

*The Liberalisation of Postal Services in the European Union*  
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Chapter 1

EVOLUTION OF TERMINAL DUES AND  
REMAIL PROVISIONS IN EUROPEAN  
AND INTERNATIONAL POSTAL LAW

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National post offices do not charge foreigners the same as their own citizens for delivery of mail. From this simple asymmetry there has grown a tangle of international postal regulations, legal and economic analyses, and lawsuits of incredible cost and complexity.

This article describes the evolution of the two principal features of international postal law resulting from this asymmetrical condition: *terminal dues* and *remail* restrictions. *Terminal dues* are what post offices charge each other for the delivery of inbound international mail. *Remail* is the practice of producing mail in one country and posting it in another. Where terminal dues are not aligned with domestic postage rates, remail poses a threat to post offices. Using remail, mailers can take advantage of terminal dues rates set below domestic postage rates (e.g., by taking domestic mail out of a country and posting it back in as international mail) and avoid international postage rates set too high in relation to domestic postage rates in the destination country (e.g., by exporting mail to the destination country and posting it there as domestic mail). More commonly, mailers have patronized post offices who are willing to forward international mail to third countries at low terminal dues rates undercutting traditionally high international postage rates. To prevent such “abuses”, international postal treaties—written by postal officials—have authorized post offices to intercept and return or otherwise penalize remail.<sup>1</sup> Since the late 1980s, European competition authorities and the commercial pressure of private international express companies have slowly pushed international postal agreements in the direction of aligning terminal dues more closely with domestic postage rates and relaxing restrictions on remail, but progress has been slow.

1. TERMINAL DUES THROUGH UPU HAMBURG CONGRESS, 1984

Postal service may be thought of as the product of three operations: collection and “outward” sorting of mail, transport of mail in bulk from the region of collection to the region of delivery, and “inward” sorting and delivery of mail to addressees. The public postal operator performs outward and inward operations using its own personnel and facilities; transportation of bulk mail is typically purchased from a common carrier, such as an airline, railroad, or trucking company. In this process, the costs of outward and inward operations are quite different.

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<sup>1</sup>For an economic analysis of remail and terminal dues see U. Stumpf, “Remailing in the European Community: Economic Analysis of Alternative Regulatory Environments”.

Outward operations account for about 20 to 30 percent of total postal costs and do not exhibit marked economies of scale; that is, if it costs X to collect and dispatch a certain amount of mail, then it costs about twice X to collect and dispatch twice as much mail. Inward operations account for about 70 to 80 of costs and exhibit strong economies of scale; that is, if it costs X to sort and deliver a certain amount of mail, then it costs about 1.6 times X to sort and deliver twice as much mail. Put simply, if a stamp on a letter were priced at 1.00 EURO, about 0.20 EURO could be attributed to the cost of collecting the letter and about 0.80 EURO to the cost of delivering the letter. Despite the fact that the cost of delivery is much more important than the cost of collection in determining the cost of postal service from end to end, international postal arrangements traditionally ignored the cost of delivery.

Since 1874, the primary legal framework for international postal services has been the Universal Postal Convention, an international treaty joined by virtually all nations in the world. The Convention is administered by the Universal Postal Union, a permanent intergovernmental organization established by a second treaty, the Constitution of the UPU, and headquartered in Berne, Switzerland. Every five years, plenipotentiaries from UPU member countries gather in a “Congress” in a major world city to revise the Convention and other “acts” of the UPU. The most recent congress was the Beijing Congress convened in 1999.<sup>2</sup>

Under terms of the various Conventions in force prior to 1969, a destination post office delivered international mail without compensation from the origin post office. Post offices generally set postage rates for outward mail high enough to cover the cost of delivering inward mail as well as the cost of collecting and dispatching the outward mail. International postage rates thus bore no relation to the cost of delivery by foreign post offices. The cost of foreign postal delivery might be substantially higher or lower than the cost of inward delivery by the origin post office. Indeed, an origin post office might find itself with more (or less) inward mail than outward mail, so that outward mailers would, in effect, be forced to pay for delivery of more (or less) mail than they posted.

In short, in the global exchange of mail, postal delivery services were bartered. A barter system does not favor all post offices equally. Post offices which exported more mail than they imported did better than those which were net importers. Large industrialized countries were usually net exporters of mail, especially of printed matter (newspapers, catalogs, magazines, books, technical manuals, etc.). Developing countries and certain industrialized countries, such as Canada and Ireland, were large net importers. Low cost post offices did better than high cost

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<sup>2</sup>Originally, the Convention both established the UPU as an organization and set the rules for the exchange of mail. The Constitution was adopted as separate treaty in 1964. Although now out of date, the best book on the history of the UPU is G. Coddington, *The Universal Postal Union* (1964). For discussion of reform of various aspects of the UPU and international postal laws, including terminal dues and remail restrictions, see generally U. Stumpf and M. Plum, eds., *Towards a New Regulatory Framework for Cross-border Mail* (1998). See also, J.I. Campbell Jr. “GATS and Physical Delivery Networks” (1999) and “Reforming the Universal Postal Union” (2001); M.S. Elcano and A. Alverno. “Reform in the Universal Postal Union and the World Trade Organization” (2001); H. Smit, “GATS and the Postal Sector: The Next Round of Negotiations” (2001); T. Walsh, “Globalization, Posts, and the Universal Postal Union: A Functional Critique” (2000)

post offices because a barter system allowed them to trade cheap services for expensive services. The economic unfairness of this system did not wholly escape the attention of postal officials. In the 1906 Rome Congress, the Italian post office noted that in the previous year it had delivered 325,000 items of printed matter received from other post offices while sending out none in return. The Italian post office's plea for some form of monetary compensation was denied.<sup>3</sup>

Not until the 1969 Tokyo Congress did the UPU finally establish a *terminal dues* charge to compensate destination post offices for the cost of delivering inward international mail not balanced by outward mail. The initial terminal dues rate was 0.50 gold francs (about SDR 0.16)<sup>4</sup> for each kilogram by which the weight of the international mail sent from post office A to post office B exceeded the weight of international mail sent from B to A. The terminal dues charge was set at the same level for all post offices worldwide; it was unrelated to the actual costs incurred by a specific destination post offices even though these costs vary many fold.

Terminal dues gradually shifted the economic advantages of the system more in favor of net importers, especially those with low costs. Postal officials, particularly but not exclusively from developing countries, came to view terminal dues as an appropriate developmental subsidy from industrialized countries and supported compensation rates well above actual inward delivery costs.<sup>5</sup> Terminal dues discussions at the UPU became freighted with considerations of international politics. In the 1974 Lausanne Congress, the terminal dues rate was tripled to 1.5 gold francs per kilogram (SDR 0.49/kg). In 1979 Rio de Janeiro Congress, the terminal dues rate was more than tripled to 5.5 gf/kg (SDR 1.80/kg). At the 1984 Hamburg Congress, postal officials from industrialized countries made a concerted effort to hold down the increase in terminal dues charges. The 1984 Convention adopted a new rate of SDR 2.641/kg, a mere 81 percent increase over the 1979 rate.

The uniform weight-based UPU terminal dues system in place from the first day of 1971 to the last day of 1990—the period of effectiveness for the Conventions of 1969, 1974, 1979, and 1984—introduced three types of economic distortions into the international commerce in mail. The first and most important economic distortion derived from the *uniformity* of terminal dues rates. If two post offices with substantially different unit costs exchange equal amounts of mail

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<sup>3</sup>1979 Rio de Janeiro Congress, Doc 7 Annex 1, pars. 1-3.

<sup>4</sup>The gold franc of the UPU was derived the exchange rate between the French franc and gold found in a 1803 French law; one gold franc was equal to 10/31 of a gram of gold with a fineness (purity) of 90 percent, or 0.29032258 grams of pure gold. In the Rio de Janeiro Congress of 1979, the UPU resolved that thereafter postal administrations should settle accounts based on an exchange rate of 3.061 gold francs to 1 Special Drawing Right (SDR) of the International Monetary Fund. 1979 Congress, Resolution C 29. Although the 1979 Convention and the 1984 Convention continue to refer to gold francs, after 1979 the UPU effectively adopted the SDR as its accounting unit. The 1989 Washington Congress finally eliminated reference to gold francs. See 1979 Const. § 7, 1979 Conv. § 8; 1979 Det. Reg. § 103 and annotations. In this article, except as just noted, all terminal dues rates are expressed in SDR whether or not so stated. On UPU documents generally, see the note under References at end of this article.

<sup>5</sup>See Treworgy and Waddell, "Postal Service and Less Developed Countries" (1991).

and terminal dues rates are uniform, each will owe the other the same amount even though the economic value of delivery services in the two countries may be very different. In other words, a uniform terminal dues rate retained the barter feature of pre-terminal dues days for all international mail except the portion of inward mail not balanced by outward mail (or visa versa in the case of a net exporter). It is as though European taxi companies agreed among themselves that an Englishman should pay London taxi rates for taxi service in Athens and a Greek should pay Athenian taxi rates for a taxi ride in London. The magnitude of distortion was proportional to the difference in delivery costs incurred by the two post offices. The discrepancy could be substantial. In the European Union, unit costs of postal service vary by a factor of three or more. The net effect of a uniform terminal dues scheme is to aid post offices with low unit costs and penalize those with high unit costs. Within the European Union, a uniform terminal dues regime hurts customers of the expensive German post office and benefits customers of the relatively inexpensive U.K. post office.<sup>6</sup>

A second source of economic distortion materialized if the amount of inward international mail was not balanced by the amount of outward mail in any given bilateral exchange. This distortion was due to misalignment between terminal dues and the actual cost of delivery incurred by the destination post office. Since actual postal costs varied widely among post offices and the level of terminal dues did not, terminal dues payments did not reflect the actual cost of delivery for imbalance mail except by coincidence.

A third source of economic distortion arose because the UPU approach to terminal dues failed to recognize that the structure of postal delivery costs. For example, although it cost much more to deliver fifty 20-gram letters than five 200-gram magazines, a terminal dues charge based solely on the weight of mail provided equal compensation for the destination post office. Nor did terminal dues reflect differences in the cost of delivery based on the size of postal items, priority of service, and other cost causative factors.

## 2. REMAIL RESTRICTIONS THROUGH UPU HAMBURG CONGRESS, 1984

In ordinary commercial usage, “re-mail” refers to international mail that is posted in a country other than the country where the mail is produced. Remail developed because the international postal system failed to keep pace with changes in business practices brought about by improvements in technology. Historically, post offices offered only two international mail services: an expensive airmail service and an inexpensive but slow surface mail service. Post offices gave low priority to collection and dispatch of outward international mail and to

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<sup>6</sup>In a balanced exchange, the magnitude of economic distortion does not depend on the terminal dues rate since the nominal liabilities between post offices cancel each other. In 1998 comments to the European Commission on the REIMS II terminal dues agreement, discussed below, the European Express Organisation developed an economic model that suggested the net effect of the CEPT terminal dues scheme, a uniform terminal dues scheme discussed below, was to create a substantial subsidy from German mailers to British mailers; Dutch, Spanish, and Greek mailers also gained to a lesser extent. The EEO analysis was based on many assumptions and illustrative only, but it demonstrated how a quantitative analysis could be undertaken given data on bilateral mail flows. Since such data have never been disclosed, there has never been a public accounting of the economic effects of uniform terminal dues systems in Europe.

distribution and delivery of inward international mail. International service was further slowed by the difficulty of coordinating activities of two or more post offices, each of whose primary focus was domestic mail delivery. Meanwhile, large international mailings increased due to expansion of international commerce and advances in computers. Improved telecommunications also made it easier to centralize production of international invoices, statements of account, personalized direct mail, and similar types of mass mail.

As early as the 1930s, European publishers circumvented limitations of the international postal system by using air freight to transport bulk shipments of publications to the United States where they were posted as domestic U.S. mail. In the late 1950s, McGraw-Hill and KLM Royal Dutch Airlines began experimenting with remail of U.S. publications bound for European addressees. The rise of the international express industry facilitated remail of more time-sensitive letter mail. In the 1980s, the Belgian post office pioneered international remail of letters.

The advantages of remail were described by a 1987 UPU report in the following terms:

The remail firms' flexibility in obtaining favourable air transportation rates is another major competitive advantage they have over postal administrations . . . Because remail firms arrange to pay very low postage rates to the postal administrations providing remail services, the rates they offer to the large business mailer are often more than fifty percent below the rate the mailer would normally have to pay to post the items locally . . . Postal administrations must take note that the remail firms often offer service that is faster and more convenient than that offered by the mailer's national postal service. Speed of delivery, especially for LC items [letters and cards], is very important to large mailers. Because of the time it takes to process and dispatch letters in the international mails and because they are very often given lower priority in processing and delivery by the destination administration in comparison to domestic mail, the remail firms which often transport the mail to a destination on the evening of the day of posting can achieve a better delivery standard. The remail firms often provide collection service at the mailer's place of business at no extra charge. They may also place stamps or postage meter impressions on the items. The added services save time and work for the mailer and make the remail service more attractive. Some remail firms offer mailers additional services such as enveloping and addressing of direct mail and updating of subscribers' lists and invoicing of subscribers.<sup>7</sup>

Remail and terminal dues were closely linked, but they were not simply two sides of the same coin. As the UPU report notes, an economically flawed terminal dues system was only one of several factors leading to the rise of remail, albeit an important factor. Remail, moreover, represented only one market reaction to poor international postal service and uneconomic international postage rates. Instead of using remail, large mailers could and did shift production

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<sup>7</sup>UPU Executive Council, "Study on remailing", Annex 1 to UPU Circular Letter n° 3370(B/C)1790 (2 Sep 1987), reprinted as CE 1988/C4 - Doc 9/Annex 1. International mailers supported competitive alternatives for distribution of international mail. As the European Commission noted, with regard to cross-border delivery services, "a number of companies, or associations of such companies . . . emphasized the potential advantages of liberalization in terms of price, choice, and quality of service." *Commission Guidelines for the development of Community postal services*, COM (93) 247 final (1993), p. 8.

of international mail from countries with high costs and poor international postal service to countries with low costs and good service. Faxes could be employed instead of international letters. Mailers of international advertisements could substitute announcements on television or in magazines for international direct mail. Flaws in the international mail system not only stimulated remail, they also encouraged flight from the international postal system.

Although remail benefitted remail users directly, the most important effect was to stimulate improvements in international postal services. A 1987 UPU survey of 74 post offices catalogued responses to remail by post offices. Of post offices surveyed, 87 percent said that they responded to remail with “improved services”; 82 percent with “new or modified service”; and 80 percent with “lower prices.”<sup>8</sup>

Even so, remail has long been an anathema to the UPU.<sup>9</sup> The 1924 Stockholm Congress first authorized post offices to intercept or surcharge remail. The 1924 provision was directed against domestic mail that had been physically taken out of a country and posted back into the same country. The anti-remail provision was embodied in a reservation (rather than an article of the Convention), Article IV of the Final Protocol, which read as follows:

Each country shall be authorized to take all the measures considered necessary to prevent correspondence originating in its territory from being conveyed across the frontier to be posted abroad. It shall have, in particular, the right to charge postage at its internal rates on or to return to origin items which persons or companies resident in that country post or cause to be posted abroad, in order to benefit from lower charges, for dispatch to persons or companies in that same country. The methods of collecting the charges shall be left to the discretion of that country.

This text was based on a proposal by Switzerland which explained that

if, in one country, the charges are considerably lower than in other countries, there is an advantage to sending to the former country letters and, in particular, printed papers from the latter countries for posting. . . . That country thus unilaterally benefits from the proceeds from the charges at the expense of the other countries. The intolerable situation arising therefrom is a danger to the very existence of the Postal Union. . . . If countries applying the normal charges of the Union could not protect themselves from what one would be tempted to call the ‘dumping’ of another country, the very existence of the Postal Union would be jeopardized.

In the 1929 London Congress, Germany added a provision to suppress not only mail physically exported and reimported by post but also mail which a mailer printed in another country and posted back to addressees in his country “with the sole aim of benefitting from lower charges”. In support of its proposal, Germany noted that

the present wording of Article IV remains virtually ineffective since it is very difficult

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<sup>8</sup>CE 1988 C5 Doc 9, par 46 (“Other aspects to be considered in the study on terminal dues”) (30 Mar 1988).

<sup>9</sup>The following history of terminal dues provisions from 1924 to 1957 is adapted from CA GT 4.1 1998.2–Doc 3. Annexe 1 (memorandum by International Bureau).

to establish whether items have been transported across the frontier to be posted in a foreign country. In any event, this question has lost all its importance since the persons concerned have got used to having their items printed, particularly in the case of bulk printed papers, in the foreign country in which they wish to post them. The reservation . . . on behalf of printed papers manufactured abroad therefore results in not only the postal administration of the country where the sender has his registered office losing the amount of the charges to which it should be legally entitled but also the local paper and printing works suffering losses because of orders going abroad. These abuses should be suppressed.

The 1957 Ottawa Congress extended the scope of the reservation to items posted in large quantities abroad regardless of whether postage was saved. The Netherlands objected, noting that printing abroad might be motivated by the fact that the country of manufacture and posting “has a special printing process which does not exist in his (i.e., the sender’s), or the cost of manufacturing printed papers is lower there. These reasons and many others may argue for manufacture and dispatch in a country other than his own”. The Dutch defense of competition in printing services was not considered persuasive.

The 1974 Lausanne Congress transferred the text of the anti-remail reservation to the Convention itself. At this point, Article 20 of the 1974 Convention read as follows:

A member country shall not be bound to forward or deliver to the addressee letter-post items which senders resident in its territory post or cause to be posted in a foreign country with the object of profiting by the lower charges in force there; the same shall apply to such items posted in large quantities, whether or not such postings are made with a view to benefiting from lower charges. The rule shall be applied without distinction both to correspondence made up in the country where the sender resides and then carried across the frontier and to correspondence made up in a foreign country. The administration concerned may either return the items to origin or charge postage on the items at its internal rates. In the latter case, the items may be disposed of in accordance with the internal legislation of the administration concerned if the sender refuses to pay the postage.

The 1979 Rio de Janeiro Congress extended the anti-remail article to include mail which was not returned by post to the country where the sender resides. The 1974 article was confusingly divided into three paragraphs and a fourth paragraph added. Paragraph 4 was directed to all mail which a sender residing one country posts or causes to be posted in a second country regardless of destination. As amended, Article 23 of the 1979 Convention read:

1. A member country shall not be bound to forward or deliver to the addressee letter-post items which senders resident in its territory post or cause to be posted in a foreign country with the object of profiting by the lower charges in force there. The same shall apply to such items posted in large quantities, whether or not such postings are made with a view to benefiting from lower charges.

2. Paragraph 1 shall be applied without distinction both to correspondence made up in the country where the sender resides and then carried across the frontier and to correspondence made up in a foreign country.

3. The administration concerned may either return its item to origin or charge postage on the items at its internal rates. If the sender refuses to pay the postage, the items may be disposed of in accordance with the internal legislation of the administration

concerned.

4. A member country shall not be bound to accept, forward or deliver to the addressees letter-post items which senders post or cause to be posted in large quantities in a country other than the country in which they reside. The administration concerned may send back such items to origin or return them to the senders without repaying the prepaid charge.

New paragraph 4 was adopted after considerable disagreement; the vote was 66 for, 30 against, and 20 abstentions. The proposal was sponsored by Japan, which argued that the addition was needed to combat “private postal services that took the most profitable mail and left postal administrations with only the marginal mail.” Germany supported the proposal arguing that “the Convention did not deal with competition between administrations.” Canada opposed the proposal as interfering with each country’s right to permit or prohibit remail by national legislation. The United Kingdom agreed and noted further that the proposal was full of imprecisions.

The 1984 Hamburg Congress of the UPU retained the 1979 provision without change, again numbering the anti-remail provision as Article 23 in the 1984 Universal Postal Convention.<sup>10</sup>

In analysis of postal policy and remail, it is customary to distinguish different categories of remail based on the relationships between the country where the sender resides, the country where the mail is posted, and the country where the mail is delivered. Thus, “ABA remail” refers to mail produced by a sender residing in country A that is transported across the border outside of postal channels and put into the postal system in country B for forwarding via the international postal system back to country A for delivery to addressees in country A. “ABB remail” refers to the mail produced by a sender residing in country A that is transported across the border outside of postal channels and put into the postal system in country B for delivery to addressees in country B. “ABC remail” refers to mail produced by a sender residing in country A that is transported across the border outside of postal channels and put into the postal system in country B, for forwarding via the international postal system to country C for delivery to addressees in that country.

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<sup>10</sup>Article 23 of the 1984 Convention was readopted without change as Article 25 of the 1989 Convention. It was significantly revised and adopted as Article 25 of the 1994 Convention. It was slightly revised and adopted as Article 43 of the 1999 Convention. Each convention took effect the second year following the year of adoption and remained in effect for five years: thus the 1984 Universal Postal Convention was in effect from 1 January 1986 to 31 December 1990. In this paper, the antiremail article of the Convention is referred to by the number appropriate to the time period under discussion.

**Table 1. Categories of remail**

	Sender resides	Mail produced	Mail posted	Addressees	Physical mail equivalent
ABA	Country A	Country A	Country B	Country A	
ABB	Country A	Country A	Country B	Country B	
ABC	Country A	Country A	Country B	Country C	
Nonphysical ABA	Country A	Country B	Country B	Country A	B to A international mail
Nonphysical ABB	Country A	Country B	Country B	Country B	Domestic mail in B
Nonphysical ABC	Country A	Country B	Country B	Country C	B to C international mail
Nonphysical ABCA	Country A	Country B	Country C	Country A	ABC remail

A second categorization of remail that has become increasingly significant to postal policy since 1988 is the distinction between “physical remail” and “nonphysical remail”. “Physical remail” refers to mail that a sender in country A produces in country A and physically transports to country B for posting. In normal commercial usage, the term “remail” connotes only physical remail. “Nonphysical” remail refers to mail which a sender who “resides” in country A “causes to be posted” in country B in some nonphysical manner. The sender in country A may send to country B the tangible ingredients of the mail or electronic data from which the mail is prepared. However, to qualify mail as “nonphysical remail”, it is not necessary to show that the sender made any contribution to the content of the mail. Nor is it necessary to establish that the sender residing in country A does not reside in country B; a post office may consider mail to be nonphysical remail if a sender residing in country A “causes mail to be posted” in country B even though *the sender also resides in country B*.<sup>11</sup>

“Nonphysical remail” thus refers to a legal doctrine rather than a distinct commercial service. What is characterized by postal officials as nonphysical remail would, in normal commercial usage, be regarded as an ordinary physical mail service where the sender is thought of as person who physically produces and posts the mail. For example, the term “nonphysical ABA” remail is used to refer to mail that a sender residing in country A produces and posts in country B for delivery to addressees in country A. “Nonphysical ABB remail” is no different from ordinary international mail sent from country B to country A except that postal officials

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<sup>11</sup>The classic example of invocation of the nonphysical remail doctrine is the following: In 1994, the German post office informed two large European banks, GZS and Citibank, that it would use Article 25, paragraph 1, to intercept credit card statements sent via the Dutch post office to German addressees. GZS and Citibank prepared credit card statements for European customers in a central facilities in Denmark and the Netherlands, respectively. The German post office demanded that the mail bound for German addresses be posted as domestic mail in Germany. In 1995, when the banks refused to change practices, the German post office sued them in German courts for German domestic postage on all mail sent to Germany. Ultimately the European Court of Justice agreed in part and disagreed in part with this use of the nonphysical remail doctrine. See *Joined Cases C-147/97 and C-148/97, Deutsche Post AG v. Gesellschaft für Zahlungssysteme mbH (GZS) and Citicorp Kartenservice GmbH*, [2000] ECR I- (decided 10 February 2000).

deem the sender, in a legal sense, to reside in country A. Similarly, “nonphysical ABC remail” is equivalent to international mail sent from country B to country C. The term “nonphysical ABB remail” could be (but rarely is) used to refer to domestic mail posted in country B by a mailer that “resides” in country A. In another elaboration, the term “nonphysical ABCA remail” is used to refer to mail that a sender residing in country A produces in country B and posts in country C for delivery to addressees in country A. “Nonphysical ABCA” remail is equivalent to physical ABC remail (with the letters shifted around) except the mailer, according to postal officials, is deemed to reside in country C.<sup>12</sup>

In summary, Article 23 of the 1984 Convention authorized a post office to intercept and return to the sender any *large* mailing which could be fit into one of the foregoing categories of “remail”. If the “sender” is considered to “reside” in the same country as the addressees of the mail, a post office may also intercept *small* mailings posted with the object of profiting by lower postage rates. Under Article 23, the sender forfeited international postage paid for delivery of such mail. In addition, if the “sender” is considered to “reside” in the same country as the addressees of the mail, then a post office could charge either the sender or the addressees domestic postage before releasing the mail.

### 3. REMAIL CONFERENCE AND CEPT TERMINAL DUES AGREEMENT, 1987

Traditional UPU rules regarding terminal dues and remail acted like dikes around each national postal administration, allocating to each administration the international mail generated in its territory and restraining development of end-to-end cross-border postal services. International mail was permitted to flow between countries only when exchanged between national postal administrations.

The hole in the dike appeared in 1986. In that year, the U.S. Postal Service, under pressure from Congress and the Reagan Administration, modified postal monopoly regulations and explicitly permitted export of U.S. letters for remailing abroad. In one stroke, the United States liberalized 10 percent of the world’s international mail, roughly 16 percent of international mail exchanged among industrialized countries. Because the U.S. Postal Service, like post offices in most industrialized countries, focused on the needs of domestic mail (more than 99 percent of total mail), remail services from U.S. to Europe were able to provide delivery services that were both cheaper and faster than the U.S. Postal Service’s international mail. U.S. liberalization gave a major commercial impetus to the remailing of international letters.<sup>13</sup>

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<sup>12</sup>No post office applies the nonphysical remail doctrine consistently. To do so would imply interception of virtually all commercial mail since most large commercial mailers can be said to “reside” in more than one country. The nonphysical remail doctrine is used intermittently, as a means of protecting a post office’s revenues and commercial position. Production of a large mailing is expensive, and delay in delivery can dissipate some or all of its value of the mailer so mere threat of interception was enough to keep most large mailers in line.

<sup>13</sup>In 1986, U.S. outbound international mail (0.80 billion items) constituted about 10 percent of world international mail (8.36 billion). In the U.S. international outbound mail was only 0.54 percent of total mail (147 billion); in industrialized countries generally, international mail was 2.00 percent of total mail (251 billion postal items). *See* 1989 Washington Congress, Doc 20

For imaginative postal officials, remail of publications and letters was the harbinger of a still more ominous prospect than the loss of some international traffic: the evolution of competitive global postal services. There was no tangible difference between a private express company collecting remail in country A for tender to post office B and post office B establishing an office in country A. Remail implied that post offices, like international telecommunications and aviation companies, should be free to open offices in each other's territories and compete for the *collection* of international traffic. The inevitable next step would be a demand for the right to *deliver* international mail in countries where postal delivery was unsatisfactory. Global postal services would ensue. Once established, global postal systems with the ability to collect and deliver cross-border mail could theoretically compete with national post offices for domestic mail. A large domestic mailer in country A might, for example, export his mail to a neighboring country, or produce his mail there, and give it to a global operator for delivery to addressees in country A. In a country where postal service is overpriced or poor in quality, a global postal system could "cream-skim" the domestic market much like a local private express company. The ultimate threat of remail—and the economic promise of remail—was the possibility that it could lead to efficient global postal services that would not only improve cross-border postal service but also offer a competitive alternative to inefficient national postal services.

The prospect of European post offices competing for large quantities of international remail from the United States shocked postal officials into concerted action. On 12 March 1987, the U.K. post office wrote to the post offices of Belgium, Denmark, Finland, France, Germany, Ireland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, and Switzerland and requested a meeting to discuss the increase in remail competition. The letter declared:

Remailing poses a serious threat to the future relationships of postal administrations. Airmail letter traffic, the traditional preserve of postal administrations, is now being strongly attacked by large, multinational companies. . . . [I]t is vital to consider whether there is a common policy we can adopt to counter the activity of these companies.

The first meeting of the Remail Conference, as the group called itself, convened in a hotel at Heathrow Airport on 22 April 1987.<sup>14</sup> The U.S. Postal Service sent two representatives bringing active membership in the Remail Conference to fifteen. Sir Ronald Dearing, chairman of the U.K. Post office, opened the discussions by noting:

We are all aware that remail has existed to a degree in the last decade or so—the traffic segment predominantly involved has been printed papers. Until recently, the traffic volumes and revenue dilution involved have not been sufficiently great to cause the level of concern that has brought us there today. In the last two years the situation has changed dramatically. Remailing firms are now seeking systematically to exploit the availability of cheaper rates in some countries, and the limitations of the present systems of imbalance charges, and they will take whatever profitable traffic they can acquire, be it printed papers or much more significantly, airmail.

They have efficient transportation networks, originally established for parcel and bulk

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("Five Yearly Report on the Development of Postal Services, 1982-1986"); U.S. Postal Service, *Annual Report 1986*.

<sup>14</sup>All invited post offices attended except the post offices of Denmark and Ireland; both, however, attended subsequent meetings of the Remail Conference.

consignment distribution, and they are now using their network strength to very good effect in establishing posting facilities throughout the world.

With the concern being expressed by several administrations we have convened this meeting today to discuss how we should respond to the challenge presented by remail in Europe. Our North American colleagues are here with us as observers as they have a particular interest in this problem; North America offers the remailer a vast market and, as you know, it is currently one of the principal sources of such traffic for European destinations.<sup>15</sup>

Working documents at the conference fleshed out postal concerns. One expressed dismay that private operators had not “limited themselves” to express services but were beginning to provide alternatives to international postal services which were admittedly “have not been able to keep up a satisfactory standard of service”. Another listed the key issues as non-economic terminal dues, non-economic air transportation rates, uncertainty of enforceability of UPU Article 23, and lack of agreement amongst postal administrations. Still another outlined possible approaches to terminal dues reform, including the competitively neutral option of relating terminal dues to domestic postage rates, an option never again raised. The Remail Conference appointed a working party which, after further study, declared it was “convinced that remail constitutes a serious threat to postal business and that a vigorous response is urgently needed. It has for that purpose worked out a three-part strategy: a new system of terminal dues, a set of aligned practices, and a new business letter service.”<sup>16</sup>

In October 1987, the Remail Conference working party agreed to replace the 1984 UPU terminal dues scheme<sup>17</sup> with a new approach towards terminal dues, one that took into account the number of pieces of mail as well as total weight. The new terminal dues rate was expressed as a formula,  $1.225/\text{kg} + 0.121/\text{item}$ , which postal officials commonly refer to as a *linear tariff*. In other words, the total terminal dues charge for a shipment of inward mail in SDR was to be 1.225 times the weight of mail expressed in kilograms plus 0.121 times the number of items received.<sup>18</sup> From the standpoint of postal officials, a linear terminal dues tariff is far easier to apply than domestic postage rates, because domestic postage rates are defined in terms of weight steps. To apply domestic postage rates to inward mail, the origin or destination post office would need to count the number of items in each individual weight step for each class of mail. With a linear tariff, the total terminal dues charge for a shipment of inward mail could be calculated by

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<sup>15</sup>Remail Conference, Draft minutes of the 22 April 1987 meeting (28 April 1987).

<sup>16</sup>Remail Conference, Report by Sweden Post (10 September 1987), quoted in Case IV/32.791 - Remail, Statement of Objections ¶ 36.

<sup>17</sup>In adopting the CEPT terminal dues agreement, participating post offices apparently violated the 1984 UPU Convention. In the 1989 Washington Congress, a paragraph was added to the terminal dues provision to permit post offices to supplant the UPU terminal dues provisions by bilateral or multilateral agreement. 1989 Conv. § 73(5).

<sup>18</sup>This formula is equivalent to a declaring that the terminal dues charge for each individual postal item is given by the linear expression  $1.225w + 0.121$ , where  $w$  is the weight of the individual postal item in kilograms.

weighing the entire shipment and counting the total number of items.<sup>19</sup> Under the new formula, the charge for a 20-gram letter, the approximate weight of a typical cross-border letter, increased from SDR 0.052 to SDR 0.146, a 178 percent increase. A lightweight, 10-gram letter, experienced a terminal dues rate increase of 410 percent. Heavier weight letters and printed papers faced smaller rate increases or even decreases: 30-gram (101 percent), 50-gram (39 percent), 100-gram (-7 percent), and 200-gram (-30 percent).

Although the linear tariff of the Remail Conference was an improvement over the UPU scheme, it was fundamentally addressed to restraining remail rather than reforming terminal dues. The improvement lay in the fact that, since the actual cost of postal delivery varied with the number of items as well as the weight of items delivered, introduction of a charge per item implied that the new formula would yield charges that corresponded more closely to actual cost. The anti-remail import lay in what was not changed. The new terminal dues substantially raised the cost of remail without reforming charges for most ordinary international mail exchanged among postal administrations. This was accomplished by modifying the level of terminal dues charges without changing the uniformity of the terminal dues rate. Since remail represented additional mail for the remail post office, increasing the level of the terminal dues charge increased the marginal cost of all remail. Yet, since the uniformity of terminal dues rates was left untouched, post offices could still trade inward delivery services to compensate for outward delivery services, regardless of the unequal economic value of the two services. In sum, the Remail Conference addressed defects in the 1984 UPU terminal dues system which had a minor, but a competitive, impact while ignoring the major economic distortion implied by the 1984 UPU terminal dues scheme.

The terminal dues system of the Remail Conference subsequently became known as the "CEPT terminal dues" system, either because most of the participants were members of the Conference of European Postal and Telecommunications Administrations (a European association of postal administrations) or because the CEPT itself officially recommended the system in February 1989.<sup>20</sup> The level of CEPT terminal dues was revised three times with across the board increases. Participating post offices agreed to a 10 percent increase in terminal dues rates in 1991, a further 5 percent increase in 1992, and a further 5 percent in 1993. After the last increase, the CEPT rate in SDR was  $1.491/\text{kg} + 0.147/\text{item}$ . At the end of 1995, European post offices in theory replaced the CEPT terminal dues agreement with first version of the REIMS terminal dues agreement. In practice, as discussed below, the REIMS agreement maintained the

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<sup>19</sup>In a liner tariff, the coefficient in the weight factor (1.225 in the case of the Remail Conference formula) represents the degree to which postage rates rise as the weight of a postal item increases. The coefficient in the item factor (0.121) represents the cost of delivery of a postal item no matter how small. This second factor should approximate the basic stamp price, less that portion of the stamp that pays for collection of a letter since terminal dues cover only the cost of delivering, not the cost of collecting, international letters.

<sup>20</sup>CEPT, Resolution PO/C33. By June 1, 1990, post offices in the following European countries participated in the CEPT terminal dues agreement: Germany, Belgium, Denmark, Finland, France, Ireland, Iceland, Luxembourg, Monaco, Norway, United Kingdom, Sweden. Most other European post offices anticipated joining the scheme. Several European post offices also implemented CEPT terminal dues with the U.S. Postal Service.

CEPT terminal dues provisions until the end of 1997.

The Remail Conference also served as a focus for efforts to discourage remail by appeal to Article 23 of the UPU Convention. One post office, for example, asked other post offices for assistance by enforcement of Article 23.<sup>21</sup> In the spring of 1988, the German post office invoked Article 23 to restrain remail in two ways. It pointed out Article 23 to German mailers to discourage them from using remail for outbound international mail. It also intercepted and returned inbound international mail posted by Community mailers with the Dutch post office and destined for German addressees.

#### 4. NORDIC TERMINAL DUES AGREEMENT, 1988

While Remail Conference post offices were addressing remail with anticompetitive terminal dues “reforms” and resort to UPU Article 23, Nordic post offices adopted a more positive approach. In 1988, the post offices of Denmark, Finland, Iceland, Norway, and Sweden agreed that, beginning 1 January 1989, terminal dues on mail exchanged among these five post offices would be based on domestic postage rates rather than the CEPT agreement. Under the Nordic system, each post office used sampling techniques to estimate, for both priority and nonpriority services, the number of letters, flats (large flat envelopes), packets (large bulky envelopes), and newspapers sent to the other post offices. Terminal dues were calculated based on 60 percent of the domestic postage rates of the destination post office. The 60 percent figure was agreed among the Nordic post offices as a reasonable approximation of the fraction of domestic postal service costs incurred in the delivery (as opposed to collection) of international mail.

As of 1 January 1991, the Nordic system was modified by the addition of quality of service standards. A destination post office’s terminal dues payment would be reduced by a certain percentage if it failed to deliver cross-border mail in accordance with quality of service standards set for domestic mail. For example, if a destination post office failed to deliver more than 80 percent of a given type of mail within an applicable domestic service standard of 95 percent overnight delivery, then its terminal dues bill to the origin post office would be reduced by about 50 percent.<sup>22</sup>

Over time, the Nordic system was highly influential as a model for reform of other terminal dues systems.

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<sup>21</sup>Letter from U.K. Post Office to post offices in and out of Europe (12 Feb 1987) (“I very much hope . . . that your administration will not accept UK-originating LC-type traffic for remailing . . . [W]e would regard it as an unhelpful act on the part of a sister postal administration which would be regrettable in light of our previous excellent relations”). In response to such pleas, in early March 1987, the Singapore post office discontinued accepting all foreign origin mail tendered by private remail companies, citing the objection of the U.K. Post office. In January 1988, the Japanese post office notified the Hong Kong Post office that it will not accept international mail remailed through Hong Kong.

<sup>22</sup>*See generally* Bruun, “Nordic Measurements 1991: Service Performance and Terminal Dues Settlement” (1993).

## 5. UPU WASHINGTON CONGRESS, 1989

Like the Remail Conference, the Universal Postal Union became increasingly concerned about remail competition.<sup>23</sup> In May 1987, the UPU Executive Council initiated a survey of remailing activities. In August 1987, the Director General of the UPU distributed a circular letter to UPU members urging post offices not to cooperate with remail companies.<sup>24</sup> In September, on the eve of a key meeting of the Remail Conference, the UPU distributed an initial report on remailing.<sup>25</sup> The final report, issued in March 1988, outlined competitive difficulties posed by remailing and noted that about half of the post offices surveyed supported increased interception of remail. At the same time the UPU distributed a second report on “other aspects to be considered in the study of terminal dues” which addressed, among other things, the rise of international competition and the role of the monopoly in opposing such competition.<sup>26</sup> In April 1989, the UPU Executive Council convened an extraordinary Round Table on terminal dues and remail and concluded remail “is a very important problem which calls for close collaboration among all administrations . . . [and] flexible, varied and swift measures . . . to face up to the competition”.<sup>27</sup> When the UPU Congress convened in Washington, D.C., in November 1989, it was prepared to address “the harmful effects for the world postal service of the expansion of remailing.”<sup>28</sup>

In terminal dues provisions agreed by the 1989 Washington Congress, the UPU departed substantially from its traditionally global approach. To win acceptance from developing countries, industrialized countries agreed to split the UPU terminal dues system into two regimes. A base terminal dues rate, SDR 2.940/kg, was adopted for mail exchanged between most post offices. A second, two-tiered rate was applied if a destination post office received more than 150 metric tonnes of mail a year from a given origin post office.<sup>29</sup> This high volume rate applied to most mail exchanged between post offices in industrialized countries and was intended to discourage remail. Under the high volume regime, different terminal dues rates were established for letter mail and printed matter. For letters, terminal dues were increased to 8.115/kg.; for printed matter, terminal dues were reduced to 2.058/kg. For both letters and printed matter, a “correction mechanism” was introduced to compensate for mail containing an usually high proportion of lightweight items. If a destination post office could establish that the

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<sup>23</sup>The 40-member UPU Executive Council included eight members of the Remail Conference who could, as a practical matter, exert substantial control over the group. The most important Remail Conference members of the Executive Council were the post offices of Germany (chairman), France, and the United States.

<sup>24</sup>Circular No. 0115(B/C)1745 (14 Aug 1987).

<sup>25</sup>Circular No. 3370(B/C)1790, Annex 1 (2 Sep 1987).

<sup>26</sup>CE 1988 C5 Doc 9 (“Other aspects to be considered in the study on terminal dues”) (30 Mar 1988).

<sup>27</sup>1989 Washington Congress, Doc 56, p. 4 (“Remailing”) (Executive Council, 23 Jun 1989).

<sup>28</sup>1989 Washington Congress, Doc 21, par 99 (“Implementation of the Declaration of Hamburg”).

<sup>29</sup>1989 Conv. § 73.

average weight of inward letter mail received from an origin post office was less than 18.1 grams per piece (i.e., greater than 55 items per kilograms), then it could charge terminal dues according a liner formula,  $1.258/\text{kg} + 0.143/\text{item}$ . The correction mechanism formula also applied to lightweight printed items, but the threshold for resort to the formula was an average weight for printed matter less than 143 grams per item (i.e., greater than 7 items per kilogram). In effect, the 1989 Convention, like the CEPT agreement, adopted a uniform linear item and weight based tariff for mail exchanged between industrialized countries; the weight-based rates for letters and printed matter represented zones in the linear tariff within which small variations in average weight per item were disregarded.

**Table 2. UPU terminal dues base rates**

Convention	Terminal dues (SDR)
Tokyo, 1969	0.163/kg
Lausanne, 1974	0.490/kg
Rio de Janeiro, 1979	1.799/kg
Hamburg, 1984	2.614/kg
Washington, 1989	2.940/kg
Seoul, 1994	3.427/kg
Beijing, 1999	3.427/kg

The overriding purpose of the 1989 UPU terminal dues provisions, like that of the CEPT agreement, was to discourage remail among industrialized countries. Like the CEPT agreement, the 1989 Convention retained the uniformity of terminal dues rates so that, for mail in balance (the great majority of international mail), post offices continued to provide delivery services without regard to economic value. Major economic distortions produced by terminal dues were continued and only remail was attacked. In addition, the 1989 Washington Congress introduced the idea of preferential rates for large customers<sup>30</sup> and instructed the Executive Council to continue work on the issue of remailing.<sup>31</sup>

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<sup>30</sup>1989 Conv. § 19(12bis) allowed “preferential rates to major users” of international mail. The Executive Council explained the proposed amendment as follows: “Large industrial and commercial firms are the customers most accessible to and sought after by the competition. These customers often complain that the tariff policy applied by the Post is too egalitarian . . . It therefore seems necessary to introduce a facility allowing post offices to give preferential rates to major users. This measure would contribute to increasing postal service competitiveness in order to retain or regain its market share in the letter-post sector which is particularly threatened by the competition. UPU, 1989 Washington Congress, Proposition 3019.11. *See* UPU, 1989 Washington Congress, Doc 56, “Remailing” p. 4 (June 23, 1989) (“In Proposition 3019.11, the Community [UPU Executive Council] aims expressly to authorize post offices to grant preferential rates to their large mailing customers so that they can compete better with remail firms for the most lucrative traffic.”)

<sup>31</sup>1989 Washington Congress, Resolution C88. This resolution was one of several omitted from the published record of the Congress, apparently inadvertently. *See* 1 UPU Annotated Code

## 6. EUROPEAN POSTAL GREEN PAPER, 1992

After four years of study, in June 1992, the European Commission published a lengthy analysis of postal policy in Europe, the “Postal Green Paper”. This study was prompted in substantial part by a legal challenge to the anti-remail measures of post offices. In July 1988, the International Express Carriers Conference, a group of private express companies, had formally complained to the European Commission that activities of the Remail Conference appeared to be inconsistent with European competition law.<sup>32</sup> The Postal Green Paper analyzed all aspects of postal policy and proposed a comprehensive European policy framework for postal services. In particular, the Postal Green Paper considered several key issues relating to terminal dues and remail. It concluded that terminal dues should not be set at a uniform rate among European post offices because of the substantial disparity in costs among post offices. Instead, the Postal Green Paper advocated that terminal dues should be related to the domestic postage rates of each destination post office.<sup>33</sup>

The Postal Green Paper also addressed the issue of nonphysical remail. It recognized that new technologies and increased centralization of European mail preparation would shift mail from domestic distribution to cross-border distribution.

It is not uncommon for publishers to centralise the printing of a European-wide magazine in one location, even if the publication is in different languages. If the material is then posted in the same country as the printer, it should be treated by the receiving administration as ordinary cross-border mail—even though it might otherwise have the appearance of domestic mail in the country of delivery.

This phenomenon of centralised production which could turn domestic mail into cross-border mail is likely to increase as customers modify their location and buying strategies as a result of the Single Market. . . .

The fact that such mail might formerly have been domestic and therefore subject to domestic monopolies causes some people to contemplate whether such movements of mail thus caused should be considered an infraction of domestic monopolies unless the items concerned are posted in the country of delivery. Briefly, the question that should be put is as follows: should the single market in printing, electronic data and advertising adjust to possible interpretations of postal rules, or the converse?<sup>34</sup>

The Postal Green Paper generally rejected application of the Universal Postal Convention to intercept remail resulting from centralization of printing and mail preparation services in the European Union. At a minimum, declared the Postal Green Paper, “use of Article 25.4 (which refers to A-B-C remail) therefore seems clearly inappropriate”. The Postal Green Paper even

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[1989] 144.

<sup>32</sup>Case IV/32.791 - Remail.

<sup>33</sup>Postal Green Paper, pages 251-52 (“The existing systems of charging between post offices (called terminal dues) is not cost based, leading to significant distortions between remuneration and actual delivery costs incurred . . . . Since inland tariffs will be related to costs, the compensation charges between post offices ought to be based on the delivery proportion of the inland tariff, with some supplement for the extra handling necessary and for profit.”)

<sup>34</sup>Postal Green Paper, page 135.

expressed doubt about the lawfulness of using the Convention to turn back “physical ABA” remail, that is, mail that had been physically taken out of country A to country B and posted back into country A. The Postal Green Paper’s view was that, at the least, the Universal Postal Convention should only be invoked by regulatory authorities, only in cases of genuine violations of the domestic postal monopoly, and never against “nonphysical” remail.<sup>35</sup>

Commission support for a competitively neutral legal framework for international postal services was also manifested in the IECC remail case. In April 1993, the Commission adopted a long Statement of Objections that condemned both the CEPT and 1989 UPU terminal dues schemes and rejected postal resort to the anti-remail provisions of the Universal Postal Convention.<sup>36</sup> The policy conclusions of the Postal Green Paper and the Statement of Objections paved the way for a new approach to terminal dues and remail in Europe. European reform, in turn, eventually prompted reform at the UPU.

The Commission’s actions in the early 1990s also induced to an unintended development in international postal law, elevation of the nonphysical remail doctrine. The IECC complaint noted, in particular, that post offices were using paragraph 4 of the Article 23 (of the 1984 UPU Convention) to intercept or discourage ABC remail. In both the Postal Green Paper and the initial response of the IECC complaint, the Commission made clear that it considered resort to paragraph 4 of Article 23 was never justified. Post offices responded by promising, in effect, to refrain from using paragraph 4 to intercept remail so long as they could continue to use paragraphs 1 to 3 of Article 23 to intercept “nonphysical remail”. This was an empty promise, since almost all large quantities of ABC remail can equally be characterized as “nonphysical ABCA remail” and intercepted using paragraphs 1 to 3 of Article 23. Nonetheless, in 1995, a newly constituted European Commission proved willing to accept this fig leaf and dismissed this portion of the IECC complaint based on the assurances of the post offices.<sup>37</sup> Thereafter, post offices relied on the nonphysical remail doctrine to define the scope of their authority under the anti-remail provision of the Universal Postal Convention.

## 7. UPU SEOUL CONGRESS, 1994

Like the 1989 Washington Congress, the 1994 Seoul Congress was very concerned about remail. The Seoul Congress substantially revised both the terminal dues and anti-remail provisions of the Convention.

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<sup>35</sup>See Postal Green Paper, pp. 210-12. The Postal Green Paper left open the question of whether UPU Article 25 should be used to turn back extra-Community remail, i.e., mail that a mailer residing in one European country posts in a country outside the European Union for delivery to addressees in a second European country; the Green Paper considered that such practices could pose a potential financial threat to Community post offices.

<sup>36</sup>For a summary of the IECC complaint, remail, and European competition law, see Tony Reeves, “An Introduction to EC Competition Rules in the Postal Sector”.

<sup>37</sup>See Joined Cases T-133/95 and T-204/95, *IECC v Commission*, [1998] ECR II-3645. After these cases were decided, the German post office withdrew its promise not to invoke paragraph 4 of the UPU anti-remail provision.

The new terminal dues scheme of the 1994 Convention and detailed regulations provided a modest increase in the base rate terminal dues rate to 3.427 SDR per kilogram.<sup>38</sup> For high volume exchanges (defined as in the 1989 Convention), the 1994 Convention established a “revision mechanism” that applied a linear formula if the average weight of inward mail drifted outside fairly narrowly defined limits. According to the revision mechanism, if the average weight of high volume mail was lower than 47.6 grams (i.e., greater than 21 items per kilogram) or higher than 71.4 grams (i.e., less than 14 items per kilogram), then terminal dues would be determined by the formula, 1.00/kg + 0.140/item. Unlike the “correction mechanism” of 1989 Convention, the “revision mechanism” of the 1994 Convention was triggered by the average weight of all mail, not to the average weights of letter and printed matter mail calculated separately.

As a further protection against remail, the 1994 Convention added a new terminal dues provision for “bulk mail”. Bulk mail was defined as more than 1500 items received from the same sender on the same day or more than 5000 items received from the same sender in a two-week period.<sup>39</sup> A post office receiving bulk mail from another post office was authorized to charge 60 percent of domestic rates for priority mail,<sup>40</sup> expressed as a linear tariff, but no more than the terminal dues allowable by the formula 1.25/kg + 0.175/item, that is, 25 percent more than the charge permitted by the “revision mechanism”. The higher terminal dues for bulk mail could be charged on mail received from any origin post office, without regard to whether the post offices exchanged more than 150 tonnes of mail. Hence, this provision served to protect post offices of industrialized countries against large amounts of remail posted in developing countries.

The 1994 bulk mail provision was the first occasion in which the UPU related terminal dues to domestic postage rates in individual countries. This was an important milestone in terminal dues reform. Nonetheless, UPU recognition of the variations in delivery costs among post offices retained a substantial level of standardization. Domestic tariffs vary not only in overall price level but also in the size of weight steps, the treatment of different sizes of mail (envelopes, large envelopes, and bulky mail), the classes of service offered, and the degree to which additional weight implies higher postage rates. Rather than directing post offices to develop linear tariffs reflecting such variations,<sup>41</sup> the UPU adopted a standard linear tariff to be used as a template for the linear versions of all domestic tariffs. The standard linear tariff was adjusted up or down

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<sup>38</sup>1994 Conv. §§ 49, RE 4901, 4902, 4903, 4904. The terminal dues arrangements authorized by the 1994 Seoul Congress were not completed by Congress itself. Congress delegated the drafting and revision of key implementing regulations to a committee of the UPU, the Postal Operations Council.

<sup>39</sup>1994 Conv. §§ RE 804(8), RE 4903.

<sup>40</sup>The rate indicated is variously referred to as the “priority” or “letter” or “first class” rate in different countries.

<sup>41</sup>In contrast, the UPU has always provided that each post office shall develop its own approach towards an “inward land rate” for delivery of international parcels. *See, e.g.*, 1999 Conv. § 56 (in the *Parcel Post Manual*).

based on single variable, the postage rate charged for posting a letter weighing 20 grams.<sup>42</sup>

The 1994 Seoul Congress also introduced significant revisions in the anti-remail provision, Article 25 in the 1989 Convention. After much debate, the Congress adopted a variation of the Executive Council proposal put forward by the United States<sup>43</sup> and Japan. Changes in Article 25 made in the 1994 Universal Postal Convention are shown below:

1. A member country shall not be bound to forward or deliver to the addressee letter-post items which senders ~~resident~~ *residing* in its territory post or cause to be posted in a foreign country with the object of profiting by the ~~lower charges in force~~ *more favourable rate conditions* there.

2. ~~Paragraph~~ *The provisions set out under 1* shall be applied without distinction both to ~~correspondence~~ *letter-post items* made up in the *sender's* country ~~where the sender resides~~ *of residence* and then carried across the frontier and to ~~correspondence~~ *letter-post items* made up in a foreign country.

3. The administration ~~concerned~~ *of destination* may ~~either return its item to origin or charge postage on the items at its internal rates: claim from the sender and, failing this, from the administration of posting, payment of the internal rates.~~ *If neither the sender refuses, nor the administration of posting agrees to pay the postage, the items may be disposed of in accordance with the internal legislation of the administration concerned: these rates, within a time limit set by the administration of destination, the latter may return the items to the administration of posting, and shall be entitled to claim reimbursement of the redirection costs, or handle them in accordance with its internal legislation.*

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<sup>42</sup>Translation from a domestic tariff to an equivalent UPU linear tariff was accomplished as follows. Article 49(4)(1)(1) of the 1994 Conv. provided that the standard linear tariff for domestic tariffs would be 1/kg + 0.140/item (the same formula as in the “revision mechanism” applicable to high volume mail exchanges). This formula yields a terminal dues charge of SDR 0.160 for a 20-gram letter. In France, by way of illustration, the postage charge for collection and delivery of a 20-gram letter was SDR 0.347 (3 francs) in 1999. Regulation RE 4903, adopted by the Postal Operations Council (a permanent UPU committee composed of postal officials) to implement Article 49, permitted the French post office to collect a terminal dues charge on inward bulk mail equal to 67 percent of the first class letter rate (but no more than 1.460/kg + 0.204/item). Sixty-seven percent of the 20-gram French postage rate was SDR 0.232, 45 percent higher than the rate implied by the standard liner tariff, SDR 0.160. Accordingly, the UPU linear tariff corresponding to 67 percent of the French domestic letter tariff would be the standard linear tariff with each factor raised by 45 percent, or 1.43/kg + 0.203/item. *See International Bureau, Circular 319 (1999).* While the terminal dues rate implied by this formula corresponded to the French postage rate for a 20-gram letter, it may or may not have corresponded to the French postage rate for a 50- or 100-gram letter or a 200-gram magazine.

<sup>43</sup>In 1994, the U.S. Postal Service adopted a regulation defining a “resident” of the United States for the purposes of the UPU Convention to include any person who “has a place of business in the United States” or “is incorporated or otherwise in the United States.” A “place of business” could include a hotel room if representatives of a foreign company spent more than 180 days in the U.S. 59 FR 11188 (10 Mar 1994). This broad interpretation of anti-remail article of the 1989 Convention helped lay the basis for modification of that article in the 1994 Seoul Congress.

4. A member country shall not be bound to forward or deliver to the addressees letter-post items which senders post or cause to be posted in large quantities in a country other than the country in which they reside, *without receiving appropriate remuneration*. The administration ~~concerned of destination may send back such items to origin or return them to the senders without repaying the prepaid charge claim from the administration of posting payment commensurate with the costs incurred and which may not exceed the higher of the following two amounts: either 80 percent of the domestic tariff for equivalent items, or 0.14 SDR per item plus one SDR per kg. If the administration of posting does not agree to pay the amount claimed, within a time limit set by the administration of destination, the administration of destination may either return the items to the administration of posting, and shall be entitled to claim reimbursement of the redirection costs, or handle them in accordance with its internal legislation.~~

The most important change was specific endorsement of the nonphysical remail doctrine by changing the word *domiciliés* in the French text (the official language of the UPU) to *résidents*. The UPU Executive Council explained that this change “allows much wider application of the article, particularly in the case of the various branches of a multinational company.”<sup>44</sup> Paragraph 4 of Article 25 was rendered more useable by permitting post offices to apply higher terminal dues to remail compared to other international mail, a less drastic remedy than interception and return of mail (in any case, most such mail could be intercepted under paragraphs 1 to 3 using the nonphysical remail doctrine). As revised, paragraph 4 authorized post offices to charge remail either “80 percent of the domestic tariff for equivalent items” or the charge derived from the “revision mechanism” adopted for terminal dues applicable to high volume mail exchanges, in SDR, 1/kg + 0.140/item. Interestingly, the reference to use of the domestic tariff does not imply transformation into a standard linear formula.

## 8. REIMS I AND REIMS II, 1995-1999

In early 1992, on the eve of publication of the Postal Green Paper, European post offices began work on a revised terminal dues agreement to be called REIMS, an acronym for Remuneration in the Exchange of International Mail Services. In the wake of the still unresolved 1988 IECC complaint, European post offices were under pressure from the European Commission to replace the CEPT agreement with a less anticompetitive approach to terminal dues. Not all were unwilling. As noted above, Nordic post offices had already agreed to an acceptable terminal dues scheme. In September 1991, the post offices of Denmark, Germany, and the Netherlands, put forward an elaborate study by a leading economic consultant that called for a new terminal dues system in the European Union in which terminal dues would be based on an unspecified percentage of domestic postage rates.<sup>45</sup> Spurred by such influences, European post offices began work on a new terminal dues agreement under the umbrella of the International Post Corporation, a private corporation organized by twenty leading post offices, most European, to facilitate improvement in international postal services.

Negotiations over REIMS among post offices and between post offices and the European Commission dragged on for more than seven years. In February 1994, IPC provided the

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<sup>44</sup> 1994 Seoul Congress, Doc 58, par. 5.

<sup>45</sup>“Approaches to Pricing for Intra-Community Postal Services” (1991). This proposal included a detailed study by Coopers & Lybrand Deloitte.

Commission with a summary briefing paper. On 17 January 1995, fourteen post offices (two non-EU) signed a preliminary agreement that set terminal dues equal to 80 percent of domestic postage rates after a six-year transition period. The fate of this proposal was in doubt from the beginning since several post offices indicated their participation was dependent on accession by other post offices who were not so inclined. Moreover, since REIMS was a price-fixing agreement under European competition law, it was necessary for the parties to seek approval of the European Commission.<sup>46</sup> After further haggling, a revised version was submitted to the Commission on 13 December 1995. This version, known as “REIMS I”, went into effect on 1 January 1996 while Commission approval was pending. REIMS I lapsed on 30 September 1997, partly because the Spanish post office never agreed (a formal condition subsequent in the agreement) and partly because the Commission objected to several provisions as anticompetitive. In practical effect, REIMS I did little more than extend the anticompetitive CEPT terminal dues another two years, until the end of 1997.<sup>47</sup>

On 31 October 1997, a substantially revised agreement, called REIMS II, was notified to the Commission by thirteen post offices (two non-EU) post offices.<sup>48</sup> After the Commission indicated continuing objections, eleven post offices (two non-EU) proffered a modified REIMS II agreement in October 1998. Eventually, the revised REIMS II was joined by all EU post offices except the Dutch and by the post offices of Iceland and Norway. On September 15, 1999, the European Commission approved the revised REIMS II with additional modifications.<sup>49</sup>

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<sup>46</sup>Under European competition rules, the European Commission can declare prohibitions against anticompetitive agreements inapplicable if a specific agreement meets certain public interest criteria. *See* EC Treaty § 81(3).

<sup>47</sup>OJ C 42, 14.2.1996, p. 7 (notice of REIMS I). Subsequently, in announcing the filing of REIMS II, the Commission refers to “the low terminal dues that would still be applicable for several years under REIMS I” and quality of service rules in REIMS I that “would prevent any terminal dues increases during the transitional period.” OJ C 53, 20.2.1998, p. 3. Apparently, the CEPT rates persisted unchanged at least until REIMS I expired on 30 September 1997; REIMS II, in turn, continued key provisions of REIMS I until December 31, 1997.

<sup>48</sup>OJ C 53, 20.2.1998, p. 3 (notice of REIMS II); OJ C 371, 1.12.1998, p. 7 (notice of revised REIMS II). In respect to both REIMS I and REIMS II, the European Commission requested public comment on the policy implications of the agreements without making public the text of the agreements, effectively rendering detailed or specific criticism impossible.

<sup>49</sup>OJ L 275, 26.10.1999, p. 17.

**Table 3. Evolution of European terminal dues systems**

Agreement	Terminal dues (SDR)
Nordic 1988 -	<ul style="list-style-type: none"> <li>• 60% domestic priority/nonpriority rates (weight steps, shape based).</li> <li>• Quality of service penalties based on standards in destination country (after 1/1/1991)</li> </ul>
CEPT 1988 to 1995	<ul style="list-style-type: none"> <li>• 1.225/kg + 0.120/item (declared anticompetitive by European Commission)</li> </ul>
REIMS I 1995 (never fully implemented)	<ul style="list-style-type: none"> <li>• Final TDs: 80% of domestic rates expressed as shape-based linear tariffs.</li> <li>• Optional TDs: domestic discount rates (“level 3 access”); discounts for prepared mail.</li> <li>• Transition: 6 years. CEPT TDs to 12/31/96; TDs increased by 15% (1997), 15% (1998), 20% (1999) and 20% (2000) until final TD level reached.</li> <li>• Quality of service: TDs reduced if agreed targets not met.</li> <li>• UPU §25 “integral” during transition, barred thereafter; parties limited to universal service providers.</li> </ul>
REIMS II 1997 (approved by Commission, 1999)	<ul style="list-style-type: none"> <li>• Standard TDs: 80% of domestic rates expressed as shape-based linear tariffs.</li> <li>• Optional TDs: domestic discount rates; discounts for prepared mail and non-priority mail.</li> <li>• Transition: 4 years. 1998 (55% domestic rates); 1998 (55%); 1999 (65%); 2000 (70%). Special rules and transition periods for post offices of Greece, Italy, and Spain.</li> <li>• Quality of service: TDs reduced if agreed targets not met.</li> <li>• UPU §25 barred after transition; parties limited to universal service providers.</li> </ul>

As approved, REIMS II provided for introduction of terminal dues based on 80 percent of the domestic postage rates in the destination country. For the purpose of applying this standard, domestic tariffs were converted into linear equivalents. “Linearization” of domestic tariffs was substantially more sophisticated than in the 1994 UPU Convention. Separate linear tariffs were developed for different sizes of mail: letters, flats, and packets; in addition, different tariffs were applied to priority and nonpriority mail.<sup>50</sup> New terminal dues rates were to be phased in over a four-year transition period, during which post offices could set terminal dues at 55 percent of domestic postage rates in 1998 and 1999, 65 percent in 2000, and 70 percent in 2001.<sup>51</sup> Exceptional provisions were adopted for the post offices of Greece, Italy, and Spain. Post offices whose domestic postage rates were below CEPT rates were allowed to maintain terminal dues at CEPT levels until 2002.

In addition to the standard terminal dues regime, an important feature of REIMS II was a guarantee of access to domestic discount postage rates. Access to domestic rates served to ensure

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<sup>50</sup>OJ L 275, 26.10.1999, p. 20 (par.19) states “Domestic tariffs usually distinguish between different weight steps (such as 20, 50 and 100 g for letters). According to the Agreement, these different tariffs are converted, on the basis of a standard structure, into linear tariffs for the purpose for the purpose of calculating terminal dues. In so doing, the Agreement distinguishes between three categories: Letters up to C5 size and a maximum weight of 100g; Flats up to C4 size and a maximum weight of 500 g; Packets of all shapes up to limits of weight and size set by the UPU.”

<sup>51</sup>Remarkably, as one condition of approval, the Commission required a one-year extension of the transition period (from three years to four years) even though it is apparent that the transition period is characterized by extension of a price fixing scheme that distorts trade between Member States and that, in one form or another, had been in effect since the star of the CEPT agreement in 1988.

that terminal dues levels were reasonable.<sup>52</sup> Moreover, destination post offices were authorized to offer discounts for various levels of mail preparation by origin post offices. As in the Nordic scheme, terminal dues were be subject to reduction if cross-border mail was not delivered within quality of service targets although, in REIMS II, the quality of service standards established in the agreement and varied by destination post offices. Post offices further agreed that, after the end of the transition period, they would refrain from resort to the anti-remail provisions of the Universal Postal Convention. By its terms, participation in the REIMS II agreement was limited to “operators (public or private) of a mandatory, universal postal service”.<sup>53</sup>

While REIMS II retained some of the elements of the CEPT system (in particular during the transition period), it represented a substantial and sophisticated move towards aligning terminal dues with domestic postage rates and eliminating restrictions on remail.

## 9. UPU BEIJING CONGRESS, 1999

Remail and terminal dues provisions were major topics in the 1999 Beijing Congress, as in the two previous congresses. For the first time, the Beijing Congress agreed on different terminal dues systems depending not on the volume of mail exchanged between pairs of countries but on whether the destination country was classified as “industrialized” or “developing”. Even more fundamentally, the Beijing Congress declared that the terminal dues agreed upon were “transitional arrangements, moving towards a country-specific payment system.”<sup>54</sup> The Beijing Congress also adopted a minor, mildly procompetitive change to the anti-remail provision of the Convention.

Groundwork of terminal dues reform in the Beijing Congress was laid by a 1998 report, “The Need for Change”, prepared by a UPU working party led by the U.K. post office.<sup>55</sup> This document reviewed weaknesses of previous terminal dues arrangements and, without saying so explicitly, made the case for aligning terminal dues with domestic postage rates in all countries. The report emphasized that post offices of industrialized countries had no choice but to raise terminal dues to the level of domestic postage rates to end incentives for ABA and ABC remail. The report recognized that developing countries have a relatively greater interest in terminal dues than industrialized countries noting that, in many developing countries, inward international mail is a substantially higher proportion of total mail than in industrialized countries.<sup>56</sup> In addition,

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<sup>52</sup>So called “level 3 access”; indeed, REIMS II provides that parties shall “relax domestic regulations for other Parties, when these regulations, in particular ones not related to costs, applied to Parties, are not justified and could, in practice, bar them access to domestic rates.”

<sup>53</sup>The Commission held that this provision is not anticompetitive because “nothing in the agreement prevents the parties from entering into identical or similar agreements on terminal dues with third parties.” OJ L 275, 26.10.1999, p. 26 (par. 67).

<sup>54</sup>1999 Conv. § 47(3).

<sup>55</sup>CEP GT 1.1 1998.1-Doc 3 Annexes 1 (summary) and 2 (full report).

<sup>56</sup>Of 69 developing countries surveyed, inward international mail was more than 40 percent of total mail in 16, more than 30 percent of total mail in 24, and more than 20 percent of total mail in 36. In the European Union, international mail, including intra-EU cross-border mail, is

in many developing countries, terminal dues, unlike domestic postage, are a source of precious hard currency. Nonetheless, the report argued that developing countries have an interest in adjusting terminal dues *down* to domestic postage rates to avoid ABB remail (posting inward international mail as domestic mail):

Since the Seoul Congress, . . . there has been a steady increase in ABB remailing. This phenomenon can largely be attributed to the fact that local postage rates in developing countries are invariably lower than the terminal dues rate for heavyweight items and consequently direct insert remailing by private and public operators is a common occurrence. Although remailing often contributes towards an increase in mail business, revenue from terminal dues decreases, resulting in an overall loss of revenue which can be ill afforded.

The report further suggested that aligning terminal dues with domestic postage was required by the principles of the General Agreement on Trade in Services, i.e., that “foreign suppliers must receive identical terms and conditions as national suppliers”.<sup>57</sup> The “Need for Change” was one step in a long negotiating process that ultimately led the Beijing Congress to adopt a terminal dues system sharply bifurcated between industrialized countries and developing countries.

For mail exchanged among twenty-four large industrialized countries,<sup>58</sup> including all fifteen Member States of the European Union, the 1999 Convention took the revolutionary step of tying terminal dues directly to domestic postage rates: “*Payment for letter-post items . . . shall be established on the basis of the application of the rates per item and per kilogramme reflecting the handling costs in the country of destination; these costs must be in relation with the domestic tariffs. The rates shall be calculated in accordance with the conditions specified in the Letter Post Regulations.*”<sup>59</sup> Application of this principle was restrained, however, by upper and lower boundaries. The lower boundary was the same as the revision mechanism, in SDR, 1.491/kg +

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less than 4 percent of total mail.

<sup>57</sup>The report dismissed the possibility that terminal dues agreements among post offices might be inconsistent with competition rules with the legally dubious declaration that “Since the terminal dues system applies only to public postal operators that have government-imposed public service obligations and not to commercial operators, it does not in any way constitute a cartel or price fixing”. In fact, as noted above, the main stimulus for terminal dues reform in Europe was the susceptibility of the CEPT terminal dues agreement to challenge under European competition rules.

<sup>58</sup>The list of “industrialized countries” also includes overseas territories of large industrialized countries and small industrialized countries Andorra, Monaco, Liechtenstein, San Marino, and the Vatican.

<sup>59</sup>1999 Conv. §48(1). A post offices may always waive terminal dues to which it is entitled or negotiate alternate terminal dues arrangements with another post office. 1999 Conv. § 47(6), (7). Although the 1999 Convention might be interpreting as authorizing post offices to establish their own cost-based terminal dues rates, the International Bureau of the UPU has periodically declared the appropriate terminal dues rates by country, setting them at the maximum permitted by the Convention. See, e.g., International Bureau, Circular 270 (2 Jul 2001).

0.147/item.<sup>60</sup> The upper boundary was set at 1.684/kg + 0.158/item (for 2001<sup>61</sup>) or 60 percent of the domestic priority postage rate, whichever is lower. As with the 1994 bulk mail provision, the domestic postage standard is implemented by converting domestic priority rates into a linear tariff using the postage rate for a 20-gram letter as the conversion factor. As in REIMS II, the 1999 Convention also provided that industrialized country post offices must permit access to domestic postage rates, an important check on terminal dues rates.<sup>62</sup> Although a dramatic break from the past, the practical scope of the 1999 UPU terminal dues provision for industrialized countries is limited by the fact that seventeen<sup>63</sup> of the twenty-four large industrialized country post offices rely on REIMS II to determine terminal dues on mail exchanged among themselves. The UPU provision applies only to mail exchanged between industrialized countries and the post offices of Australia, Canada, Israel, Japan, Netherlands, New Zealand, and the United States.<sup>64</sup>

**Table 4. Summary of UPU terminal dues for industrialized country post offices**

Convention	Terminal dues (SDR)
Washington, 1989	<ul style="list-style-type: none"> <li>• Special rule for “high volume” mail flow (more than 150 tonnes/year)</li> <li>• Correction mechanism formula, 1.258/kg + 0.143/item, simplified to 8.115/kg (letters); 2.058/kg (printed matter)</li> </ul>
Seoul, 1994	<ul style="list-style-type: none"> <li>• Special rule for “high volume” mail flow (more than 150 tonnes/year)</li> <li>• Revision mechanism, 1.00/kg + 0.140/item, simplified to 3.427/kg.</li> <li>• Bulk mail rate, 1.25/kg + 0.175/item or 60% domestic priority rate (linear), if lower.</li> <li>• Remail rate, 1.00/kg + 0.140/item or 80% equivalent domestic rate, if higher.</li> </ul>
Beijing, 1999	<ul style="list-style-type: none"> <li>• Special rule for “industrialized countries”.</li> <li>• 1.684/kg + 0.158/item or 60% domestic priority rate (linear), if lower, but not lower than 1.491/kg + 0.147/item.</li> <li>• “System harmonization” rule limits developing countries use of base TD rate.</li> <li>• Revision mechanism, bulk mail rates, and remail rate similar to 1994 Conv.</li> </ul>

For mail sent to industrialized countries from developing countries, the 1999 Convention maintained the same base terminal dues rate, SDR 3.427/kg, adopted in the 1994 Convention. Access to domestic postage rates is also guaranteed for developing country post offices. At the same time, the 1999 Convention adopted three rules to protect post offices in industrialized countries from a flood of remail sent through post offices in developing countries. First, the 1999 Convention applied industrialized country terminal dues rates to “bulk mail” (defined as in

<sup>60</sup>1999 Conv. RE 1009. The level of the minimum terminal dues rate is set by a regulation adopted by the Postal Operations Council, not by the Convention itself.

<sup>61</sup>This portion of the upper bound increases to 1.684/kg + 0.172/item in 2002 and 1.684/kg + 0.215/item in 2003. The limits in 2004 and 2005 are to be set by the Postal Operations Council.

<sup>62</sup>1999 Conv. § 47(4).

<sup>63</sup>The post offices of Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Norway, Portugal, Spain, Sweden, Switzerland, and United Kingdom.

<sup>64</sup>Moreover, some of these post offices have specific terminal dues arrangements (e.g., Canada-United States) which supersede the UPU provisions. On the other hand, a developing country post office can opt for treatment as an industrialized country at any time. 1999 Conv. § 48(7).

1994). Second, the 1999 Convention adopted a new “system harmonization” rule that limits the amount of mail that a developing country may send to an industrialized country using the base terminal dues rate to 110 percent of the amount of mail dispatched the year before. Third, the 1999 Convention retained the “revision mechanism” from the 1994 Convention according to which a destination post office may request that terminal dues be calculated using the formula  $1.00/\text{kg} + 0.140/\text{item}$  if it receives more than 150 tonnes of mail whose average weight per piece is less than 47.6 grams (i.e., greater than 21 items per kilogram).<sup>65</sup>

For mail sent to developing countries, the 1999 Convention likewise retained the terminal dues of the 1994 Convention, SDR 3.427/kg. Post offices in developing countries also may invoke the bulk mail terminal dues rate and the revision mechanism in the same manner as an industrialized country post office if they receive bulk mail or a large amount of lightweight mail.

One of most notable provisions of the terminal dues scheme adopted by the Beijing Congress was the introduction of an explicit tax on international mail sent from industrialized countries to developing countries. Under the 1999 Convention, industrialized country post offices are obliged to pay into a special fund a tax equal to 7.5 percent of the applicable terminal dues payment. This fund, the Quality of Service Fund, was established to finance developmental projects in developing countries. It will be administered by the International Bureau under the direction of a UPU committee of postal officials.<sup>66</sup> The concept of the Quality of Service Fund was developed hastily during preparations for the Beijing Congress. It was apparently first broached in a February 1999 meeting of the UPU’s Council of Administration. At this time, the annual revenue from the proposed tax was estimated to be SDR 20 million.<sup>67</sup> The Beijing Congress did not address potential legal and political difficulties posed by an intergovernmental organization taxing international commerce and delegating administration of the tax fund to parties who may have a direct or indirect interest in expenditures. Nor did the Beijing Congress consider possible adverse consequences of the tax on mail flows from industrialized countries to developing countries even though there seems no way to distinguish between such a tax and the practice, criticized in the 1998 report “The Need for Change”, of setting terminal dues levels above domestic postage levels in developing countries.

The Beijing Congress also amended the first sentence of paragraph 4 of the anti-remail provision of the Convention, renumbered as Article 43, as follows:

A member country shall not be bound to forward or deliver to the addressees letter-post items which senders post or cause to be posted in large quantities in a country other than the country where they reside ~~without receiving appropriate remuneration~~ if the amount of terminal dues to be received is lower than the sum that would have been received if the mail had been posted in the country where the senders reside.

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<sup>65</sup>1999 Conv. § 49. In addition, if a developing country sends unusually heavy mail to an industrialized country, the origin post office may request the benefit of the terminal dues formula,  $1.00/\text{kg} + 0.140/\text{item}$ , whenever the average weight per items exceeds 71.4 grams (less than 14 items per kilogram).

<sup>66</sup>1999 Conv. § 50; 1999 Beijing Congress Doc 37 Annex 1.

<sup>67</sup>1999 Beijing Congress Doc 37 Annex 1, pars 2-3, citing CA 1999 Doc 14b Annex 3.

According to the U.K. post office, author of this change, it was intended to prevent a destination post office from intercepting remail under circumstances in which it would receive the same terminal dues payment from the remailing post office and as from the post office where the sender resides. This may be considered mildly procompetitive in effect because it gives the sender greater choice. Nonetheless, this amendment appeared to demonstrate continuing support for the suppression of remail among UPU members.

At the signing of the 1999 Universal Postal Convention there was an unusual and interesting flurry of contentious declarations and reservations relating to terminal dues and remail provisions. Of these, the most controversial were filed by the United States. Thwarted in its efforts to promote basic reform of the Universal Postal Convention, the United States prepared both a declaration and a reservation. The declaration called attention to the need to bring terminal dues in line with the principles of the General Agreement on Trade in Services and to decrease reliance on the anti-remail provision of the Convention:

The United States of America supports the terminal dues system as adopted by the Beijing Congress, acknowledging it as a significant but incomplete measure that moves the system toward a sound economic basis for compensating postal administrations. It is the policy of the government of the United States of America to pursue vigorously further terminal dues reform, which will maintain a viable, efficient and universal international mail service, provide proper compensation to postal administrations for the delivery costs they incur, and review the need for article [43] restrictions. Further, the United States of America anticipates that such a system should be adopted no later than the year 2005, and substantially earlier for exchanges of mail between industrialized countries.<sup>68</sup>

In its reservation, the United States reserved “*the right to implement these terminal dues agreements in accordance with the provisions adopted in future negotiations involving the General Agreement on Trade in Services.*”<sup>69</sup> Unlike a declaration, a reservation is legally binding on those that ratify the Convention. The United States explained this reservation as follows:

. . . some member countries of the World Trade Organization are considering the inclusion of postal services and express delivery services in the new round of General Agreement on Trade in Services (GATS) negotiations that will be launched in Seattle in November 1999. Because of the growing blur between private delivery services and competitive services of the postal operators, the exact scope of the talks is still unknown. In the view of the United States of America, its negotiators participating in the Seattle meeting need flexibility to negotiate without being limited by the decisions on terminal dues taken at the Beijing Congress.

It is also the view of the United States, however, that the UPU must monitor closely developments in WTO and in GATS and take these developments into account as it continues with its own further examination of the terminal dues system. It believes that important steps have been taken at the Beijing Congress toward the introduction of a

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<sup>68</sup>Declarations Made on Signature of the Acts of the 1999 Beijing Congress, Declaration VII.

<sup>69</sup>1999 Conv., Prot Article XXIV(10).

more economically sound and cost-based terminal dues system. Nevertheless, further work is urgently needed to help developing countries participate in economically sound terminal dues arrangements and in eliminating market distortions and compensation inadequacies still inherent in the new UPU terminal dues structure.<sup>70</sup>

Despite its limited nature, the U.S. reservation provoked a strong reaction from other UPU members. Sixty countries— including nine Member States of the European Union—filed a “counter reservation” against the U.S. reservation<sup>71</sup> stating that they “reserve the right to fully apply the provisions approved by the Beijing Congress regarding terminal dues in their mutual relations with the countries having signed these reservations”.<sup>72</sup> These countries thus insisted that they will not accept any effort to bring terminal dues into conformance with GATS principles prior to the effective date of the next Universal Postal Convention, 1 January 2006.

In another sign of discontent, Germany filed a reservation to the terminal dues provisions for 2004 and 2005 stating that, if the Postal Operations Council failed to define the relationship between industrialized country terminal dues and domestic tariffs for 2004 and 2005, the Germany “reserves the right to define itself the percentages pursuant to article 48.3 for the years 2004 and 2005 in accordance with the principles laid down in that article”.<sup>73</sup> In response, the Netherlands, United Kingdom, and United States filed a counter reservation declaring that notwithstanding Germany’s reservation to “to define unilaterally the percentages pursuant to article 48.3 for the years 2004 and 2005 [they] reserve the right to continue applying terminal dues rates based upon the methodology and percentages for converting domestic tariffs into terminal dues rates in effect for the years 2001 to 2003”.<sup>74</sup>

The Beijing Congress ended with a distinct sense that at least some key members considered additional reforms in provisions relating to terminal dues and remain imperative. To address such issues, the Beijing Congress formed a special High Level Group, which is presently studying possible provisions for the 2004 Congress to be held in Abidjan.

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<sup>70</sup>Beijing Congress, Proposal 23.20.914.

<sup>71</sup>A counter reservation appears to trump a reservation. In the 1994 Convention, several countries filed a reservation to Article 25 that limited to the terminal dues specified for bulk mail the amount that they would pay to a destination post office for delivery of ABC remail posted in large quantities. Other countries then filed a counter reservation to this reservation. 1994 Conv. Prot. VII, VII.5. On consultation, the International Bureau upheld the legal validity of the counter reservation: “Legally, the situation of the countries quoted in article VII.5 in relation to those quoted in article VII.4 was the following: only Article 25, and not Article VII.4, was applicable to them. That meant that those countries were authorized to claim payment amounting to as much as 80% of the domestic rate applicable to equivalent items, or 0.14 SDR per item and 1 SDR per kilogramme. However, the administration of posting might refuse to pay the amount claimed”. CA 1996 Doc 2a at 26-28.

<sup>72</sup>1999 Conv., Prot Article XXIV(11).

<sup>73</sup>1999 Conv., Prot Article XXIV(7).

<sup>74</sup>1999 Conv., Prot Article XXIV(8).

## 10. SUMMARY

The history of terminal dues and remail restrictions in international postal law offers a remarkable story of economic policy that stretches back almost a century. As early as 1924, the Universal Postal Union's rejection of a terminal dues system aligned with domestic postage rates required adoption of restrictions on the free movement of mail and printing services among nations. As international commerce expanded in the 1980s, following a quickening of new technologies, post offices redoubled their efforts to prevent the use of remail to circumvent rules for the exchange of international mail prescribed by the UPU. These efforts were thwarted by two key governmental decisions. In 1986, the United States opened the market for substantial international remail services by permitting export of international remail. In 1992 and 1993, the European Commission, after long study, declared terminal dues arrangements and remail restrictions developed within the Remail Conference and the Universal Postal Union must yield to the principles of the European competition rules. In 1999, in the REIMS II terminal dues agreement in Europe and the Beijing Congress of the UPU, postal officials accepted the principle that terminal dues should be related to domestic postage. This was a major step, but not the final step, towards elimination of the distinctions between international and domestic mailer long perpetuated by international postal doctrines on terminal dues and remail.

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Many documents cited in this article are non-public; post offices and the Universal Postal Union do not generally make public documents relating to terminal dues and remail. Some documents and studies publicly available (even if unpublished) are listed below. The best sources for the acts of the UPU are the obscurely titled but well annotated versions published by the UPU's International Bureau. Annotated texts are published a year or two after the end of each UPU Congress. The "Universal Postal Convention" is an international convention that is revised every five years by the Congress. In the notes in this article, the Convention agreed in the 1979 Congress in Rio de Janeiro, effective 1 January 1981 through 31 December 1984, is referred to as "1979 Conv." and may be found in the annotated version of the acts published in 1981, listed below. The Constitution of the UPU is a permanent treaty, but it is amended at each Congress; hence, "1994 Const." refers to the Constitution as amended through the end of the Seoul Congress in 1994. It may be found in *Constitution, General Regulations [Etc.]* published in 1995. A similar approach is used to refer to other acts of Congress, such as the General Regulations ("Gen. Reg.") and Detailed Regulations of the Convention ("Conv. Det. Reg.").

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