scope. Even though electricity is not high on the agenda or not appearing in it at all yet, there is every chance that it will come into the picture sooner or later specially given the condition of GATS that requires 'progressive liberalization'.

¹⁶ 'Analysis of Sri Lanka's Power Crisis', by Citizens' Trust,

Any chance of electricity being exempted or considered to be outside the scope of GATS lies in whether it can qualify to be a service 'supplied in the exercise of governmental authority'. For which electricity should satisfy the condition 'neither supplied on a commercial basis nor in competition with one or more service suppliers'. Whatever the reasons are, the Sri Lankan electricity sector has been loss making for the last decade or so. Therefore, in commonly used terms one may argue that it is not operating on a commercial basis because it has not been at least covering the cost. On the other hand, according to the principles of interpretation discussed above, it is not operating in competition with any other service supplier. Being arguably a natural monopoly, it is unlikely that electricity sector as a whole could be considered to be 'operating in competition' unless a very broad meaning to the term is assumed.

However, considering the Sri Lankan electricity sector separately in isolation may be of not much use because it is quite likely that a universal policy may be adopted by WTO on the issue. In such a scenario, it is very important to see what the position is in the other member countries.

In 1990s a number of countries liberalized their electricity sectors and made them to operate in a competitive environment as commercial ventures. Even though their success or failure is debatable, one may see that the basic qualification requirements are present there.

6.5 What Implications GATS Rules may have on Sri Lankan Electricity Sector

The most important character of GATS one would notice from the debate and discussion taking place internationally is the fact that it would be extremely difficult for a country to withdraw from a commitment once made through the process of request and offer. Only possibility appears to be through paying compensation to the affected countries or if so decided, to all WTO member countries. This makes it a virtual impossibility for a country like Sri Lanka which is heavily depending on lender and donor countries to bridge the annual budget deficit. On the other hand when such a lender or donor makes a request it would be very hard to disagree.

The consulted experts who had knowledge about GATS either by participating in the WTO negotiations or studying about it believed that a country is free to decide what it is committing and what it does not offer. Even though it may appear to be so at this stage of negotiations, how the rules would be interpreted by the DSB and the Appellate Body in case a member country contests that position and a dispute arises is difficult to predict. The best example probably is the Internet Gambling case where the intended commitment was later interpreted by those bodies to be much more wide ranging though against the laws of USA. Accordingly, some commitment in the area of energy may later be interpreted to include electricity as well unless such an intended exemption is clearly indicated at the time of making the offer and commitment.

One may argue that the possibility of changing the provisions of any such flexibility in future is remote given the difficulty to reach consensus at WTO negotiations and the effective resistance the developing countries showed especially at the Cancun round. However, there has been a marked change later in the Hong Kong round to the stance of countries such as India who earlier pioneered the developing countries' course.

If the electricity sector has not been a hot topic under GATS for the last decade or so possibly due to the reasons discussed earlier, that situation appears to be fast changing as evidenced by the formation of the 'energy friends group' by USA, EU, Venezuela, Cuba, Norway, Chile and Japan in 2001. They are the countries who have submitted proposals on energy services. At least the EU proposal specifically discusses the electricity sector while others are on more general terms and make proposals on the energy sector. USA and Norway have proposed to bring the electricity generation, about which there is a debate as to whether it is a product or a service, also under the auspices of GATS.

Another area of concern would be the GATS transparency rule. As discussed above, it requires a member country to inform the other members of WTO of all changes to its statute.

And they may be interpreted as barriers. The proposed amendments to the Electricity Reform Act and the CEB Act would have to be brought to their notice accordingly. The bringing in of the Reform Act in year 2002 also would have had to be thus consented by the WTO. The Energy Supply Act¹⁷ by which the Energy Supply Committee was set up to address the issues with regard to the power crisis at the time might well have been objected to by the WTO on the grounds that it empowered the ESC to take wide ranging decisions that affect the power sector specially with regard to procurement of power generating capacity, by-passing certain laws that existed.

The Paragraph 2 of Article XIX under Part IV of the GATS legal text may be deemed to give sufficient flexibility to developing countries compared to other WTO agreements. However, the interpretation of 'appropriate flexibility' plays a decisive role in the final outcome. At the same time the Paragraph 4 of the same Article may be interpreted to limit this flexibility or to make it meaningless.

According to the government procurement guidelines, preference is to be given to local raw materials and domestic bidders¹⁸. This is with a view to promote national industry and enterprise. When competing with foreign bidders, a domestic bidder has to be given a margin of preference in the tender evaluation (7.5% & 15% for works and goods respectively for contracts funded by World Bank or ADB, 10% or 20% for works and goods respectively for contracts funded by the GOSL). This may not be possible under Market Access and National Treatment rules of the GATS for committed services.

Under the MFN treatment, there cannot be any discriminatory treatments to certain countries. In the case of Sri Lanka, it has had bilateral agreements with countries such as Japan, China, Germany and India with regard to the development of the electricity sector in the recent past. Japan Bank for International Cooperation (JBIC) was one of the country's leading funding sources for a long time now. They have loan financed not only electricity generation projects like Upper Kothmale but transmission and distribution projects as well. China has offered soft loans for Norochcholai Coal Power Project and some other medium scale hydro power projects. An MOU was signed with India for a Coal Power Project in Trincomalee (Sampur). Possibility to come to such agreements may be hindered if Sri Lanka makes GATS commitments in the electricity sector. It is important to note that presently Sri Lanka is free to decide on the type of power plants, their capacity etc. and stick to whatever expansion plan it desires. Whenever there have been influences from the lending institutions such as the ADB in the form of loan conditions to adhere to their policies (such as reforms), the country could seek the assistance of friendly countries to raise finances to execute projects it deemed necessary¹⁹. In that manner Sri Lanka could maintain electricity supply security (not implementing the LTGEP of CEB was due to many other reasons and is outside the scope of this study). However, such independence may no longer be available if the country commits electricity service under GATS.

The continuance of the Rural Electrification projects (grid connected) and specially the off-grid community electricity projects may encounter difficulties if electricity is liberalized under GATS. Presently there are about 1.14 million households yet to be electrified and the government target is to supply 20% of that (approximately 230,000 households) by year 2016 through off-grid electricity supplies making the total thus supplied 365,000 households.²⁰

By allowing the mode three operation, the foreign investments are expected to flow in to the country. However, the sustainable development of the local electricity sector may not take place in such an environment. There has been a school of thought with regard to expansion of generation capacity that the government or the CEB should not worry about the technology through which the electricity is generated as long as the capacity requirement is met and the price is right. If that is policy is adopted, the country may end up with a generation system that

¹⁷ Energy Supply (Temporary Provisions) Act, No.2 of 2002, Parliament of the Democratic Socialist Republic of Sri Lanka

¹⁸ Procurement Guidelines 2006, Goods & Works, National Procurement Agency, Democratic Socialist Republic of Sri Lanka, p. 51

¹⁹ Assistance of the Government of the People's Republic of China was secured for the implementation of the first coal fired power plant in Sri Lanka. (Norochcholai Coal Power Plant)

²⁰ Mahinda Chinthana

is highly distorted and unbalanced in terms of the fuel used. What may happen was clearly demonstrated during the past decade or so where only diesel burning generators were brought in (even without such liberalizations the other governing factors such as lead times and delays in decision making finally rendered in only such plants feasible). As a whole, the sustainability of the sector may get seriously impaired.

7.0 The Policies at National and Provincial Council Level that could be Under Threat as Barriers for Trade

What transpired through the stakeholder consultation was,

- Vast majority of the stakeholders consulted were not aware of the GATS even though they have some knowledge about WTO mainly through what appears in media. Due to the lack of awareness, they were not in a position to comment on what policies could be under threat.
- Some stakeholders believed that this cannot bring much good to the country judging in general by the past record of the developed countries' policies toward the developing countries.
- Some expressed sentiment that Sri Lanka as a small country would not be able to resist or change the policies imposed by the international community.

Under the circumstances, an attempt was made to understand the existing policy framework spelt out by the relevant Acts of Parliament, the declared policies of the government to solve the present issues of the electricity sector and how such policies could come under threat by GATS rules. International research work also was referred with a view to draw from them the possible parallels to the local scenario.

7.1 Authority of the Central Government and the Provincial Councils

In November 1987, the thirteenth amendment to the Constitution of the Democratic Socialist Republic of Sri Lanka set up the Provincial Councils (PCs). While retaining with the Central Government the powers with regard to the generation of electricity including hydro electricity to feed the national grid, it has vested (Clause 34) with the provincial councils the powers to develop, conserve and control sites and facilities for the purpose of generating and developing electricity²¹. Accordingly, the mini-hydro and other electricity generation facilities which are grid connected fall under the purview of the central government. Micro-hydro and other community electricity schemes may deem to have become the responsibility of the provincial councils.

The second (II) list under 9th Sub-listing²² spells out the reserved listing of items about which the provincial council has no powers to make legislation. Third (III) list under 9th Sub-listing²³ gives the concurrent listing of items on which the Parliament may make laws after consulting all provincial councils as appropriate and also a provincial council may make laws (that conform to the Constitution) with respect to that PC after consulting the Parliament as appropriate.

7.2 Relationship between Planned Electricity Sector Reforms/Restructuring and the GATS

It is quite interesting to note the relationship between the basic requirements to qualify as a service within the scope of GATS and the objectives of the planned and partly executed electricity reforms/restructuring of Sri Lanka and their timing.

Two main objectives of reforming the sector were to operate the sector entities on a **commercial basis** and to bring in **competition** among the sector entities so that efficiencies would improve and the costs would come down. It was expected that investments especially for the electricity generation projects also would flow in after the reforms because the sector would be on a sound **commercial** footing. To facilitate that, the sector was to be vertically and horizontally unbundled (meaning separation of generation, transmission and distribution

²¹ 13th Amendment to the Constitution of the Democratic Socialist Republic of Sri Lanka, Clause 34

²² 13th Amendment to the Constitution of the Democratic Socialist Republic of Sri Lanka, Clause 7

²³ 13th Amendment to the Constitution of the Democratic Socialist Republic of Sri Lanka, Clause 5

functions and entrusting those to separate entities and then making several other entities to take over the function of electricity distribution in separated out geographical areas which were supposed to operate in competition with each other) and a regulatory framework was also to be brought in.

As discussed earlier, operating on a commercial basis and in competition are the very characteristics that make a service non eligible to be considered 'a service supplied in the exercise of governmental authority' and therefore outside the scope of the GATS. Even though it can be argued either way whether electricity would be considered outside the scope of GATS if it is neither supplied on a commercial basis nor in competition, it would definitely fall within the scope by fulfilling either of the two conditions 'supplied on a commercial basis' or 'supplied in competition with one or more service suppliers'.

Moreover, the Power Sector Policy Directions published by the Ministry of Irrigation and Power in August 1997 and amended in October 1998 also contain certain references that warrant attention. In Clause 4 Vision, it says, '*... There will be a **non-monopolistic** situation in the power sector and it will operate on sound **commercial** and business principles....*'. Clause 5 Basic Policy states, '*.... Within this strategy, special emphasis is placed on public enterprise reforms including **commercialization** and **privatization**, reform of the public administration system,.....*'. Clause 5.2 Restructuring of the Sector contains, '*.... The power sector will be restructured to accommodate **competition** and to facilitate **private sector** participation in order to create a **non-monopolistic** situation within the power sector. ...Sector entities will be allowed to operate as independent autonomous bodies....*' And Clause 5.7 Tariff Policy begins with, '***Even though electricity is a non-traded service, the tariff (price) charged should have some relationship to tariff levels in other countries.....***'. There are many references to say that the sector is to be operated on commercial principles. When looked at from the point of GATS scope of coverage, one may see some deliberate effort in drafting the Policy Directions to make electricity sector fall within the GATS, or at least to make sure that it cannot claim any exemption by way of provisions in Article 1:3 (b) and (c) of the GATS.

Therefore, it may be of use to dig into the history of reforms to find out how and what originated it.

7.3 How Reforms/Restructuring Originated in Sri Lanka

The first official document that discusses the need and recommends electricity reforms in Sri Lanka is the Pricewaterhouse study report published in 1996.

It is also of importance to note that there was no substantiation of the statements made in the report of Pricewaterhouse on which it based its recommendations. In addition, how reforms were going to address and solve the outstanding issues of the sector was not clear. Such issues became larger with time and they were clearly identified and spelt out in the 'Report of the Committee on Power Sector Reforms' developed by a committee comprising of the electricity sector stakeholders appointed by the Ministry of Power and Energy. The recommendations of the Report were later approved by the Cabinet of Ministers.

The identified four root causes of the crisis in Power Sector were²⁴,

1. Obstacles faced by the CEB during the past one or two decades, in implementing the plans for setting up large scale, low cost base load plants, particularly those using coal as fuel and large scale hydropower projects.
2. The proliferation of relatively low capacity thermal power generating plants using petroleum fuels, the prices of which have risen sharply.

²⁴ 'Report of the Committee on Power Sector Reforms', prepared by the Committee on Power Sector Reforms appointed on May 13, 2005 by the Hon. Minister of Power and Energy, July 2005, Part II, Clause 1.0

3. The inability of the CEB to increase tariffs commensurate with,
 - (a) increase in fuel prices
 - (b) depreciation of the Sri Lankan Rupee which contributed to the increase in capital costs and a part of the operational cost
 - (c) consequential higher prices paid to Independent Power Producers in terms of their contracts.
4. Structural and management weaknesses and operational inefficiencies within the monolithic power utility-CEB, as well as an inadequate level of empowerment in its decision making process.

To overcome them and 'to ensure a viable, self-sustainable and nationally beneficial power sector', three principal strategic initiatives each constituting a leg of a 'Power Sector Tripod' has been proposed. They were²⁵,

1. Immediate adjustments of the tariff to at least reflect the direct costs consequent to the steep increase in the price of fuel. This should be followed by a realistic, fair and transparent mechanism for tariff setting and compensation for tariff subsidies.
2. Urgent implementation of the lower cost large scale thermal base-load generating plants using coal, until they meet a substantial part of the energy requirements. There should not be any room for vacillation and diversionary moves in this respect.
3. Restructuring the power sector by unbundling the CEB and establishing independent, self contained and commercially oriented companies fully owned by the CEB and ensuring their continued viability by offloading debt and subject to an independent and transparent regulatory mechanism.

There it can be clearly seen that reforms were only one third of the solution.

These issues have been identified in the ten year development framework of the government as well.

It is important to note here the fact that Pricewaterhouse was one of the companies assigned by the WTO for the task of reviewing the sector and recommending in 1996.

7.4 What is Expected from Reforms?

It has been identified that the absence of independent regulation, vertically integrated structure, lack of transparency, command control structure, exposure to political interference, inadequate provisions for consumer protection, combined owner, operator, regulator functionalities and commercialization and governance issues as the weaknesses of the existing structure. To overcome them, economic, structural, technical and safety reforms have been proposed.²⁶

It is declared that the following benefits would be accrued through reforms,

- Opportunity for CEB to carry out business functions independently with more autonomy within the existing legal framework.
- Higher business focus for generation, transmission, distribution and non-core functions.

²⁵ 'Report of the Committee on Power Sector Reforms', prepared by the Committee on Power Sector Reforms appointed on May 13, 2005 by the Hon. Minister of Power and Energy, July 2005, Part II, Clause 2.0

²⁶ 'Sri Lanka Power Sector Reforms, Proposed Reforms, Reforms in the Industry Structure', presentation by Mr. Nihal Wickramasuriya, Reform Manager, Power Sector Reforms Office at seminar on 'Sri Lanka Power Sector Reforms; Issues and Challenges' at Waikkal, Sri Lanka, October 2004

- Scope for better customer care and higher quality of service
- Scope for operational efficiency improvements and thereby to reduce burden on the Treasury.
- Improvement of stakeholder confidence
- Minimization of industry unrest.

7.5 Definition of Liberalization, Privatization, Regulation/de-regulation and Unbundling

Not only locally but internationally it can be seen that the terms liberalization, privatization, regulation/de-regulation and unbundling are used interchangeably. But they have specific and definite meanings.

Liberalization generally means breaking of the monopoly. Competition is not an essential part of liberalization. In Sri Lanka electricity distribution was liberalized in this sense with the setting up of the Lanka Electricity Company (LECO) in 1983 and electricity generation liberalization came with the introduction of Independent Power Producers (IPPs) in 1998.

Privatization is to transfer the ownership wholly or partly from public to private hands. Policy makers in Sri Lanka have been continuously emphasizing that there will be no privatization of the electricity sector even after reforms/restructuring. In the existing Reform Act parliamentary approval has been made mandatory for privatizing any of the state owned companies that were to be formed. With strong opposition from trade unions, political parties and certain interest groups the reform process has been stalled now. Previously, the planned reforms were reviewed by a committee comprising of most of the stakeholders of the electricity sector. The committee also agreed that the sector should not be privatized. Certain amendments were suggested to the planned reforms including barriers to privatization. They were later approved by the Cabinet of Ministers but the amendments to the Acts have not materialized yet due to political reasons.

The two terms de-regulation and regulation are also mixed up to the extent that sometimes it is said the sector would be 'deregulated and a regulator would be brought in'. De-regulation is to allow competition and to let the market forces determine the price. Regulation is the opposite where a regulator would set the price taking into consideration the factors involved. In the electricity sector de-regulation can be seen specially in the generation. No competition can be brought into transmission given its nature of being a natural monopoly. Therefore, it has to be regulated. In certain electricity markets competition has been introduced in the retail distribution sector allowing final consumers to choose their supplier. However, many issues have been encountered in this respect not only in retailing but in generation as well such as being landed with distorted and undesirable generation mix etc. Hence, the proposed set up is very unlikely to succeed in a small electricity system like that of Sri Lanka.

7.6 Why WTO negotiations were not focused on electricity?

Though there were a large number of US and European companies expanding into the markets that opened up through IPPs in the 1980s and through privatization in mid-1990s, there have been gradual withdrawals specially by the US companies from around year 2000 onwards. Presently US companies are not looking beyond North American markets and none of the EU companies too are expanding any more. AES, Southern Company (Mirant), PPL, TXU, PSEG and Entergy are examples of such US companies. The EU companies EDF and Tractebel (France), Endesa (Spain), RWE and E.ON (Germany), National Grid Company, Scottish Power and Scottish & Southern (UK) are just concentrating in the markets where they are already in.

USA and EU being the major players in the WTO and GATS negotiations, would not have taken much interest to pursue electricity liberalization in the above context. However, they are ideologically committed to a deregulated model for the electricity industry as evident from their proposals in year 2000²⁷.

The EU in its proposal states:

'The latest steps in the liberalisation process have included the opening up to competition, subject to certain conditions, of the electricity and natural gas markets, which has resulted in significant price reductions for final consumers. The physical characteristics of these energy sources and the level of industrial concentration have led to the establishment of an appropriate regulatory framework, with the objective to avoid distortion of competition in the market. The process of liberalisation of the energy markets has, in particular, created new opportunities for the supply under competitive conditions of a large range of energy services, some of which were previously carried out in-house by the monopoly companies.'

In its proposal of December 2000, the US government states:

'Competitive provision of energy services helps ensure that energy consumers have access to efficiently produced, market-priced, reliable energy. The availability of varied sources of energy at competitive prices, including access to supplies transmitted cross-border, contributes to a nation's ability to compete in the world marketplace. Competitive conditions in a nation's energy services markets enhance the competitiveness of domestic energy consumers as well as incentives for foreign investors to invest in both energy services and energy-consuming sectors. They also can benefit residential consumers and social services, as well as employment, through the beneficial impact on energy-dependent services and manufacturing sectors.'

Accordingly, electricity can be expected to be discussed prominently in the future GATS negotiations.

If and when that happens, there will be pressure on countries like Sri Lanka to liberalize and deregulate the electricity market. The presently stalled reform process will immediately spring to life in such a situation. Even though many aspects have been discussed, nothing really has taken place with regard to amending the Reform Act of year 2002 or the CEB Act of 1969. Therefore, the originally planned horizontal and vertical break-up of the sector with the repeal of the state owned utility CEB is still firmly in place.

7.7 Present Status of WTO Negotiations²⁸

By February 2007, the WTO Doha negotiations have formally resumed in Geneva. But according to the reports there are hardly any 'negotiations' as such. Most of the negotiators are said to be in the dark about what is really going on. For example, with regard to the very important and decisive Agriculture issue is not being discussed in any formal meetings of the agriculture committee. Instead, the chairman of the committee is holding what are called 'fireside chats' to which only selected members are invited. Most notably the African delegates are not being invited to these discussions despite the WTO Director General's declaration that the round is most important to Africa.

Even though no real change is evident from their positions with regard to Agriculture issues, the United States and the European Union are said to be continuing to exert pressure on the developing countries to intensify the Non-Agriculture Market Access (NAMA) negotiations. This has been rejected by the developing countries. Yet it clearly shows that what the US and EU want is to safeguard and expand their interests.

²⁷ 'GATS and the Electricity and Water Sectors', by Stephen Thomas and David Hall, March 2006, p. 17

²⁸ 'WTO 'Resumption': Another Blair House Accord?' by Aileen Kwa who is a research associate with Focus on the Global South based in Geneva

In the area of Services which is the focus of this study, the domestic regulation talks have been continuing under the chairmanship of Singapore. Main areas of discussion have been transparency, technical standards, necessity test and development. However, the position of US and EU is a very clear disagreement to the inclusion of the necessity test. Switzerland, Australia, India and Hong Kong China are among the countries that push for the necessity test. On the other hand, the US is pushing hard for 'prior comment' which means that the member countries need to notify the WTO membership before changing their domestic regulation and be open to receiving feedback about the proposed changes. Developing countries have opposed this saying it would give other countries an opening to interfere in their domestic policies.

What these developments indicate is that there are a lot of disagreements in the WTO and efforts are being made by developed countries to push through their agenda. Quite alarming is the fact that there are no member-driven negotiations but 'processing' of bilateral and plurilateral agreements which are then passed through the multilateral route for mere justification, as one African delegate had commented.

Noteworthy is the UNCTAD revelation that the positive economic growth has not decreased poverty in the Least Developed Countries²⁹. A study by Harvard has concluded that African countries can grow but they cannot sustain the growth³⁰.

7.8 Possibilities to narrow the scope of GATS by legal means

It was apparent from the discussion above that no clear meaning could be derived to the phrase 'services supplied in the exercise of governmental authority' from the generally accepted principles of interpretation. In summary, according to Vienna Convention on the Law of Treaties a narrow meaning to the phrase and a broader scope to GATS rules may be assigned. The Restrictive approach and the effective interpretation could bring about a broader meaning to the phrase. However, none of these are binding on the Appellate Body.

It appears that there is concern among civil society groups that the scope of GATS is too broad. It is possible that some governments too hold the same view even though no one has expressed that so far. Therefore, it is worthwhile to consider what legal means are available to narrow the scope. The following three ways have been identified to be the options.³¹

7.8.1 Amendment to GATS or an interpretative understanding

Even though this may be the best approach to define what is meant by 'supplied in the exercise of governmental authority', 'on a commercial basis' and 'in competition with one or more service suppliers', the process may take a prohibitively long time. This may make it an unlikely option to pursue.

7.8.2 Authoritative interpretation

According to WTO agreement, the Ministerial Conference and the General Council can adopt interpretations of any WTO agreement. In the case of GATS this authority shall be exercised on the basis of a recommendation by the Council for Trade in Services. Though an authoritative interpretation does not have the same legal status as an amendment or an interpretative understanding, it is easier to achieve and also the Appellate Body would be bound by it. Therefore, it appears to be the most practicable option.

7.8.3 Non-binding statement

²⁹ 'Least Developed Countries Report 2006', UNCTAD, July 2006

³⁰ 'Goodbye Washington Consensus, Hello Washington Confusion', Dani Rodrik, Harvard University, January 2006

³¹ 'Public Services and the Scope of the General Agreement on Trade in Services (GATS)' a research paper written by Markus Krajewski for Center for International Environmental Law (CIEL), May 2001

An interpretation can be given in the form of a decision by the Council on Trade in Services or the General Council. However, such a statement would not be legally binding. Still the Appellate Body is likely to give it due regard almost as if it is legally binding. It would amount to 'subsequent practice' as stated in the Vienna Convention. Also, the Appellate Body has been accommodating the collective will of the WTO members.

8.0 Observations and Conclusions

There is very little awareness among the stakeholders about the GATS and its possible implications on the electricity sector. Even though most knew something about WTO and GATT a much less number had any knowledge whatsoever about the GATS. However, most of the stakeholders consulted were keen to know about it. If done, it is very likely that they would contribute positively to crystallize the possible implications of GATS.

Opening up the electricity sector particularly at this stage where the country is not yet fully electrified to international competition would leave the poor villagers who are yet to enjoy the benefits of electricity waiting.

Given the special characteristics of electricity service, such as its natural monopolistic nature, it is quite unlikely that there will be much in store for consumers through competition among companies. This is confirmed by the experiences of the countries where electricity market has been opened up. Specially the domestic consumers have not got much out of it.

The best bet to keep electricity out of the GATS is to claim it to be a 'service supplied in the exercise of governmental authority'. For that purpose, the electricity should neither be supplied on a commercial basis nor in competition.

It was observed that the local companies and the utility are not given the facilities such as tax concessions the government is extending to the foreign companies that venture into the sector at present.

It would be very important to keep the authorities who hold the decision making positions and who participate at the GATS negotiations well informed about what implications any commitments may bring to the electricity sector which is decisively vital for the development of the industry, commerce and improvement of living standard of the masses.

In the backdrop of the countries like India beginning to switch from a position of championing the cause of developing countries to that of a developed nation looking for expansion opportunities for its businesses it is paramount that countries like Sri Lanka form more and more groupings with countries having similar interests to safeguard their own interests of development. Given the way 'negotiations' are taking place, it is quite likely that the interests of smaller developing countries be sidelined even if they are heard which by itself is a rarity.

Since the larger business interests of the companies from the developed countries would look for larger markets like India and China, there may be some breathing space for smaller countries like Sri Lanka to at least develop the sector quickly so that it is ready to handle the market forces to which it will be exposed under the GATS when their turn comes.

The government needs to formulate ways and means of keeping the electricity consumers who are poor afloat (presently done through cross-subsidies) while extending the supply to the un-electrified areas which is not a commercially viable exercise.

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Annex – 1

List of Stakeholders Consulted

Policymakers

Mr. A.M.D. Bandusena, Director, Department of National Planning
Mr. Wimal Dissanayake, Consultant, MOPE (Former Additional Secretary, MOPE)
Mr. Nihal Wickramasuriya, Manager, Power Sector Reforms

Utilities

Ceylon Electricity Board (CEB)

Mr. Gamunu Abeysekara, Additional General Manager, Distribution Region 3
Mrs. Badra Jayaweera, Additional General Manager, Distribution Region-1
Mr. Bandula Tilakasena, D.G.M.-Corporate Affairs, Transmission Division

Lanka Electricity Company (Pvt.) Ltd. (LECO)

Mr. H.M.G. Herath, Branch Manager-Moratuwa

Consumers

Mr. Chanrarathna D. Vithanage, Senior Asst. Secretary – General, Ceylon Chamber of Commerce
Mr. Rathnarajah, President, Ceylon National Chamber of Industries
Mr. Maxi Prelis, Chairman, Small and Medium Enterprises Development Bank and Former Chairman, CEB
Dr. Tilak Siyambalapitiya, Independent Energy Expert

Power Producers

Mr. M.J.M.N. Marikkar, Deputy General Manager, LTL

Employee Unions

Mr. H.K. Illeperuma, Vice President, CEB Engineers' Union
Mr. Ananda Nimalaratne, Convener, Alliance of Trade Unions, CEB

Others

Energy Conservation Fund (ECF)
Mr. Harsha Wickramasinghe, General Manager

Public Utilities Commission of Sri Lanka (PUCSL)
Prof. Priyantha Wijayathunga, Director General

Experts on GATS (referred to by stakeholders)

Dr. R.H.S. Samarasinghe, Director General - Trade, Tariff & Investment Policy, Treasury
Miss. Subashini Abeysinghe, Economist, Ceylon Chamber of Commerce

The Intermediate Technology Development Group was founded almost forty years ago in Britain by economist E F Schumacher, author of 'Small is Beautiful'. Today the organization has widened its reach and has offices in seven countries-Bangladesh, Kenya, Nepal, Peru, Sri Lanka and Zimbabwe-across the globe. The new working name of Intermediate Technology Development Group is Practical Action.

With a vision to make this world free of poverty and injustice in which technology is used to the benefit of all, Practical Action (ITDG) has a unique approach to development. We don't start with technology, but with people. The tools may be simple or sophisticated, but to provide long-term, appropriate and practical answers, they must be firmly in the hands of local people: people who shape technology and control it for themselves.

Practical Action (ITDG) believes that the right idea, however small can change lives. It can create jobs, improve health and livelihoods, and help people have better lives. That's why, since 1966, the organization has been working with poor people to develop the skills and technology that will enable them to build a better future.



PRACTICAL ACTION (ITDG) - South Asia Programme

5, Lionel Edirisinghe Mawatha, Colombo 5

T | (011)2829412 **F** | (011) 2856188 **E** | srilanka@practicalaction.org.lk

W | www.janathakshan.org www.practicalaction.org