

INTERNATIONAL REGULATION OF POSTAL SERVICES: UPU vs. WTO

RULES

Chapter two of the forthcoming book on "*The Liberalisation of Postal Services in the European Union*", European Monographs, Kuwer, 2001

By David Luff¹ ©

I. INTRODUCTION

The Universal Postal Union (UPU) Congress held in Beijing in 1999 fundamentally reformed the structure of international postal law. It implemented new provisions to adapt to changes led by liberalisation in the postal sector in several industrialised countries. It substantially modified tariffication in international postal relations, extended the scope of international postal law to postal parcels services and added new requirements of universal service.

Several countries, aware of the impact of these rules on international trade relations, declared on signature of the Acts of the Beijing Congress that they will apply them "*in accordance with*" or "*insofar as they are compatible with*" their obligations under the WTO, in particular the General Agreement on Trade in services (GATS)². UPU Members also recognised that, among other factors, the WTO's most-favoured-nation and national treatment principles will "*strongly*" influence international reimbursement schemes³. The Universal Postal Union has been instructed to further examine this issue and a project team has been established with this objective.

This chapter discusses the relevance of WTO rules in the international regulation of postal services as well as the manner in which they might interfere in the application of current rules. It will first recall the most relevant provisions adopted under the Universal Postal Union, in particular those that affect international commercial relations (II). It will then discuss the current impact of WTO rules on these provisions (III). Finally, it will discuss possible future regulation of international postal services, in light of the current negotiations at the WTO on the subject and of the proposals submitted by certain WTO members (IV).

II. RELEVANT RULES OF THE UNIVERSAL POSTAL UNION

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² See Declaration of the Members of the European Union, Beijing Congress, Doc. 86. Add. 7; Declaration of Australia, Beijing Congress, Doc. 86. Add. 2; Declaration of New-Zealand, Beijing Congress, Doc. 86. Add. 5; Reservation of the United States, Proposal for an Article XX bis, UPU internal document 23.20.914.

³ See Resolution C 46/ Beijing 1999.

This section will present a brief overview of the most relevant rules contained in the UPU Acts as revised at the 1999 Beijing Congress. The revised Acts entered into force on January 1st, 2001.

1. Constitution and its General Regulations⁴

The Constitution is the fundamental act containing the organic rules of the Postal Union⁵. The General Regulations contain the provisions relating to the application of the Constitution and the operation of the Union⁶. Both the Constitution and the General Regulations are international treaties which must be ratified or given national approval by the competent authorities of each member country⁷.

Provisions of the Constitution and the General Regulations do not themselves regulate the inward or outward flow of mail between the Members of the Union and they are, therefore, not directly relevant for the purpose of our analysis. For the sake of clarity, however, it is useful to briefly mention the bodies of the Union whose activities might be relevant in this regard.

Pursuant to the Constitution, four entities are in charge of the operation of the Union: the Congress, the Council of Administration, the Postal Operation Council, and the International Bureau⁸.

1.1 The Congress

The Congress is the supreme authority of the Union. It is an intergovernmental conference which usually meets every five years.

Only the Congress has competence to modify the constitution⁹. The last Congress was held in Beijing in 1999, the Acts of which serve as the basis of our analysis. The next Congress is scheduled in Abidjan, Ivory Coast in 2004.

1.2 The Council of Administration

The Council of Administration is the executive entity of the UPU. Its role is to oversee all Union activities and to study questions regarding government policies. In this capacity, the Council of Administration created three project teams concerning respectively "*Universal Postal Service*", "*Relations with the WTO*" and "*Terminal Dues*".¹⁰

⁴ See UPU Manual: "*Constitution, General Regulations, Resolutions and Decisions, Rules of Procedure, Legal Status of the UPU, With The Commentary of the International Bureau of the UPU*", available on the UPU's web-site (www.upu.int/acts/en/acts.shtml).

⁵ Art. 22.1 of the Constitution.

⁶ Art. 22.2 of the Constitution.

⁷ Art.25.3 and 25.4 of the Constitution.

⁸ Art. 13 of the Constitution.

⁹ Art. 14 and 15 of the Constitution; Art. 101 of the General Regulations.

¹⁰ Art. 102.6 of the General Regulations.

The Council of Administration is also competent to approve proposals from the Postal Operation Council for the adoption of regulations or new procedures until the next Congress and is competent to resolve urgent affairs¹¹.

1.3 The Postal Operation Council

The Postal Operation Council (POC) is the consultative committee for postal services¹². Its meetings take place at postal administrations level¹³.

The POC undertakes technical studies and exchange information of all kinds. In particular, it received competence to study questions with major financial repercussions, such as charges, terminal use, transit charges, airmail conveyance rates, parcel-post rates, and remail¹⁴.

It is also the body responsible to draw up or amend the rules contained in the Regulations implementing the Universal Postal Convention¹⁵. As discussed below, these are the more directly relevant provisions for the supply of postal services themselves.

The role of the POC in commercial questions is obvious and has been considered as prominent since the 1994 Seoul Congress. Its general objective is to help postal services to modernize and upgrade their postal products¹⁶.

1.4 The International Bureau

The International Bureau is the secretariat of the UPU¹⁷. It also acts as a clearing house for the settlement of accounts between postal administrations in relation to the international charges for the cross border exchange of postal items¹⁸. The Beijing Congress decided that the clearing house facility should also be provided to other entities involved in postal services such as airlines.

Albeit the International Bureau does not intervene in relations between postal administrations and their customers, it may be called upon to give its opinion on the interpretation of the Acts of the Union or be appointed as sole arbitrator in disputes between two administrations¹⁹.

1.5 Status of the UPU and cooperation with other international organisations

The UPU is a specialized agency of the United Nations. In this capacity, it has concluded several cooperation agreements with other specialized agencies such as

¹¹ See Art. 17 of the Constitution; Art. 102 of the General Regulations.

¹² Art. 18 of the Constitution.

¹³ See Art. 104 of the General Regulations.

¹⁴ Art. 104.9.1 of the General Regulations.

¹⁵ Art. 22.5 and 29.3 of the Constitution.

¹⁶ See Art. 104 and 105 of the General Regulations.

¹⁷ Art. 20 of the Constitution. See Art. 110.2 of the General Regulations.

¹⁸ Art. 114.4 of the General Regulations.

¹⁹ See Art. 32 of the Constitution; Art. 129 of the General Regulations.

Unesco, the World Health Organization, the International Telecommunication Union, the International Labour Organisation, etc... but surprisingly not with the WTO, despite a draft agreement has been circulating among UPU Members for several years²⁰.

2. Universal Postal Convention and its Regulations²¹

The Universal Postal Convention and its Regulations contain the rules applicable to the supply of the international postal service, in particular the provisions concerning letter-post and postal parcels services. Postal payment services are covered by a separate agreement. While the Convention and its Regulations apply to all UPU Members²², the Postal Payment Agreement only concerns the countries who accepted to be bound by it²³.

The Universal Postal Convention is an international treaty and contains the rules which are intergovernmental in nature and which set out the fundamental provisions relating to the supply of the postal services concerned²⁴.

The Regulations taken on the basis of the Universal Postal Convention have been recasted following the Beijing Congress. They are now two and are, respectively, the Letter-Post Regulation and the Parcel-Post Regulation. Since the 1994 Seoul Congress, they have been enacted and amended by the Postal Operations Council²⁵. They are thus agreements concluded at postal administration level and regulate all matters which are not so fundamental that they require Congress approval. They are nevertheless binding on all UPU Members²⁶.

The most relevant provisions to commercial relations contained in the Universal Postal Convention (the "UPU Convention") and its Regulations are the following :

2.1 Universal service

The Beijing Congress inserted in the UPU Convention a new Article 1 obliging all UPU members to provide a universal postal service. Pursuant to this provision, all users or customers located within members of the UPU must have a right to benefit from quality basic postal service at all points in the territory at an affordable price. Furthermore, UPU Members must ensure that the offers of postal services and quality standards will be achieved by operators responsible for providing the universal postal service²⁷.

²⁰ The official Commentary of Article 10 of the Constitution nevertheless mentions the WTO among the organizations having related interest and activities to the UPU (see UPU Manual: "*Constitution, ...*", above, note 3, p. 53).

²¹ See UPU "*Letter Post Manual*" and "*Parcel Post Manual*", available in the UPU's web-site (see note 3).

²² Art. 22.3 of the Constitution.

²³ Art. 22.4 of the Constitution.

²⁴ See Official Commentary to Article 22.3 of the Constitution, note 3, p. 61.

²⁵ Art. 22.5 of the Constitution. For the composition of the Postal Operation Council, see Art. 104.3 of the General Regulations.

²⁶ Art. 22.3 of the Constitution.

²⁷ Art. 1.1 to 1.3 of the UPU Convention.

This requirement is a response to the liberalisation movement in the postal sector. It is generally recognised that liberalization and globalisation of services encourage postal administrations to adopt the logic of the market and to organize themselves along commercial lines. The universal service provision's declared intention is to prohibit governments from renouncing to the less profitable portions of the market by focusing only in zones of higher urban concentration. It is considered to be justified by the fundamental objective of the Union as set forth in its Constitution, i.e.²⁸.

"to develop social, cultural and commercial communications between all people throughout the single postal territory by the efficient operation of postal services described in the Acts".

2.2 Access to domestic basic services

Article 10 of the Convention obliges postal administrations to provide access of international mail to its domestic basic service. In other words, postal administrations must accept, convey and deliver all letter-post items and, to a certain extent, postal parcels which are entrusted to them²⁹.

Article 10 also provides for a classification of postal services other than postal financial services.

Concerning letter-post items, UPU Members can choose between two alternative classifications and must handle all items falling within one of the selected categories³⁰. Thus international mail can be classified

- according to the speed of treatment: priority items, i.e. items conveyed by the quickest routes, and non priority items³¹, or
- according to the kind of mail: letters and postcards (LC), printed papers, literature for the blind and small paquets (AO)³² or special bags (handbags containing printed papers for the same addressee at the same address)³³.

Concerning parcel-post items, dispatch of them is in principle obligatory³⁴, except for those whose individual weight exceeds 20 kg³⁵. Handling and delivery of parcels must be done as soon as possible in accordance with the laws of the destination country³⁶.

²⁸ See the official commentary to Article 1 of the Convention, UPU, "*Letter Post Manual*", p. 38.

²⁹ The basic service is part of the universal service domestically, but does not impose a full geographical coverage for the collection of mail. It is mainly an obligation imposed on postal administrations of the countries of transit or of destination.

³⁰ Art. 10.2 of the UPU Convention and its official commentary, "*Letter-Post Manual*", p. 54.

³¹ Art. 10.3.1 and 10.3.2 of the UPU Convention.

³² Art. 10.4 of the UPU Convention.

³³ Art. 10.5 of the UPU Convention.

³⁴ Art. 10.1 of the UPU Convention.

³⁵ Art. 10.6 of the UPU Convention

³⁶ Art. 10.7 of the UPU Convention

The Convention and the Regulations further specify the specific conditions for acceptance of mail and parcels (such as security, presentation of the envelopes, proper packing, etc) and set standards of size, weights, limitations as to the contents of envelopes or bags, their basic characteristics, etc³⁷.

Note should be made of Article 42 of the Convention, which instructs postal administrations to fix a quality service target for the handling of mail addressed to or sent from their country. This provision specifies that quality service targets cannot be less favourable than those applied to comparable items in their domestic service³⁸.

Discrimination as to the quality of the service between national postal services and international postal services is thus prohibited. However, considering that bilateral agreements between national postal administrations are authorised and encouraged³⁹, discrimination against mail originating in third countries not parties to these agreements seems still possible.

Note should also be made of the stringent transparency requirements concerning quality targets contained in the Convention.⁴⁰

2.3 *Freedom of transit*

Article 2 of the Convention establishes a general principle of freedom of transit of closed mails and a *découvert* letter-post items. This implies the obligation of every UPU Member to forward all mail passed to it by the postal administration of another Member to a third country using the quickest routes and the most secure means⁴¹.

Exceptions of course are authorised for, among others, mail containing perishable and biological substances or radioactive substances⁴². Furthermore, ensuring transit of postal parcels by land and by sea is not required for countries which do not operate postal parcel services⁴³.

In all other cases, provision is made that if the intermediary country fails to observe the provisions regarding freedom of transit, the other UPU Members may discontinue their postal service with it⁴⁴.

The official commentary to Article 2 of the Convention specifies that the freedom of transit does not mean, however, that UPU Members must open their territory to transit organised by another UPU Member⁴⁵.

³⁷ See Art. 201 to 207 and 209 of the Letter-Post Regulation.

³⁸ Art. 42.1 of the UPU Convention.

³⁹ See Recommendation C 33/Washington 1989 and Recommendation C 85/Seoul 1994.

⁴⁰ Art. 42.2 to 42.7 of the UPU Convention.

⁴¹ Art. 2.1 of the UPU Convention.

⁴² Art. 2.2 of the UPU Convention.

⁴³ Art. 2.3 and 2.4 of the UPU Convention.

⁴⁴ Art. 2.5 of the UPU Convention; Art. 102 of the Letter-Post Regulation.

⁴⁵ See the official Commentary to Article 2 of the UPU Convention, UPU, "*Letter Post Manual*", p. 39.

2.4 Charges for postal services

Pursuant to Article 7 of the Convention, the charges for international postal services must be set by the national postal administrations and must in principle be related to the cost of providing these services⁴⁶. Each postal administration normally retains the charges which it has collected⁴⁷ and no additional charges than those provided for in the UPU Acts can be imposed on customers⁴⁸.

Pursuant to Article 11.1. of the Convention, the charges for each mail are defined by the postal administration of the country of origin. The costs referred to in Article 7 are the costs of collecting and handling the mail in the country of origin, transportation costs and the costs of delivery in the country of destination. The latter should in principle be covered by terminal dues paid by the postal administration of the countries of origin to the postal administrations of destination countries⁴⁹. This is, however, seldom the case and generated several difficulties for postal administrations (see below and next chapter).

Charges imposed for international mail cannot be lower than those imposed for domestic mail presenting the same characteristics⁵⁰. The Convention and its Resolutions contain guidelines in relation to charges which can be imposed⁵¹. These charges can be surpassed if this is to recover the costs of the services or to align international tariffs with domestic ones⁵².

Under Article 8 of the Convention exemption from postal charges is allowed for mail between postal administrations, mail to prisoners of war and civilian internees, literature for the blind, etc...

Note should be made of article 4 of the Convention indicating that a postal administration may create a new service not explicitly provided for in the Acts of the Union and that the charges for this new service have to be determined "*having regard to the expenses of operating the service*".

⁴⁶ Article 7.1 of the UPU Convention.

⁴⁷ Article 7.6 of the UPU Convention. In this regard, Article 6 of the UPU Convention confers a monopoly to national postal administrations to issue postage stamps attesting payment of postage. Concerning stamps, see Articles 305 to 310 of the "Letter-Post Regulation".

⁴⁸ Article 7.5 of the UPU Convention.

⁴⁹ Idem.

⁵⁰ Article 7.2 of the UPU Convention. Another manner to express this notion is that dumping of postal services is prohibited.

⁵¹ Guidelines for postal charges are given in Articles 301 and 302 of the Letter-Post Regulation. Postal charges can be imposed according to the weight and priority of the items, or according to the content of the mail (such as letter and postcards, printed papers or paquets). Conditions to collect additional charges for priority post items, for air conveyance of mail or for non-standardised items are set forth in Article 11 of the Convention and Article 302 of the Letter-Post Regulation. Other special charges are provided for in Article 12 of the Convention and Article 304 of the Letter-Post Regulation. Finally, for further details of the conditions for payment and dispatching of special postal services such as registered items, insured items, delivery to the addressee person, fragile parcels, etc, see Articles 13 to 22 of the UPU Convention and Articles 401 to 411 of the Regulations.

⁵² Article 7.3 of the UPU Convention.

2.5 Transit charges and terminal dues

2.5.1 *Letter-post items*

Articles 46 to 52 of the Convention (Section H) contain the provisions implementing the transit charges and terminal dues systems. Their objective is to ensure remuneration of the postal administrations of the countries through which mail transits or in which the mail must be delivered. Such remuneration must be settled between postal administrations, in accordance with the criteria and conditions contained in the UPU Convention and its Regulations.

These systems are the consequence of the obligation of transit countries and destination countries to provide access to their domestic services. They also derive from the fact that customer charges are retained by the postal administration of the countries of origin only, albeit their costs are generally lower than those of transit and delivery costs (see next chapter).

a) Transit charges

Article 46 of the UPU Convention confirms the right of transit countries to receive payment of transit charges, while Articles 1001 and 1002 of the Letter-Post regulation specify the conditions for their imposition, as well as the proposed scales, based on the distance travelled by land or by sea.

b) Terminal dues

Terminal dues are given to postal administrations of the countries of destination pursuant to Article 47.1 of the Convention⁵³. Several conditions and obligations are set forth in this respect:

1° Transparency obligation

Article 47.4.1 specifies that postal administrations of the country of destination must

"make available to the other administrations all the rates, terms and conditions offered in their respective domestic services, on conditions identical to those proposed to [their] national customers".

The underlining idea is to enable postal administrations of the countries of origin to check whether terminal dues can reasonably be considered to be in line with costs in the destination country. It also facilitates the application of the national treatment provision below.

⁵³ It should be noted that, pursuant to Article 47.7, any administration may waive all or in part the payment provided for under the terminal dues system.

2° Access price to the domestic service: obligation of industrialised countries to provide national treatment

Administrations of the countries of origin have the right to request to the administration of an industrialized country of destination to offer them the same conditions that are offered to that industrialised country's national customers, for equivalent items⁵⁴.

Developing countries are not subject to the same obligation. However, when a developing country states that it authorizes access on the conditions offered in its domestic system, that authorisation must apply to all foreign administrations on a non-discriminatory basis⁵⁵.

3° Most-favoured-nation treatment concerning bulk mail

Article 47.5 of the Convention specifies that the terminal dues rates used for bulk mail cannot be higher "*than the most favourable rates applied by administrations of destination under bilateral or multilateral agreements concerning terminal dues*".

4° Preferential treatment under bilateral or multilateral agreements

Most-favoured-nation treatment, however, is not granted in relation to terminal dues imposed for other mail items. On the contrary, Article 47.8 of the Convention provides that national administrations may, by bilateral or multilateral agreements, apply other payment systems than those provided for in the Convention for the settlement of terminal dues account. So far, however, these agreements have implemented higher terminal dues than those set forth in the Convention, with the objective to fully recover the costs arising for the countries of destination. This is the case, for instance, of the REIMS II Agreement concluded between 14 of the 15 postal administrations of the EU, together with the Norwegian, Swiss and Icelandic postal administrations.

5° Applicable rates

A new feature of the terminal dues' system adopted by the Beijing Congress consists in the application of different payment schemes depending on whether the senders or addressees are industrialised or developing countries⁵⁶.

As discussed below and in the next chapter, the inefficient manner in which terminal dues have been determined so far and the differences existing between the terminal dues charged by different national postal administrations lead to the explosion of the remail practice.

⁵⁴ Art. 47.4.2 of the UPU Convention.

⁵⁵ Art. 47.4.3 of the UPU Convention.

⁵⁶ The methods of calculation of the terminal dues rates and other provisions implementing the rules here above are set forth in articles 1007 to 1015 of the Letter-Post Regulation. Furthermore, it should be noted that Article 52 contains the rules enabling, on certain very specific occasions, exemptions from transit charges and terminal dues. Finally, for a list of industrialised countries and developing countries, see Resolution C 32/Beijing 1999.

- Exchanges between industrialised countries

Concerning exchanges between industrialised countries, Article 48 of the Convention stipulates that payment for letter-post items, including bulk mail, but excluding M bags⁵⁷, must be established on the basis of rates per item and per kilogram, reflecting the handling costs in the country of destination. They must also be in relation with domestic tariffs⁵⁸.

For the years 2001 to 2003, the Convention sets, as a guideline, that rates should be equivalent to 60% of the charge for a 20-gramme letter in the domestic service and not be higher than certain thresholds gradually increasing during the period⁵⁹. After 2003, the rates must be gradually linked exclusively with actual costs and domestic tariffs and be determined by the Postal Operation Council individually for each country⁶⁰.

Article 48.7 specifies that the provisions applicable between industrialized countries can apply to any developing country which declares that it wishes to abide by them and would like to be considered as an industrialized country for the purpose of defining the applicable terminal dues.

- Mail flows from developing countries to industrialised countries

Article 49 of the Convention sets forth the terminal dues applicable to mail flows from developing countries to industrialized countries. Generally speaking, tariffs are lower in this situation than those that are applicable in exchanges between industrialised countries only.

In principle, the tariff for all letter-post items, excluding bulk mail⁶¹ and M Bags⁶², is uniformly set at 3.427 SDR per kilogram⁶³.

Article 49.2. implements a revision mechanism according to which a postal administration from a developing country which dispatches a mail flow of over 150 tons a year, may request the rate to be revised if the average number of items per kilogram is very small (less than 14 items)⁶⁴.

The administration of destination which receives a similar mail flow may also request a revision if the average number of items per kilogram is very large (more

⁵⁷ Special rules are applicable to M bags (Art. 48.5 of the UPU Convention).

⁵⁸ Art. 48.1 of the UPU Convention.

⁵⁹ Art. 48.2 of the UPU Convention. For instance, in 2001 the rates cannot be lower than 0.158 SDR per item and 1.684 SDR per kilogram and in 2003, they cannot be lower than 0.215 SDR per item and 1.684 SDR per kilogram.

⁶⁰ See Art. 48.3 of the UPU Convention.

⁶¹ Terminal dues for bulk mail are the same as those charged in relations between industrialised countries (Art. 49.4 of the UPU Convention.). This provision is clearly intended to constitute a deterrent to remail (see below).

⁶² See Art. 49.1.1.2 of the UPU Convention.

⁶³ Art. 49.1 of the UPU Convention.

⁶⁴ Art. 49.2.1 of the UPU Convention.

than 21 items)⁶⁵. If the tonnage received surpasses another threshold specifically established for the country concerned⁶⁶, it may charge to the surplus mail the (generally higher) terminal dues applicable to other industrialised countries, to the extent it did not apply the revision mechanism⁶⁷. This provision is intended to discourage remail from developing countries (see below).

- Mail flows from industrialised countries to developing countries and exchanges between developing countries

Concerning mail flows from industrialized countries to developing countries and exchanges between developing countries, Articles 50 and 51 of the Convention establish a tariff similar to the one of the previous situation: for all mail items, excluding bulk mail⁶⁸ and M Bags⁶⁹, the terminal dues are in principle uniformly set at 3.427 SDR per kilogram⁷⁰.

In addition, industrialised countries must pay a tax of 7.5 % to a trust fund *"to finance improving quality of service in developing countries"*⁷¹. This obligation does not apply to developing countries sending mail to other developing countries.

A revision mechanism is also put in place, but only destination countries can use it if they receive a mail flow of over 150 tons a year and if the average number of items per kilogram is very large (more than 21 items)⁷². In practice, this means that only developing countries can benefit from the revision mechanism in order to increase the terminal dues they can charge.

4° Air conveyance dues

Pursuant to Article 53 of the Convention, the air conveyance dues must normally be borne by the administration of the country of origin of the mail or by the administration which forwards the letter-post items to another administration.

Furthermore, postal administration of countries of destination are entitled to reimbursement of domestic air conveyance of international mail if the weighted average distance covered by all mail received is more than 300 kilometres. The dues must be uniform for all priority and airmail coming from abroad, but agreements that no charge should be imposed are allowed⁷³. In addition, if the terminal dues are based on costs or on domestic rates, no additional reimbursement for internal air conveyance can be made⁷⁴.

⁶⁵ Art. 49.2.2 of the UPU Convention.

⁶⁶ See Art. 1010 of the Letter-Post Regulation.

⁶⁷ Art. 49.3 of the UPU Convention.

⁶⁸ Terminal dues for bulk mail are determined in Art. 50.3 and 51.3 of the UPU Convention.

⁶⁹ See Art. 50.1.2 and 51.1.2 of the UPU Convention.

⁷⁰ Art. 50.1 and 51.1 of the UPU Convention.

⁷¹ Art. 50.1.1.1 of the UPU Convention.

⁷² Art. 50.2 and 51.2 of the UPU Convention.

⁷³ Art. 53.3 of the UPU Convention.

⁷⁴ Art. 53.4 of the UPU Convention.

2.5.2 Parcel mail

Parcel mail was added in the scope of the UPU at the Beijing Congress in 1999.

Articles 56 to 58 of the Convention set forth the right of postal administrations of transit and destination countries to receive payment for the services they provide in relation to the cross border exchange of postal parcels. Contrary to letter post items, these provisions do not provide for differentiated treatment depending on the development stage of the countries concerned.

a) Transit charges

Transit charges are divided into land and sea transit charges.

Land transit rates are defined in Article 57 of the Convention according to the distance step applicable⁷⁵. For parcel transit à découvert, postal administrations may charge a single rate per item⁷⁶. Of course, no transit charge can be applied if the administration of the transit country does not participate in the transit operations⁷⁷.

Sea transit charges are defined in Article 58 of the Convention and are also defined according to the distance step applicable⁷⁸.

b) Terminal dues

Article 56 indicates that terminal dues must be calculated by combining guideline rates per parcel and guideline rates per kilogram.⁷⁹ It also prescribes that inward land rates must be brought into relation with the costs of the services. It does not differentiate between industrialised and developing countries.

The Beijing Congress expressly instructed the Postal Operation Council to consider a way of discouraging any possible excess with regard to inward land rates⁸⁰. Such instruction is clearly a reaction to the opening of the parcels market to competition and is intended to avoid that national postal administrations charge uncompetitive and excessive prices.

Article 59 of the UPU Convention allows a destination country to claim a charge for air conveyance of parcel-post items and Articles 714 and 715 of the Parcel-Post Regulation define the required conditions in this respect and the formula for the calculation of the dues.

⁷⁵ See Articles 705 and 706 of the Parcel-Post Regulation.

⁷⁶ Art. 57.2 of the UPU Convention.

⁷⁷ Art. 57.1, *a contrario*, of the UPU Convention; Art. 706.3 of the Parcel-Post Regulation. See Art. 39.3 of the UPU Convention.

⁷⁸ See Art. 707 to 709 of the Parcel-Post Regulation.

⁷⁹ These rates are laid down in Art. 701 to 704 of the Parcel-Post Regulation.

⁸⁰ Resolution C 90, Beijing Congress 1999.

2.6 Remail

Remail is a system whereby cross-border mail is collected in one country, taken outside to another country subject to lower charges and then posted there⁸¹.

Remail is due to the difference existing between tariffs and terminal dues applicable in various countries. As explained above, terminal dues between two industrialised countries are higher than those applicable in mail sent from a developing country to an industrialised one. This has an obvious impact on the final tariffs charged to customers. In some countries, domestic tariffs are even higher than those charged to incoming mail originating from abroad. Therefore, there is an obvious commercial benefit for private operators and for competing post offices to collect the mail in an expensive country, convey it in bulk to a country where the posting charges are lower and then send it from there.

Such practice clearly takes advantage of the low terminal dues imposed on developing countries pursuant to the Convention. It also results from the higher terminal dues negotiated in the framework of the "REIMS II" Agreement (see above). Rates under this agreement are even higher than those applicable pursuant to the Convention in exchanges between industrialised countries and explain that remail practices between industrialised countries themselves are taking place.

Article 43 of the Convention contains the so-called "anti-remail" provisions. It enables postal administrations of the countries of destination confronted with remail to demand payment of additional postal charges or otherwise return the letters handed over by the State where more favourable rate conditions apply⁸².

⁸¹ When the final destination country is the one where the mail was initially collected, the remail practice is referred to as "ABA" remail. When the destination country is the one where the mail is posted, it is referred to as "ABB" remail and when the destination country is a third one, reference is made to ABC remail. A difference is also established between physical remail, whereby the first transportation takes place by using classical transportation means, and non-physical remail, whereby the first conveyance of the mail to the country where it must be posted is done through electronic means.

⁸² Article 43 is drafted as follows:

"Posting abroad of letter-post items

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

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

3° The administration of destination may claim from the sender and, failing this, from the administration of posting, payment of the internal rates. If neither the sender, nor the administration of posting agrees to pay these rates between a time-limit set by the administration of destination, the latter 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 own legislation.

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 where they reside 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. The administration of destination may 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% of the domestic tariff for equivalent items, or 0.14 SDR per item plus 1 SDR per kilogram. If the administration of posting does not agree to pay the amount claimed within the time limit set by the administration of

2.7 Non-admissions of items

Article 25 of the convention specifies that items not fulfilling the conditions laid down in the Convention and its Regulations cannot be admitted in the country of destination⁸³.

It also describes the items which cannot be inserted in mail and whose admission can thus be prohibited, subject to certain other conditions. These are for instance narcotics, explosive substances, certain biological or radioactive substances, life animals, and, generally speaking all dangerous items⁸⁴. Also coins, banknotes, currency notes, securities, jewellery and generally speaking valuable goods cannot be inserted in mail⁸⁵.

Conversely, Article 5 also contains a list of items which must be admitted, such as, bees, leeches and silkworms or parasite and destroyers of noxious insects (!). Concerning parcels, all documents and correspondence of any kind exchanged between the sender and the addressee or persons living with them must be admitted⁸⁶.

Finally, note should be made that several countries reserved their right not to admit items which are subject to a customs duty⁸⁷.

2.8 Customs

Pursuant to Article 31.1, *"the postal administration of the countries of origin and destination shall be authorized to submit items to custom control, according to the legislation of those countries."*⁸⁸ⁿ

Articles 31.2 to 33 of the UPU Convention also authorise UPU Members and their postal administrations to charge to customers a customs-clearance fee based on actual costs. Maximum charges in this regard are specified in Article 602 of the Letter-Post Regulation..

The Conventions and the Regulations contain several other provisions relating, for instance to the conditions under which postal administration are liable in case of loss or damage to the items they were supposed to convey⁸⁹, issues relating to security,

destination, the administration of destination may either return the item to the administration of posting and shall be entitled to claim reimbursement of the redirection costs, or handle them in accordance with its own legislation."

⁸³ Art. 25.1 of the UPU Convention.

⁸⁴ Art. 25.2 of the UPU Convention. See also Art. 300 bis of the Parcel-Post Regulation.

⁸⁵ Art. 25.5 of the UPU Convention.

⁸⁶ Art. 25.3 of the UPU Convention.

⁸⁷ Art. XIV of the Protocols to the UPU Convention. The Protocols contain reservations of UPU Members in relation to the provisions of the Convention.

⁸⁸ Article 601 of the Letter-Post Regulation provides that items which must be submitted to customs control must bear on the front the CN 22 adhesive label. This is for instance the label affixed on shipments we usually receive when we order books.

⁸⁹ For instance, pursuant to Article 35(3) of the UPU Convention, postal administrations do not accept liability for customs declarations or for any customs authorities's decisions.

redirection of mail, inquiries etc. However, considering that these provisions do not directly regulate the commercial aspect of postal services, it would be useless to describe them in the context of this chapter.

3. Postal payment agreement

The Postal payment agreement is an international treaty which does not belong to the obligatory set of Acts binding on all UPU members. It is only obligatory for those who ratified it as such⁹⁰.

Its purpose is to regulate "*the provision of services for the transfer of postal funds*"⁹¹. It contains provisions describing services such as money orders, transfers, post cheques, the POSTNET network of cash dispensers, etc. It rules on the depositing, the transmission and the treatment of orders. The services it covers are similar to those offered by banks and generally qualify as financial services.

Considering that this category of services does not constitute the direct object of the book, this chapter will thus not address them.

4. Resolutions, decisions, recommendations and formal opinions

Several resolutions, decisions and recommendations were adopted by UPU members in the context of the Beijing Congress. Where relevant, these have been mentioned under the title to which they relate.

However, particular note should be made of the following resolutions:

- Resolution C 12/1999 provides for the reconstitution of the WCO-UPU Contact Committee, in order to pursue efforts to speed up and simplify customs treatment of postal items⁹².

- Resolution C 46/1999 concerns terminal dues. It states that "*the problems associated with the remuneration for postal services rendered by postal administrations of destination are among the major concerns of the Union*". It also notes that the physical mail share of the market (by opposition to non-physical mail) will decline by 26% and that the postal share of the physical mail market will decline by 5.7% by 2005. Therefore, it considers that the improvement of the quality of services is critical to maintaining this market share and to provide a reliable universal service. It furthermore reiterates the principle that terminal dues should be based on economic criteria which should take into account the delivery costs linked to the number of items delivered, the cost of improving infrastructures in postal administrations of developing countries, the affordability of universal service, the economic efficiency of the delivery services available and the operating costs of maintaining the statistical and accounting systems.

⁹⁰ Art. 22.4 of the Constitution.

⁹¹ Art. 1.1 of the Agreement.

⁹² See also Resolution C 19/Beijing 1999 concerning a study on the CN 22 and CN 33 customs declaration forms; as well as Resolutions C 53/ Beijing 1999 and C 74/ Beijing 1999.

Resolution C 46/1999 also recognises that the "*WTO's most-favoured-nation and national treatment principles and other competition law will strongly influence the development of terminal dues systems and make it difficult to enforce provisions against re-mail*". It therefore instructs the Council of Administration, in liaison with the Postal Operation Council task force, to undertake all necessary studies in this regard. As already mentioned, two project teams established within the POC deal, respectively, with "*Relations with the WTO*" and with "*Terminal Dues*".

- Resolution C 49/1999 concerns the application of the anti-remail provisions contained in Article 43 of the Convention. It recognises the growing importance of non physical remail due to technological developments. Wishing to "*eliminate any uncertainty which might jeopardise the continuity of international postal exchanges*", it commissions to the Council of Administration further studies in this respect.

- Resolution C 82/99 concerns international express mail. It acknowledges that express/value added letters are "*expanding areas for international mail services*". It promotes a new express postal service enabling to trace the mail and to obtain confirmation of its delivery in optimal conditions. The striking feature of this resolution is that it is drafted as a business paper describing the service, the market and the existing competition.

In summary, the current rules of the UPU continue to reflect a transition system which goes from the exclusive provision of postal services by State Monopolies to both domestic and international liberalised services. It thus maintains a system of terminal dues system, although it adapts it to the requirements of industrialised countries that it should be more economically efficient⁹³. It also maintains anti-competitive provisions, such as the anti-remail one, which is precisely due, among others, to tariff imbalances generated by the coexistence of different terminal dues mechanisms⁹⁴. Transition meaning a next phase, it remains to be seen how future UPU rules will be developed. Other norms of international law, in particular the rules of the WTO, which have not been seriously considered at the Beijing Congress, will have to play an important role in this regard.

II. CURRENT IMPACT OF WTO RULES ON INTERNATIONAL POSTAL LAW

This section will be organized according to the method of analysis prevailing under WTO agreements and not according to the sequence of UPU Acts presented above, in order to facilitate further analysis under WTO law. It is indeed not the intention of the author to provide a thorough and detailed analysis of the compatibility of each provision of UPU Acts, or their application, with the WTO agreements. This article is merely intended to introduce the main issues arising under the WTO in the international trade of postal services.

⁹³ See U.S. Reservation to the Acts signed at the Beijing Congress (Congrès-Doc. 86 Add.6).

⁹⁴ See Judgment of the European Court of Justice, 17 May 2001, "International Express Carriers Conference (IECC) v. Commission of the European Communities, Deutsche Post AG, United Kingdom of Great Britain and Northern Ireland, The Post Office and La Poste", Case C-450, [2001] ECR, para. 6.

1. Trade in goods v. trade in services

Assessing the impact of WTO law on international postal services requires a determination of which agreements are applicable. In this connection a difference must be made between trade in goods and trade in services. In the postal sector, both are relevant.

Trade in goods is affected when discriminatory or abusive provisions or the conduct of a supplier of postal services create an obstacle to the trade of goods which are imported using the postal system. For instance, in the WTO dispute settlement case “*Canada - certain measures concerning periodicals*”, the Panel considered that discriminatory tariffs applied by the Canadian Postal Administration on magazines consisted in a violation by Canada of Article III.4 of the GATT and thus unduly restricted trade in those magazines⁹⁵.

Trade in services might also be affected in so far as the provision of postal services is itself a service.

2. Trade in goods

As already mentioned, the goods concerned are those which are conveyed using the postal system. These may be letters or postcards, newspapers, magazines or all items contained in postal parcels. With the growth of home-shopping and internet-shopping, increasingly goods are delivered by post.

The most relevant agreement concerning trade in goods is the GATT. Its basic principles are :

- (i) A tariff discipline varying according to each countries' schedules of commitments (Article II of the GATT);
- (ii) the prohibition of non-tariff restrictions to imports or exports by any Member (Article XI:1 of the GATT);
- (iii) the obligation of non-discrimination between goods of different origins, called the most-favoured-nation obligation (Article I of the GATT);
- (iv) the obligation of non-discrimination between goods of domestic origin and foreign goods called the national treatment obligation (Article III of the GATT).

All other provisions of the GATT and the other agreements concerning trade in goods, although being extremely detailed and important in practice, are mainly modalities or exceptions to the above-mentioned basic principles.

Assessing the impact of GATT on international postal law can be done at two levels: first, one could assess the compatibility of the UPU Acts themselves with the GATT.

⁹⁵ See WTO Panel Report, "Canada - Certain Measures Concerning Periodicals", WT/DS31/R, 14 March 1997, para. 5.34 to 5.39.

Secondly, the assessment can also be done at the level of measures of postal administrations.

2.1 Compatibility of UPU Acts with the GATT

As indicated above, UPU Acts are clearly governmental measures as they have been ratified by and are binding on UPU Members. They can thus be assessed under the WTO as such⁹⁶.

2.1.1 *Most-favoured-nation-treatment and national treatment*

Both the MFN and national treatment obligations prohibit discrimination by States against products according to their origin. Therefore, to the extent the UPU Acts are discriminatory, they could be considered as contrary to one of those rules.

One could argue that these Acts must be implemented by States and their postal administrations before they have any material effect and, that, consequently, they should not be considered themselves as discriminatory.

However, under the theory of mandatory v. discretionary legislation, UPU Acts can themselves be considered as discriminatory if they mandatorily require the States and their postal administrations to act in a discriminatory manner. It is only when the executive branches have the possibility to apply them in a non-discriminatory manner that they would be "discretionary" and could thus not be considered as contrary to WTO rules⁹⁷.

a) Non mandatory provisions

UPU Acts authorise and encourage postal administrations to grant preferential treatment to countries with which bilateral agreements have been concluded concerning quality services targets⁹⁸ and air-conveyance dues⁹⁹.

⁹⁶ For the applicability of WTO rules to international agreements entered into by WTO Members, see, among others, the WTO Panel Report, "Turkey - Restrictions on Imports of Textile and Clothing Products", WT/DS34/R, 31 May 1999, para. 9.4 to 9.15.

⁹⁷ See GATT 1947 Panel Report "United-States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, L/6175 - *BISD* 34S/154, para 5.2.2 ; GATT 1947 Panel Report "EEC - Regulation on Imports of Parts and Components ", adopted on 16 May 1990, L/6657 - *BISD* 37S/142, para. 5.25 ; GATT 1947 Panel Report "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes ", adopted on 7 November 1990, DS10/R - *BISD* 37S/214, para. 83 ; GATT 1947 Panel Report "United States - Measures Affecting alcoholic and Malt Beverages, adopted on 19 June 1992, DS23/R - *BISD* 39S/233, para; 5.39 ; GATT 1947 Panel Report "United States - Refusal to grant MFN treatment to footwear other than in rubber coming from Brazil", adopted on 19 June, DS18/R - *BISD* 39S/142, para. 6.13 ; WTO Panel Report "Argentina - Certain Measures affecting imports of Footwear, Textile Apparel and Other Items ", WT/DS56/R, 25 November 1997, para. 6.45 and 6.46; WTO Panel Report, "United States - Articles 301 - 310 of the Trade Act of 1974 ", WT/DS152/R, 22 December 1999, para. 7.51 to 7.92; WTO Appellate Body Report, "United-States - Antidumping Act of 1916", WT/DS136/AB/R, WT/DS162/AB/R, 28 August 2000, para. 88.

⁹⁸ See Article 42 of the UPU Convention.; see Recommendation C 33/Washington 1989 and Recommendation C 85/Seoul 1994.

⁹⁹ Art. 53.3 of the UPU Convention.

They do not, however, mandate such differential treatment. The issue is therefore how UPU members and their postal administrations would apply these provisions or whether they engaged in bilateral discriminatory agreements (see below). The UPU Acts themselves are not concerned in this regard.

b) Mandatory provisions

By contrast, the UPU Acts, in particular the Convention, mandate differential treatment in terminal dues.

No particular difficulty seems to arise in relation to the national treatment obligation. First, Article 47.4.2 of the UPU Convention obliges industrialised countries to provide, on request, national treatment to any other country. The same obligation is not expressed for developing countries. However, there is no obligation for them to discriminate between domestic and foreign mail and the Convention is fully discretionary in this respect.

Difficulties start to arise in relation to the MFN obligation. Indeed, except what concerns bulk mail¹⁰⁰, Articles 48 to 51 of the Convention expressly mandate the application of different terminal dues depending on whether the sender or the addressee of mail are located in industrialised countries or in developing countries.

The problem lies essentially with industrialised countries. Under Articles 48 and 49 of the Convention, postal administrations of these countries do not seem to have other possibilities than to apply lower tariffs to developing countries than to other industrialised countries.

Developing countries would not themselves violate the MFN treatment obligation. Indeed, terminal dues for mail dispatched to these countries are in practice set at the same level, whatever is the country of origin¹⁰¹. Furthermore, pursuant to Article 47.4.3.1 of the Convention, developing countries who indicate they intend to grant national treatment to foreign mail also have the obligation to extend it to all UPU Members.

The Convention, nevertheless, obliges industrialised countries sending mail to developing countries to pay a tax of 7.5 % to a trust fund, whereas such obligation is not imposed on the latter¹⁰². This tax is discriminatory in nature. Despite it is not imposed by developing countries themselves, an industrialised country could argue that it violates its MFN rights under WTO law and that, in the absence of a special WTO waiver¹⁰³, it should not be obliged to pay it.

Pursuant to the WTO jurisprudence related to the MFN treatment obligation, any discriminatory treatment that affects, directly or indirectly, imported goods, is covered by Article I of GATT, insofar as their competitive position is adversely

¹⁰⁰ Art. 47.5 of the UPU Convention.

¹⁰¹ Art. 50.1 and 51.1 of the UPU Convention.

¹⁰² Art. 50.1.1.1 of the UPU Convention.

¹⁰³ Waivers of obligations pursuant to the WTO can be obtained pursuant to Article IX:3 of the Marrakech Agreement establishing the WTO (the WTO Agreement).

affected in relation to imported like goods of another origin¹⁰⁴. Concerning postal services, differences in terminal dues normally affect postage tariffs which themselves affect the cost structure of imported goods using the postal system. Artificial variations in this connexion are likely to distort normal competitive relations. As indicated, it is less expensive to post mail in a developing country than in an industrialised one. Thus, *de facto*, certain like products delivered by mail can be advantaged in relation to others by reason of their origin only.

Consequently, Articles 48 and following of the UPU Convention, being mandatory in nature, appear to be themselves discriminatory and contrary to Article I of GATT.

This preliminary conclusion could theoretically enable an industrialised country sending mail to another industrialised country to claim before the WTO the right to benefit from the more favourable terminal dues generally granted to developing countries. This would clearly annihilate the entire UPU system of terminal dues as well as any effort to reconcile terminal dues with actual costs¹⁰⁵.

Considering this possible situation and the general support of the current evolution in the UPU for the gradual increase of terminal dues, UPU Members (that are also WTO Members) should perhaps file a request to the WTO Council for Trade in Goods to obtain a special waiver for the application of the MFN provision in GATT. The waiver procedure is organised by Article IX:3 of the WTO Agreement imposing a three-fourth majority of WTO Members for the acceptance of the waiver. Its granting would have the advantage to temporarily provide legal certainty in relation to terminal dues.

2.1.2 *Prohibition of non-tariff restrictions*

Article XI:1 of GATT prohibits non-tariff restrictions. This notion covers any measure instituted or maintained by a WTO Member which effectively restricts the importation or exportation of products. Similarly to the non-discrimination provisions, its objective is to protect the competitive expectations of imported products in an importing country's domestic market resulting from the latter's tariff commitments¹⁰⁶.

¹⁰⁴ See, for instance, WTO Appellate Body Report, "EC - Regime for The Importation, Sale and Distribution of Bananas", WT/DS27/AB/R, 9 September 1997, para. 206 and 207.

¹⁰⁵ Higher terminal dues in exchanges between industrialised countries are intended to enable a destination country to fully recover the costs of delivery. The conflict under WTO law and the prevalence of the latter in the context of a WTO dispute settlement is of course without prejudice of the application of the general principles of international law governing conflicts between international treaties (see Art. 30 of the Vienna Convention on the Law of Treaties). The rules in this regard provide that the more recent or more specific agreement prevails over the older or the more general one. Concerning postal services and payment thereof, the UPU Acts being more recent and apparently more specific than WTO rules, they could prevail.

¹⁰⁶ WTO Appellate Body Report, "India - Patent Protection for Pharmaceutical and Agricultural Chemical Products", WT/DS50/AB/R, 19 December 1997, para 36; WTO Panel Report "Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather", WT/DS155/R, 19 December 2000, para 11.20; GATT 1947 Panel Report on "United-States - Taxes on Petroleum and Certain imported Substances", adopted on 17 June 1987, *BISD* 34S/136, para. 5.2.1.

The question could arise as to whether postal regulations are not internal measures which should be subject to the national treatment measures obligation included in Article III of GATT rather than non-tariff trade restrictions subject to Article XI:1 of GATT. The difference between internal measures and import restrictions is that the latter are imposed at the time of importation and as a condition to importation, whereas the former apply both to domestic products and to imported products¹⁰⁷. Therefore, to the extent postal administrations are obliged or encouraged by UPU Acts to refuse entry and conveyance of imported mailed items, this could constitute a violation of Article XI:1 of GATT, unless a similar prohibition is also applied to like domestic mail. UPU Acts do not regulate domestic postal services. Consequently, their provisions concerning refusal of entry of mailed items should be addressed in the context of this analysis in light of Article XI:1 of GATT. This is of course without prejudice of other possible determinations according to the domestic postal regulation of a particular country.

- a) First issue: Article 25 of the UPU Convention concerning the non admission of items

Article 25 of the UPU Convention provides that items not fulfilling the conditions laid down in the Convention and its Regulations cannot be admitted in the country of destination¹⁰⁸. It also specifies that certain items cannot be inserted in mail and should thus not be admitted¹⁰⁹. This provision is mandatory in nature¹¹⁰. Therefore, unless it is justified by one of the exceptions to the basic principles of GATT, it allegedly constitutes a non-tariff restriction contrary to Article XI:1 of the GATT.

It could be argued that the obligation of postal administrations to refuse entry of certain mailed items does not entail a general prohibition of the importation of those items and therefore does not constitute an import prohibition covered by Article XI:1 of GATT. Mailed items can indeed be imported through other means such as private transportation. However, to the extent postal delivery is an essential element for the competitiveness of the imported mail, its refusal might lead to a *de facto* import restriction, covered by Article XI:1 of GATT. This does not mean that destination countries should be obliged to provide all postal services, but to the extent these services are provided domestically and not for international mail, the prohibition is not an internal measure which could be accepted if it was not discriminatory. It is a border measure which may constitute a *de facto* import restriction contrary to Article XI:1 of GATT¹¹¹.

¹⁰⁷ See Interpretative Note "ad Article III" of GATT.

¹⁰⁸ Art. 25.1 of the UPU Convention.

¹⁰⁹ Art. 25.2, 25.4 and 25.5 of the UPU Convention.

¹¹⁰ See however, tempering this statement, Article 501 of the Letter Post Regulation relating to the treatment of item wrongly admitted. Pursuant to this provision, in certain cases, items can nevertheless be delivered, in accordance with domestic regulation. In this situation, the concrete application of this provision as well as the domestic regulations concerned must be assessed in accordance with Article III of GATT as internal measures or regulations.

¹¹¹ See WTO Panel Report "Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather", WT/DS155/R, 19 December 2000, para 11.17; GATT 1947 Panel Report, "Japan-Trade in Semiconductors", adopted on 4 May 1988, *BISD* 35S/116, para. 105 to 109.

This being said, the prohibition of certain mailed items contained in Article 25 of the Convention could also be justified by one of the authorised exceptions to Article XI: of GATT. These are exceptions in the field of agriculture¹¹², textiles and clothing¹¹³, certain safeguard measures¹¹⁴ and the protection of non-trade interests¹¹⁵. Particular note should be made in this regard of Article XX of GATT, which reads as follows

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;*
- (b) necessary to protect human, animal or plant life or health;*
- (c) relating to the importations or exportations of gold or silver;*
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;*
- (e) relating to the products of prison labour;*
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;*
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption*
- (h) ..."*

All these exceptions are relevant and generally meet the same objectives as those pursued by Article 25 of the UPU Convention. It would nevertheless be necessary to check whether all of the prohibitions contained in the latter provision meet the test of necessity or the one of direct relationship that are required in several of the subparagraphs of Article XX of GATT. As a very preliminary impression, this could be the case and it seems unlikely that Article 25 of the UPU Convention would itself cause many difficulties in this regard.

¹¹² Art. XI:2(b) and (c) of GATT.

¹¹³ See WTO Agreement on Textiles and Clothing.

¹¹⁴ See Art. XII, XVIII.B and XIX of GATT and the WTO Agreement on Safeguard Measures.

¹¹⁵ Art. XX and XXI of GATT. WTO Agreements on Sanitary and Phytosanitary Measures and on Technical Barriers to Trade.

- b) Second issue: Article 43 of the UPU Convention concerning anti-remail measures

Article 43 of the UPU Convention enables postal administrations of the countries of destination confronted with remail to return the mail handed over to them to the country of origin.

This provision is not mandatory in nature. It only allows postal administrations to return mail subject to remail. This, however, does not by itself exclude the possible application of Article XI:1 of GATT. Indeed, pursuant to GATT and WTO jurisprudence, the imperative v. discretionary theory does not apply to Article XI:1 of GATT. The main test under this provision is whether a measure effectively restricts imports or exports of goods¹¹⁶.

In the GATT 1947 Panel Report on Semiconductors, the Panel stated that the prohibition of Article XI:1 applies to non-mandatory provisions if the following condition is satisfied:

"there[are] reasonable grounds to believe that sufficient incentives or disincentives exist for non-mandatory measures to take effect".¹¹⁷

WTO jurisprudence also admits that Article XI:1 of GATT can be violated by any measure whose effect would be chill trade and undermine the confidence of commercial operators that unrestricted trade would take place.¹¹⁸

Thus, pursuant to this jurisprudence, UPU's formally non-binding anti-remail provision would fall under Article XI if it was sufficiently conducive for postal administrations to apply it and to generate uncertainty for trade. It is recognised that Article 43 of the UPU Convention is a source of insecurity¹¹⁹. However, arguably, it does not actually encourage governments to return remailed items. On the contrary, UPU's current policy admits that recourse to the anti-remail provision is not desirable. National postal administrations of several EU Member States also gave assurances that they would not use the anti-remail provision¹²⁰. The European Court of Justice, finally, warned that use of the anti-remail provision would not be acceptable under EC law if terminal dues received by the postal administration of the

¹¹⁶ See WTO Panel Report, "United States - Sections 301 to 310 of the Trade Act of 1974", WT/DS152/R, 22 December 1999, para 7.53 and foll.

¹¹⁷ GATT 1947 Panel Report "Japan - Trade in semiconductors", adopted on 4 May 1988, *BISD* 35S/116, paras 106-109.

¹¹⁸ WTO Appellate Body Report, "India - Patent Protection for Pharmaceutical and Agricultural Chemical Products", WT/DS50/AB/R, 19 December 1997, para 36; WTO Panel Report, "United States - Sections 301 to 310 of the Trade Act of 1974", WT/DS152/R, 22 December 1999, para. 7.68, 7.71, 7.81, 7.84 and 7.91; WTO Panel Report "Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather", WT/DS155/R, 19 December 2000, para 11.20; GATT 1947 Panel Report on "United-States - Taxes on Petroleum and Certain imported Substances", adopted on 17 June 1987, *BISD* 34S/136, para. 5.2.1.

¹¹⁹ See Resolution C49/Beijing 1999, above-mentioned.

¹²⁰ See Judgment of the European Court of Justice, 17 May 2001, "International Express Carriers Conference (IECC) v. Commission of the European Communities, Deutsche Post AG, United Kingdom of Great Britain and Northern Ireland, The Post Office and La Poste", Case C-450, [2001] ECR, para. 11, 20 and 48.

incoming mail were defined at the level of costs¹²¹. Postal administrations of 14 out of 15 EU Member States are party to the REIMS II agreement, whose object is precisely to align terminal dues with costs and are thus impeded under EC law to use the anti-remail provision. Therefore, even if one could feel uncomfortable with this provision, it cannot be asserted, on a preliminary basis, that it itself violates Article XI:1 of GATT.

c) Third issue: possible limitations concerning parcels

Article 10.6 of the UPU Convention authorises UPU Members not to provide access to parcel-post items whose individual weight exceeds 20 kg. It also prohibits them from accepting items exceeding 50 kg. Articles 2.3 and 2.4 of the Convention mirror these rules in relation to transit obligations.

Concerning parcel-post items between 20 kg and 50 kg, the UPU rules are discretionary. They do not seem to particularly encourage postal administrations to apply them. Should the latter nevertheless implement them, Article X:1 of GATT would be relevant if the prohibition was not applicable to domestic parcels of that kind; otherwise, only the national treatment principle contained in Article III would be relevant. In a situation falling under Article XI:1 of GATT, it would then be necessary to assess whether using a postal service is an essential element for the competitiveness of the parcels concerned. Arguably, this is doubtful.

The same reasoning could also apply to parcel items exceeding 50 kg.

d) Fourth issue: Article 2 of the UPU Convention concerning transit

Article 2.2 of the UPU Convention authorises exceptions to the free transit obligation under certain conditions.

These exceptions would be contrary to Article XI:1 of GATT if no similar restrictions were put in place domestically or in the absence of a proper justification under one of the authorised exceptions of Article X:1 of GATT (see above). Likely, restrictions under Article 2.2 of the Convention, concerning radioactive material and perishable living substances, would fall within the scope of one of the subparagraphs of Article XX of GATT, or even Article XXI of GATT (national security). Thus, under these conditions, they could be justified under GATT.

Note should be made of article 2.5 of the Convention according to which, if the intermediary country fails to observe the provisions regarding freedom of transit, the other UPU Members may discontinue their postal service with it¹²². Such discontinuation would clearly constitute a counter-measure taking the form of an import restriction prohibited by Article XI:1 of GATT. Pursuant to Article 23 of the

¹²¹ Judgement of the European Court of Justice, 10 February 2000, "Deutsche Post AG v. Gesellschaft für Zahlungssysteme mbH GZS)" (Case C-147/97), and Citicorp Kartenservice GmbH (Case C-148/97), Request for a Preliminary Ruling, Oberlandesgericht Frankfurt am Main - Germany, Joined cases C-147/97 and C-148/97, [2000], ECR I-0825, para. 53 and foll.

¹²² Art. 2.5 of the Convention; article 102 of the Letter-Post Regulation.

WTO Dispute Settlement Understanding¹²³, such counter-measures cannot be made without the approval of the Dispute Settlement Body, following a complete WTO dispute settlement procedure. WTO jurisprudence considers that the mere fact that a legislation authorises unilateral counter-measures constitutes itself a violation of Article 23 of the WTO Dispute Settlement Understanding¹²⁴.

2.1.3 *Conclusion concerning UPU Acts and the GATT*

In conclusion, there is one major conflict between UPU Acts and GATT insofar as the former mandate discriminatory terminal dues in a manner contrary to Article I of the latter.

Provisions of the UPU Convention preventing admission or transit of certain items under certain conditions may also be contrary to Article XI:1 of GATT prohibiting non-tariff restrictions. However, most of these provisions either appear to pursue the same objectives as those protected by the exception clauses of GATT, or, concerning heavy parcels, do not seriously affect their competitive position. They should not pose too many difficulties.

Finally, it should be noted that Article 2 of the UPU Convention, which authorises UPU Members to unilaterally discontinue their postal services for mail originating in countries which unduly restrict transit of mail in their territory, appears to violate Article 23 of the WTO Dispute Settlement Understanding.

2.2. *Compatibility of measures of postal administrations with the GATT*

2.2.1 *Government liability under the WTO*

Strictly speaking, GATT rules apply to governments. Normally, they do not grant rights or obligations to economic operators whose activities are not managed or controlled by governments¹²⁵. The situation of postal operators may vary depending on whether or not postal services are liberalised in the countries participating in the exchange of mail.

a) Non-liberalised market

In a non-liberalised market, national postal administrations are often either part of a governmental administration or are directly controlled by it. Therefore, there is no doubt that government must take responsibility for conduct of such national postal administrations under international trade rules¹²⁶.

¹²³ The complete name is "Understanding on Rules and Procedures Governing the Settlement of Disputes".

¹²⁴ WTO Panel Report, "United States - Sections 301 to 310 of the Trade Act of 1974", WT/DS152/R, 22 December 1999, para. 7.60 to 7.68, 7.86.

¹²⁵ See for instance Interpretative Note "ad Article XVII" of the GATT, paragraph 1 (a).

¹²⁶ Under WTO law, each WTO Member is "fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory" (Art. 13 of Understanding on the Interpretation of Article XXIV of GATT 1994).

It may also happen that certain postal administrations are privatised. In this case, their activities would be subject to WTO rules if they remained controlled and could be oriented by the government. In the Periodical case, preferential postage tariffs were applied by Canada Post to periodicals of Canadian origin. The applicable provision was Article III:4 of GATT, setting forth the national treatment obligation with respect to "*laws, regulations and requirements affecting the sale, offering for sale, purchase, transportation, distribution or use of imported goods*". The Canadian government argued before the WTO Panel that

„since Canada Post is a privatised agency (a Crown corporation) with a legal personality distinct from the Canadian Government, the "commercial Canadian" or "international" rates it charges for the delivery of periodicals are out of the Government's control and do not qualify as "regulations" or "requirements" within the meaning of Article III:4¹²⁷.

The Panel responded to Canada that

„First, it is clear that Canada Post generally operates under governmental instructions. Canada Post has a mandate to operate on a "commercial" basis in this particular sector of periodical delivery: a mandate that was set by the Canadian Government. Second, Canada admits that if the Canadian Government considers Canada Post's pricing policy to be inappropriate, it can instruct Canada Post to change the rates under its directive power based on Section 22 of the Canada Post Corporation Act. Thus, the Canadian Government can effectively regulate the rates charged on the delivery of periodicals . . . This analysis is unaffected by the fact that Canada Post has a legal personality distinct from the Canadian Government¹²⁸.

Therefore, considering that Canadian postal operations are controlled by the government and depend on its action,

„Canada Post's pricing policy on periodicals can be regarded as governmental regulations or requirements within the meaning of Article III:4 of GATT 1994¹²⁹.

The other provisions of the GATT also applying to measures of the government, there are no reasons that this jurisprudence should not also apply to them.

b) Liberalised market

In a liberalised market, the government in principle does not control any more the provision of postal services. However, under UPU rules, it remains under the obligation to ensure the provision of a universal postal service¹²⁹. Therefore, for that purpose, it will always grant special or exclusive rights to certain operators.

Article XVII of GATT applies to companies benefiting from special or exclusive rights granted by States. These are qualified as State trading enterprises. They have the power to buy and sell and to influence the level or direction of exports or

¹²⁷ WTO Panel Report, "Canada - Certain Measures Concerning Periodicals", WT/DS31/R, 14 March 1997, para. 5.33.

¹²⁸ Idem, para. 5.35, 5.36.

¹²⁹ Art. 1.1 to 1.3 of the UPU Convention.

imports¹³⁰. Pursuant to Article XVII of GATT, disciplines imposed on governments under the GATT, particularly Articles I, II¹³¹, arguably III¹³², XI¹³³ and related provisions of the GATT¹³⁴ apply to state trading companies¹³⁵.

When special or exclusive rights are granted to an independent postal company, Article XVII of GATT would clearly be applicable if that company had also been granted the exclusive right to buy postal equipment for the provision of the reserved postal service. Pursuant to Article XVII of GATT, such purchases would be subject to the disciplines of the GATT, particularly if they can be used in the provision of a liberalised service as well.¹³⁶

Application of Article XVII of GATT is less obvious when discriminatory conduct of an independent postal company only concerns the manner in which it provides its services or the tariff it charges for these services; in other words, when abusive conduct does not directly affect this company's sales or purchases of goods. In that situation, in order to entail its government's liability under the GATT, it would be necessary to demonstrate that its behaviour is due to a government action which at least strongly lead it to behave in a discriminatory manner, resulting in a trade restriction affecting posted items¹³⁷.

¹³⁰ See the Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994, see also the Panel Report on "Subsidies and State Trading" adopted on 24 May 1960, *BISD 9S/179*, paras 21-23.

¹³¹ Article II.4 of the GATT.

¹³² The legislative history seems to suggest that Article XVII of the GATT does not cover the national treatment obligation of Article XVII (see W. Davey, "Article XVII of the GATT, An Overview" in T. Cottier and P. Mavroidis (eds), *State Trading in the Twenty First Century*, Univ of Michigan Press, Ann Arbor, Michigan, 1998, p. 26). In support of this view, see Panel Report on "Canada - Administration of the Foreign Investment Review Act", adopted on 7 February 1984, *BISD 30S/140*, 163, para 5.16. In sharp contrast with the above report, see Panel Report on "Canada - Import, Distribution and sale of Certain Alcoholic Drinks by Provincial Marketing Agencies", loc. cit., in particular 5.6 and paras 5.10 and foll. See also, supporting the idea that state trading enterprises are not shielded from the application of Article III of the GATT, the final conclusions of the Panel Report on "Canada - Administration of the Foreign Investment Review Act", adopted on 7 February 1984, *BISD 30S/140*, which finally applied Article III; the WTO Panel Report, "Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS/169/R, 31 July 2000, para 317 and 753; WTO Panel Report, "EC - Measures Affecting Asbestos and Products Containing Asbestos, WT/DS135/R, 18 September 2000, para 8.98; and the Preamble to the Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994 which states that "members are subject to their GATT 1994 obligations in respect of those governmental measures affecting state trading enterprises".

¹³³ See Panel Report on "Japan - Restrictions on Imports of Certain Agricultural Products" adopted on 22 March 1988, *BISD 35S/163*, 220, para 5.2.2.2.

¹³⁴ See Interpretative Note "*ad Articles XI, XII, XIII, XIV and XVIII*" which provides that throughout these provisions, "*the terms 'import restrictions' or 'export restrictions' include restrictions made effective through state-trading operations*".

¹³⁵ See D. Luff, "Multilateral Trade Issues and Liberalisation: Current and Future Perspectives", in D. Gérardin (Ed) *The Liberalisation of State Monopolies in the European Union and Beyond*, Kluwer Law International, 1999, pp. 339 and foll.

¹³⁶ Arguably, the procurement of goods for the supply of a reserved postal service is excluded from the scope of Article XVII of the GATT, in accordance with paragraph 2 of this Article and the Interpretative note on this paragraph 2.

¹³⁷ GATT 1947 Panel Report "Japan - Trade in semiconductors", adopted on 4 May 1988, *BISD 35S/116*, paras 106-109.

The same conclusion also applies to independent postal companies which do not benefit from special or exclusive rights.

It is of course without prejudice of any finding of a violation of GATS by the postal companies concerned (see below).

2.2.2 Possible violations of the GATT by national postal administrations

When WTO rules apply to a postal operator, there are mainly four possible sources of violation of GATT provisions:

a) Violation of the tariff discipline

Pursuant to Article II of GATT, imported goods cannot be subject to a customs duty higher than the one inscribed in the importing country's Tariff Schedules. Customs duties include border taxes or charges which are not otherwise imposed on domestic like goods¹³⁸. Thus, concerning postal services, a tax on incoming mail which would *de facto* increase the tariff applicable to mailed items above the commitments applicable to them would constitute a violation of Article II of GATT.

Pursuant to Article VIII:1 of GATT, a WTO Member may nevertheless charge a fee for its customs-clearance-related costs. Therefore, to the extent charges applied by postal administrations on incoming mail would be limited to the costs incurred by them in relation to the clearance of mailed items, there would be no violation of Article II of GATT¹³⁹. Similar principles are contained in Articles 31.2 to 33 of the UPU Convention¹⁴⁰.

A violation of Article II of GATT could also result from the application of the anti-remail provision contained in Article 43 of the UPU Convention. Indeed, such provision allows postal administrations of the countries of destination confronted with remail to demand payment of additional postal charges to incoming mail. Such charges, if not imposed as a result of a contractual service provided, could arguably be qualified as *de facto* additional customs duties and therefore constitute a possible violation of tariff Schedules¹⁴¹.

b) Violation of the prohibition of non-tariff restrictions

As already indicated, Article XI:1 of GATT prohibits any measure instituted or maintained by a WTO Member which effectively restricts the importation or exportation of goods.

¹³⁸ For the difference between a customs duty and an internal tax imposed at the border, see Interpretative Note "Ad Article III" of GATT; WTO Panel Report, "EC - Measures Affecting Asbestos and Products Containing Asbestos", WT/DS135/R, 18 September 2000, para 8.88 and foll.

¹³⁹ Art. II.2.c) of GATT.

¹⁴⁰ See also Article 602 of the Letter-Post Regulation setting forth maximum charges.

¹⁴¹ A possible defence for the use of the anti-remail provision is presented in point b) below.

The application of the anti-remail provision contained in Article 43 of the UPU Convention by postal administrations would clearly constitute a violation of Article XI:1 of GATT if trade of the items contained in the returned mail was affected.

As a defence, postal administrations using the anti-remail provision could invoke Article XX(d) of GATT. This provision authorises certain restrictive measures to the extent they are "*necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement*". In the postal sector, the laws and regulations the anti-remail provisions aims at ensuring compliance with are the UPU rules concerning terminal dues. However, as already indicated, there are strong indications that these rules are not themselves consistent with the GATT, thus arguably cutting short any such defence¹⁴².

Another violation of Article XI:1 of GATT could result from the application of Article 25 of the UPU Convention. As already indicated, the latter specifies that items not fulfilling the conditions laid down in the Convention and its Regulations cannot be admitted in the country of destination¹⁴³. It also describes the items which cannot be inserted in mail and whose admission can be prohibited. Therefore, if postal administrations refuse admission of mail pursuant to this provision without proper justification under one of the authorised exceptions of GATT, this would constitute an undue import restriction. However, as indicated above, it is unlikely that action taken on the basis of Article 25 of the UPU Convention would pose any serious difficulty under the GATT.

Other violations of Article XI:1 of GATT could result from the implementation of reservations made by several countries at signature of the Acts of the Beijing Congress, maintaining their right not to admit items which are subject to a customs duty¹⁴⁴. Non-admission of items for such reasons would clearly constitute a prohibited import restriction.

As already indicated, the fact that these measures do not implement a general prohibition to import the affected items does not prevent a finding of a violation of Article XI:1 of GATT, if these measures *de facto* limit the importation and undermine the competitiveness of goods which are traded using the postal system.

c) Violation of the national treatment obligation

For memory, the national treatment obligation contained in Article III of GATT implies that imported products are accorded treatment no less favourable than that accorded to like products of national origin.

¹⁴² See by contrast, the position of the European Court of Justice judging that the anti-remail provision can be considered, under certain conditions, necessary for the maintenance of monopoly rights and for the pursuit by postal administrations of the mission of "public service" assigned to them by the UPU Acts (Judgement of the European Court of Justice, 10 February 2000, "Deutsche Post AG v. Gesellschaft für Zahlungssysteme mbH GZS)" (Case C-147/97), and Citicorp Kartenservice GmbH (Case C-148/97), Request for a Preliminary Ruling, Oberlandesgericht Frankfurt am Main - Germany, Joined cases C-147/97 and C-148/97, [2000], ECR I-0825, para. 49 and foll.).

¹⁴³ Art. 25.1 of the UPU Convention.

¹⁴⁴ Art. XIV of the Protocols to the UPU Convention. The Protocols contain reservations of UPU Members in relation to the provisions of the Convention.

Postal administrations would violate the national treatment obligation if they applied higher tariffs on foreign mail than on domestic mail or imposed any other form of discriminatory treatment on foreign mail, such as longer delivery time, higher red tape, etc.

Discriminatory treatment which is not tariff-related is normally prohibited under Article 42.1 of the Convention. Indeed, as already indicated, pursuant to this provision, postal administrations must fix quality service targets for the handling of foreign mail that are not less favourable than those applied to comparable items in their domestic service.

Concerning discriminatory postal tariffs, there is a precedent relating to periodicals establishing a violation of Article III:4 of GATT. A Canadian programme called the "*Publications Assistance Programme*" enabled Canadian-owned and -controlled publications, published and printed in Canada, meeting certain requirements, to benefit from subsidised postal rates. The Canadian Post had also authority to determine certain commercial rates by itself, which could vary depending on whether the customer entered into an agreement with it and at certain conditions. Canadian Post entered into two such agreements: the "*Publications Mail Product Service Agreement*" which was applicable to mail entirely produced and sent in Canada, and the "*International Publications Mail Product (Canadian Distribution) Sales Agreement*", applicable to foreign publications mailed in Canada. Under the first of these agreements and as a consequence of the subsidised rates, postage rates were lower than under the second¹⁴⁵.

The panel first considered that the foreign and domestic periodicals concerned by the agreements were like products¹⁴⁶. Second, it ruled that Canadian Post tariffs were to be considered a measure by the government¹⁴⁷. Finally, it considered that preferential postal tariffs in favour of Canadian publications clearly constituted a discrimination against the foreign publications concerned:

«We find that the design, architecture and structure of Canada Post's different pricing policy on domestic and imported periodicals all point to the effect that the measure is applied so as to afford protection to the domestic production of periodicals», 148

Therefore, the tariff differences applied by Canada Post were found to be contrary to Article III:4 of GATT¹⁴⁹.

d) Violation of the MFN treatment obligation

¹⁴⁵ See WTO Panel Report, "Canada - Certain Measures Concerning Periodicals", WT/DS31/R, 14 March 1997, para. 2.10 and foll.

¹⁴⁶ Idem, para. 5.33.

¹⁴⁷ Idem, para. 5.35 and 5.36.

¹⁴⁸ Idem, para. 5.37 and 5.38.

¹⁴⁹ Idem, para 5.39.

Under the MFN obligation contained in Article I of GATT, a national postal company cannot discriminate between imported goods according to their origin.

The UPU Acts however authorise and even encourage in certain cases the conclusion of bilateral agreements providing for preferential or at least differentiated treatment. The participation of postal administration to these agreements would clearly violate the MFN treatment principle.

For instance, first under Article 42 of the UPU Convention, national postal administrations may conclude bilateral agreements concerning quality service targets¹⁵⁰. Thus, there would be a violation of the MFN treatment obligation if, pursuant to such agreements, national postal administrations discriminated against mail originating in countries which are not parties to these agreements.

Second Articles 48 to 51 of the UPU Convention mandate the application of discriminatory terminal dues depending on whether the sender or addressee of the mail is from a developing country or an industrialised one. As already mentioned, such system already constitutes by itself a violation of the MFN treatment obligation. Thus, its application and translation into postage charges by postal administrations necessarily entails a similar violation.

Third, a violation of the MFN treatment obligation could result from the application of the REIMS II agreement concluded by the postal administrations of 17 industrialised countries in Europe¹⁵¹. As already mentioned, pursuant to this agreement, terminal dues are even higher than those applicable in exchanges between industrialised countries under the UPU Convention. This creates a "negative" discrimination against parties to it and would arguably enable them to claim before a WTO Panel the right to benefit from the lower terminal dues granted to other countries under the UPU Convention¹⁵².

It should be noted that, concerning bulk mail, the UPU convention itself prohibits terminal dues rates to be higher "*than the most favourable rates applied by administrations of destination under bilateral or multilateral agreements concerning terminal dues*"¹⁵³. Lower tariffs than those applied by bilateral agreement are

¹⁵⁰ See Recommendation C 33/Washington 1989 and Recommendation C 85/Seoul 1994.

¹⁵¹ This kind of agreement is authorised under UPU rules pursuant to Art. 47.8 of the Convention. It could theoretically also be justified under Article XXIV of GATT concerning customs unions and free-trade areas. Pursuant to this provision, exceptions to the MFN principle are accepted if they are necessary for the operation of a customs union or a free-trade area. These, however, must cover a substantial part of trade between their members. Thus, considering that almost all parties to the REIMS II agreement are Members either of the European Union or of EFTA, it should be analysed whether the requirements of Article XXIV are met for them (see UPU, Secretary-General's report, "*Obligations arising from the General Agreement on Trade in Services (GATS)*", 15 April 1999, Congrès-Doc 72, para. 15, considering these requirements are not met).

¹⁵² It should be noted that the REIMS II agreement cannot be considered as an agreement between private parties falling outside the scope of WTO rules. Indeed, as indicated above, conduct of national postal administrations in the supply of a reserved service must be considered as government action, taking into account the fact that the latter may control and orient the conditions for the supply of this service.

¹⁵³ Art. 47.5 of the UPU Convention.

nevertheless not prohibited. Therefore, difficulties arising from the signature of, for instance, the REIMS II agreement, providing for higher postal tariffs, are not resolved under this provision¹⁵⁴.

e) Ancillary issue: differentiated customs treatment

Differentiated customs treatment, whether or not resulting from an international agreement, of mail originating in different countries amounts to be a violation of Article I of the GATT. This issue is relevant to the extent postal administrations of countries of origin (or their government) enter into agreements with customs administrations of destination countries (or their government) for the purpose of customs facilitation.

Pursuant to Article I of GATT, any preferential treatment granted according to one of these agreements must be extended to all like mail originating in other countries. Therefore, an agreement which would limit the benefit of easier customs procedures to mail delivered by public postal companies of specific countries (such as the Members of the World Customs Organisation) would violate Article I of GATT if such easier procedures were not granted to mail originating in countries that are not parties to the agreement.

Arguably - and this is a rarely considered point - there would also be a violation of Article I of GATT if the preferential treatment was not equally applied to like mail dispatched by private carriers of Members that are parties to the said agreement. Indeed, such mail would be discriminated against like "public" mail¹⁵⁵ originating in other countries that are parties to the agreement. The fact that pursuant to it all "public" mail originating from all countries parties to it benefits from an equal treatment does not appear to be relevant. Indeed, the "public" or "private" character of the conveyance service should not be sufficient to differentiate mail so as not to consider it anymore as a "like product"¹⁵⁶.

2.2.3 *Conclusion*

There is little doubt that in most cases, conduct of national postal administrations are directly subject to the disciplines of GATT. The only exception may concern an independent postal company providing a liberalised postal service without any particular involvement of its government. This is arguably also the case if the postal company in question benefits from special or exclusive rights granted by the government, but whose behaviour does not directly affect its sales or purchases of goods.

¹⁵⁴ One could add to the list of potential MFN violations the fact to use the anti-remail provision in a discriminatory manner. However, arguably, as indicated above, the mere use of such provision is contrary to Article XI:1 of GATT.

¹⁵⁵ By "public" mail, it is intended mail conveyed by public postal administrations.

¹⁵⁶ The fact that the measure appears on its face to be neutral from the point of view of the origin of the product, or does not directly relate to products, does not prevent a finding of a "de facto" discrimination, depending on the actual competitive conditions applicable to the affected products (see WTO Appellate Body Report, "Canada-Measures affecting the automobile industry", WT/DS139/AB/R, 31 May 2000, para. 78 and 79 (among others)).

The postal operators concerned by the GATT, must, in order to behave in a GATT compatible manner, ensure that

- tariffs they impose on incoming mail are not higher than actual customs-clearance costs,
- they do not make use of the anti-remail provision contained in Article 43 of the UPU Convention,
- they do not refuse items for reasons not connected (at least) to the objectives protected by the exception clauses of the GATT and
- they do not impose different postage rates to mail according to its origin.

The problems are more likely to arise in relation to the different terminal dues mandated by the UPU Convention and with respect to the conclusion of the REIMS II agreement, whose legality under the MFN clause of the GATT is highly questionable.

Finally, attention must be given to any agreement concluded either bilaterally between postal administrations (or their governments) or under the auspices of the World Customs Organisation providing a better customs treatment to certain mail (such as "public" mail) to the exclusion of certain other like mail (such as "private" mail).

3. Trade in services

International postal law is obviously affected by international rules governing trade in services as it regulates the provision of postal services themselves. The relevant WTO instrument in this regard is the General Agreement on Trade in Services (GATS). Although it also aims at protecting equality of competitive opportunities for companies regardless of their origin and the origin of their services, it has a radically different structure than the GATT. Indeed, in contrast with the latter, the GATS contains a mix between horizontal obligations applying to all sectors of economic activity, and sectoral commitments only applicable to those sectors which have been explicitly open to trade by WTO members.

Sectoral commitments result from the inclusion by WTO Members of specific services into their individual Schedules of Commitments. This implies that these services are appropriately defined as well as an express acceptance that the more stringent obligations contained in GATS apply to them.

3.1 Definition and classification of postal services

Under GATS, commitments are made in relation to services according to a classification prepared by the Group of Negotiations of services during the Uruguay Round, on the basis of the United-Nations Central Product Classification list (CPC list)¹⁵⁷.

¹⁵⁷ See doc. MTN.GNS/W/120.

Postal and courier services are listed as sub sectors of Communication services. They are classified as follows:

Postal and courier services

- postal services (CPC No 7511)

- pick-up, transport and delivery services related to letters, newspapers, journals, periodicals, brochures, leaflets and other similar printed matters, whether for domestic or foreign destinations,
- pick-up, transport and delivery services related to parcels and package, whether for domestic or foreign destinations,
- post office counter services (sale of postage stamps, handling of certified or registered letters and packets and other counter services),
- and other postal services (such as mailbox rental services or "poste restante" services), to the exclusion of financial services by the post office.

- courier services (CPC No 7512)

- multimodal courier services, to the exclusion of courier services for mail by air which are classified as "*Mail Transportation by Air*" in "*Air Transport Services*",
- other courier services.

According to this classification, the difference between postal and courier services consists in the fact that the former are supplied by a State Monopoly while the latter can be domestically supplied in competition with national postal companies¹⁵⁸.

There are allegations that this historical distinction is not compatible any more with market reality since, increasingly, postal services are domestically liberalised while national postal administrations are positioning themselves in the courier market. Furthermore, the CPC classification does not coincide with the one proposed by the UPU Convention which suggests to divide postal services either according to the speed of treatment (express or normal) or according to the kind of mail (letter and postcards, printed paper, etc)¹⁵⁹. Thus, as it will be indicated in the final part of this chapter, proposals have been made to amend the current classification method of postal/courier services¹⁶⁰.

3.2 *Commitments in postal services*

As already indicated, additional rules apply when a service has been included in a WTO Member's Schedule of Commitments. In short, this means that international

¹⁵⁸ See Background Note by the WTO Secretariat "Postal and Courier Services", S/C/W/39, 12 June 1998, pp. 2 and 3.

¹⁵⁹ Art. 10.2 of the UPU Convention.

¹⁶⁰ See Communication from the European Communities and their Member States, "*GATS 2000: Postal/Courier Services*", S/CSS/W/61, 23 March 2001 and Communication from Switzerland, "*GATS 2000: Postal and Courier Services*", S/CSS/W/73, 4 May 2001.

trade of this service is liberalised for this Member, to the extent indicated in its Schedule. If a service is not included, the WTO Member concerned may limit, in its territory, the provision of this service by a foreign service supplier or from a foreign country. The lack of inclusion of a service into a Member's Schedule of Commitments is however without prejudice of the fact that this service may be domestically liberalised.

In other words, it is not because there is domestic competition for a particular service in a specific country that trade of this service cannot be limited. For instance, the EC liberalised courier services to a large extent in the single market. However, considering that it did not include them in its Schedule of Commitments, it has no particular obligation to open its market to foreign suppliers of these services.

Only six members made commitments in postal services: Albania¹⁶¹, the Kyrgyz Republic¹⁶², Mongolia¹⁶³, Djibouti¹⁶⁴, Senegal¹⁶⁵, and Gambia¹⁶⁶. All the other countries either explicitly reserved postal services to a State monopoly or made no indication of these services in their Schedules of Commitments, which obviously means a lack of commitment.

Courier services, instead, are more often included in Members' Schedules of Commitments¹⁶⁷.

3.3 *Government liability*

Similarly to the GATT, the assessment of the impact of GATS in the international regulation of postal services can be done at the level of the UPU Acts themselves or at the level of postal administrations' conduct.

As already mentioned, UPU Acts, being clearly measures of the government, directly entail its liability under WTO law. They may, however, be subject to the theory of discretionary v. imperative legislation and not be considered themselves as contrary to the non-discrimination provisions contained in the GATS if they allow the executive power to behave in a non-discriminatory manner.

Concerning postal administrations, the GATS applies to acts of central, regional or local governments and to those of non-governmental bodies in the exercise of powers delegated by the public authorities¹⁶⁸.

This means that not only national postal administrations belonging to government and/or controlled by it are subject to the disciplines of the GATS, but also independent regulators, if any, that may be instituted in a liberalised postal sector.

¹⁶¹ Doc. GATS/SC/31. The Commitments are limited here to postal parcels.

¹⁶² Doc. GATS/SC/125.

¹⁶³ Doc. GATS/SC/123.

¹⁶⁴ Doc. GATS/SC/104.

¹⁶⁵ Doc. GATS/SC/75.

¹⁶⁶ Doc. GATS/SC/112.

¹⁶⁷ Forty WTO Members made commitments in courier services, including the United States, but not the European Communities.

¹⁶⁸ Article I:3(a) of GATS.

Independent postal companies functioning in a liberalised domestic environment, outside the scope of any regulatory powers, are thus not by themselves directly subject to the rules of the GATS. However, if they benefit from special or exclusive rights in relation to the supply of certain services, they may be subject to the provisions of Article VIII of GATS applicable to monopoly suppliers (see below).

3.4 Obligations pertaining to all postal and courier services

3.4.1 *Scope of application*

Horizontal rules of the GATS apply to service activities irrespective of whether they have been inscribed in Members' Schedules of commitments. They concern all measures by Members affecting trade in services¹⁶⁹. These include, pursuant to Article XXVIII(c) of GATS "*measures in respect of*

1. *the purchase, payment or use of a service*
2. *access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally*
3. *the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member".*

The GATS, however, only applies to services that are not supplied in the exercise of governmental authority¹⁷⁰. This means it applies to services that are supplied either on a commercial basis or in competition with other service suppliers¹⁷¹. The GATS does not further define these notions.

Postal services are usually supplied to private customers or to other postal administrations in exchange of a payment for the service. The UPU mandates this payment to be in relation with costs¹⁷². Furthermore, in many countries a number of postal services are supplied in competition with other operators or with other means of conveying letters or parcels. Therefore, arguably postal services are supplied on a commercial basis and none of them is excluded from the scope of GATS¹⁷³.

¹⁶⁹ Article I.1 of the GATS. Pursuant to Article I:2 of GATS, trade in services is defined as "the supply of a service (a) from the territory of one Member into the territory of any other Member (cross border mode); (b) in the territory of one Member to the service consumer of any other member (consumption abroad mode); (c) by a service supplier of one Member through commercial presence in the territory of any other Member (commercial presence mode) and; (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member (physical presence mode)".

¹⁷⁰ Article I:3(b) of the GATS.

¹⁷¹ Article I:3(c) of the GATS.

¹⁷² Art.4.1 and 7.1 of the UPU Convention.

¹⁷³ See Background Note by the WTO Secretariat "*Postal and Courier Services*", S/C/W/39, 12 June 1998, p. 2; UPU, Secretary-General's report, "*Obligations arising from the General Agreement on Trade in Services (GATS)*", 15 April 1999, Congrès-Doc 72, para. 9; UPU, "*Background Note on WTO Agreement and Postal Services for the Universal Postal Union Council of Administration Project Team on Relations with the WTO*", 25 February 2000, pp. 10-11.

An exception could be the provision of a universal service for which monopoly rights would be instituted and which would be supplied at a non-commercial price, i.e., for instance, constantly below costs. However, if this exception was accepted, there would not be an obvious practical impact precisely because of the lack of competition for these services. Furthermore, the exclusion of a universal service from the GATS would not mean that the manner in which a universal service is provided cannot affect another service supplied on a commercial basis. In that case, the GATS would be fully applicable to protect the competitive position of the affected service.

Postal services concerned in the country of origin of the mail are the collection, handling, transportation, and delivery of mail. Postal services concerned in the country of destination of the mail are the clearance, sorting and delivery of mail. These are provided with varying degrees of urgency, safety and commitment and can in principle all be assessed under the provisions of the GATS.

3.4.2 *Most favoured nation treatment*

Pursuant to Article II of the GATS, each WTO Member must grant the most-favoured-nation treatment to all services and service suppliers of any other WTO Member. This implies the prohibition of de facto as well as de jure discriminations between foreign services and service suppliers¹⁷⁴.

As an exception to this basic principle, a Member may exempt itself from this obligation in a list of exemptions under Article II of the GATS. No such exemptions have been made specifically for postal services. However, horizontal exemptions, applicable to all service sectors, could be relevant, such as limitations to land ownership, participation to capital of domestic firms, free movement of persons, etc¹⁷⁵

UPU rules appear to violate the MFN provision insofar as they relate to terminal dues. Indeed, they mandate different tariffs schemes for the service of delivering mail in the destination countries according to the stage of development of these countries¹⁷⁶. Such differences clearly affect the competitive positions of the suppliers of postal services concerned and affect the provision by them of cross-border postal services, in a manner incompatible with Article II of the GATS.

A violation of the MFN rules could also result from the conduct of UPU Members or their postal administrations. This would be the case if, for instance, they entered into bilateral agreements pursuant to which the quality of service provided to mail originating in countries parties to the agreement is higher than the one provided to

¹⁷⁴ See WTO Appellate Body Report "European Communities-Regime for the Importation, Sale and Distribution of Bananas", WT/DS27/AB/R, 9 September 1997, para. 234.

¹⁷⁵The European Community applied for a number of these exemptions in order to allow, for instance, preferential measures for countries with which they have historical links such as San Marino, Monaco, Andorra, or measures which are based on open bilateral agreements for the purposes of temporary contract work, etc. The United States exempted "differential treatment of countries due to application of reciprocity measures or through international agreements guaranteeing market access or national treatment".

¹⁷⁶ Art. 48 to 51 of the UPU Convention.

mail originating in other countries. As previously indicated, the conclusion of such agreements is authorised and encouraged by UPU Acts in apparent contradiction with Article II of the GATS¹⁷⁷.

Furthermore, the participation of postal administrations to the REIMS II agreement, increasing terminal dues for the parties to this agreement, also appears to be incompatible with the MFN provision, for the same reasons as those exposed under GATT¹⁷⁸.

Another violation of the MFN obligation could result from the application of the anti-remail provision contained in Article 42 of the Convention to mail originating in certain countries and not in others.

Generally speaking, postal administrations must treat all mail addressed to them or sent by them to third countries in a similar manner, irrespective of the country concerned and of the type of the service supplier¹⁷⁹, since any form of discrimination would not only affect trade in goods dispatched by mail, but also the cross-border supply of postal services in those countries, thus violating Article II of GATS.

This obligation extends to postage charges. Pursuant to the UPU Convention, these must in principle be related to the costs of providing the postal services¹⁸⁰. If such rule was genuinely respected, different postage charges for mail addressed to different countries are not necessarily contrary to the MFN principle. However, arguably, postage charges incorporate discriminatory terminal dues and are thus themselves discriminatory and contrary to the MFN rule contained in Article II of the GATS.

3.4.3 *Obligation of transparency*

Article III of the GATS contains an obligation of transparency which obliges all WTO Members to publish promptly all laws, regulations or administrative guidelines which significantly affect trade in services.

Stringent transparency obligations are also contained in Articles 42.2 to 42.7 of the UPU Convention, concerning quality of service targets and in Article 47.4.1 of the UPU Convention, concerning terminal dues. Consequently, unless UPU countries and/or their postal administrations act in a manner incompatible with the UPU Convention, Article III of the GATS should not pose many difficulties.

3.4.5 *Monopoly suppliers*

¹⁷⁷ Art. 10 of the UPU Convention. See Recommendation C 33/Washington 1989 and Recommendation C 85/Seoul 1994.

¹⁷⁸ The fact that REIMS II was concluded by postal administrations does not exclude the applicability of GATS. Indeed, arguably, the REIMS II agreement was concluded by postal operators in the exercise of regulatory powers related to tarification that were delegated to them by the government. Article I:3(a)(ii) of GATS explicitly provides that in such circumstances, acts of regulators are "measures by governments". The problem is here that the regulator and the operator are not separated (see below).

¹⁷⁹ For developments concerning discrimination between "public" and "private" conveyance of mail, see above p. [to complete].

¹⁸⁰ Art. 7.1 of the UPU Convention.

Pursuant to Article VIII of the GATS, the above rules, particularly the most-favoured-nation obligation, apply to monopoly suppliers, i.e. enterprises which have been granted special or exclusive rights¹⁸¹.

In the postal sector, this obligation is relevant for independent postal companies benefiting from special or exclusive rights for the provision of particular postal services. Should they treat, in the context of the provision of these services, mail originating in different third countries in a discriminatory manner, that would amount to be a violation by the State in which they operate of the MFN rule.

3.5 Obligations pertaining to services open to international trade

Obligations concerning services which are included in Members' Schedules of commitments are of course much more stringent than those applicable to services for which no commitments were made. As indicated above, only seven countries made commitments in postal services and a much larger number of countries made commitments in courier services. The following rules apply to services open to international trade:

3.5.1 *Market access*

Article XVI of the GATS (Market Access) prohibits national measures limiting the number of service suppliers in a domestic market, or the value or the quantity of services supplied or of the number of persons authorised to supply a service¹⁸². It also prohibits limitations as to the participation of foreign capital or restrictions as to the legal entity in which a service supplier is authorised to provide a service. Capital movements which are an essential part of the service must be authorised¹⁸³.

Article XVI thus indirectly obliges WTO members to dismantle special or exclusive rights granted in their country to any postal company for the supply of committed postal services. It thus implies domestic liberalisation of these services. Limitations to this principle are possible to the extent described in WTO Member's Schedules of Commitments¹⁸⁴. In the postal sector these could concern in particular the possibility of countries to either reserve for themselves the provision of a universal service or to impose universal service requirements on all operators. Additional rules and commitments can be included in this regard in the Schedules of Commitments pursuant to Article XVIII of GATS.

Besides the liberalisation of domestic markets, one of the consequences of the market access rule is that it enables postal companies to bypass the transit and terminal dues system put in place by the UPU Convention. Indeed, pursuant to it, postal companies

¹⁸¹ See Article VIII:5 of the GATS. The notion of monopoly suppliers does not include de facto monopolies, i.e. those which benefit from an exclusive sale capacity by the mere operation of market forces (see Article XXVIII (h) of the GATS).

¹⁸² Article XVI applies to market access through the modes of supply identified in Article I. See above note 157.

¹⁸³ See footnote 8 to para 1 of Article XVI and Article XI of the GATS.

¹⁸⁴ Article XVI:1 of GATS.

are entitled to provide end-to-end services, thus making any remuneration of a destination country's postal administration irrelevant.

The market access rule also implies the obligation of destination countries to provide access to their domestic basic services, in the absence of any available competing end-to-end services. Basic services can indeed be necessary for the provision of a specific postal service, such as express delivery, needing to use the network of the incumbent postal company. It should be noted in this regard that Article 10 of the UPU Convention already contains this obligation and thus appears in this connexion to be complementary to GATS¹⁸⁵.

Generally speaking, the refusal of a government or a national postal administration to admit incoming mail, for any reason, including for the fact that remail took place, is prohibited under Article XVI of GATS. The same also applies to the implementation of unduly burdensome procedures for incoming mail such as long and time-consuming customs formalities, obligatory deposit in a warehouse etc, which have a similar effect.

3.5.2 *National treatment*

Article XVII of the GATS contains the national treatment obligation. It has the same meaning as Article III of the GATT and implies the prohibition of de jure as well as de facto discriminations between domestic and foreign services and service suppliers¹⁸⁶. The national treatment obligation, as the market access one, may nevertheless be limited by the contents of WTO Members' Schedules of Commitments.

Under the UPU Convention, UPU Members are already under a general obligation to provide national treatment in respect of the quality of the service. Industrialised countries must also align, on request, their terminal dues to the tariffs they charge to their national customers, for equivalent items¹⁸⁷. Developing countries are not subject to a similar obligation, but it is unlikely that terminal dues they charge are higher than tariffs charged for domestic mail. Thus in practice, the national treatment obligation should not pose major difficulties.

3.5.3 *Reasonableness, objectivity and impartiality of domestic regulation*

Article VI of the GATS imposes on governments a general obligation of reasonableness, objectivity and impartiality of domestic regulations affecting trade in services. This provision also imposes disciplines in the provision of authorisations and licences. Service suppliers applying for authorisations must be informed without delay on the status of application and of the decision on their application. Furthermore, measures relating to requirements and procedures, technical standards

¹⁸⁵ Article 10 of the UPU Convention is to postal services what the GATS Annex on Basic Telecommunications services is to telecommunication services.

¹⁸⁶ See WTO Appellate Body Report, "EC-Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, 9 September 1997, para. 233 and 240 and foll.

¹⁸⁷ Art. 47.4.2 of the Convention. Considering the upper limits contained in the UPU Convention, alignment might not work in practice.

and licensing requirements must be based on objective and transparent criteria and must otherwise not be administered in such a way as to nullify or impair market access rights.

UPU Acts concerning mostly the provision of postal services by State administrations, they do not address the issue of licence provision in a liberalised environment. They do, however lay down standards and other technical regulations. A problem could arise here with respect to their impartiality. Indeed standards and regulations are laid down in the UPU by national postal administrations which are themselves operators¹⁸⁸. Arguably, this is contrary to the principle of the independence of the regulator in a liberalised environment which is implicitly contained in Article VI of the GATS. Furthermore, the UPU does not itself mandate separation of national regulators and operators, allowing the latter to impose whatever partial and interested domestic regulation it desires. Therefore, arguably, both UPU Acts themselves and the interested conduct of national operators appear to be incompatible with Article VI of GATS.

It should be noted that the UPU also mandate States to ensure the provision of a universal service. Such regulation of course can be admitted under the GATS. However, the manner in which universal services requirements are imposed can be scrutinised under Article VI of the GATS.

3.5.4 *Activities of public monopolies*

Pursuant to Article VIII of GATS, independent postal companies which have been granted special or exclusive rights can be subject to GATS rules.

In addition to the general application of the MFN provision to their activities, this provision is also relevant if they supply both liberalised services and reserved services. It requires governments to ensure that these companies do not abuse their dominant position in the reserved services to act in a manner inconsistent with their country's commitments relating to the liberalised services.

The notion of "abuse of dominant position" is not explained in the GATS, which of course leaves a wide margin of discretion to the legal interpreter. In practice, it could address the issue of cross-subsidisation, i.e. the fact to use the profits generated by the operation of the reserved service to finance the provision of the liberalised service. It also applies to the use of the anti-remail provision. Indeed, it could be perceived as abusive for a national postal operator to refuse bulk mail delivered to it after remail by a competing operator.

3.5.5 *Restrictive business practices of private operators*

Pursuant to Article IX of GATS, WTO Members may find that certain business practices of independent postal operators which do not benefit from special or

¹⁸⁸ It should be noted that after the "recasting" of UPU Acts, some 80 percent of UPU legislation is found in the Regulations and not in the Convention. The Regulations are enacted by the Postal Operations Council which is itself composed of representatives of national postal administrations (Art. 18 of the Constitution and Article 104 of the General Regulations).

exclusive rights, may nevertheless restrain competition and thereby trade in services. Even though strictly speaking States are not obliged to combat such practices, at least they must accept, at the request of any other Member to enter into consultations with a view to eliminate them.

This provision might be useful in those countries where postal services have been recently liberalised, but where an incumbent operator remains *de facto* dominant in the market.

UPU rules do not address this particular issue.

3.5.6 *Additional commitments*

The principles above may be completed by additional commitments regarding, among others, qualifications, standards or licensing requirements. These commitments can be added to the Members' Schedules of Commitments pursuant to Article XVIII of the GATS.

No such commitments have yet been made in the postal sector so far, leaving it essentially to the UPU to set standards and universal service requirements. However, as already mentioned, rules on licensing requirements or on the independency of the regulator are missing.

3.6 *Conclusion concerning GATS*

Similarly to trade in goods, both UPU rules and their application by States and postal administrations may pose difficulties with regard to GATS.

GATS is applicable to postal services as well as to courier services even if, in fact, not many countries made commitments to open the former to international trade. Indeed, whatever commitments are made, obligations such as the MFN treatment or transparency requirements are always applicable. Thus, arguably, the entire system of discriminatory terminal dues is incompatible with GATS. Furthermore, postal administrations must pay attention not to discriminate between foreign postal operators when establishing the conditions of access to their basic services.

In those sectors which have been opened to international trade - in most cases courier services -, countries must dismantle all monopolies and of course provide national treatment, as already requested by the rules of the UPU. Furthermore, postal administrations in charge of a reserved service, which also supply a liberalised service, must pay attention not to use their privileges obtained in the former to acquire competitive advantage in the latter. A problem also arises with respect to the exclusive presence of monopoly operators to the UPU, being arguably incompatible with the requirement that regulation of postal services is objective and impartial. Finally, similarly to the GATT, the use of the anti-remail provision by whatever administration, is a source of serious conflict with GATS rules when it is not applied uniformly to all third countries or when it is used against mail conveyed by means of a service open to international trade.

4. General conclusion on the impact of WTO law on international postal law

As a general conclusion to this analysis, it can be noted that contact points, as well as frictions, between WTO principles and international postal law are numerous and require a somewhat complex legal analysis.

Not only current UPU rules are not adapted to the constraints of international trade rules, but the latter, in particular concerning schedules of commitments and the classification of postal services, do not appear to be adapted to market evolutions. Furthermore, as noted in the above analysis, UPU rules, certain of which can be useful in practice, may not be enforceable under WTO law and could be successfully challenged by UPU Members wishing to circumvent them. This creates legal uncertainty.

Consequently, additional coherence is required as well as technical adjustments to current rules. The UPU itself is committed to pursue a deep analysis in the context of three project teams instituted on "*Universal Postal Service*", "*Relations With the WTO*" and "*Terminal Dues*".¹⁸⁹ However, no formal cooperation with the WTO has yet been established in this respect. Also, surprisingly, the system of differentiated terminal dues, which is intended to remedy to market distortions, has not been proposed for a waiver at the WTO.

Ongoing negotiations could provide the opportunity to develop a co-ordinated approach between negotiators at the WTO and postal administrations which are active at the UPU. This approach would combine the need for regulation of postal services, protection of universal service requirements and fair trade conditions for both goods using the postal system and liberalised postal services.

III. FUTURE NEGOTIATIONS

Pursuant to Article XIX of GATS, future negotiations for further liberalisation of trade in services are ongoing. There seems to be now a consensus that the approach for these negotiations should be a sectoral one in principle, along the lines of the methodology adopted in the telecommunications sector.

Proposals concerning postal and courier services have been submitted by the European Communities and Switzerland¹⁹⁰.

Both proposals insist on the need to make a proper classification of postal services reflecting market reality. They suggest to eliminate the current distinction between postal services and courier services due to an outdated division of tasks among State monopolies and independent operators. They propose instead to divide postal/courier services according, among others, to the type of mail (letters, parcels, etc) or the speed of delivery (express or normal delivery) or the personalisation of the service

¹⁸⁹ Art. 102.6 of the General Regulations.

¹⁹⁰ See Communication from Switzerland "*GATS 2000: Postal and Courier Services*", S/CSS/W/73, 4 May 2001; Communication from the European Communities and their Member States "*GATS 2000: Postal/courier services*", S/CSS/W/61, 23 March 2001.

(insured items, registered mail or other services). Commitments should then be taken separately for each of these services, on a negotiated basis.

The classification proposed does not, however, suggest to split the "handling" of mail, which includes, according to both proposals, the clearance, sorting, transport and delivery of mail. Full liberalisation of postal services could however require unbundling of these services. In other words, one could imagine that the sorting and transport of mail is kept under monopoly rights, while pick up and delivery could be liberalised, or other formulas, depending on countries' priorities and universal service requirements¹⁹¹. Thus, more detailed sub-classifications could be useful to make more precise commitments in all relevant aspects of the handling of mail.

The connection between postal services and transportation services has also been rightly pointed out in the proposals. Indeed, free movement of mail and liberalisation of postal services presupposes the availability of appropriate transportation means. Currently, lack of coherence is still possible between commitments. As already indicated, postal and courier services are classified in "*Communication Services*" while transportation of mail by plane is classified as "*Air Transport Service*". It would be pointless to include commitments in the first without liberalising the second. Thus, the idea has been put forward to define "clusters" of related services and negotiate them as a whole in a coordinated manner¹⁹².

It is generally recognised that liberalised postal services require regulation in order to ensure, among others, the proper provision of a universal service, undiscriminated access to the incumbent's basic services, fair licensing procedures and independent regulators.

A possible technique, used in other sectors such as in telecommunication services, has been to negotiate additional commitments for inclusion in Member's Schedules of Commitments pursuant to Article XVIII of GATS. However, as indicated in the above analysis, several regulatory issues pertaining to liberalised services already appear in the UPU Acts. These are for instance the right of access to basic services, the maintenance of a universal service, transparency requirements and determination of tariffs according to costs. Blatantly incorporating them in schedules of commitments, as suggested by the EC¹⁹³, might not be appropriate. Indeed, as indicated above, UPU acts are not always coherent with WTO rules, particularly the GATT and GATS and still enable postal administrations to behave in a manner incompatible with them.

Theoretically, it could be possible to make additional regulatory commitments without taking into account UPU Acts. Pursuant to general international law related to conflicts between international treaties, WTO specific commitments would even prevail over the latter¹⁹⁴. However, institutional rivalry is not a sound policy in

¹⁹¹ See Background Note by the WTO Secretariat "Postal and Courier Services", S/C/W/39, 12 June 1998, p. 12.

¹⁹² See Communication from Switzerland "*GATS 2000: Postal and Courier Services*", above, para. 6.

¹⁹³ See Communication from the European Communities and their Member States "*GATS 2000: Postal/courier services*", above, para. 5.

¹⁹⁴ See Art. 30 of the Vienna Convention on the Law of Treaties.

international law and might exacerbate a certain antagonism against the WTO, particularly considering the declared generous objective of the UPU¹⁹⁵. Active cooperation and coordination of rules between the two institutions is thus necessary.

The importance of cooperation is particularly manifest in the field of terminal dues. Indeed, a specific difficulty in the postal sector comes from the fact that under UPU rules, terminal dues between industrialised countries are higher than those applicable to developing countries. The former, however, are economically more efficient than the latter, considering that they must be determined according to costs.

Although one could wonder whether fixing terminal dues in an international agreement is still relevant in a fully liberalised environment, for the time being, in light of the concomitant existence of liberalised postal markets and those subject to a State monopoly, regulation of terminal dues remains unavoidable. In theory, pursuant to WTO rules, differentiated terminal dues should be eliminated. Nevertheless, it would be neither efficient, nor tolerated, to reduce terminal dues applicable between industrialised countries to the level of those prevailing for developing countries. Such reduction would indeed undermine the efforts of postal administrations to gradually increase terminal dues up to the level of delivery costs in destination countries. It might also not be appropriate, or accepted, to increase terminal dues applicable to developing countries, since this might be incompatible with their development objectives and would increase the price of outgoing mail for their citizens in an undistorted manner¹⁹⁶. Consequently, on a temporary basis at least, it is highly likely that UPU Members would want to maintain the differentiated treatment set forth in the UPU Convention.

Therefore, in order to avoid unproductive disputes involving incompatible WTO and UPU rules, this issue should be addressed in the WTO. One of the safest solutions would be to initiate a special waiver procedure under Article IX:3 of the WTO Agreement. Another could be to conclude a gentleman's agreement pursuant to which no WTO dispute settlement procedure would be initiated in relation to terminal dues until at least the next round of negotiations¹⁹⁷.

Furthermore, to the extent different terminal dues are maintained, it is also necessary to address remail activities which are a consequence of this situation. Remail might be considered as unfair, as it takes advantage of inefficient or subsidised rates in developing countries and in countries in which terminal dues are not yet at the level of costs¹⁹⁸. As already mentioned, the anti-remail provision contained in Article 43

¹⁹⁵ For a very critic vision of current developments in the postal sector, see Sinclair, Scott "*The GATS and Canadian Postal Services*", Canadian Centre for Policy Alternatives, March 2001.

¹⁹⁶ The argument could be made, nevertheless, that enterprises in developing countries should be able to pay for higher postage tariffs, so should tourists sending postcards. Furthermore, another argument could be that development aid should not be provided in the form of inefficient discounts, but in the form of grants for specific projects.

¹⁹⁷ Such gentleman's agreement has been concluded, for instance, in the sector of telecommunications with respect to accounting rates between national telecommunications operators (see Report of the Group on Basic Telecommunications, S/GBT/4, 15 February 1997, para. 7).

¹⁹⁸ Pursuant to Article 48 of the UPU Convention, these are industrialised countries which have until 2003 to adjust their terminal dues to the level of their costs. It should be reminded that other 18 industrialised countries have already done this in accordance with the REIMS II agreement.

of the UPU Convention is generally considered not to provide the most appropriate response. Thus, sound anti-remail procedures should be implemented in the framework of GATS, with a view to ensure a balance between free trade requirements and the need to provide remedies against injurious remail practices. Antidumping or antisubsidy procedures concerning trade in goods could provide useful guidance. It should be noted in this regard that WTO Members had agreed at the end of the Uruguay Round to undertake negotiations on, among others disciplines on subsidies (Article XV of GATS) and safeguard measures (Article X of GATS) applicable to trade in services. These procedures, if implemented, may already entail a better control on the level of prices for outward postal services. They may also provide satisfactory remedy against the most injurious market distortions due to otherwise acceptable low terminal dues in developing countries.

It should be noted that the UPU Convention already prohibits dumping of postal services and contains an interesting mechanism, similar to tariff quotas. Pursuant to this mechanisms, if the tonnage of mail received from a developing country exceeds a specific threshold specifically established for each destination country¹⁹⁹, the latter may charge to the surplus mail the higher terminal dues applicable to other industrialised countries²⁰⁰. Clearly, these provisions must be taken into consideration for any future regulation of anti-remail measures²⁰¹.

In conclusion, despite the complexity of the legal analysis concerning the interaction between WTO rules and international postal law, several regulatory elements are either already in place or in the verge of being negotiated at the WTO. Each of them needs to be adjusted and to be completed taking into account liberalisation in many countries as well as the goals of the UPU. It would be imprudent to ignore them or to start a new regulatory effort from scratch. Perhaps an effective method could be to review current international postal rules so that they regulate, in a WTO-compatible manner, the non-liberalised markets, including terminal dues, as well as the non-trade concerns of the provision of all postal services. One question remains in this regard whether the exclusive presence of monopoly or incumbent postal administrations at the UPU Postal Operation Council is acceptable and should not be revised. At the level of the WTO then, the task of negotiators would be to include the new UPU rules by reference in a "Postal Reference Paper", which would be part of GATS pursuant to Article XVIII of the latter. They could also add, if appropriate, supplementary rules applicable to liberalised markets, such as licensing requirements and procedures and an obligation to establish independent domestic regulators.

Whatever approach is adopted, substantial work still needs to be done to harmonise the different rules. This certainly requires cooperation between delegates at the UPU and the WTO to a much higher level than the one currently existing. A first good move would certainly be the creation of a joint WTO-UPU Committee.

References:

¹⁹⁹ See Art. 1010 of the Letter-Post Regulation.

²⁰⁰ Art. 49.3 of the UPU Convention.

²⁰¹ See A. Perazzelli and P. Vergano, "Terminal Dues Under the UPU Convention and the GATS: An Overview of the Rules and of Their Compatibility", 23 *Fordham International Law Journal*, 1999, at 751.

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