

6 Sep 2015

United States Department of State  
Advisory Committee on International Postal and Delivery Service  
Meeting of September 9, 2015

Specific Proposals for the U.S. to Propose for  
Approval of the UPU Congress  
by J. Campbell, K. Kellison, and N. Sparks

In an accompanying document, we have proposed a draft set of “Principles for Integration and Modernization of UPU Products” for consideration and recommendation by the IPODS Committee. We continue to believe, however, that the Committee should also endorse specific proposals that clearly reflect these general principles and that could be proposed for consideration of the Istanbul Congress. Specific proposals are critical to the process of developing agreement with other countries in advance of the Congress.

In September 2014, we proposed several specific proposals that we urged the U.S. to propose for agreement at the UPU Congress in Istanbul in September 2016. The proposals relating to reform of the institutional provisions of the UPU were immediately adopted by the IPODS Committee as recommendations. Over the last year, the proposals relating to customs/security matters and remuneration have been revised in simplified substantially in light of discussions in the full Committee and subcommittees and working parties. This document presents a final version of these proposals for consideration and possible recommendation by the IPODS Committee.

## **Proposal 1: Non-discriminatory application of customs and other import/export laws to designated operators**

---

Convention – Proposal

### **UNITED STATES OF AMERICA**

Add a new article as follows:

Article 20bis

#### **Customs and other import and export controls.**

- 1 Member countries shall ensure that customs and other laws and procedures related to import and export, including those related to customs clearance, apply to shipments conveyed by designated operators in the same manner as they apply to similar shipments conveyed by non-designated operators and do not create an undue or unreasonable preference or competitive advantage for any designated operator or class of designated operators.
- 2 A determination with respect to similarity of shipments under paragraph 1 shall be based upon objective criteria relevant to enforcement of customs laws and other laws relating to import or export and may introduce appropriate flexibility for designated operators of developing countries, progressively extending the principles of paragraph 1 in line with their development situation.

## **Proposal 2: Non-immunity for designated operators in regard to liability for customs declarations**

---

Convention – Proposal

### **UNITED STATES OF AMERICA**

Amend Convention, Article 24, by revising paragraph (3) to read as follows

(underscoring indicates new language):

- 3 Except as provided in paragraph 3.1, member countries and designated operators shall accept no liability for customs declarations in whatever form these are made or for decisions taken by the Customs on examination of items submitted to customs control.
- 3.1 Paragraph 3 shall not create an immunity for designated operators under national laws relating to customs control.

**Proposal 3: National treatment with respect to regulation of terminal dues and other remuneration for delivery of postal shipments exchanged between industrialized countries**

---

Convention – Proposal

**UNITED STATES OF AMERICA**

Add a new article as follows:

**Article 29bis**

**Remuneration for delivery of postal items between member countries in the country-specific system.**

- 1 For documents, small packets, parcels, and other packages conveyed between two countries in the country-specific system, the designated operator(s) in the destination country shall make available to other designated operators, non-designated operators, mail consolidators, and other customers rates, terms, and conditions for delivery that are consistent with the legal standards and criteria that govern similar domestic delivery services.
- 2 Rates, terms, and conditions provided in accordance with paragraph 1 shall be available to national customers to the same extent and on the same terms as provided to foreign customers.
- 3 Member countries shall ensure that senders of postal items subject to the country-specific system shall have, in connection with delivery services by the designated operator(s), the same rights and privileges before national regulatory authorities, competition authorities, and/or national courts that are available to national customers in connection with provision of similar domestic services.
- 4 The provisions of this article shall apply to countries and territories in the target system prior to 2010 and to any other country that declares to the International Bureau that it will join the country-specific system.

## **Proposal 4: Limits on abuse of preferential remuneration rates**

---

Convention – Proposal

### **UNITED STATES OF AMERICA**

Revise Article 28 to read as follows:

#### **Article 28**

##### **Limits on abuse of preferential remuneration rates and charges**

- 1 A member country may set appropriate limits on the availability of rates and charges provided under articles 29(7) to 29(1), 30, 31, 35, and 36 for postal items received from the designated operator(s) of a member country otherwise entitled to the application of such articles if and to the extent that the destination country determines that —
  - 1.1 the application of such rates and charges to postal items containing merchandise results in either (A) substantial uncompensated costs for the designated operator of destination country or (B) a substantial adverse effect on the ability of merchants in the destination country to compete with merchants in the origin country; or
  - 1.2 the quantity of postal items not containing merchandise (measured by number, weight, and/or shape) received in a six-month period substantially exceeds levels achieved prior to 2014 and is not justified by corresponding growth in the domestic letter post of the origin country or other objective factors.
- 2 A member country may not decline to apply the rates and charges listed in paragraph 1 because either (A) the residence of the sender who posts or causes to be posted the letter post items or (B) the office or facility where the letter post items are posted is located outside the national territory of the designated operator of origin.
3. For the delivery of postal items in excess of limits set under paragraph 1, a designated operator may charge the origin designated operator rates and charges consistent with the legal standards and criteria that govern domestic items presenting the same characteristics (category, quantity, handling time, etc.) but not more than 80% of the domestic tariff for similar priority items.
- 4 A member country shall notify the International Bureau at least six months before setting limits on the availability of rates and charges under paragraph 1 and establishing alternative delivery rates pursuant to paragraph 3.

## Explanatory Notes

### **Proposal 1: Non-discriminatory application of customs and other import/export laws to designated operators**

The DOS Proposal with respect to the non-discriminatory application of customs and other import/export laws was submitted to the Postal Operations Council in spring 2015. POC C 1 CG 2015.1–Doc 9b. The POC decided not to consider this proposal, so the U.S. will submit it anew to the Council of Administration in the fall 2015 meeting.

The need to resubmit the proposal provides an opportunity to refine its language. In the POC, the DOS Proposal was criticized, with some accuracy, as a general customs rule applicable to all operators and thus more properly addressed to the World Customs Organization. At the same time, in order to introduce necessary flexibility, the DOS Proposal was so loosely worded that it would apparently allow industrialized countries to continue to provide discriminatory customs treatment for postal shipments exchanged between industrialized countries, an outcome contrary to U.S. law and U.S. interests. The revised version attempts to refine the DOS Proposal to address such issues.

Para 1. The wording of the first sentence in the DOS Proposal has been revised so that the requirement of non-discrimination refers only to shipments conveyed by designated operators. This revision aims to meet the criticism that the DOS Proposal was properly addressed to the WCO and not to the UPU. In addition, the phrase “non-discriminatory” has been changed to “in the same manner” so that the U.S. proposal conforms to U.S. law.

Para 2. The wording of the second sentence of the DOS Proposal has been revised to maintain national flexibility in the application of this article while ensuring that member countries do not continue granting designated operators preferential customs treatment in inappropriate circumstances simply because they are designated operators.

In the DOS Proposal, the second sentence would permit customs authorities to provide discriminatory application of customs and other import/export laws based on “customer characteristics”, “capabilities of operators”, “operational differences”. This wording could allow customs authorities to continue preferential customs treatment for postal shipments between industrialized countries, merely because the DOs do not want to invest the money to upgrade their physical and data networks to meet the customs requirements applied to private operators. Discrimination on such cases would be unreasonable, unfair to private operators, and contrary to U.S. law.

On the other hand, customs authorities should have reasonable flexibility to take into account the “capabilities of operators” and “operational differences” of designated operators from developing countries. Paragraph 2 introduces such flexibility by adopting

language borrowed from Article XIX(2) of GATS.

### **Proposal 2: Non-immunity for designated operators in regard to liability for customs declarations**

Paragraph 3 of current Convention article 24 is arguably ambiguous. It may be interpreted (A) to create an immunity for designated operators from national laws relating to customs control or (B) only to limit the liability of designated operators to other designated operators and, possibly, to mailers. The proposed new paragraph rules out the former interpretation without modifying the possibility of the latter interpretation.

The proposed new paragraph makes clear that Article 24(3) does not create an immunity for designated operators under national laws relating to customs control. In this manner, Article 24(3) will be fully consistent with Article 20(1), which provides “The designated operators of the countries of origin and destination shall be *authorized to submit items to customs control, according to the legislation of those countries.*”

### **Proposal 3: National treatment with respect to regulation of terminal dues and other remuneration for delivery of postal shipments exchanged between industrialized countries**

The UPU term “country-specific” terminal dues refers to delivery rates that are consistent with domestic postage. As the Copenhagen Economics report concludes, a country-specific system is the only way to eliminate distortions and anticompetitive effects of the current system. Although each UPU Convention since 1999 has declared that “*provisions of the present Convention . . . are transitional arrangements, moving towards a country-specific payment system,*” the current UPU Convention does not apply country-specific terminal dues to any bilateral flow. In fact, it appears that terminal dues for flows between industrialized countries have become less well aligned (or at least no better aligned) with domestic postage.

The proposed article creates a new “country-specific system” of remuneration for delivery of international postal items by adopting the trade law principle of “national treatment” (treating foreigners and locals equally). The new system would apply *only to mail flows between the 24 major industrialized countries (ICs)*. This limited approach is in line with UPU practice. Since 1999, the UPU Convention has provided a separate terminal dues system for ICs. Of the 24 ICs affected by the new system, 17 are already subject to EU law that requires country-specific terminal dues for universal service mail. The other industrialized countries are the U.S., Canada, Switzerland, Israel, Japan, Australia, and New Zealand.

The “country-specific system” is not a pricing-fixing agreement. It is legal principle stating that each designated operator must “self-declare” rates for delivery of international mail in accordance with the same legal criteria that govern domestic rates. This principle is the basis for both 39 USC § 407(c)(1) and Article 13 of the EU Postal Directive.

Para 1. The country-specific system will not prevent the UPU from agreeing to a common framework for self-declared rates. For example, the UPU could adopt a framework that requires DOs to quote separate rates for documents and parcels according to priority of service, as contemplated in the integration and modernization initiative at UPU. In the case of the US, USPS could continue to conclude NSAs (contract rates) with foreign posts to the extent permitted by U.S. law.

Para 2. To ensure that terminal dues are consistent with domestic postage, they must be available to national customers to the same extent and on the same terms as to foreign customers.

Para 3. In the country-specific system, national regulators must enforce national law with respect to delivery rates for international mail in the same way as for domestic mail.

Para 4. “Countries and territories in the target system prior to 2010” refers the 24 major ICs (and some small industrialized city-states and territories). Any other country can join the system voluntarily.

#### **Proposal 4: Limits on abuse of preferential remuneration rates**

Since the UPU Convention provides preferential delivery rates for foreign mailers compared to domestic mailers, it creates a potential for abuse that goes beyond the need to maintain a “single postal territory.” The right to preferential rates is a commercially valuable privilege that can be exploited by, for example, establishing large regional fulfillment centers for e-commerce goods that take advantage of low terminal dues rates for small packets or by remail operations and ETOEs that arbitrage the difference between terminal dues rates accorded different countries.

In response, the UPU has adopted measures to restrict remail and ETOEs. But, as the recent House subcommittee hearing has highlighted, these measures do not protect industrialized countries from unfair competition from developing countries specializing in e-commerce nor their designated operators from large losses. Moreover, these measures are unnecessarily anticompetitive, creating, in essence, a market allocation system that gives each designated operator a competitive advantage in the market for outbound postal services in its national territory.

The proposed revision of Article 28 provides a more effective, more straightforward, and less anticompetitive solution to such abuses.

Para 1.1. Destination countries should not be required to apply preferential remuneration rates to postal items containing items of merchandise (e-commerce goods) if the result is to impose substantial losses on the destination designated operator or create unfair competition for its merchants.

Para 1.2. Destination countries should be able to limit the availability of preferential remuneration rates in cases of substantial volume increases above historical levels that are unexplained by growth in domestic mail volumes or other factors.

Para 2. This paragraph forbids continuation of anticompetitive UPU provisions restricting remail and ETOE competition. This paragraph does not affect the sovereign right of each country to prevent remail and ETOE competition within its borders.

Para 3. of letter post in excess of reasonable limits set under paragraph 1, a member country is authorized to charge rates consistent with the legal standards and criteria that govern domestic items presenting the same characteristics (category, quantity, handling time, etc.) but no more than 80% of the domestic tariff for equivalent items. The latter is the standard adopted in the current UPU article dealing with remail (article 28(4)).