THE STUDY OF THE RELATIONSHIP BETWEEN THE CONSTITUTION, RULES AND PRACTICE OF THE UNIVERSAL POSTAL UNION, THE WTO RULES (IN PARTICULAR THE GATS), AND THE EUROPEAN COMMUNITY LAW

FINAL REPORT

submitted by

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INTRODUCTION

This document is the final report of the *Study of the Relationship between the Constitution, Rules and Practice of the Universal Postal Union (UPU), the Rules of the World Trade Organization (WTO), in particular the GATS (General Agreement on Trade in Services), and European Community (EC) Law*, carried out by the TMC Asser Institute for the European Commission. The objective of the Study was to review the Constitution, rules and practice of the UPU in the light of the WTO rules (in particular the GATS), and EC law relating to postal services. The Study is intended to provide the European Commission and the Member-States of the EC with a detailed and meaningful view on the relationship between their UPU and WTO commitments. This informed view should be instrumental for the co-ordination between the European Commission and the Member-States with respect to UPU issues, particularly in view of the 23rd UPU Congress, which will be held in Bucharest from 15 September to 5 October 2004.[1]

Section 1.1.3 of the *Tender Specifications* describes the context of the Study, stating that the UPU is based on the concept of a single postal territory, which envisages one universal postal provider ('Post Office') in each member country of the UPU. It explains that the regulations of the UPU control the movement of postal items internationally and aim to standardise and facilitate the relevant procedures and charges incurred in this regard. Section 1.1.3 subsequently indicates that the UPU Constitution, rules and practice may not be consistent with current market developments, consisting of increased competition in the provision of postal services, as exemplified in a plurality of postal providers, a plurality of postal products, and private rather than state ownership of postal providers. These market developments are associated with the General Agreement on Trade in Serices (GATS), the General Agreement on Tariffs and Trade 1994 (GATT 1994) and EC law relating to postal services.[2]

[1] Invitation to tender n° MARKT/2003/04/C, Section 1.1.2; Section 4.1.1.

[2] Invitation to tender n° MARKT/2003/04/C, Section 1.1.3.

Section 4 of the *Tender Specifications* describes the activities to be carried out as part of the Study:[3]

(i) To map the interfaces between the UPU Constitution, practice and regulations and (a) the WTO rules (in particular the GATS) and (b) EC law relating to postal services;
(ii) to assess the relative legal status of the Acts of the UPU and (a) the WTO rules (in particular the GATS) and (b) EC law relating to postal services;
(iii) to identify possible areas of divergence between the UPU Constitution, rules and practice and (a) the WTO rules (in particular the GATS) and (b) EC law relating to postal services;
(iv) to assess the potential implications and relative significance of such areas of divergence;
(v) to scope alternative ways in which such inconsistencies may be practically resolved;
(vi) to make recommendations concerning the appropriate level of co-ordination required at the Community level and at the level of Member-States with regard to UPU issues.

This report presents the results of those activities, as follows: Part I provides an overview of the Constitution, rules and practice of the UPU, the WTO rules (GATS/GATT1994) and EC law relating to postal services. Part II addresses the question of the interfaces between these different fields and institutions. Part III deals with the question of the relative legal status of these different fields and institutions. Part IV contains a description and analysis of the divergences that might be identified between these different fields and institutions. Part V considers the relative significance and potential implications of such divergences. Part VI presents conclusions and recommendations.

[3] Invitation to tender n° MARKT/2003/04/C, Section 4.1.1; Section 4.1.2.

PART I OVERVIEW OF THE CONSTITUTION, RULES AND PRACTICE OF THE UPU, WTO RULES (GATS/GATT 1994) AND EC LAW RELATING TO POSTAL SERVICES

I.1 Overview of the Constitution, rules and practice of the UPU

I.1.1 Objective and scope

The UPU is an international institution which, pursuant to Article 1 (2), Constitution of the UPU, aims to secure the organization and improvement of the postal services and to promote the development of international collaboration in this sphere.[4] In view of this objective, Article 1 (1), Constitution of the UPU, provides that the member countries of the UPU comprise a single postal territory for the reciprocal exchange of letter-post items. The UPU is recognized by the United Nations as the specialized agency responsible for the field of international postal services.[5]

I.1.2 The Acts of the UPU

The law of the UPU is contained in differentiated instruments. Article 22, Constitution of the UPU, enumerates these instruments as Acts of the UPU. Article 22 (1), Constitution of the UPU, refers to the Constitution of the UPU as the 'basic Act' of the UPU. The General Regulations embody the provisions ensuring the application of the Constitution of the UPU and the working of the UPU.[6] The Universal Postal Convention, the Letter Post Regulations

[4] In parallel with this objective, the Preamble to the Constitution of the UPU refers to the objectives of developing communications between peoples by the efficient operation of the postal services and of contributing to the attainment of the noble aims of international collaboration in the cultural, social and economic fields.

[5] Agreement between the United Nations and the Universal Postal Union, Article I.

[6] Article 22 (2), Constitution of the UPU.

and the Parcel Post Regulations embody the rules applicable throughout the international postal service relating to the letter post and parcel post services.[7] The Agreements of the UPU and the Regulations relating to those Agreements, regulate the services other than the letter post and the parcel post services between the member countries parties to those Agreements.[8]

The Constitution of the UPU is a permanent international instrument[9], which is subject to amendment in the form of additional protocols.[10] Proposals relating to the amendment of the Constitution of the UPU require the approval of two thirds of the member countries.[11] The other Acts of the UPU are non-permanent international instruments and are renewed at each Congress.[12] Proposals relating to the amendment of those Acts are subject to the provisions of those Acts.[13]

I.1.3 The bodies of the UPU

The institutional law of the UPU is mainly found in the Constitution of the UPU, in the General Regulations and in the Rules of Procedure of the respective bodies of the UPU. Article 13 (1), Constitution of the UPU, enumerates the 'bodies' of the UPU, which are: (i) Congress; (ii) the Council of Administration; (iii) the Postal Operations Council; and (iv) the International Bureau.

(i) Congress

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[7] Article 22 (3), Constitution of the UPU.

[8] Article 22 (4), Constitution of the UPU.

[9] Article 33, Constitution of the UPU.

[10] Article 30 (2), Constitution of the UPU.

[11] Article 30 (1), Constitution of the UPU.

[12] Article 31 (2), Constitution of the UPU.

[13] Article 31 (1), Constitution of the UPU; Article 130, General Regulations; Article 64, Universal Postal Convention.

According to Article 14 (1), Constitution of the UPU, Congress is the 'supreme body' of the UPU; it consists of representatives of the member countries.[14] Congress is a non-permanent body[15]; Article 101 (1), General Regulations, prescribes that it must be convened not later than 5 years after the date on which the Acts of the preceding Congress have come into operation. Instruments that may be adopted by Congress include resolutions, recommendations and decisions.

(ii) The Council of Administration (CA)

Pursuant to Article 17, Constitution of the UPU, the Council of Administration is charged with ensuring the continuity of the work of the UPU. The Council of Administration consists of 41 member countries[16]; Article 102 (4), General Regulations, prescribes that the representatives of those member countries must be competent in postal matters.

Article 102 (6), General Regulations, defines the functions of the Council of Administration. These include:

- (6.1) taking account of international regulatory developments relating to, *inter alia*, trade in services and competition;
- (6.2) considering and approving, within the framework of its competence, any action considered necessary to safeguard and enhance the quality of and to modernize the international postal service;
- (6.3) promoting, coordinating and supervising all forms of postal technical assistance within the framework of international technical cooperation;
- (6.20) establishing principles for the Postal Operations Council to take into account in its study of questions with major financial repercussions (charges, terminal dues, transit charges, basic airmail conveyance rates and the posting abroad of letter post items);
- (6.21) studying administrative, legislative, and legal problems concerning the UPU or the international postal service.

[14] Article 14 (2), Constitution of the UPU.

[15] Article 13 (2), Constitution of the UPU.

[16] Article 102 (1), General Regulations.

To carry out its work, the Council of Administrations maintains committees and project teams. Important project teams are the Acts of the Union Project Team and the Management of the Work of the Union Project Team, which both resort under Committee 1, which is responsible for General Matters of Policy and Principle, and the project teams on Relations with the WTO, on Universal Postal Service, and on Terminal Dues.

Article 102 (14), General Regulations, allows the Council of Administration to associate any international body, any representative of an association or enterprise, or any qualified person with its work.

It should further be mentioned that pursuant to resolution C 105/1999, an Advisory Group was established by the Council of Administration. The Advisory Group was intended to achieve transparency through the involvement of external stakeholders in the work of the UPU. International non-governmental organizations which may currently be associated with the work of the UPU in this manner comprise consumers' organizations, organizations of private operators, organizations of labour unions and users' organizations. Apart from representatives from those organizations, the membership of the Advisory Group also comprises members of the CA and the POC. Non-governmental members of the Advisory Group have observer status at plenary meetings of the CA[17] and the POC[18]. It is envisaged that the Advisory Group will be converted into a Consultative Committee at the 23rd Congress (proposal 15.104.91).[19]

(iii) The Postal Operations Council

Article 18, Constitution of the UPU, determines that the Postal Operations Council is responsible for operational, commercial, technical and economic questions concerning the postal service. It consists, according to Article 104 (1), General Regulations, of 40 member

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[17] Resolution CA 13/2001.

[18] Resolution CEP 4/2002.

[19] Report on the Activities of the High Level Group, Congrès-Doc 23; Report on the Activities of the CA Advisory Group, Congrès-Doc 24.

countries. Pursuant to Article 104 (3), General Regulations, the representatives of member countries of the Postal Operations Council are appointed by postal administrations.

The Postal Operations Council has been designated as the body mainly responsible for the content of the Regulations which implement the Universal Postal Convention and the Agreements of the UPU. According to Article 22 (5), Constitution of the UPU, the Postal Operations Council draws up those Regulations. In addition, Article 104 (9.2), General Regulations, charges the Postal Operations Council with revising the Regulations, subject to guidance by the Council of Administration.

Article 104 (9), General Regulations, defines other functions of the Postal Operations Council. These include:

- (9.1) studying operational, commercial, technical, economic and technical cooperation problems, including questions with major financial repercussions (charges, terminal dues, transit charges, air-mail conveyance rates, parcel post rates and the posting abroad of letter post items);
- (9.3) coordinating practical measures for the development and improvement of international postal services;
- (9.4) taking action considered necessary to safeguard and enhance the quality of and modernize the international postal service;
- (9.8) preparing and issuing standards for technological, operational and other processes.

Article 104 (13), General Regulations, determines that the Postal Operations Council may involve international bodies, qualified persons, postal administrations of non-member countries and associations or enterprises in its work.

(iv) The International Bureau

Article 20, Constitution of the UPU, provides that the International Bureau serves as an organ of execution, support, liaison, information and consultation. Article 114, General Regulations,

mentions, in addition, a number of important functions of the International Bureau. Article 114 (1), General Regulations, provides that the International Bureau is at the disposal of the Council of Administration, the Postal Operations Council and postal administrations to provide necessary information. According to Article 114 (2), General Regulations, the International Bureau deals with information relating to the international postal service, gives an opinion, at the request of the parties involved, on questions in dispute, and acts on requests for interpretation and amendment of the Acts of the UPU. It may also conduct non-binding enquiries requested by postal administrations to obtain the views of other postal administrations on a question. Further, the International Bureau may act as a clearing house for the settlement of accounts relating to the postal service.

It is further important to note that the International Bureau, pursuant to Article 115, General Regulations, develops technical assistance within the framework of international technical cooperation.

I.1.4 The Universal Postal Convention

The main substantive law of the UPU is found in the Universal Postal Convention and the Regulations. The Universal Postal Convention contains the rules applicable throughout the international postal service. Some of its main provisions are the following:

Universal Postal Service
Article 1, Universal Postal Convention, introduces and defines the concept of a universal postal service, providing that member countries shall ensure that all users/customers enjoy the right to a universal postal service involving the permanent provision of quality basic postal services at all points in their territory, at affordable prices.

Freedom of Transit
Article 2, Universal Postal Convention, states the principle of freedom of transit, which involves the obligation for each postal administration to forward always by the quickest routes and the most secure means which it uses for its own items, closed mails and à découvert letterpost items which are passed to it by another postal administration.

Basic Services

Article 10 (1), Universal Postal Convention, defines basic services relating to letter post and postal parcels and provides that postal administrations shall provide for the acceptance, handling, conveyance and delivery of letter post items and for postal parcels, either as laid down in the Convention or, in the case of outward parcels and after bilateral agreement, by any other means which is more advantageous to customers.

Charges

Articles 7 and 11, Universal Postal Convention, relate to charges. Article 7 (1), Universal Postal Convention, provides that the charges for the various postal and special services shall be set by the postal administrations in accordance with the principles set out in the Universal Postal Convention and the Regulations and that these charges shall be in principle be related to the cost of providing these services. Article 11 (1), Universal Postal Convention, determines that the administration of origin shall fix the postage charges for the conveyance of letter-post items throughout the entire extent of the single postal territory, including delivery.

Prohibitions and Non-Admission

Article 25, Universal Postal Convention, contains prohibitions and provides for the possibility of not admitting certain postal items.

Quality of Service

Article 42 (1), Universal Postal Convention requires postal administrations to fix quality of service targets for international mail, which shall be no less favourable than those applied to comparable items in their domestic service.

Remailing

Articles 43, Univeral Postal Convention, relates to the posting abroad of letter post items in the form of ABA and ABC remailing, stipulating that the obligation to forward and deliver postal items does not apply in those cases of remail.

Terminal Dues

Articles 47-51, Universal Postal Convention, contain the terminal dues system providing for the reimbursement of the cost of delivery of international mail in the member country of destination.

I.2 Overview of the WTO (GATS/GATT 1994)

I.2.1 The WTO

The WTO constitutes, pursuant to Article II (1), Agreement establishing the WTO, the common institutional framework for the conduct of trade relations between the Members of the WTO. As far as relevant for the present report, trade relations between the Members of the WTO are regulated in the GATS, the GATT 1994 and in the Agreement on Technical Barriers to Trade (TBT).

I.2.2 Overview of the GATS

The GATS, attached as Annex 1B to the Agreement establishing the WTO, contains a multilateral framework for trade in services. The GATS is composed of three elements: (1) the framework agreement itself, which contains the general obligations and disciplines, (2) the annexes to the agreement, which comprise special rules for specific service sectors (e.g. for telecommunications and financial services), and (3) the specific commitments, which every Member has undertaken in order to grant market access to its territory and national treatment to foreign services and service suppliers.

The framework agreement consists of 6 parts: Part I determines its scope and contains definitions; Part II contains general obligations and disciplines; Part III relates to specific commitments; Part IV relates to progressive liberalization; Part V contains institutional provisions; Part VI contains final provisions, including further definitions. As outlined above, the GATS is complemented by Schedules of Specific Commitments[20] and several Annexes[21].

[20] Cf. Article XX (3), GATS.

Scope of the GATS: Measures by Members Affecting Trade in Services

Article I (1), GATS, determines the scope of the GATS and provides that it applies to 'measures by Members affecting trade in services'.[22] According to Article XXVIII (a), GATS, 'measure' means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form. Article XXVIII (c), GATS, elaborates that 'measures by Members affecting trade in services' include 'measures in respect of (i) the purchase, payment or use of a service; (ii) the 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; (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member'.

As regards the connection between 'trade in services' and 'measures by Members', it should be noted that the Appellate Body has interpreted the word 'affecting' as including all measures that "have an effect on" which shall indicate a 'broad' scope of application of the GATS.[23] In particular, the term "affecting" shall be wider in scope than such terms as "regulating" or "governing". At the same time, however, it must be borne in mind that the Appellate Body has also indicated that the connection between a measure and trade in services must be demonstrated and cannot be assumed.[24]

Unlike the GATT, the GATS does not only refer to the traded object (good or service respectively) but also to the service supplier.[25] A 'service supplier' is defined in Article XXVIII (g), GATS, as 'any person that supplies a service', while 'person' is defined in Article XXVIII (j), GATS, as meaning either a natural or a juridical person. Additionally 'juridical person' is defined in Article XXVIII (l), GATS, as 'any legal entity duly constituted

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[21] Cf. Article XXIX, GATS.

[22] International Bureau, Impact, 12; Alverno, Measures relating to ETOEs, 4.

[23] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 9 September 1997, 220.

[24] Appellate Body Report, *Canada – Certain Measures affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 31 May 2000, 158-167.

[25] Cf, Art. II (1) GATS.

or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association'.

As a consequence, a Member's measure might not only affect trade in services if it has an effect on the service itself but also if it has an effect on the supplier of the respective service. Even though Panels and the Appellate Body do not seem to have elaborated a reliable rule with regard to the application of GATS disciplines towards service suppliers yet[26], the mere fact that measures affecting suppliers of (traded) services are scrutinized under the agreement also argues for a broad application of the GATS.

The Scope of Services covered by the GATS

As in international trade, a commonly used idea of "services" was not established prior to the GATS and a precise definition could not be agreed upon in the course of the negotiations of the Uruguay Round, the GATS lacks a straightforward definition of 'services'. Insofar, Article I (3) (b), GATS, only provides that 'services' shall include 'any service in any sector except services supplied in the exercise of governmental authority'[27].

Postal Services

The text of Article I (3) (b), GATS, which refers to 'any service in any sector', suggests that postal services are included within the scope of the GATS if postal services constitute a sector or subsector. Sector 2 of the Sectoral Classification List, relating to communications services, is subdivided into subsector 2A, relating to postal services, and subsector 2B, relating to courier services.[28] Sector 2A is cross-referenced to item 7511 of the provisional United

[26] Until now, apparently only seven Dispute Settlement Proceedings have addressed the GATS-conformity of particular measures: (1) *United States – The Cuban Liberty and Democratic Solidarity Act* (WT/DS38), (2) *Japan – Measures Affecting Distribution Services* (WT/DS45), (3) *Belgium – Measures Affecting Commercial Telephone Directory Services* (WT/DS80/1), (4) *Canada – Measures Affecting Film Distribution Services* (WT/DS117/1), (5) *European Communities - Regime for the Importation, Sale and Distribution of Bananas* (WT/DS/27/R/), (6) *Canada – Measures in the Automotive Industry* (WT/DS139/1), and (7) *Mexico – Measures Affecting Telecommunications Services* (WT/DS204/R). Only in cases (5) and (7) Panel or Appellate Body Reports have been issued.

[27] Cf. below.

[28] MTN.GNS/W/120.

Nations Central Product Classification, which defines postal services. Sector 2B is cross-referenced to item 7512 of the provisional United Nations Central Product Classification, which defines courier services. On this basis, it has to be concluded that the GATS applies to postal services.[29]

Another issue that must be treated separately, however, is the question to what extent measures affecting postal services can actually be scrutinized under specific GATS-provisions. Generally speaking, the provisions of Part II of the GATS apply irrespective of particular commitments for postal services by the Members while the provisions of Part III of the GATS are only applicable to the extent such specific commitments have been made.[30]

The Exclusion of Services Supplied in the Exercise of Governmental Authority

Although the GATS applies to postal services, account must be taken of the exclusion from the scope of the GATS, pursuant to Article I (3) (b), GATS, of 'services supplied in the exercise of governmental authority'. Article I (3) (c), GATS, defines a service supplied in the exercise of governmental authority as 'any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers'. Hence, it follows that the governmental status of the service supplier alone (i.e. the fact that the service is supplied by an administrative body) is not sufficient for an exclusion of the respective service from the GATS. It is rather the function and the intention which underlies the service that has to be looked at. However, the notions of 'commercial basis' and 'in competition with one or more service suppliers' are not further defined.[31] It has been observed that the indeterminacy of these criteria entails legal uncertainty regarding the exact scope of the GATS.[32] A precise analysis has further suggested that the exclusion from the scope of the GATS should be interpreted 'narrowly'.[33]

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[29] Council for Trade in Services, Postal and Courier Services, 2; International Bureau, Obligations arising from the GATS, Congrès-Doc 72.Add1.Annexe 1, 2-3; Luff, Regulation, 73-74.

[30] Cf. below.

[31] International Bureau, Impact, 8; Luff, Regulation, 76-77.

[32] International Bureau, Obligations arising from the GATS, Congrès-Doc 72.Add1.Annexe 1, 3-4; International Bureau, Impact, 6-12; Alverno, Measures related to ETOEs, 3.

[33] Krajewski, Public Services, 347-359.

However, the assertion that the exclusion from the scope of the GATS should be interpreted narrowly leaves open the question how narrowly the exclusion should be interpreted. In order to understand the exclusion more fully, the following considerations may be appropriate. In order to be meaningful, some significance must be attributed to the exclusion. At the same time, if a Member could unilaterally determine that a service is not supplied on a commercial basis nor in competition with other service suppliers, it could give the exclusion a wider scope than intended by other Members.

From the wording of Article I (3) (c), GATS, it follows that for an exclusion of a service supplied in the exercise of governmental authority it is necessary that both conditions listed therein are met, i.e. that the service is supplied *neither* on a commercial basis *nor* in competition with other suppliers (emphasis added). In other words, if a governmental service is provided on a commercial basis then it is subject to GATS restrictions; similarly, if a governmental service is supplied in competition with any other supplier then it is likewise subject to the GATS.[34]

Hence it follows, that all areas of postal services that are open to competition do not fall within the scope of the exception clause. Uncertainty only remains with regard to those postal services, where national post administrations or state-owned suppliers are equipped with exclusive rights. Therefore, in the field of postal services, the main situation that seems to require consideration in this context is that of a postal administration on which special or exclusive rights are conferred in order to fulfil a universal postal service obligation.

The decisive factor, in this respect, is whether such postal services are provided 'on a commercial basis' as set forth in Sec. I (3) c, GATS. This term is not defined in the GATS. With regard to the criterion that a service is not supplied on a commercial basis, it has been suggested that this requires that the service is not supplied in order to make a profit. Insofar, one might argue that postal services are supplied against payment – and not free of charge – and these charges alone might suffice to classify the services as commercial services. Also some Members acknowledge that there would appear to be few examples of postal services

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[34] Sinclair, Postal Services, 22.

supplied neither on a commercial basis nor in competition with one or more suppliers as most, if not all, postal regimes charge their consumers a fee for their services.[35]

As a viable argument for the applicability of the exceptions clause one might put forward the universal service obligations which are associated with postal services. It could be argued that such obligations might not be fulfilled in a "commercial environment" so that the supply of postal services would have to be regarded as a purely governmental responsibility. Yet, as legislation and practice in other service sectors (e.g. telecommunications) shows, the safeguarding of a universal service is also possible in a competitive environment. Therefore, a general exclusion of postal services from the GATS does not seem to be justified.[36]

Additional arguments for or against the commercial character of postal services might be drawn from the legal form of the supplier of postal services: in particular if the supplier is organized as a private juridical person (e.g. a stock company), which normally returns dividend to its shareholder (the Government), it seems to be very likely that a WTO panel will find that postal services are covered by the GATS and do not fall within the scope of the exception clause set forth in Article I (3) (c), GATS[37].

However, what criteria should be used to determine whether a service is supplied in order to make a profit remains to a certain extent unclear.[38] With regard to the criterion that the service is not supplied in competition with other service suppliers, the question arises whether this applies to actual or potential competition. As has been observed, if this criterion is limited to actual competition, the existence of the special or exclusive right seems sufficient to exclude the service from the scope of the GATS – if the second condition (no provision on a commercial basis) is also met.[39] If this criterion extends to potential competition, the exclusion would not be applicable if other service suppliers could provide the service. This would be the case if the exclusive or special rights are defined too broadly.

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[35] Council for Trade in Services, Communication from New Zealand, S/CSS/W/115 from 6 November 2001, 17.

[36] Cf. Smit, GATS-Prinzipien, 14.

[37] Cf. Sinclair, Postal Services, 23.

[38] International Bureau, Impact, 8; Krajewski, Public Services, 351-352.

[39] Luff, Regulation, 76-77.

In view of these considerations and the absence of relevant dispute settlement practice, some uncertainty regarding the exclusion from the scope of the GATS remains. With regard to the example relating to special or exclusive rights, it may further be noted that Article VIII, GATS, deals with monopolies and exclusive service suppliers. It would seem to follow from this that special or exclusive rights are not sufficient to fall under the exclusion relating to services provided in the exercise of governmental authority. Therefore, the exclusion relating to services supplied in the exercise of governmental authority does not remove postal services from the scope of the GATS.[40]

Trade in Services - The Modes of Supply

Another issue with regard to the field of application of the GATS is the 'tradeability' of services. In this respect the GATS approach is not to generally define *trade* in services, but to classify services trade according to four modes of supply of a service as set forth in Article I (2), GATS: (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 (presence of natural persons mode).

According to Article XXVIII (b), GATS, 'supply of a service' shall comprise 'the production, distribution, marketing, sale and delivery of a service' so that, again, it seems to be prudent to assume a broad scope of application.

With regard to postal services it can be concluded, that the mode (1) 'cross-border-supply' is most relevant, as it might govern the situations in which only the mail – by means of co-operation between a foreign and a domestic service supplier – is transferred across borders.[41]

[40] Krajewski, Public Services, 354.

[41] Cf. below.

Moreover, mode (3) 'commercial presence' is particularly relevant as it governs any kind of commercial settlement abroad surpassing a mere co-operation, e.g. the creation of branches, representative offices, the constitution of subsidiaries, and consequently applies to the activity of extraterritorial offices of exchange.[42]

Relevant Provisions of Part II of GATS

Part II, GATS, contains general obligations and disciplines relating to trade in services. This may suggest that these general obligations and disciplines apply regardless of whether specific commitments have been made with regard to a service sector. However, it must be noted that several provisions of Part II (in particular Articles VII, IX, X, XIII and XV GATS) are conditional upon specific commitments. Articles II, III, IV, V, VI, VIII und XIV GATS apply irrespective of specific commitments.

The provisions of Part II that are considered most relevant for the present report are Article II (most-favoured-nation treatment), Article III (transparency), Article VI (domestic regulation), Article VIII (monopoly and exclusive service suppliers), Article IX (business practices) and Article XV (subsidies).

Article II (1), GATS, contains the MFN obligation and provides that, with respect to any measure covered by the GATS, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country. Article II (1), GATS, requires non-discrimination between the services and service suppliers of other Members and – even though this is not stated explicitly in the text – prohibits both *de jure* and *de facto* discrimination.[43] As to the level of scrutiny for *de facto* discriminations in the sense of Article II (1) GATS, it may be noted that a Panel in *EC – Bananas III*, referring to an earlier Panel[44],

[42] Alverno, Measures related to ETOEs, 3.

[43] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 9 September 1997, 231-234.

[44] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 1 November 1996, 29.

stated that a measure's "protective application can be discerned from the design, architecture and the revealing structure of a measure".[45]

Article III, GATS, deals with transparency and contains several obligations relating to publication and notification. The concept of transparency may be understood in a formal and in a material sense. The concept of transparency in a formal sense seems limited to the provision of information. The concept of transparency in a material sense extends to the fair application of criteria in actual processes of decision-making or operation. In the Reference Paper, which contains regulatory principles concerning the liberalization of trade in telecommunications services and which is not applicable to postal services, the concept of transparency is utilized in both senses. Sections 2.3, 2.4, 4 and 6, Reference Paper, refer to the concept of transparency in a formal sense. Sections 2.2 (b), 3 and 6, Reference Paper, refer to the concept of transparency in a material sense. In Article III, GATS, the use of the concept seems to be limited to the formal sense.[46] This seems to be confirmed by Section 4 of the Annex on Telecommunications.[47]

Article VI, GATS, relates to domestic regulation. Article VI (1), GATS, requires that in sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. Article VI (2), GATS, which is not subject to specific commitments, determines that each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Further, where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.

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[45] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/RW/ECU, adopted 12 April 1999, 6.127.

[46] Working Group on the Interaction between Trade and Competition Policy, Fundamental WTO Principles, 52-60; Moos, Bindung, 247-250.

[47] Annex on Telecommunications, Section 4: In the application of Article III of the GATS, each Member shall ensure that relevant information on conditions affecting access to and use of public telecommunications networks and services is publicly available, including: tariffs and other terms and conditions of service; specifications of technical interfaces with such networks and services; information on bodies responsible for the preparation and adoption of standards affecting such access and use; conditions applying to attachment of terminal or other equipment; and notifications, registrations or licensing requirements, if any.

Article VI, GATS, seeks to reconcile the objective of liberalizing trade in services and the possibility of Members to regulate the supply of services within their territories with a view to attaining national policy objectives.[48]

Article VIII, GATS, relates to monopolies and exclusive service suppliers. Pursuant to Article XXVIII (h), GATS, a monopoly supplier of a service is defined as any person, public or private, which, in the relevant market of the territory of a Member, is authorized or established, formally or in effect, by that Member as the sole supplier of that service. Article VIII (1), GATS, provides that each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II (MFN) and specific commitments. Further, Article VIII (2), GATS, prescribes that where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments. Pursuant to Article VIII (5), GATS, these provisions apply *mutatis mutandis* to exclusive service suppliers.

Article IX (1), GATS, states that business practices other than those falling under Article VIII, GATS, may restrain competition and thereby restrict trade in services. Similarly, Article XV (1), GATS, states that, in certain circumstances, subsidies may have distortive effects on trade in services. However, in both areas the text of the GATS does not contain substantive obligations. Nevertheless, it must be noted that, according to a fairly broad opinion, the national treatment obligation contained in Article XVII, GATS, extends to subsidies.

Part III of the GATS

Part III relates to specific commitments and may be seen as the most important part of the GATS. It provides a facility for Members to commit and thereby open service sectors to liberalization. Its main components are rules on market access and national treatment,

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[48] Moos, Bindung, 264-265.

contained in Articles XVI and XVII, GATS. If Members commit a service sector to liberalization, the rules of Articles XVI and XVII, GATS, apply to those sectors. However, Members retain the possibility of providing for conditions and/or limitations with respect to those sectors, which must be entered into the Schedule of that Member. The system of liberalization of trade in services provided for in Articles XVI and XVII, GATS, is therefore essentially a system of voluntary commitment.[49] Article XVIII, GATS, provides for the possibility of negotiating commitments additional to those provided for in Articles XVI and XVII, GATS, as e.g. the commitments concerning telecommunications services based on the Reference Paper which has been mentioned earlier.

Article XVI, GATS, relates to market access. According to Article XVI (1), GATS, with respect to market access, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule. Subsequently, Article XVI (2), GATS, lists 6 types of quantitative limitations or restrictions which Members shall not maintain, unless specified otherwise in their Schedules. Article XVI (2) (a), GATS, proscribing limitations on the number of service suppliers, *inter alia*, in the form of monopolies and exclusive service suppliers, implies market liberalization in the form of the suppression of exclusive or special rights.[50]

Article XVII, GATS, contains the national treatment obligation. Article XVII (1), GATS, provides that, in the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers. Article XVII (2), GATS, specifies that a Member may accord to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers. According to Article XVII (3), GATS, formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

[49] Euopean Commission, Green Paper on Services of General Interest, 100; Annex, 74-90.

[50] Luff, Regulation, 79-80.

I.2.3 Overview of the GATT 1994

The GATT 1994 is part of the Multilateral Agreements on Trade in Goods, attached as Annex 1A to the Agreement establishing the WTO. The GATT 1994 is legally distinct from the GATT 1947, and consists of GATT 1947 and additional legal instruments – in particular some protocols, decisions and Understandings – which are enumerated in No. 1 (b), (c) and (d) of the GATT 1994.[51]

Relevance of GATT 1994 for the Postal Sector

Unlike the GATS, the GATT 1994 does not define its scope of application. It is clear from the text that the GATT 1994 relates to trade in products, but this concept is not defined in the text. In order to ascertain, as far as possible, the meaning of this concept, it may be appropriate to consider that the notion of non-discrimination, underlying the MFN and national treatment obligations, is contingent on a comparison of 'like products'. In the context of this examination, criteria that are commonly used to determine whether products are 'like' include their properties, nature and quality, their end-uses and consumers' tastes and habits.[52]

In the light of these criteria, the question arises to what extent the GATT 1994 is relevant for the postal sector. This question may be considered at two levels: at the level of the postal items that are used to convey goods, and form part of the postal system as a system of communication, and at the level of the goods conveyed by means of the postal system. The criteria of properties, nature and quality, end-uses and consumers' tastes and habits do not seem meaningful when related directly to postal items, since these items are not intended to have end-uses and to satisfy consumers' tastes and habits. Instead, the end-use of postal items is precisely to convey other goods. Therefore, it seems more appropriate to consider that

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[51] Article II (4), Agreement establishing the WTO.

[52] Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 11 July 1996, 6.21.

postal items are not products but may contain products or facilitate communication relating to trade in products.

As such, postal services may be employed as a measure restricting international trade in products. In fact, in *Canada – Certain Measures concerning Periodicals*, a panel scrutinized 'international' postal rates for imported periodicals which were higher than 'commercial' or 'funded' rates for domestic periodicals, applied by Canada Post, under Article III (4), GATT 1994, and found those rates to be inconsistent with that provision.[53] Thus, indirectly, GATT 1994 is relevant for the postal sector.

Relevant Provisions of the GATT 1994

The main provisions of GATT 1994 that are relevant for the present report are Article I (1) (most-favoured-nation treatment), Article III (national treatment) and Article XI (1) (quantitative restrictions).

Article I (1), GATT 1994, contains the MFN obligation and provides that (…) any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties. Article I (1), GATT 1994, prohibits both *de jure* and *de facto* discrimination.[54]

Article III, GATT 1994, requires Members to provide equality of competitive conditions for imported products in relation to domestic products.[55] Article III (1) is interpreted by the Appellate Body as articulating a general principle, informing Article III (2) and III (4), that internal measures should not be applied so as to afford protection to domestic production.[56]

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[53] Panel Report, *Canada – Certain Measures concerning Periodicals*, WT/DS31/R, adopted 14 March 1997, 5.31-5.39.

[54] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 31 May 2000, 78.

[55] Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 4 October 1996, 16.

[56] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 4 October 1996, 18.

Article III (2), GATT 1994, relates to internal taxes or other internal charges imposed on products. Its object and purpose, as interpreted by the Appellate Body, is to promote non-discriminatory competition among imported and like domestic products.[57] A distinction is commonly made between the obligation contained in Article III (2), first sentence, GATT 1994, and the obligation contained in Article III (2), second sentence, GATT 1994.

Article III (2), first sentence, GATT 1994, provides that the products of the territory of any Member imported into the territory of any other Member shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. This requires a determination that imported and domestic products are like products and that imported products are subject, directly or indirectly, to internal taxes or other internal charges in excess of those applied, directly or indirectly, to domestic products.[58] According to the Appellate Body, the concept of like product contained in Article III (2), first sentence, should be interpreted narrowly and is dependent on the circumstances of a particular case.[59] As interpreted by the panel in *United States – Taxes on Petroleum and Certain Imported Substances*, Article III (2), first sentence, GATT 1994, obliges contracting parties to establish certain competitive conditions for imported products in relation to domestic products, protecting expectations regarding the competitive relationship between imported and domestic products.[60]

Article III (2), second sentence, GATT 1994, provides that no Member shall otherwise apply internal taxes or other charges to imported or domestic products in a manner contrary to the principles set forth in Article III (1), GATT 1994. According to the Interpretative Note ad Article III (2), a tax conforming to Article III (2), first sentence, GATT 1994, is only inconsistent with Article III (2), second sentence, GATT 1994, if competition is involved

[57] Appellate Body Report, *Japan, Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 4 October 1996, 20.

[58] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 4 October 1996, 19.

[59] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 4 October 1996, 20-22.

[60] Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, L/6175 – 34S/136, adopted 17 June 1987, 5.1.9.

between the taxed product and a directly competitive or substitutable product which is not similarly taxed. As interpreted by the Appellate Body, three issues must be examined to evaluate the consistency of an internal tax or other internal charge with Article III (2), second sentence, GATT 1994: (1) the imported products and the domestic products are directly competitive or substitutable products which are in competition with each other; (2) the directly competitive or substitutable imported and domestic products are not similarly taxed; and (3) the dissimilar taxation of the directly competitive or substitutable imported and domestic products is applied so as to afford protection to domestic production.[61] The determination whether products are directly competitive or substitutable should be made on a case-by-case basis and be based on the end-uses of those products, as indicated, *inter alia*, by elasticity of substitution.[62] The requirement that directly competitive or substitutable products are not similarly taxed means that there must be differential taxation of imported products which is more than *de minimis*.[63] To determine whether the dissimilar taxation of the directly competitive or substitutable products is applied so as to afford protection to domestic production, account should be taken of the design, the architecture, and the revealing structure of the measure.[64]

Article III (4), GATT 1994, relates to laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution and use of products. Article III (4), first sentence, GATT 1994, provides that the products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. According to the panel in *Italian Discrimination against Imported Agricultural Machinery*, Article III (4), GATT 1994, seeks to ensure equal conditions of competition between imported and domestic products once imported products

[61] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 4 October 1996, 25-26.

[62] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 4 October 1996, 27.

[63] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 4 October 1996, 28-29.

[64] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 4 October 1996, 31.

are cleared through customs and have entered the internal market.[65] Similarly, the panel in *United States – Section 337 of the Tariff Act of 1930* considered that the no less favourable treatment standard requires effective equality of opportunities for imported products as compared to domestic products. According to the panel, this might require formally identical treatment, but could also require formally different treatment of imported products so as to prevent *de facto* discrimination.[66]

Examples of laws, regulations and requirements that have been considered as inconsistent with Article Article III (4), first sentence, GATT 1994, include: a package configuration requirement applying to imported products[67]; restrictions on access to points of sale applying to imported products[68]; restrictions on the private delivery of imported products[69]; minimum prices imposed on imported products[70]; a requirement to use wholesalers applying to imported products[71]; a requirement to use a common carrier imposed on imported products[72]; maximum prices imposed on imported products[73]; and listing and delisting practices applying to imported products[74].

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[65] Panel Report, *Italian Discrimination against Imported Agricultural Machinery* (L/833 – 7S60), adopted 23 October 1958, 11-13.

[66] Panel Report, *United States – Section 337 of the Tariff Act of 1930* (L/6439 – 36S/345), adopted 7 November 1989, 5.11.

[67] Panel Report, *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* (DS17/R – 39S/27), adopted 18 February 1992, 5.4.

[68] Panel Report, *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* (DS17/R – 39S/27), adopted 18 February 1992, 5.6.

[69] Panel Report, *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* (DS17/R – 39S/27), adopted 18 February 1992, 5.13-5.15.

[70] Panel Report, *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* (DS17/R – 39S/27), adopted 18 February 1992, 5.29-5.31.

[71] Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages* (DS23/R – 39S/206), adopted 19 June 1992, 5.30-5.32.

[72] Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages* (DS23/R – 39S/206), adopted 19 June 1992, 5.50.

[73] Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages* (DS23/R – 39S/206), adopted 19 June 1992, 5.59.

[74] Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages* (DS23/R – 39S/206), adopted 19 June 1992, 5.63.

Article XI (1), GATT 1994, relates to quantitative restrictions and provides that no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any Member on the importation of any product of the territory of any other Member or on the exportation or sale for export of any product destined for the territory of any other Member. According to the panel in *Japan – Trade in Semi-Conductors*, Article XI (1), GATT 1994, applies comprehensively to all measures instituted or maintained prohibiting or restricting the importation, exportation or sale for export of products other than measures that take the form of duties, taxes or other charges.[75] These include import restrictions or export restrictions prescribing a minimum price level[76] and listing/delisting requirements and restrictions of points of sale relating to imported products[77].

I.2.4 The relation between the GATS and the GATT 1994

As regards the relation between the GATS and the GATT 1994 and their applicability, the question arises, whether the agreements are mutually exclusive or whether both agreements might be applied simultaneously. Insofar, it has to be borne in mind that neither the WTO Agreement nor the GATS or the GATT 1994 include a provision which explicitly settles the relationship between the agreements. In the absence of such provision establishing a hierarchical order between the GATT 1994 and the GATS, the Panel in *Canada – Periodicals* stated that "the ordinary meaning of the text of the GATT 1994 and the GATS and Article II (2) of the WTO Agreement indicates that obligations can co-exist and that one does not override the other"[78]. On appeal, the Appellate Body affirmed the panel's finding. In the *EC Bananas* case, the Appellate Body addressed the issue more elaborately and considered that a measure may be scrutinized at the same time under both GATT 1994 and GATS if it falls within the scope of both agreements. This may be the case if, for example, a service relates to

[75] Panel Report, *Japan – Trade in Semi-Conductors* (L/6309 – 35S/116), adopted 4 May 1988, 104.

[76] Panel Report, *Japan – Trade in Semi-Conductors* (L/6309 – 35S/116) adopted 4 May 1988, 105.

[77] Panel Report, *Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies* (L/6304 – 35S/37), adopted 22 March 1988, 4.23-4.25.

[78] Panel Report *Canada – Certain Measures Concerning Periodicals*, WT/DS31/R, adopted on 14 March 1997, 5.17.

a product or is supplied in conjunction with a product. The Appellate Body added that, in such a case, the 'services aspect' should be analyzed from the perspective of the GATS and the 'product aspect' should be analyzed from the perspective of the GATT 1994.[79] However, the Appellate Body stated that the question whether a certain measure affecting the supply of a service relating to a particular good is scrutinized under the GATT 1994 or the GATS or both, is a matter that can only be determined on a case by case basis. According to legal literature, in the course of such determination one should first examine the object and the effects of the given measure and then distinguish between the principal activity and incidental activity affected by the measure, i.e. trade in goods or trade in services. The principal activity so identified should then determine under which of the agreements – the GATS or the GATT 1994 – the measure should be assessed.[80]

Accordingly, one might not generally decide whether UPU rules and practices must be scrutinized simultaneously under both, the GATT 1994 and the GATS or under one of them exclusively. However, as postal services are itself services and at the same time by the usage of the postal system, goods are conveyed, it seems very likely that a Panel or Appellate Body could apply both, the GATS and the GATT 1994, to measures affecting postal services. It remains to be seen whether Panels and/or the Appellate Body follow the suggestion in legal literature and assigns a measure to one of the agreements according to the principal activity concerned.

Therefore, in the present report, Acts of the UPU are examined with respect to their consistency with both the GATS and the GATT 1994. Such an examination is consistent with the position adopted by the Appellate Body.

I.3 Overview of EC law relating to postal services

[79] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 9 September 1997, 221.

[80] Gaffney, The GATT and the GATS, 152.

EC law relating to postal services is primarily contained in Directive 97/67 on common rules for the development of the internal market of Community postal services and the improvement of quality of service.[81] In addition, EC competition rules, including Articles 81, 82, 86, 87-89 EC, as well as the merger control regulation,[82], are particularly relevant for the postal sector.

Overview of Directive 97/67

Directive 97/67 establishes common rules for the development of the internal market in postal services and the improvement of the quality of service. Its main provisions are the following:

Common Rules

Article 1, Directive 97/67, provides that the Directive establishes common rules concerning:

the provision of a universal postal service within the Community;
the criteria defining the services which may be reserved for universal service providers and the conditions governing the provision of non-reserved services;
tariff principles and transparency of accounts for universal service provision;
the setting of quality standards for universal service provision and the setting-up of a system to ensure compliance with those standards;
the harmonisation of technical standards; and
the creation of independent national regulatory authorities.

Universal Postal Service

Article 3 (1), Directive 97/67, provides that Member States shall ensure that users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users.

[81] OJ L 15, 21.01.1998, 14-25. Directive 97/67 is based on Articles 47 (2), 55 and 95, EC. Directive 97/67 has been amended by Directive 2002/39 with regard to the further opening to competition of Community postal services, OJ L 176, 5.7.2002, 21-25.

[82] See Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, 1-22.

Reserved Services

Article 7, Directive 97/67, deals with the services which may be reserved. Article 7 (1), Directive 97/67, provides that, to the extent necessary to ensure the maintenance of universal service, the services which may be reserved by each Member State for the universal service provider(s) shall be the clearance, sorting, transport and delivery of items of domestic correspondence, whether by accelerated delivery or not, the price of which is less than five times the public tariff for an item of correspondence in the first weight step of the fastest standard category where such category exists, provided that it weighs less than 350 grams. Article 7 (2), Directive 97/67, adds that, to the extent necessary to ensure the maintenance of universal service, cross-border mail and direct mail may continue to be reserved within the price and weight limits laid down in paragraph 1.

The new postal directive goes one step further in terms of market opening. Article 1 (1), Directive 2002/39, which amends Article 7 (1), subparagraph 1, Directive 97/67, provides that, to the extent necessary to ensure the maintenance of universal service, Member States may continue to reserve services to universal service provider(s). Those services shall be limited to the clearance, sorting, transport and delivery of items of domestic correspondence and incoming cross-border correspondence, whether by accelerated delivery or not, within both of the following weight and price limits. The weight limit shall be 100 grams from 1 January 2003 and 50 grams from 1 January 2006. These weight limits shall not apply as from 1 January 2003 if the price is equal to, or more than, three times the public tariff for an item of correspondence in the first weight step of the fastest category, and, as from 1 January 2006, if the price is equal to, or more than, two and a half times this tariff.

According to Article 7 (1), subparagraph 3, Directive 97/67, as amended by Article 1 (1), Directive 2002/39, to the extent necessary to ensure the provision of universal service, direct mail may continue to be reserved within the same weight and price limits. According to Article 7 (1), subparagraph 4, Directive 97/67, as amended by Article 1 (1), Directive 2002/39, to the extent necessary to ensure the provision of universal service, for example when certain sectors of postal activity have already been liberalised or because of the specific characteristics particular to the postal services in a Member State, outgoing cross-border mail may continue to be reserved within the same weight and price limits.

Non-Reserved Services

Article 9, Directive 97/67, subsequently makes a distinction between non-reserved services that are outside the scope of the universal service and non-reserved services that are within the scope of the universal service. Article 9 (1), Directive 97/67, provides that for non-reserved services which are outside the scope of the universal service as defined in Article 3, Member States may introduce general authorisations to the extent necessary in order to guarantee compliance with the essential requirements as defined in Article 2. Article 9 (2), subparagraph 1, Directive 97/67, provides that for non-reserved services which are within the scope of the universal service as defined in Article 3, Member States may introduce authorisation procedures, including individual licenses, to the extent necessary in order to guarantee compliance with the essential requirements and to safeguard the universal service. Article 9 (2), subparagraph 2, Directive 97/67, provides that the granting of authorisations may:

where appropriate, be made subject to universal service obligations;
if necessary, impose requirements concerning the quality, availability and performance of the relevant services; and
be made subject to the obligation not to infringe the exclusive or special rights granted to the universal service provider(s) for the reserved postal services under Article 7 (1) and (2).

Tariffs

Article 12, Directive 97/67, deals with tariffs of the services forming part of the universal service. It provides that Member States shall take steps to ensure that the tariffs for each of the services forming part of the provision of the universal postal service comply with the following principles:

prices must be affordable and must be such that all users have access to the services provided;
prices must be geared to costs; Member States may decide that a uniform tariff should be applied throughout their national territory;
the application of a uniform tariff does not exclude the right of the universal service provider(s) to conclude individual agreements on prices with customers; and
tariffs must be transparent and non-discriminatory.

Article 1 (2), Directive 2002/39, has added the following two indents to Article 12, Directive 97/67:

whenever universal service providers apply special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different customers, they shall apply the principles of transparency and non-discrimination with regard both to the tariffs and to the associated conditions. The tariffs shall take account of the avoided costs, as compared to the standard service covering the complete range of features offered for the clearance, transport, sorting and delivery of individual postal items and, together with the associated conditions, shall apply equally both as between different third parties and as between third parties and universal service providers supplying equivalent services. Any such tariff shall also be available to private customers who post under similar conditions;
cross-subsidisation of universal services outside the reserved sector out of revenues from services in the reserved sector shall be prohibited except to the extent to which it is shown to be strictly necessary fo fulfil specific universal service obligations imposed in the competitive area (…).[83]

Terminal Dues

Article 13, Directive 97/67, deals with terminal dues. It provides that, in order to ensure the cross-border provision of the universal service, Member States shall encourage their universal service providers to arrange that in their agreements on terminal dues for intra-Community cross-border mail, the following principles are respected:

terminal dues shall be fixed in relation to the costs of processing and delivering incoming cross-border mail;
levels of remuneration shall be related to the quality of service achieved;
terminal dues shall be transparent and non-discriminatory.[84]

Article 13, Directive 97/67, adds that the implementation of these principles may include transitional arrangements designed to avoid undue disruption on postal markets or unfavourable implications for economic operators provided there is agreement between the

[83] In its notice on the application of competition rules to the postal sector (O.J. 1998, C39/2), the Commission defines the concept of cross-subsidisation as the technique by which "an undertaking bears or allocates all or parts of the costs of its activity in one geographical or product market to its activity in another geographical or product market". Point 3.1.

[84] This provision is also embodied in the Reims II agreement, which will be discussed below.

operators of origin and receipt, and that such arrangements shall be restricted to the minimum necessary to achieve those objectives.

Transparency of Accounts

Article 14 (2), Directive 97/67, seeks to ensure transparency of accounts of universal service providers and provides that the universal service providers shall keep separate accounts for reserved services and non-reserved services and for non-reserved services which are part of the universal service and non-reserved services which are not part of the universal service. This provision is designed to reduce the risk of anti-competitive "cross-subsidisation", which, as illustrated by the Deutsche Post decision[85], is a serious concern in the postal sector.[86]

Quality of Service

Article 16, Directive 97/67, deals with standards for quality of service. Article 16 (1), Directive 97/67, provides that Member States shall ensure that quality-of-service standards are set and published in relation to universal service in order to guarantee a postal service of good quality. In accordance with Article 16, subparagraph 3, first indent, Directive 97/67, and Article 17, subparagraph 1, Directive 97/67, Member States shall lay down quality standards for national mail. In accordance with Article 16, subparagraph 3, second indent, Directive 97/67, and Article 18 (1), Directive 97/67, quality standards for intra-Community cross-border mail are laid down in the Annex to Directive 97/67.

Regulatory Authorities

Article 22, Directive 97/67, deals with the designation of a national regulatory authority and provides in subparagraph 1 that Member States shall designate national regulatory authorities for the postal sector that are legally separate from and operationally independent of the postal operators. Article 22 also provides that the national regulatory authorities shall have as a particular task ensuring compliance with the obligations arising from this directive. They may also be charged with ensuring compliance with competition rules in the postal sector.

EC competition rules

[85] See Commission Decision 2001/354/EC of 20 March 2001 relating to a proceeding under Article 82 of the Treaty (Case COMP/35.141, Deutsche Post AG), 2001 O.J., L 125/27.

[86] See H. Ungerer, Postal Services, Liberalisation and EC Competition Law, Speech, Brussels, 12 June 1998, available at http///europa.eu.int/comm./competition/speeches/text/sp1998_026_en.html

In addition to the provisions of Directive 97/67, as amended by Directive 2002/39, EC competition rules play a significant role in the postal sector.

EC competition law contains four categories of rules: (i) Articles 81 and 82 of the EC Treaty, which prohibit agreements between competitors that restrict competition, and abuses of a dominant position; (ii) Article 86 of the EC Treaty, which prevents governments from enacting measures designed to favour public companies or companies enjoying exclusive and special rights in violation of the EC Treaty; (iii) Article 87 to 89 of the EC Treaty, which contain provisions designed to control State aids to industry; and, (iv) the Merger Control Regulation, which contains a procedure to control mergers between firms with a view to the prevention of mergers that would significantly impede competition in the single market In the paragraphs that follow, we will essentially concentrate on the first and second categories of provisions, which are the most relevant ones for the purpose of this study.

Articles 81 and 82 represent the core of EC competition law. Article 81(1) prohibits agreements between undertakings whose object or effect is the prevention, restriction, or distortion of competition within the common market and that may affect trade between Member States. For the prohibition of Article 81(1) to apply, several elements must be established: (i) the existence of a collusion (an agreement, decision, or concerted practice) between two or several undertakings; (ii) the collusion must have as its object or effect the prevention, restriction, or distortion of competition; and (iii) it has an effect on trade between Member States. Article 81(2) states that agreements, decisions, or concerted practices prohibited by Article 81(1) are automatically void.

Article 81(3) provides that the prohibition of Article 81(1) may be declared inapplicable in the case of any agreement, decision or concerted practice that fulfils all of the four following conditions: (i) it contributes to the improvement of the production or distribution of goods or to the promotion of technical or economic progress; (ii) it allows consumers a fair share of the resulting benefits; (iii) it imposes on the undertakings only restrictions that are indispensable to the attainment of those objectives; and (iv) it does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Although the Commission has not so far used Article 81 to pursue restrictive practices in the postal sector, it exempted from the application of the provision the so-called REIMS II agreement on the ground that it fulfilled the conditions of Article 81(3).[87]

Article 82 prohibits undertakings from committing an abuse of a dominant position held within some substantial part of the common market where that abuse has an effect on trade between Member States. For the prohibition of Article 82 to apply, several elements must be established: (i) the existence of one or more undertakings in a dominant position; (ii) the dominant position must be held within the common market or a substantial part of it; (iii) there is an abusive conduct; and (iv) the conduct has an impact on trade between Member States.

Article 82 has played a major role in the postal sector. In spite of the liberalization process, incumbent postal operators remain dominant on most postal markets and tend to use their market power to prevent entry. The article 82 decisions adopted by the Commission address a wide range of abuses committed by postal incumbents, including:

predatory pricing, fidelity rebates and cross-subsidisation: Commission decision 2001/354;[88]
interception of cross-border mail: Commission decision 2001/892;[89] and
tying: Commission decision 2002/180.[90]

Article 86 has also been applied in a number of cases in conjunction with Article 82. Article 86(1) prohibit Member States from enacting and maintaining in force any measure in relation to undertakings to which they have granted special or exclusive rights which are contrary to the rules of the EC Treaty, and in particular the provisions dealing with non-discrimination, as well as the competition provisions of the Treaty. Article 86(2) gives a limited derogation from Treaty rules to undertakings entrusted with services of general economic interest in so far as

[87] See Commission Decision 1999/695 of 15 September 1999 (Case No IV/36.748 – REIMS II), O.J. 1999, L 275/17; Commission Decision 2004/139 of 23 October 2003 (Case COMP/C/38.170 – REIMS II renotification), O.J. 2004, L 56/76.

[88] Commission Decision of 20 March 2001 (Case COMP/35.141 — Deutsche Post AG), OJ 2001 L 125/44.

[89] Commission Decision of 25 July 2001 (COMP/C-1/36.195 – Deutsche Post AG – Interception of cross-border mail), O.J. 2001, L 331/40.

[90] Commission Decision of 5 December 2001 (COMP/37.859 – De Post – La Poste), O.J. 2002, L 61/32.

necessary for carrying out such services.[91] Finally, Article 86(3) provides that the Commission may address decisions to Member States to ensure the observance of Article 86. It also gives the Commission power to issue directives to Member States to ensure the application of this provision.

In Decision 2001/76, the Commission decided that an Italian legislative decree, which reserved the delivery phase of hybrid mail (in which postal items are generated electronically) to the incumbent postal operator, was incompatible with Article 86(1) in conjunction with Article 82 of the Treaty, as it excludes competition with respect to the day- or time-certain delivery phase of hybrid electronic mail services.[92]

In addition, in *Traco*, the ECJ ruled that Article 82 of the Treaty, read in conjunction with Article 86, precluded Italian legislation which granted Poste Italiane the exclusive right to provide an express mail service not forming part of the universal service subject to payment of postal dues equivalent to the postage charge normally payable to Poste Italiane, unless it could be shown that the proceeds of such payment are necessary to enable the undertaking to operate universal postal service in economically acceptable conditions and that the undertaking is required to pay the same dues when itself providing an express mail not forming part of the universal service.[93]

Finally, in its decision 2002/344, the Commission ruled that French postal legislation was contrary to Article 86(1), read in conjunction with Article 82 of the EC Treaty, to the extent that it allowed only limited scrutiny of the non-discriminatory nature of the scales of charges and technical conditions applied by La Poste to mail preparation firms, and to the extent that

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[91] For an example of application of Article 86(2) in the postal sector, see Case C-320/91, Corbeau, (1993) E.C.R. I-2533.

[92] Commission Decision 2001/176 of 21 December 2000 concerning proceedings pursuant to Article 86 of the EC Treaty in relation to the provision of certain new postal services with a guaranteed day – or time-certain delivery in Italy, O.J. 2001, L 65/39.

[93] Case C-340/99, Traco, (2001) E.C.R. [2001] I-4109.

this partial scrutiny was furthermore exercised by a public authority insufficiently independent and neutral in relation to La Poste.[94]

[94] Commission Decision 2002/344 of 23 October 2001 on the lack of exhaustive and independent scrutiny of the scales and technical conditions applied by La Poste to mail preparation firms for access to its services, O.J. 2002, L 120/19.

PART II THE INTERFACES BETWEEN THE CONSTITUTION, RULES AND PRACTICE OF THE UPU AND (A) WTO RULES (IN PARTICULAR THE GATS) AND (B) EC LAW RELATING TO POSTAL SERVICES

II.1 The concept of interface

Subsequent to the overview of the Constitution, rules and practice of the UPU, the WTO rules (GATS/GATT 1994) and EC law relating to postal services, the question of the interfaces between the Constitution, rules and practice of the UPU and (a) the WTO rules (in particular the GATS) and (b) EC law relating to postal services must be addressed.

Prior to indicating these interfaces, it must be determined what is meant by the word 'interface'. It may be determined that the word 'interface' may have several diverging meanings: (i) an area of interaction between two systems; (ii) an area separating two systems; (iii) an area connecting two systems.[95] It is not immediately clear in what sense the word interface is intended in the *Tender Specifications*. Following the different meanings of the word interface, the relation between the three systems may be seen in diverging ways. For example, the relation between the UPU and the WTO could be seen as alternative or as complementary. We also note that the study should be directed to indicating possible divergences and inconsistencies between the three systems. This may suggest that the relation between the three systems to be examined is a relation of conflict, i.e. the identification of provisions that cannot co-exist. If this perspective is adopted, the relation between the three systems is seen as alternative. This would mean that, in the case of conflict, provisions of one system must prevail over those of another system. This excludes the possibility of complementarity between the systems.

The analysis of relations between provisions of legal systems in terms of conflict seems to be the most common in legal analysis. This means that it is assumed that different legal systems

[95] Concise Oxford Dictionary, Tenth Edition.

co-exist and that, if a conflict between those provisions is identified, it must be determined on the basis of applicable rules which of those provisions prevails. Given that analysis of legal relations in terms of interaction and connection, which suggest complementarity, seems less common, and also that a major part of the required analysis is formulated in terms of divergence and inconsistency, it is proposed that the analysis of the interfaces between the systems is limited to the initial considerations outlined below.

II.2 The interface between the Constitution, rules and practice of the UPU and the WTO rules (GATS/GATT 1994)

When analyzing the interface between the Constitution, rules and practice of the UPU and the WTO rules (GATS/GATT 1994), it should be seen that international legal analysis is based on the premise that States (designated within the UPU framework as member countries and within the WTO framework as Members) are sovereign, independent and equal. This implies that normative relations between States must be constructed on the basis of rules of international law. The UPU framework seeks to establish postal communications between States on the basis of rules of international law contained therein. The WTO framework seeks to establish a free flow of products and services on the basis of rules of international law contained therein.

The UPU seeks to establish and develop an international postal service or international postal services between member countries. This work is based on the assumption that in the absence of this establishment and/or development, the international postal service or postal services between member countries would be absent, because, on the basis of the concepts of sovereignty and independence, the organization and development of postal services does not extend to international postal services and is limited to the internal sphere of member countries . The GATS seeks to promote trade in postal services between Members. This work is based on the assumption that, in the absence of this promotion, trade in postal services, which could be provided by service suppliers, is impeded by protective domestic legislation based on the concepts of sovereignty and independence of Members. Similarly, the GATT 1994 seeks to promote trade in products. This work is based on the assumption that, in the absence of this promotion, trade in products is impeded by protective domestic legislation based on the concepts of sovereignty and independence of Members.

It may thus be seen that the UPU and the GATS both seek to establish postal communications between States. In the UPU approach, the existence of national postal administrations, on which special or exclusive rights are conferred, is assumed, although the UPU rules do not seem to require that postal services be reserved to a national postal administration. The main objective of the UPU has been to enable international delivery of mail by means of co-operation between the postal administrations or the monopoly suppliers of postal services.[96] In the GATS approach, it is assumed that postal services can be provided by service suppliers; in the absence of specific commitments relating thereto, Members can maintain monopoly service providers, which are required to act in accordance with the MFN obligation and specific commitments (Article VIII (1), GATS). The rules and regulations of the GATS therefore address the international delivery of mail as an issue of international trade law.

It seems appropriate to see the UPU framework as the framework within which the liberalization of postal services takes place. As foreseen by the GATS, and depending on specific commitments relating to market access (Article XVI, GATS) and national treatment (Article XVII, GATS), the liberalization of postal services is primarily a matter of access of foreign services and service suppliers to a national market and national treatment thereon. A possible problem may be identified if State A, as Member of the WTO and member country of the UPU, liberalizes its postal market and if State B, as Member of the WTO and member country of the UPU, does not liberalize its postal market. It may then be seen that private operators from the liberalized market of State A could demand access and non-discriminatory treatment on the market of State B. However, since Articles XVI and XVII, GATS, do not require State B to liberalize its market, those private operators do not have a basis to demand acess to and non-discriminatory treatment on the market of State B. In this context, it seems that such differentiation in domestic regulation cannot be avoided.

It should also be borne in mind that the liberalization of postal markets does not automatically ensure the maintenance of a universal postal service at the national or international level. If private operators are free to operate both nationally and internationally, it seems appropriate to expect that such private operators will act on the basis of market principles. Such principles may lead them to interconnect with other private operators, thereby creating international

[96] Smit, GATS-Prinzipien, 2.

networks. However, if it is deemed desirable that a level of universal postal service is maintained, a framework of rules of international law must remain in place to ensure this. In sum, the liberalization of postal services in the context of the GATS seems to require continuous regulation to ensure that a public interest is guaranteed at both the national and international levels. The UPU framework and the GATS framework may therefore appropriately be seen as complementary ways of establishing postal communications between States.

As regards the interface between the UPU and GATT 1994, it seems appropriate to regard in a similar manner the international network provided in the framework of the UPU as a system of communication facilitating trade in products. If that is correct, the UPU and the GATT 1994 may also be seen as complementary.

II.3 The interface between the Constitution, rules and practice of the UPU and EC law relating to postal services

With the adoption of Directives 97/67 and 2002/39, the EC has moved into a field previously organized among the Member States on the basis of the rules of the UPU. The Member States continue to be member countries of the UPU and the Constitution of the UPU presently does not provide for the possibility of membership of the EC. However, it is indisputable that with the development of an internal market for postal services, the EC has occupied a position which brings it into contact with the UPU.

An illustration of this can be found in the various references made by EC law instruments to the UPU. For instance, with respect to the universal postal service, Article 3 (6), Directive 97/67, provides that the minimum and maximum dimensions of the postal items concerned shall be those laid down in the Convention and the Agreement concerning Postal Parcels adopted by the UPU. Also, in the field of the harmonization of technical standards, Article 20, subparagraph 2, Directive 97/67, provides that the European Committee for Standardisation shall be entrusted with drawing up technical standards applicable in the postal sector. Article 20, subparagraph 3, Directive 97/67, provides that this work shall take account of the harmonisation measures adopted at international level and in particular those decided upon within the UPU. It may be noted that in 2001 a Memorandum of Understanding constituting

their mutual relationship was concluded between the UPU and the European Committee for Standardisation.

In addition, the case law of the ECJ has made punctual references to the UPU and to its provisions. For instance, in *Deutsche Post I*, the Court held that 'for the postal services of the Member States, performance of the obligations flowing from the UPU is thus in itself a service of general economic interest within the meaning of Article 86 (2) of the Treaty'.

In view of the elements outlined above, the interface between the UPU and EC law relating to postal services may appropriately be seen as a relation of mutual reference and interaction. The UPU seeks to organize and develop an international postal service or international postal services at the international level and EC law relating to postal services seeks to organize and develop postal services at the EC level. At the same time, it must be noted that the UPU framework organizes interaction between postal administrations. The EC framework organizes a situation in which postal administrations, operating within and outside of a reserved area, and private operators, operating in the non-reserved area, co-exist.

PART III THE RELATIVE LEGAL STATUS OF THE CONSTITUTION, RULES AND PRACTICE OF THE UPU, THE WTO RULES (GATS/GATT 1994) AND EC LAW RELATING TO POSTAL SERVICES

III.1 When does the question of relative legal status arise?

In international law, the question of the relative legal status is normally raised in the case of conflict between provisions of different treaties/conventions/agreements. This presupposes that those different treaties/conventions/agreements are seen as alternative frameworks, containing prescriptions which cannot be complied with at the same time.

When can prescriptions of different not be complied with at the same time? This is the question of the definition of the notion of conflict. In theory of international law, both 'narrow' and 'broad' definitions of the notion of conflict may be identified. In a narrow definition of the concept of conflict, a conflict between provisions of different treaties/conventions/agreements arises only if those provisions prescribe obligations that a State which is the adressee of those obligations cannot simultaneously comply with. In other words, if a provision of treaty/convention/agreement A prescribes an obligation for State X to do T and if a provision of treaty/convention/agreement B prescribes an obligation for State X not to do T, it can be said, according to the narrow definition of the notion of conflict, that a conflict between those treaties/conventions/agreements exists. In a broad definition of the notion of conflict, a conflict between provisions of different treaties/conventions/agreements arises not only if those treaties/conventions/agreements prescribe obligations which cannot be complied with simultaneously, but also if treaty/convention/agreement A prescribes an obligation which cannot co-exist with a right conferred by treaty/convention/agreement B. Thus, if treaty/convention/agreement A prescribes an obligation for State X not to do T and if treaty/convention/agreement B confers on State X the right to do T, it can be said, according

to the broad definition of the notion of conflict, that a conflict between those treaties/conventions/agreements exists.[97]

In the context of this report, it may be emphasized that it is only necessary to proceed to the question of the relative legal status of different treaties/conventions/agreements, if it is established that a conflict – defined narrowly or broadly – between provisions of those treaties/conventions/agreements exists. It should also be noted that in WTO jurisprudence, it is considered that international law contains a presumption of the absence of conflict between different treaties/conventions/agreements.[98] This means that it must be established positively that a conflict between provisions of different treaties/conventions/agreements exists.

III.2 The relative legal status of the Constitution, rules and practice of the UPU and the WTO rules (GATS/GATT 1994)

III.2.1 General considerations

In addition to the conditions outlined in the preceding section, for a conflict to arise between the provisions of different treaties/conventions/agreements, the provisions of both treaties/conventions/agreements must bind States. Article 22 (2)-(3), Constitution of the UPU, provides expressly that the General Regulations, the Universal Postal Convention, the Letter Post Regulations and the Parcel Post Regulations bind the member countries. In addition, in accordance with Article 22 (4), Constitution of the UPU, the Agreements of the Union and the Regulations pertaining thereto bind the member countries that have adhered thereto.[99] With respect to the GATS and the GATT 1994, Article II (2), Agreement establishing the WTO,

[97] Marceau, Conflicts, 1083-1086; Neumann, Koordination, 15.

[98] Report of the Panel, *Indonesia – Automobile Industry*, 14.28.

[99] We note that Article 22 (1), Constitution of the UPU, does not indicate whether the Constitution of the UPU itself binds the member countries. However, in the context of Article 22 (2)-(4), it would not seem to make sense to consider that the Constitution of the UPU does not bind the member countries. If the Constitution of the UPU does not bind the member countries, it would be ineffectual to determine that the other Acts of the UPU bind the member countries.

specifies that the Multilateral Trade Agreements, including the GATS and the GATT 1994, are integral parts of the Agreement establishing the WTO and bind all Members. It may thus be determined that both provisions of the UPU framework and provisions of the WTO framework bind States and that this condition is therefore satisfied.

The question whether conflicts, in the sense of divergences or inconsistencies, between the UPU framework and the WTO framework can be identified is the subject of Part IV of this report. If it is established that a conflict between the UPU framework and the WTO framework exists, the hierarchical relation between those frameworks or those provisions, whether (provisions of) the UPU framework prevail(s) over (provisions of) the WTO framework or vice versa, should be determined. In this connection, it must be mentioned that, in view of the horizontal structure of international law, derived from the concepts of sovereignty and independence, the absence of a hierarchical relation between provisions of different treaties/conventions/agreements, is assumed. This means that the identification of a hierarchical relation between different treaties/conventions/agreements must be based on, and flow from, a rule of international law.

Essentially, there are two ways in which a hierarchical relation between (provisions of) different treaties/conventions/agreements can be established: (1) if the relation between the different treaties/conventions/agreements is determined in the texts of those treaties/conventions/agreements; (2) by means of the application of rules of conflict, in particular the rules (a) *lex posterior derogat priori*; and (b) *lex specialis derogat generali*.

III.2.2 Is the relation between the UPU framework and the WTO framework determined in the text of those frameworks?

The question whether the relation between the UPU framework and the WTO framework is determined in the text of those frameworks must be answered in the negative – the UPU framework and the WTO framework do not contain provisions regulating their mutual relationship. However, it must be noted that at the occasion of the signature of the Acts of the 1999 Beijing Congress, several member countries made declarations to the effect that the Acts and Regulations of the UPU would be applied to the extent that those Acts and Regulations were consistent with their rights and obligations under the Agreement establishing the WTO

and the GATS.[100] Can those declarations have the effect of subordinating the UPU framework to the WTO framework?

In addressing this question, it may be noted that Article 30 (2), Convention on the Law of Treaties, determines that if a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. This implies that if such a provision is not contained in the text of the UPU framework, the UPU framework cannot be regarded as subordinate to the WTO framework. Declarations of member countries which state that the UPU framework will be applied 'in compliance with', 'consistent with', or 'in accordance with' the WTO framework, express the views of those member countries that, to the extent that a conflict between both frameworks exists, the WTO framework prevails. However, those declarations cannot be sufficient to presume the agreement of other member countries that the UPU framework is subordinate to the WTO framework. We therefore proceed to the application of the rules *lex posterior derogat priori* and *lex specialis derogat generali*.

III.2.3 Application of the rules *lex posterior derogat priori* and *lex specialis derogat generali*

(a) Application of the rule *lex posterior derogat priori*

In the context of conventional international law, the rule *lex posterior derogat priori* prescribes that a later treaty, if it relates to the same subject matter and if the parties to the earlier treaty are also parties to the later treaty, prevails over an earlier treaty. Article 30 (1), in conjunction with Article 30 (3), Convention on the Law of Treaties, prescribes that if successive treaties relate to the same subject matter, and all the parties to the earlier treaty are parties also to the later treaty (…), the earlier treaty applies only to the extent that its

[100] Declaration III: Australia will apply the Acts and Regulations adopted by this Congress in full compliance with its rights and obligations under the Agreement establishing the WTO and in particular the GATS (Congrès-Doc 86.Add 2); Declaration VI: New Zealand will apply the Acts and regulations adopted by this Congress insofar as they are consistent with its other international obligations, in particular, the GATS (Congrès-Doc 86.Add 5); Declaration VIII: The delegations of the member countries of the EU declare that their countries will apply the Acts adopted by this Congress in accordance with their obligations pursuant to (…) the GATS (Congrès/Doc 86.Add 7).

provisions are compatible with those of the later treaty.[101] Can this rule be applied to determine the relation between the UPU framework and the WTO framework?

In addressing this question, it must be observed that Article 30 (1), in conjunction with Article 30 (3), Convention on the Law of Treaties, requires as a condition for the application of this rule that the successive treaties relate to the same subject-matter.[102] Accordingly, the question must be answered whether the UPU framework and the WTO framework relate to the same subject matter. In this connection, it may be observed that, according to Article 1 (2), Constitution of the UPU, the UPU framework relates to the organization and improvement of an international postal service or international postal services. On the other hand, on the basis of Article II (1), Agreement establishing the WTO, in conjunction with Article I (1), GATS, the WTO framework relates to trade in postal services.

Thus, both frameworks may be regarded as relating to the international postal service or international postal services. However, the WTO framework seeks to liberalize trade in postal services by securing market access and ensuring non-discriminatory treatment. On the other hand, the UPU framework seeks to organize and develop the international postal service or international postal services. The framework relating to the organization and development of the international postal service or international postal services may be regarded as impeding the liberalization of trade in postal services. At the same time the liberalization of trade in postal services may also be seen as taking place within the framework of the organization and development of the international postal service or international postal services. In view of these different perspectives, it is doubtful whether it can be said that both frameworks relate to the same subject-matter.

Assuming that both frameworks relate to the same subject-matter, another condition that would need to be fulfilled is that the parties to the earlier treaty are parties to the later treaty. With respect to the relation between the UPU framework and the WTO framework, this would mean, in view of the broader membership of the UPU, that the UPU framework could prevail over the WTO framework on the basis of this rule, but not vice versa.

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[101] Marceau, Conflicts of Norms and Conflicts of Jurisdictions, 1090-1095.

[102] Reuter, Law of Treaties, 200-203.

Arriving then at the temporal aspect of the relation between the UPU framework and the WTO framework, it may be noted that the Constitution of the UPU was adopted in 1964 and that the WTO framework was adopted in 1994. At the same time, it should be noted that the Universal Postal Convention is renewed every 5 years (it is proposed to the Bucharest Congress that this will be changed into 4 years). The present Universal Postal Convention was adopted in 1999 and the next Universal Postal Convention will foreseeably be adopted in 2004. If this is considered as decisive, it would have to be concluded that the Universal Postal Convention prevails over the GATS. If, on the other hand, specific commitments relating to postal services were entered into after the Bucharest Congress, it would have to be concluded that those specific commitments prevail over the Universal Postal Convention.

It may be seen that if the rule *lex posterior derogat priori* is applied in this manner, one arrives at the rather odd result, abstracting from the condition relating to membership, that the UPU framework may be amended implicitly by developments in the WTO framework and that the WTO framework may be amended implicitly by developments in the UPU framework.[103] Furthermore, in theory of international law, it has been questioned whether the date of adoption of an international instrument should be dispositive with regard to the application of this rule. Specifically, it has been suggested that a framework such as the WTO is intended to have continuous effects and that, therefore, its location in time should not be reduced to the date of adoption.[104] It could be said that similar considerations apply to a framework such as the UPU.

(b) Application of the rule *lex specialis derogat generali*

In the context of conventional international law, the rule *lex specialis derogat generali* presribes that a special treaty prevails over a general treaty. Can this rule be applied to determine the relation between the UPU framework and the WTO framework?

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[103] Neumann, Koordination, 40-41. We also note that the Panel in *EC – Poultry* signalled a reluctance on the part of previous Panels to apply the rule *lex posterior derogat priori* to tariff schedules; *EC – Poultry*, 206. If it is not considered appropriate to apply the rule *lex posterior derogat priori* to tariff schedules, it seems inappropriate, *a fortiori*, to apply the rule *lex posterior derogat priori* to construct a hierachical relation between the UPU framework and the WTO framework.

[104] Pauwelyn, Role, 545-547.

In addressing this question, it may be observed that the UPU framework could be considered as containing general rules relating to the international postal service or international postal services and that the WTO framework could be considered as containing special rules relating to the liberalisation of trade in postal services. In this case, the WTO framework would prevail over the UPU framework. Alternatively, it may be observed that the WTO framework could be considered as containing general rules relating to trade in services and that the UPU framework could be considered as containing special rules relating to international postal services. In this case, the UPU framework would prevail over the WTO framework. If this is correct, a fixed relation of generality-speciality between both frameworks cannot be determined.[105] We note that some authors have adopted the position that the GATS prevails over the UPU framework on the basis of the rule *lex specialis derogat generali*. However, this position does not seem to be supported by the reasoning employed.[106]

III.2.4 Other considerations

In view of the foregoing considerations, we conclude that a hierarchical relation between the UPU framework and the WTO framework cannot be established on the basis of a relation determined in the text of those frameworks or on the basis of application of the rules *lex posterior derogat priori* and *lex specialis derogat generali*.[107] On this basis, it could be concluded at this point that a hierarchical relation between the WTO framework and the UPU framework cannot be established. It seems, however, important to consider in addition an approach adopted in a study which may have informed the *tender specifications* of this Study. We note, in passing, that it sometimes assumed that the GATS prevails over the UPU framework.[108] We also note, however, that, in view of the horizontal structure of international

[105] Pauwelyn, Role, 538-540; Neumann, Koordination, 40-41.

[106] Perrazzelli/Vergano have adopted the position that the GATS has a broader purpose and therefore prevails over the Universal Postal Convention; Perrazzelli/Vergano, Overview, 746-748. It is, however, difficult to see how, if the GATS has a broader, i.e. more general, purpose, it can prevail over the UPU framework on the basis of the rule *lex specialis derogat generali*.

[107] The conclusion that the rules *lex posterior derogat priori* and *lex specialis derogat generali* do not lead to conclusive results regarding the relation between the WTO framework and the UPU framework is also drawn in International Bureau, Impact, 23-26.

[108] Alverno, Measures related to ETOEs, 4: This memorandum assumes that the GATS prevails over any conceivable inconsistent provisions in other international agreements, such as the Universal Postal Convention. No authority has yet determined the hierarchy between the two instruments in the event of a conflict.

law, the absence of a hierarchical relation between different treaties is assumed, because all treaties are regarded as emanating from the consent of States.

Turning now to one of the sole articles on the issues discussed in the present study, we note that in an article by David Luff, International Regulation of Postal Services: UPU vs. WTO Rules, the position is adopted that the UPU framework is subordinate to the WTO framework because the UPU framework consists of measures by Members of the WTO which can be assessed under WTO rules.[109] If this is correct, the UPU framework is to be regarded as subordinate to the WTO framework. However, we note that this reasoning dissolves the distinction between domestic law and international law. While it may be correct that multilateral treaties are a product of national measures, it seems incorrect to state that multilateral treaties are national measures. If this reasoning is followed, it could just as well be said that the WTO framework consists of national measures. Multilateral treaties like the WTO and the UPU are commonly regarded as the main instruments of international co-operation. Those instruments are simultaneously regarded as emanating from the consent of States and as separate from and superior to States. In view of these considerations, we do not consider it sufficient to construct a hierarchical relation between the WTO framework and the UPU framework on the basis that the UPU framework consists of measures by Members of the WTO.

In view of the horizontal structure of international law, it follows that if a hierarchical relation between the WTO framework and the UPU framework cannot be established, the relation between the UPU framework and the WTO framework must be a relation of co-ordination.

III.2.5 A relation of co-ordination between the UPU framework and the WTO framework

If a relation of co-ordination exists between the UPU framework and the WTO framework, this means that, even if it is established that a conflict exists between (provisions of) both frameworks, it cannot be determined which provision or which framework should prevail. It

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[109] Luff, Regulation, 57.

seems that, in the current state of international law, the only envisageable way of overcoming such a situation is co-operation between the international institutions concerned.

In this connection, it may be observed that both frameworks contain provisions foreseeing the creation of relations with other international institutions. As regards the WTO, Article V (1), Agreement establishing the WTO, provides that the General Council shall make appropriate arrangements for effective cooperation with other international organizations that have responsibilities related to those of the WTO. In addition, Article XXVI, GATS, provides that the General Council shall make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies as well as with other intergovernmental organizations concerned with services. As regards the UPU, Article 10, Constitution of the UPU, provides that in order to secure close cooperation in the international postal sphere, the UPU may collaborate with international organizations having related interests and activities.

Given that both international institutions, the WTO and the UPU, are concerned with postal services, the WTO from the perspective of the liberalisation of trade in postal services and the UPU from the perspective of the organization and development of an international postal service or international postal services, it seems appropriate to determine that, from the perspective of the WTO, the UPU is an international organization ‘having responsibilities related to those of the WTO’ and ‘concerned with services’, and, from the perspective of the UPU, the WTO is an international organization ‘having related interests and activities’.

It may further be mentioned that the possibility of concluding a Memorandum of Understanding between the WTO and the UPU has been examined by both institutions; however such a Memorandum of Understanding has not actually been concluded.

III.3 The relative legal status of the Constitution, rules and practice of the UPU and EC law relating to postal services

The relations between the Constitution of the UPU and the Universal Postal Convention, on the one hand, and EC law relating to postal services, on the other hand, do not appear problematic. Indeed, in a large number of cases, the provisions of the UPU (i) leave States an option on whether to apply given principles as well as (ii) a considerable leeway for

construing these principles. Thus, in practice, these States will often be in a position to enforce the UPU principles in conformity with EC law. In case of conflict, however, EC primary and secondary legislation will most likely prevail over potentially conflicting UPU principles. This results from the principles of both public international law and EC law.

As far as public international law is concerned, Declaration VIII, made by the Member States of the EU at the occasion of the signature of the Acts of the 1999 Beijing Congress, states that EU Member States will only apply the Acts adopted by that Congress in accordance with their obligations pursuant to the Treaty establishing the European Union.[110] This Declaration seeks to ensure that, in so far as the Acts of the UPU contain provisions which are incompatible with EC law, those Acts do not contain obligations binding the member countries of the EU and requiring them to act inconsistently with EC law.

Since Declaration VIII seeks to exclude the binding character of the Acts of the UPU for the Member States in so far as they are incompatible with EC law, the question arises whether it constitutes a reservation. Article 2 (d), Convention on the Law of Treaties, defines a reservation as a unilateral statement, however phrased or named, made by a State when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it puports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. Article 22 (6), Constitution of the UPU, specifies that the Final Protocols annexed to the Acts of the Union referred to in paragraphs 3, 4 and 5 shall contain the reservations to those Acts. However, Article 22 (6), Constitution of the UPU, refers only to paragraphs 3, 4 and 5, which relate to the Universal Postal Convention, the Letter Post Regulations and the Parcel Post Regulations, the Agreements of the UPU and their Regulations. Article 22 (6), Constitution of the UPU, does not refer to paragraphs 1 and 2, which relate to the Constitution and the General Regulations. It could be inferred from this that reservations to the Constitution and the General Regulations are not permitted.[111] However, such a prohibition is not actually contained in the text of Article 22, Constitution of

[110] Congrès-Doc 86.Add 7.

[111] Council of Administration Report on Reservations to the Acts of the Union (Congrès-Doc 27), 9: Article 22, paragraph 6 of the Constitution mentions only reservations to the Universal Postal Convention and the Regulations, implying that the Constitution and the General Regulations are not subject to reservations. They are considered as organic rules of the organization, so it would not make sense to allow reservations to the Constitution and the General Regulations.

the UPU.[112] Accordingly, it could also be argued that is not required that reservations to the Constitution of the UPU and to the General Regulations be contained in the Final Protocols annexed to the Acts of the UPU.

Accordingly, it seems appropriate to examine the effect of Declaration VIII according to the rules on reservations contained in Articles 19-23, Convention on the Law of Treaties. Articles 19-23, Convention on the Law of Treaties, contain rules regarding the treatment of reservations. The effect of these rules may be summarized as follows. If a state formulates a reservation, it may, in principle, be regarded as a party to the treaty concerned, if the reservation is accepted by other States or if another State objects to the reservation but not to regarding the reserving State as a party to the treaty.[113] If a reservation is accepted by another party, the reservation modifies between the reserving and the accepting party the provisions of the treaty to which the reservation relates to the extent of the reservation.[114] If a reservation is objected to by another party, the provisions to which the reservation relates do not apply between the reserving party and the objecting party.[115] It should further be noted that if a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of the international organization.[116] In view of these rules and requirements, we note that, from the perspective of the reserving State, it does not make a significant difference whether other parties accept or object to the reservation; in either case, the reserving State is not bound by the relevant provisions of the treaty. As regards the requirement that the reservation requires the acceptance of the competent organ of the international organization, we note that it appears that the acceptance of reservations is not included among the designated functions of the bodies of the UPU.

[112] It may be noted in this context that Proposal 10. 22.1 seeks to include in the text of Article 22 (1)-(2), Constitution of the UPU an explicit statement that the Constitution and the General Regulations shall not be subject to reservations.

[113] Article 20 (4), (a)-(b), Convention on the Law of Treaties.

[114] Article 21 (1), (a)-(b), Convention on the Law of Treaties.

[115] Article 21 (3), Convention on the Law of Treaties.

[116] Article 19 (3), Convention on the Law of Treaties.

In view of the foregoing considerations, it seems appropriate to conclude that, pursuant to Declaration VIII, the Member States do not have to apply provisions contained in the Acts of the UPU that are not in accordance with their obligations pursuant to the Treaty establishing the European Union.

As far as EC law is concerned, the problem of the conflict between the UPU and EC legislation has to be dealt with under the rules governing the hierarchy of norms in the EC. These rules make it clear that the international agreements concluded by Member States shall in no way prejudice the application of EC primary and secondary legislation. A distinction must be drawn between treaties that were concluded after to the conclusion of the EC Treaty and treaties that were concluded prior to the conclusion of the EC Treaty.[117]

Treaties that were concluded by Member States of the EU prior to the entry into force of the EC Treaty are submitted to the rules provided in Article 307 of the EC Treaty. Pursuant to this provision, the rights and obligations arising from these treaties concluded, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of EC Law. However, Article 307(2) EC additionally requires that: "To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude." The latter provision has been stringently construed by the ECJ. The duty to eliminate incompatibilities requires Member States to take effective steps to bring their international commitments into line with EC law. This is true for EC primary law as well as for EC secondary law.[118] The persistence of incompatibilities could lead the Commission to initiate infringement proceedings against the recalcitrant MS under Article 226 EC.[119]

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[117] See D. Simon, Le Système Juridique Communautaire, (3 Ed.) Presses Universitaires de France, 2003 at p.310 ; See also, J. Rideau, Droit Institutionnel de l'Union et des Communautés Européennes, LGDJ, (2 Ed). p.170.

[118] See D. Simon, Le Système Juridique Communautaire, (3 Ed.) Presses Universitaires de France, 2003, at p.310.

[119] A recent example of this can be found in the field of Investment matters. The Commission sent formal request for information to a number of EC Member States concerning a series of Bilateral Investment Treaties concluded with non EU countries prior to their accession to the EU. See Commission Press Release, IP/04/618 of 10 May 2004.

The rules applicable to treaties that were concluded by Member States subsequent to the entry into force of the EC Treaty are simpler. The ratification of the EC Treaties by MS prevents them from entering into treaties that could lead them to infringe EC law.[120] In addition, in a variety of cases, the entry into force of the EC Treaty and the adoption of EC secondary legislation has led to a transfer of the power to enter into international agreements from the national to the EC level.[121] The infringement of these principles could also lead to the initiation of infringement proceedings by the Commission on the basis of Article 226 EC.

In light of the above, the EC Treaty provisions as interpreted by the ECJ make it clear that the Member States are compelled to give preference to EC law provisions in case of conflict with their UPU commitments. The Constitution of the UPU and the Universal Postal Convention were not concluded before the entry into force of the EC Treaty. Article 307 EC is not relevant to that extent. In so far as the Universal Postal Convention is concerned, which is renewed every 5 years, Member States should ensure that it is not incompatible with their obligations under EC law.[122] In addition, attention should be given to the fact that, if EC legislation has been internally adopted on the subject matter, the MS may no longer enjoy the power to conclude the agreement.[123]

[120] See J. Rideau, Droit Institutionnel de l'Union et des Communautés Européennes, (2 Ed) LGDJ, at p.175.

[121] See supra.

[122] Simon, Le Système Juridique Communautaire, (3 Ed.) Presses Universitaires de France, 2003, at p.310.

[123] Id. and Opinion 1/75, ECJ, 11 November 1975, E.C.R. [1975]-1355.

PART IV EXAMINATION OF DIVERGENCES BETWEEN THE UPU, THE WTO (GATS/GATT 1994) AND EC LAW RELATING TO POSTAL SERVICES

This part of the report focuses on identifying possible divergences or inconsistencies between the Constitution, rules and practice of the UPU, the WTO rules (the GATS and the GATT 1994) and EC law relating to postal services. In this report, the concepts of 'divergence' and 'inconsistency' are understood in terms of the notion of conflict. That is, a divergence or inconsistency between (provisions of) legal frameworks A and B exists if (provisions of) legal framework A prescribes X and (provisions of) legal framework B prescribe(s) Y and X and Y are mutually exclusive. It should be noted that the existence of a conflict between (provisions of) two legal frameworks is withouth prejudice to the question of the relative legal status of those frameworks.

Each section of this part introduces an element of the Constitution, rules and practice of the UPU that might be considered as divergent from or inconsistent with the WTO rules (the GATS and the GATT 1994) and/or EC law relating to postal services. This element is described and subsequently analyzed from the perspective of WTO law and, where considered relevant, from the perspective of EC law relating to postal services. The elements of the Constitution, rules and practice of the UPU examined are: (i) the concept of the single postal territory; (ii) the concept of a universal postal service: (iii) the terminal dues system; (iv) the practice of remailing and anti-remail measures; (v) extra-territorial offices of exchange; (vi) postal technical assistance; (vii) non-admission of postal items; (viii) weight limits; (ix) exceptions to freedom of transit; (x) unilateral measures relating to freedom of transit; and (xi) the practice of representation of member countries by postal administrations. In addition, the issue of the external competence of the EC in the field of postal services requires examination.

IV.1 The concept of the single postal territory

Description of the concept of the single postal territory

Article 1 (1), first sentence, Constitution of the Universal Postal Union, contains the concept of a single postal territory, stating that the member countries of the UPU form a single postal territory for the reciprocal exchange of letter-post items.

The Commentary to Article 1 (1), Constitution of the Universal Postal Union, explains that the concept of a single postal territory should be understood as figurative rather than legal and that it is intended to suggest ideas of standardization and close cooperation. It elaborates that, although the member countries of the UPU do not form a single postal territory, it expresses the notion that letter-post items in the international service on the territories of the member countries are subject to a postal law which, in its basic principles is uniform. It further states that the concept of a single postal territory implies an obligation on member countries to treat letter-post items in transit like their own letter-post items, without discrimination, and an obligation not to subject letter-post items from other member countries to fees or charges to which letter-post items from their own users/customers are not subject nor to make any other distinction between their own letter-post items and letter-post items from other member countries to the detriment of those member countries.

Assessment of the concept of the single postal territory from the perspective of the GATS (Articles II, VI, VIII and XVII)

The question may be raised whether, interpreted as requiring that the postal service is organized in the form of a monopoly in the territories of the member countries, the concept of the single postal territory might be inconsistent with Articles II, VI, VIII and XVII, GATS. However, it seems clear from the description of the concept of the single postal territory that it does not require the establishment or maintenance of a monopoly service supplier for the international postal service. In fact, the UPU framework does not seem to require that the postal service is provided in the form of a monopoly, although it may recognize that national postal services are organized in the form of a monopoly.

In any case, it may further be observed that the existence of monopoly service suppliers is recognized in, and consistent with, Article VIII, GATS, which requires that a monopoly service suppliers respects the MFN obligation and acts in accordance with specific commitments. Article VI, GATS, which relates to domestic regulation, does not seem relevant in this connection. As regards the national treatment obligation contained in Article XVII, GATS, it may be observed that, according to the description in the commentary, the concept of the single postal territory itself requires national treatment in respect of postal items in the international postal service.

Accordingly, we cannot identify a divergence or inconsistency between the concept of the single postal territory and GATS obligations.

Assessment of the concept of the single postal territory from the perspective of EC law relating to postal services

To the extent that the concept of the single postal territory does not require that postal services be provided by public monopolies, there does not seem to be a conflict between this concept and EC law. Moreover, the principle of non-discrimination between domestic and foreign letter-post items, expressed in the commentary to Article 1(1), is in line with the EC Treaty.

IV.2 The concept of a universal postal service

Description of the concept of a universal postal service

Article 1, Universal Postal Convention, introcudes the concept of a universal postal service within the context of the UPU. In Article 1 (1), Universal Postal Convention, the concept of a universal postal service is linked to the concept of the single postal territory and expressed as a right of users/customers. It provides that, in order to support the concept of the single postal territory of the Union, member countries shall ensure that all customers/users enjoy the right

to a universal postal service involving the permanent provision of quality basic postal services at all points in their territory, at affordable prices.

Article 1 (2), Universal Postal Convention, elaborates that, with this aim in view, member countries shall set forth, within the framework of their national postal legislation or by other customary means, the scope of the postal services offered and the requirement for quality and affordable prices, taking into account both the needs of the population and their national conditions. Article 1 (3), Universal Postal Convention, complements this provision by providing that member countries shall ensure that the offers of postal services and quality standards will be achieved by the operators responsible for providing the universal postal service.

The Commentary to Article 1 (1), Universal Postal Convention, refers to the mission of the UPU to develop social, cultural and commercial communications between all peoples throughout the single postal territory by the efficient operation of the postal services provided for in the Acts of the UPU. It adds that the UPU thus takes the form of the guarantor of the right of peoples to communication and information. The Commentary then notes that postal services are increasingly being offered in a competitive environment. It further notes that, if offered on a commercial basis, postal services are not necessarily accessible at affordable prices to all members of a national community. In that context, the right to a universal postal service is constructed as an international obligation of member countries, so as to ensure that all members of a national community enjoy the right to communication.[124]

[124] Commentary to Article 1 (1), Universal Postal Convention: The UPU's mission as it emerges from the Constitution is "to develop social, cultural and commercial communications between all peoples throughout the single postal territory by the efficient operation of the postal services described in the Acts." From the preamble to its Constitution, the UPU thus takes the form of the guarantor of the right of peoples to communication and information. However, several recent developments could be liable to reduce this right of the peoples unless there is an appropriate reaction from Union member countries. By promoting the development of competition, the general movement towards liberalization and globalization of services has introduced the logic of the market into the postal sector which, accordingly, has reorganized itself on more commercial lines. To remain competitive in this new environment, a growing number of postal administrations are being converted into commercial companies subject to the demands of profitability and profit. Although the postal services are commercial services, in most countries they play a social and cultural role. As such, they represent a material form of the right to communication. Furthermore, as it is necessary to maintain a postal network sufficiently dense to serve the whole population of the territory, the postal services provide a permanent link between the members of a particular national community. The local post office is often the only access to communication in isolated areas, abandoned by other commercial activities or not yet reached by 21st century communication technologies, particularly because of their cost. It is up to member countries to ensure that the modernization of postal administrations and the reform process started in most countries in application of the SPS contribute to the discharge of the obligations arising from their commitment to provide a universal postal service. This commitment includes, in particular, the obligation to ensure the provision and accessibility of postal services, at

The *Memorandum on Universal Postal Service Obligations and Standards*, drafted by the Universal Postal Service Project Team of the Council of Administration, indicates that the universal postal service concept aims to facilitate national regulation in this field.[125]

The Memorandum on Universal Postal Service Obligations and Standards is carefully worded so as not to go beyond the principles contained in Article 1, Universal Postal Convention. With regard to the legal and regulatory framework relating to the setting of standards, it remarks that the diversity of institutional systems in UPU member countries prevents the Universal Postal Service Project Team from making suggestions about the possibility of defining a common world-wide template for relations between universal postal service operators and governments and that, by virtue of the principle of national sovereignty, it is not up to the UPU to oblige member countries to adopt one legislative or regulatory procedure.[126]

The Memorandum subsequently considers to what extent letter post, parcel post and other services should form part of the universal postal service. With respect to letter post, the Memorandum distinguishes between universal postal service at the domestic level and universal postal service at the international level: with regard to the domestic level, it states that the UPU should issue recommendations for member countries on how they should define their universal postal service obligations; with regard to the international level, it states that the UPU should attempt to define minimum standards.[127]

The Memorandum further identifies 5 areas of the universal postal service: (i) access; (ii) customer satisfaction; (iii) speed and reliability; (iv) security; and (v) liability, provision of information and treatment of enquiries. It is stressed that the government, the regulator or another body and/or the operator of the universal postal service are responsible for setting standards in those areas.[128]

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affordable prices, in areas which strict commerical logic would not consider as offering sufficient value added potential (for instance, in areas which are difficult to get into).

[125] International Bureau, Memorandum on Universal Postal Service Obligations and Standards, 12.

[126] International Bureau, Memorandum on Universal Postal Service Obligations and Standards, 15.

[127] International Bureau, Memorandum on Universal Postal Service Obligations and Standards, 16-17.

[128] International Bureau, Memorandum on Universal Postal Service Obligations and Standards, 20; 23-24; 26; 28; 30.

Assessment of the concept of a universal postal service from the perspective of the GATS (Articles II (1) and XVII (1))

The question may be raised whether the universal service concept is consistent with or divergent from Article II (1), or Article XVII (1), GATS. Article II (1), GATS requires that, with respect to any measure covered by the GATS, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country. If we follow the distinction drawn in the Memorandum on Universal Postal Service Obligations and Standards between universal postal service at the domestic level and universal postal service at the international level, it may be observed that an inconsistency of the universal postal service at the domestic level with the MFN obligation could arise if universal postal service suppliers from different Members are treated differently. However, this is not mandated by the universal postal service concept contained in Article 1, Universal Postal Convention. According to Article 1 (2) Universal Postal Convention it is explicitly up to the member countries to set forth the scope and requirements of their national universal service. As a consequence, the UPU provisions on a universal postal service are not inconsistent with Article II, GATS.

The concept of universal postal service at the domestic level may also be scrutinized under the national treatment obligation contained in Article XVII (1), GATS. As outlined above, Article XVII GATS only applies to services, in respect of which specific commitments have been made by the Members. Such commitments in postal services have only been undertaken by seven countries: Djibouti, Gambia, Israel, Kyrgyz Republic, Mongolia, Senegal, Turkey[129]. Additionally, commitments in courier services[130] have been undertaken by 35 countries: Argentina, Austria, Barbados, Botswana, Brazil, Canada, Czech Republic, Cuba, Djibouti, Dominica, Estonia, Gambia, Grenada, Israel, Kyrgyz Republic, Latvia, Lesotho, Mexico, Mongolia, Norway, Papua New Guinea, Philippines, Poland, Qatar, Senegal, Sierra Leone,

[129] For a detailed overview of the specific commitments in postal services cf. Smit, GATS-Prinzipien, 57-59.

[130] Cf. above Part I.2.2.

Singapore, Slovak Republic, Slovenia, South Africa, Turkey, United Arab Emirates, Uruguay, USA, Venezuela.[131]

As a result, the actual impact of Article XVII GATS on measures affecting postal or courier services is quite limited. Moreover, even with regard to these Members, which have undertaken specific commitments in postal or courier services, a violation of Article XVII GATS is excluded to the extent they have inscribed limitations on national treatment in their respective schedules of specific commitments.

A conflict would only arise, if UPU rules require their members to treat foreign and domestic universal postal services or their suppliers differently. However, such an obligation cannot be derived from the UPU rules, in particular not from Article 1, Universal Postal Convention. Consequently, the imposition of universal postal service obligations may be regarded as consistent with the national treatment obligation contained in Article XVII (1), GATS.

Finally, the UPU rules on universal services do not conflict with the provisions relating to domestic regulation contained in Article VI, GATS.[132] Due to the fact, that Article VI GATS does not effectively bind the Members with regard to universal service regulations, it may be noted that the Reference Paper, which has been adopted as an additional commitment in the field of trade in telecommunications services, specifies in Section 3 (universal service) that any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations are not regarded as anti-competitive *per se* if they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member. Members must be regarded as having retained the right to regulate universal service obligations.[133] Accordingly, the concept of a universal postal service as contained in Article 1, Universal Postal Convention may be regarded as consistent with GATS obligations.[134]

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[131] For a detailed overview of the specific commitments in courier services cf. Smit, GATS-Prinzipien, 59-60.

[132] European Commission, Communication on Services of General Interest in Europe, 67; European Commission, Green Paper on Services of General Interest, 100; Annex, 83; with regard to the universal service obligations in telecommunications services cf. Moos, Bindung, 284-285.

[133] Moos, Bindung, 284.

[134] This conclusion is in line with the remarks made by Mr. David Hartridge at the Panel of Experts.

Assessment of the concept of a universal postal service from the perspective of EC law relating to postal services

Within EC law, the concept of universal service is commonly associated with the concept of service of general (economic) interest.[135] According to Article 16, EC, the Community and the Member States, within the framework of their respective competences and within the scope of the Treaty, are to ensure that those services function on the basis of principles and conditions which enable them to fulfil their task. Article 86 (2), EC, provides that undertakings charged with the provision of services of general economic interest fall under the rules of the Treaty, in particular under the competition rules, in so far as the fulfilment, in law or in fact, of the special task entrusted to them is not impeded, if the development of trade between Member States is not affected to an extent contrary to the interest of the Community. These provisions illustrate the importance attached to the concept of universal service by EC law.

The EC Treaty does not define the concept of services of general economic interest. However, pursuant to the case law of the ECJ,, services of general economic interest, and thus by association universal service, generally comprise the following elements: (i) coverage of the whole territory; (ii) continuity; (iii) quality of service; (iv) affordability; (v) user and consumer protection.[136]

As far as postal services are concerned, Article 3 (1), Directive 97/67, provides that Member States shall ensure that users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users. A precise set of universal service obligations, to be implemented by the Member States, is subsequently isolated to give effect to these core principles. According to Article 3 (3), Directive 97/67, the universal service involves, as a minimum, one clearance and one delivery every working day and not less than five days a week. Article 3 (4),

[135] See Report to the Laeken European Council: Services of general interest COM(2001) 598 of 17 October 2001.

[136] See, e.g., ECJ, Case C-320/91; ECJ, Case C-393/92, Almelo, (1994) E.C.R. I-1517.

Directive 97/67, specifies that the universal service includes, as a minimum, the clearance, sorting, transport and distribution of postal items up to 2 kg; the clearance, sorting, transport and delivery of postal packages up to 10 kg; and services for registered items and insured items. Article 3 (5), Directive 97/67, determines that the maximum weight for universal service coverage for postal packages may be set at 20 kg and that, in any event, postal packages with a maximum weight of 20 kg received from other Member States must fall under the universal service obligation.

Other relevant provisions include Article 4, Directive 97/67, which requires, *inter alia*, that Member States shall ensure that the provision of the universal service is guaranteed and shall notify the Commission of the steps taken to fulfil this obligation. Further, Member States shall determine in accordance with Community law the obligations and rights assigned to the universal service providers(s). Article 5 (1), Directive 97/67, specifies additional requirements relating to universal service provision. Article 6, subparagraph 1, Directive 97/67, provides that Member States shall take steps to ensure that universal service provider(s) inform users regarding the universal services offered, including access, prices and quality standard levels. Finally, Article 9 (4), Directive 97/67, provides that, in order to ensure that the universal service is safeguarded, Member States may establish a compensation fund to finance the universal service as determined in Article 3, Directive 97/67.[137]

The above developments show that there is a large degree of convergence between the objectives of Article 1 of the Universal Postal Convention and Articles 3-7 of Directive 97/67. A possible conflict between these provisions could have occurred if the Universal Postal Convention had mandated that universal service be provided by public postal operators and/or that it should be funded by the maintenance of exclusive rights. But, since it is not the case, one cannot find a conflict between the Universal Postal Convention and EC law.

IV.3 The terminal dues system

[137] Geradin/Humpe, Analysis of Directive 97/67, 92-96; 101-103.

Description of the terminal dues system

Articles 47 – 51, Universal Postal Convention, elaborated in Articles RE 1006 *bis* – RE 1015, Letter Post Regulations, contain the provisions organizing the terminal dues system: Article 47 contains general provisions; Article 48 contains provisions relating to exchanges between industrialized countries; Article 49 contains provisions relating to mail flows from developing countries to industrialized countries; Article 50 contains provisions relating to mail flows from industrialized countries to developing countries; Article 51 contains provisions relating to exchanges between developing countries.

General provisions

According to Article 47 (1), each administration receiving letter-post items from another administration shall have the right to collect from the dispatching administration a payment for the costs incurred for the international mail received. This provision explains the objective of the terminal dues system; to ensure that the postal administration that receives letter-post items from another postal administration is remunerated for that part of the international postal service that it provides. Article 47 (2) subsequently determines that, for the purpose of the terminal dues system, postal administrations are classified as industrialized countries or developing countries. Article 47 (4) contains a national treatment obligation relating to access to the domestic service. It provides that each administration shall make available to the other administrations all the rates, terms and conditions offered in its domestic service on conditions identical to those proposed to its national customers. Article 47 (5) contains an MFN-provision relating to bulk mail and provides that terminal dues for bulk mail shall not be higher than the most favourable rates applied by administrations of destination under bilateral or multilateral agreements concerning terminal dues.

Exchanges between industrialized countries

As regards exchanges between industrialized countries, Article 48 (1) provides that payment for letter-post items, including bulk mail, shall be established on the basis of the application of the rates per item and per kilogram reflecting the handling costs in the country of destination and that these costs must be in relation with domestic tariffs. Article 48 (2) provides that, for the years 2001 – 2003, the rates per item and per kilogram may not exceed those calculated on the basis of 60 % of the charge for a 20-gramme letter in the domestic service, or exceed the following rates: 0.158 SDR per item and 1.684 SDR per kilogram for the year 2001; 0.172

SDR per item and 1.684 SDR per kilogram for the year 2002; 0.215 SDR per item and 1.684 SDR per kilogram for the year 2003. Article 48 (3) provides that, for the years 2004 and 2005, the Postal Operations Council shall set the final percentage of the tariffs appropriate to each industrialized country in line with the relations between the costs and tariffs of each country. Article 48 (4) provides that, for the period 2001- 2005, the rates to be applied may not be lower than 0.147 SDR per item and 1.491 SDR per kilogram. As regards exchanges between industrialized countries, it may thus be observed that there are both maximum and minimum rates per item and per kilogram, that the maximum rates per item must gradually increase in the period 2001 – 2003 and that for the years 2004 and 2005 the Postal Operations Council is to set the final percentage of the tariffs appropriate to each industrialized country in line with relations between the costs and tariffs of each country.

Article RE 1006 *bis*, Letter Post Regulations, contains further provisions relating to terminal dues applicable to exchanges between industrialized countries in 2004 and 2005. Article RE 1006 *bis* (1) provides that payment for letter-post items, including bulk mail, shall be established on the basis of application of the rates per item and per kilogram calculated in relation to the domestic priority retail tariffs. According to Article RE 1006 *bis* (2), for 2004, the rates per item and per kilogram may not be higher than those calculated on the basis of 60 % of the domestic retail tariffs, or exceed the maximum rates applicable for industrialized countries in 2003. According to Article RE 1006 *bis* (3), for 2005, the rates per item and per kilogram may not be higher than those calculated on the basis of 60 % of the domestic retail tariffs, or exceed the maximum rates applicable for industrialized countries in 2003, increased by the quality of service incentives provided for under Article RE 1006 *ter* (4).

Article RE 1006 *ter*, Letter Post Regulations, links the terminal dues remuneration between industrialized countries to quality of service performance. Article RE 1006 *ter* (1) provides that, starting in 2005, terminal dues remuneration between industrialized countries shall be based on quality of service performance in the country of destination in accordance with the conditions established by the Postal Operations Council for this purpose. Article RE 1006 *ter* (4) specifies incentive payments, consisting of terminal dues increases of 2.5 % for participation in the quality of service monitoring system and meeting quality of service targets. Article RE 1006 *ter* (5) provides for a penalty if quality of service targets are not met, consisting of 0.33 % of the terminal dues remuneration for each percent of underperformance, with a maximum of 5 %.

Mail flows from developing countries to industrialized countries

As regards mail flows from developing countries to industrialized countries, Article 49 (1) provides for a fixed rate for letter-post items of 3.427 SDR per kilogram. By virtue of Article 49 (4), in respect of bulk mail the rules provided for in Article 48 (1) apply also to mail flows from developing countries to industrialized countries. Thus, with respect to bulk mail to industrialized countries, there is no dissimilar treatment between industrialized countries and developing countries.

Mail flows from industrialized countries to developing countries

As regards mail flows from industrialized countries to developing countries, Article 50 (1) provides for a fixed rate for letter-post items of 3.427 SDR per kilogram, increased by a charge of 7.5 % which forms a contribution to the quality-of-service-fund. In respect of bulk mail, Article 50 (3) differentiates between postal administrations of developing countries which authorize access on the conditions offered in the domestic service and those that do not. Postal administrations which do not authorize such access may request for bulk mail received a payment of 0.14 SDR per item and 1 SDR per kilogram. Postal administrations which do authorize such access may apply to bulk mail received a payment corresponding to the domestic tariffs, increased by 9 %, offered to domestic customers of the same kind, if the rates determined in Article 48 (2) are not exceeded.

Exchanges between developing countries

As regards exchanges between developing countries, Article 51 (1) provides for a fixed rate for letter-post items of 3.427 SDR per kilogram. In respect of bulk mail, Article 51 (3) differentiates between postal administrations of developing countries that authorize access on the conditions offered in the domestic service and those that do not. Postal administrations that do not authorize such access may request for bulk mail a payment of 0.14 SDR per item and 1 SDR per kilogram. Postal administrations that do authorize such access may apply to bulk mail received a payment corresponding to the domestic tariffs, increased by 9 %, offered to national customers for items of the same kind, if the rates determined in Article 48 (2) are not exceeded.

Revision mechanism

Articles 49 (2), 50 (2) and 51 (2) contain a 'revision mechanism' applicable to mail flows of over 150 tonnes a year; this revision mechanism is applicable to mail flows between industrialized countries and developing countries and exchanges between developing countries. The revision mechanism contained in Article 49 (2), applicable to mail flows from developing countries to industrialized countries, may be invoked by both dispatching and receiving administrations. It may be invoked by a dispatching administration if it establishes that the average number of items per kilogram of mail dispatched is less than 14; it may be invoked by a receiving administration if it establishes that the average number of items per kilogram of mail received is more than 21. The revision mechanism contained in Article 50 (2), applicable to mail flows from industrialized countries to developing countries, may be invoked by a receiving administration if it establishes that the average number of items per kilogram of mail received is more than 21. The revision mechanism contained in Article 51 (2), applicable to exchanges between developing countries, may be invoked by a receiving administration if it establishes that the average number of items per kilogram of mail received is more than 21.

System harmonization mechanism

In addition, Article 49 (3) contains a 'system harmonization mechanism' applicable to mail flows of over 50 tonnes a year; this system harmonization mechanism is applicable to mail flows from developing countries to industrialized countries. It may be invoked by a receiving administration if it establishes that the annual weight of this flow exceeds a threshold; it allows the application of the payment system applicable to exchanges between industrialized countries to this surplus.

Other provisions

According to Article 47 (6), the Postal Operations Council shall be authorized to amend the payments mentioned in Articles 48 – 51 between Congresses. Article 47 (8) authorizes postal administrations concerned to apply, by bilateral or multilateral agreement, other payment systems for the settlement of terminal dues accounts. According to Article 47 (3), the terminal dues system contained in Articles 47 – 51 is a transitional arrangement, which moves towards a country-specific payment system.

New Terminal Dues System

In the Joint Council of Administration and Postal Operations Council Report on Terminal Dues to the 23rd Congress, a new terminal dues system is outlined, which differentiates between two systems: (1) a target system, comprising exchanges between industrialized countries: and (2) a transitional system, comprising exchanges between developing countries and flows between industrialized and developing countries. Proposals 20. 25.1 and 20. 26.1 contain the relevant amendments. According to Proposal 20. 25.1, terminal dues in the target system shall be established on the basis of the rates per item and per kilogram reflecting the handling costs in the country of destination, which are to be in relation with the domestic tariffs. The rates per item and per kilogram are calculated on the basis of a percentage of the charge for a 20-gram priority letter in the domestic service. This percentage is 62% in 2006, 64% in 2007, 66% in 2008 and 68% in 2009. Both maximum and minimum rates apply in the period 2006-2009. These rates also apply to bulk mail. According to Proposal 20. 26.1, terminal dues in the transitional system will be 0.147 SDR per item and 1.491 SDR per kilogram. However, for flows below 100 tonnes/year, these two components are converted into a rate of 3.272 SDR per kilogram on the basis of a worldwide average of 15.21 items per kilogram. For flows above 100 tonnes/year, a revision mechanism may be invoked by postal administrations in order to calculate terminal dues in accordance with the real number of items per kilogram. A system harmonization mechanism may be applied both to mail flows from the transitional system to the target system and to mail flows within the transitional system. Flows of bulk mail to the target system are to be treated according to the rates applying within the target system. Flows of bulk mail to or within the transitional system are to be subject to 0.147 SDR per item and 1.491 SDR per kilogram.[138]

Assessment of the terminal dues system from the perspective of the GATS (Articles II (1) and III)

The question may be raised whether the terminal dues system is consistent with Articles II (1) and III of the GATS. Article II (1), GATS, contains the most-favoured-nation obligation of the GATS, providing that with respect to any measure covered by the GATS, each Member

[138] Joint Council of Administration and Postal Operations Council Report on Terminal Dues (Congrès-Doc 28), VII.

shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country. As determined by the Appellate Body, this provision prohibits both *de jure* and *de facto* discrimination.[139]

The UPU rules relating to the terminal dues system provide for a differential treatment of postal services in several aspects. For example: (1) according to Article 49 of the Convention, terminal dues applicable to mail flows from developing countries to industrialized countries are generally lower than those applicable to mail flows between industrialized countries; (2) the obligation imposed by Article 50 (1.1.1) to contribute to the quality of service fund applies to industrialized countries, but not to developing countries; (3) according to Article 50.2 of the Convention, only developing countries are entitled to rely on the therein established revision mechanism in order to increase their charges. This enumeration is not exhaustive.

To examine the question of the consistency of these terminal dues regulations with Article II (1), GATS, it must be considered whether the MFN obligation contained in Article II (1), GATS, allows a distinction between industrialized countries and developing countries, pursuant to which services and service providers of developing countries are treated more favourably than services and service providers of industrialized countries.

In this respect it has to be assessed whether (1) terminal dues are measures of a WTO Member, (2) the affected services at issue are supplied cross-border, (3) the delivery of mail from developed countries on the one hand and from industrialized countries on the other hand are "like services" in the sense of Article II GATS, and (4) these services or their suppliers are treated less favourably.

Measures of WTO Members

First of all, it has to be assessed, whether the terminal dues rates are measures of a WTO Member. As follows from Article XXVIII (a) GATS, a "measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative

[139] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 9 September 1997, 231-234.

action, or any other form. According to Article I (3) a "measures by Members" means measures taken by central, regional or local governments and authorities; and non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities".

Therefore, the terminal dues rates would have to be considered as measures by a Member, if the rates were charges by postal administrations, which would certainly be the case where the postal services itself are supplied by administrative bodies.[140] It might be doubtful however, whether the terminal dues can be regarded as measures by Members, if the supplier of the postal service which charges the terminal dues is a non-administrative operator, e.g. a juridical person owned by the government. A similar question has arisen in the course of the WTO negotiations with regard to the revenue sharing system in international telecommunications, the so-called "Accounting Rates Regime".[141] Because the Members could not reach a common position on the WTO-conformity of the country-specific accounting rates, six Members notified their accounting rate regime as an exception to their MFN obligation according to Article II (2) GATS, because these country-specific accounting rates would imply a discrimination of like services or service suppliers from other countries. However, it has also been argued that accounting rates fixed or settled by a non-administrative operator could not be regarded as "measures by a Member" because the conditions set forth in Article I (3) (a) GATS – exercise of delegated powers – are not fulfilled.[142]

With regard to the payment of terminal dues for postal services according to UPU rules, the view is taken in legal literature that such measures shall be considered as "measures by a Member" merely because of the countries' membership in the UPU; at least the GATS provisions shall be applied by analogy.[143]

Cross-border supply of postal services

[140] Also cf. Sinclair, Postal Services, 24; Alverno, Measures related to ETOEs, 4.

[141] Cf. Moos, Bindung, 175-176.

[142] Sherman, Multilateral Agreement, 70; Bronckers/Larouche, Telecommunications Services, 34.

[143] Smit, GATS-Prinzipien, 21.

On the assumption that the terminal dues rules can be regarded as "measures by a Member" the question has to be addressed whether the postal administration of the other Member supplies its services cross-border within the meaning of Article I (2), GATS.

In this regard, it must be observed that the international postal service is a co-operative service which is composed of actions of a sending postal administration and a receiving postal administration. Against this background it might be argued that the services at issue are not supplied cross-border, because the service suppliers do not themselves transmit the letters to the customers in the territory of another Member. Instead, the letters are exchanged between offices of exchange, so that it is only the letters (i.e. the "goods") cross the border.[144]

This argument has been put forward by Mexico in the recent dispute settlement procedure *Mexico – Measures Affecting Telecommunications Services*.[145] This argument would imply, in effect, that cross-border supply within the meaning of Article I (2) (a) GATS can only occur if the supplier operates, or is present in some way on the other side of the border. In this case, Mexico drew an analogy with services involving the distribution of tangible products such as mail.[146] Stating that making findings with respect to postal services would be outside its mandate, the Panel rejected the arguments put forward by Mexico for the following reasons:

Firstly, it examined the wording of Article I (2) (a) GATS and noted that the ordinary meaning of this provision indicates that the *service* is supplied from the territory of one Member into the territory of another Member and that the provision is silent as regards the *supplier* of the service. In particular, the provision does not specify where the supplier must operate or be present in some way, much less imply any degree of presence of the supplier in the territory into which the service is supplied. Thus, the Panel concluded that the place where the supplier itself operates or is present is not directly relevant to the definition of cross-border supply.[147]

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[144] Cf. Smit, GATS-Prinzipien, 46.

[145] Panel Report, *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, adopted on 1 June 2004, 7.27.

[146] Panel Report, *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, adopted on 1 June 2004, 7.39.

[147] Panel Report, *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, adopted on 1 June 2004, 7.30.

Secondly, the Panel examined the context of subparagraph (a) – especially subparagraphs (c) and (d) and stated that where the presence of the service supplier was required to define a particular mode of supply (subparagraphs (c) and (d)) the drafters of the GATS expressed this clearly.

Additionally, with regard to postal service it seems noteworthy that foreign suppliers of postal service usually *do* have a presence in the country of destination, namely an extra territorial office of exchange, which supplies some kind of postal services at the other side of the border. Therefore it seems even more appropriate for postal than for telecommunications services to conclude that such services are supplied cross-border.[148]

Moreover, the Panel examined the UN Provisional Central Product Classification (CPC), which most WTO Members used for scheduling their specific commitments. According to the WTO Services Sectoral Classification List[149] for postal services reference is made to CPC 7511 which describes postal services related to letters as: "Services consisting of pick-up, transport and delivery services of letters, newspapers, journals, periodicals, brochures, leaflets and similar printed matters, whether for domestic *or foreign destinations*, as rendered by the national postal administration" (emphasis added).

This definition specifies, that the postal service – also for foreign destinations – comprises the pick-up, transport and delivery of letters. It therefore follows from this definition, that the supply of postal services is generally understood as an end-to-end-service from the sender to the addressee, even if such service involves or requires the co-operation between several national suppliers to complete the service, i.e. to deliver the mail to an addressee abroad.

We therefore conclude that international postal services must be regarded as supplied cross-border in the sense of Article I (2) (a) GATS, even if the service supplier of another Member is not present in the destination country, or is only present in the form of an extra-territorial office of exchange, and the completion of the service (i.e. the delivery of the mail to the

[148] Cf. Alverno, Measures related to ETOEs, 3.

[149] MTN.GNS/W/120.

addressee) is carried out by a domestic supplier. This view seems to be shared in legal literature.[150]

Likeness of postal services from developed and industrialized contries

Moreover, the delivery of mail originating from developing countries and the delivery of mail originating from industrialized countries would have to be considered "like services". According to the Appellate Body, there is no one precise and absolute definition of what is "like". The concept of likeness is rather a relative one that evokes the image of an accordion which stretches and squeezes in different places as different provisions of the WTO Agreement are applied.[151] A definition for the "likeness" in the sense of Article II GATS has not yet been established in the course of dispute settlement practice. In relation to Articles I and III GATT, the Panels have found that criteria such as the product's end uses, consumers' tastes and habits and the product's properties, nature and quality should be used for interpreting "like or similar products" generally in the various provisions of GATT.[152]

If one applies these criteria in the context of Article II GATS to the postal services at issue, a difference between the delivery of mail originating from developing and from industrialized countries can hardly be identified as the main characteristics of both services do not differ from each others.

The likeness of the services at issue, i.e. the delivery of mail, or the service suppliers respectively may only be doubted if one finds that mail from developing countries and their postal service suppliers differentiate from the respective services and service suppliers from industrialized countries. In this respect, it could be argued that there are different levels of economic development which are reflected e.g. in the competitive status of the service suppliers that is being taken account of by the terminal dues system aiming at a fostering of the developing countries' mailing system and the safeguarding effective possibilities of communication.

[150] Cf. Smit, GATS-Prinzipien, 47.

[151] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 97.

[152] Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted on 2 July 1998, 7.13.

However, the Appellate Body has explicitly refused to consider the "aims and effects" of a measure in determining whether that measure is inconsistent with Article II GATS.[153] Accordingly, such – legitimate – aims cannot have any influence on the notion of "likeness" in the sense of Article II GATS. As a conclusion, the postal services at issue in principle have to be regarded as "like" services in the sense of Article II GATS, irrespective of their origin in a developing or industrialized country.

Less favourable treatment

In this connection, it may first be observed that the text of Article II (1), GATS, does not make a distinction between industrialized countries and developing countries and refers to services and service suppliers of any other Member. Thus, the granting of the above mentioned advantages to developing countries only generally constitutes a less favourable treatment of industrialized countries.

Yet, the GATS contains several provisions allowing a special and differential treatment of developing countries.[154] In this respect reference may be made to Article IV, GATS, which specifically deals with 'increasing participation of developing countries'. Article IV (1), GATS, provides that increasing participation of developing country Members shall be facilitated through negotiated specific commitments by different Members, pursuant to Parts III and IV, GATS. Article IV (1) (c), GATS, provides that such specific commitments relate to the liberalization of market access in sectors and modes of supply of export interest to those developing countries. In order to achieve the objective of increasing participation of developing countries, such specific commitments may grant preferential treatment to developing countries. Anyhow, Article IV, GATS, does not imply that the MFN obligation

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[153] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 9 September 1997, 241.

[154] Cf. Article IV (1), (2) and (3), Article V (3), Article XIX (3) GATS and Committee on Trade an Development, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions, WT/COMTD/77.

contained in Article II (1), GATS, must be interpreted in the sense of allowing a differentiation between industrialized countries and developing countries.[155]

Likewise, a recourse to the Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries[156] (the so-called "Enabling Clause") is not possible with regard to Article II GATS. Even though, the legal function of the Enabling Clause is to authorize derogation from the MFN principle, so as to enable the developed countries, inter alia, to accord preferential treatment to developing countries[157], it is clear from the wording of the Enabling Clause, in particular No. 1 and 2, that the allowance to accord preferential treatment to developing countries only applies to the GATT (Article I) and not to the GATS.

The same is true for the Decision on Preferential Tariff Treatment for Least-Developed Countries[158], according to which only the provisions of paragraph 1 Article I of the GATT (MFN treatment) shall be waived until 30 June 2009 to the extent necessary to allow developing country Members to provide preferential tariff treatment to products of least-developed countries.

Finally, different terminal dues do not seem to be exempted from Article II (1) GATS by way of a waiver which Members in principle could have listed according to Article II (2) in connection with the Annex on Article II Exemptions.

Since the MFN obligation contained in Article II (1), GATS, does not permit a differentiation between industrialized countries and developing countries in the context of the terminal dues system, the terminal dues system would have to be regarded as divergent from the MFN obligation contained in Article II (1), GATS. This point of view is shared by several commentators in the legal literature.[159]

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[155] International Bureau, Impact, 21-23; International Bureau, Obligations arising from the GATS, Congrès-Doc 72.Add1.Annexe 1, 4.

[156] Decision of 28 November 1979, GATT Document L/4903, BISD/203.

[157] Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 1 December 2003.

[158] Decision on Waiver, adopted on 15 June 1999, WT/L/304.

[159] Alverno, Impact, 16-23; Luff, Regulation, 77-78; Perrazzelli/Vergano, Overview, 744-746.

Consistency with Article III GATS

The terminal dues system does not seem inconsistent with Article III, GATS, which has been analyzed as relating to the concept of transparency in a formal sense. The public availability of information about the organization and operation of the terminal dues system seems fully consistent with this concept.

Assessment of the terminal dues system from the perspective of the GATT 1994 (Article I (1))

The question regarding the consistency of the terminal dues system with Article I (1), GATT 1994, may also be raised. Article I (1), GATT 1994, contains the most-favoured-nation obligation of the GATT 1994. It provides that, with regard to customs duties and charges of any kind, imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation or exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties. As determined by the Appellate Body, this provision prohibits both *de jure* and *de facto* discrimination.[160]

Article 47 (2), Universal Postal Convention, makes a formal distinction, for the purpose of the terminal dues system, between postal administrations of industrialized countries and postal administrations of developing countries. For the purpose of analyzing whether the terminal dues system contained in Articles 47 – 51, Universal Postal Convention is consistent with or divergent from the MFN obligation contained in Article I (1), GATT 1994, the question must

[160] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 31 May 2000, 78.

be addressed whether the MFN obligation contained in Article I (1), GATT 1994, allows for the possibility of making a formal distinction between industrialized countries and developing countries.

Therefore, a discrimination inconsistent with or divergent from Article I (1) GATT might be identified: (1) in the different terminal dues rates payable by industrialized countries and developing countries for, respectively, exchanges between industrialized countries and mail flows from developing countries to industrialized countries; (2) in the different terminal dues rates payable by industrialized countries and developing countries for, respectively, mail flows from industrialized countries to developing countries and exchanges between developing countries.[161] The differential terminal dues rates may entail indirect discrimination of products from industrialized countries in comparison with products from developing countries.[162]

Applicability of the Enabling Clause

In analyzing the question of the compatibility of such differential treatment of products from industrialized and developing countries with the MFN obligation contained in Article I (1), GATT 1994, it seems most relevant to refer to the so-called 'Enabling Clause' by means of which the Contracting Parties of GATT 1947 authorized the contracting parties to differentiate between developing countries and other contracting parties.[163] The Enabling Clause is also a part of GATT 1994 as one of the "other decisions of the CONTRACTING PARTIES to GATT 1947" under paragraph 1(b)(iv) of GATT 1994, which has recently been affirmed by the Appellate Body[164].

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[161] Cf. Luff, Regulation, 58-59.

[162] Luff, Regulation, 58-59; 70-71.

[163] *Differential and more favourable Treatment, Reciprocity and fuller Participation of Developing Countries*, paragraph 1: Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.

[164] Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 7 April 2004, 90.

Paragraph 1 of the Enabling Clause, which applies to all measures authorized by that Clause, provides: “Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties” (footnote omitted).

By using the word "notwithstanding", paragraph 1 of the Enabling Clause permits Members to provide "differential and more favourable treatment" to developing countries "in spite of" the MFN obligation of Article I:1. Such treatment would otherwise be inconsistent with Article I:1 because that treatment is not extended to all Members of the WTO "immediately and unconditionally". Paragraph 1 thus exempts Members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause. As such, the Enabling Clause operates as an "exception" to Article I:1.[165]

Measures that shall be exempt from a finding of inconsistency with Article I (1) GATT by virtue of the Enabling Clause must fit within one of the clauses in paragraph 2, sub-paragraphs (a) – (d), of which the most relevant for this case seems to be paragraph 2(b), which provides for differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT.

Moreover, paragraph 3 identifies three conditions that must also be satisfied by any measure under the Enabling Clause. According to these conditions, any differential and more favourable treatment (a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting party; (b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation-basis; (c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

[165] Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 7 April 2004, 90.

As a result, the differential and more favourable treatment of developing countries with regard to the terminal dues system – if notified to the other contracting parties – could be consistent with the Enabling Clause.

Assessment of the terminal dues system from the perspective of EC law relating to postal services

Within the EC, terminal dues are determined by the REIMS II Agreement. REIMS II is not a legislative act, but an agreement concluded between the public postal operators of the Member States of the EU (with the exception of the Netherlands), and the operators of Norway and Iceland. The agreement was notified to the Commission which, pursuant to Article 81 (3) EC, exempted it in its Decision 1999/695 from the prohibition of Article 81 (1) EC.[166]

The REIMS II Agreement has two objectives: (1) to ensure that the parties receive equitable remuneration for the delivery of cross-border mail, corresponding more closely to the effective costs of delivery of each party; and (2) to improve the quality of cross-border postal services.[167]

A central aspect of the REIMS II Agreement is that it provides that terminal dues are to be connected to the domestic tariffs of the country of destination. During a transitional period, terminal dues were to be raised to a level of 80 % of domestic tariff, the rise being spread as follows: CEPT + 15% in 1997, 55% in 1998, 65% in 1999, 70% in 2000, and 80% in 2001.

[166] Decision 1999/695/EC of 15 September 1999 (Case IV/36.748 – REIMS II), OJ L 275, 26.10.1999, 17-31. According to the Commision, the REIMS II Agreement constituted an agreement between undertakings, which fixed sales prices and thereby restricted competition and affected trade between Member States. However, the Commission found that the Agreement fulfilled the conditions of Article 81 (3) EC, because it contributed to the improvement of the distribution of products and/or to technical or economical progress, in that it provided for remuneration related to the cost of delivery of cross-border mail and improved the quality of cross-border postal services. The Commission also found that users would receive an equitable share of the advantages flowing from the Agreement and that the restriction of competition was indispensable, even though terminal dues were related to domestic tariffs and not directly to the cost of delivery. In the opinion of the Commision, the Agreement would not exclude competition; although it could be expected to reduce the practice of remailing, this should not be regarded as an exclusion of competition, but as the reestablishment of normal conditions of competition.

[167] Decision 1999/695/EC, at § 16.

Although this does not connect terminal dues directly to the costs of delivery, and thus could be problematic under Article 13 of Directive 97/67, the Commission considered that the linkage with domestic tariffs was a sufficient approximation of the costs of delivery.[168]

Another central aspect of the REIMS II agreement is that any increase in terminal dues is subject to improvement in quality. The agreement contains a system of quality standards pursuant to which contracting parties are divided into three groups, each with specific quality targets. Groups A, B, and C have to attain respectively a percentage of 90, 85, and 80 within one working day from arrival.[169] These standards are underpinned by a penalty system pursuant to which a reduction of up to 50% of the level of terminal dues payable can be imposed.[170]

The Commission strictly limited the duration of the exemption, which was set to expire on 31 December 2001, in effect preventing terminal dues to increase to 80% of the domestic tariffs. The Commission acknowledged that it possessed insufficient evidence to ascertain that the actual cost of delivery of inbound cross-border mail represents 80% of domestic tariff.[171] These evidentiary difficulties were in turn attributable to the failure of a majority of postal operators to introduce transparent cost accounting systems.[172]

On 18 June 2001, the parties to the REIMS II agreement, which at the time included 17 members (including Swiss Post), re-notified it to the Commission, which in its Decision 2004/139 exempted it again until 31 December 2006.[173] The re-notified agreement consolidated various supplementary agreements (four in total) that had been signed by the parties during 1998-2001.[174] In the re-notified agreement, terminal dues were to be increased, subject to penalties for lack of compliance with quality standards, over a transitional period as

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[168] Id. at §§ 17-18.

[169] Id. at §§ 27-31.

[170] Id.

[171] Id. at § 94

[172] Id.

[173] Commission Decision 2004/139.

[174] Id. at §§ 24-31.

follows: 73,3% of domestic tariffs in 2002, 76,6% of domestic tariffs in 2003, and 80% of domestic tariffs in 2004.[175] In response to objections of the Commission with respect to the length of the transition period and the level of terminal dues to be applied, the parties adopted an additional supplementary agreement (the fifth) providing for an extended transitional period running from 31 December 2004 to 31 December 2006 and revised levels of terminal dues pursuant to which such dues would amount to 73,3% for 2002, 74,5 for 2003, 75,7% for 2004, and 78,5% for 2005 and 2006.[176]

Among the conditions imposed by the Commission was the fact that each REIMS II Party should provide to any third-party operator competing with the REIMS II Parties for the provision of outgoing cross-border mail services in any other REIMS II country, delivery of incoming cross-border mail in its country at terminal dues and under conditions which are non-discriminatory as compared to those that the REIMS II Party offers to REIMS II Party(ies) in the sender's country.[177]

The central question at this stage is whether the REIMS II agreement is compatible with the system of terminal dues contained in Article 48, Universal Postal Convention. First, it should be noted that the two systems share the same philosophy, which is that there should be a link between the cost of delivery and the amount of the terminal dues. The problem is that the rates provided for in Article RE 1006 bis, Letter Post Regulations, do not correspond to the rates contained in the re-notified REIMS II agreement. For instance, while Article RE 1006 bis (2) provides that, for 2004, the rates per item and per kilogram may not be higher than those calculated on the basis of 60% of the domestic retail tariffs, or exceed the maximum rates applicable for industrialized countries in 2003 (i.e., rates must be lower than 0.147 SDR per item and 1.491 SDR per kilogram), the REIMS II agreement provides that, for that year, the terminal dues should correspond to 75,4% of the domestic rates.

It would be wrong, however, to believe there is a conflict between Article 48 of the Universal Postal Convention and the REIMS II agreement. First, as noted above, Article 47(8) of the

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[175] Id. at § 32.

[176] Id. at § 40.

[177] Id. at §§ 169-72.

Universal Postal Convention authorizes postal administrations concerned to apply, by bilateral or multilateral agreement, other payment systems for the settlement of terminal dues accounts. REIMS II clearly represents such an agreement. Conversely, the REIMS II agreement provides for some degree of flexibility. For instance, it provides that the Parties are free to conclude bilateral or multilateral agreements on terminal dues between themselves in which different conditions, in particular other levels of terminal dues, may be fixed.[178] Nothing would thus prevent some Parties to agree to apply between themselves the terminal dues provided for in Article 48 of the Universal Postal Convention.

IV.4 The practice of remailing and anti-remail measures

Description of the practice of remailing

The practice of remailing is linked to the terminal dues system to the extent that it seeks to exploit differences between domestic rates and terminal dues rates. Terminal dues rates may be significantly lower than domestic rates; in that case, it may be profitable to circumvent the domestic rates by posting mail to domestic destinations abroad. Terminal dues rates may also be significantly higher than domestic rates; in that case, it may be profitable to circumvent the international rates by posting mail to foreign destinations directly in the country of destination.

Several forms of the practice of remailing are commonly distinguished. In the case of 'ABA' remailing, mail addressed to domestic destinations in country A is posted abroad in country B for delivery to the addressees in country A. This form of remailing is attractive if the international rates for mail from country B to country A are lower than the domestic rates of country A. In the case of 'ABB' remailing, mail originating in country A addressed to foreign addressees in country B is posted directly abroad in country B. This form of remailing is attractive if the international rates for mail from country A to country B are higher than the domestic rates of country B. In the case of 'ABC' remailing, mail originating in country A

[178] The agreement also provides that where a Party grants another Party, or other Parties, lower terminal dues in such an agreement, it is obliged to apply the same terminal dues to all the Parties, provided that the transaction are equivalent.

and addressed to destinations in country C is posted in country B for delivery in country C. This form of remailing is attractive if the international rates for mail from country B to country C are lower than the international rates for mail from country A to country C.[179]

These forms, ABA, ABB and ABC remailing, are commonly referred to as 'physical remailing'. It is also common to make a distinction between 'physical' and 'non-physical remailing'. Physical remailing refers to the actual transport of physical mail items from country X to country Y; non-physical remailing refers to the electronic transport or communication of the contents of mail items from country X to country Y. An outstanding question is whether non-physical remailing is comparable to physical remailing or should not be regarded as remailing at all.

If non-physical remailing is considered as a form of remailing, other forms of remailing, in addition to those described above, may be distinguished. In the case of ABA non-physical remailing, mail is transported or communicated electronically from country A to country B. Subsequently, the mail is transformed into a physical form and posted for delivery in country A. In the case of ABB non-physical remailing, mail is transported or communicated electronically from country A to country B. Subsequently, the mail is transformed into a physical form and posted for delivery in country B. In the case of ABCA non-physical remailing, mail is transported or communicated electronically from country A to country B. Subsequently, the mail is transformed into a physical form and transported in this physical form from country B to country C for delivery in country A.

If non-physical remailing is not considered as a form of remailing, the form described as ABA non-physical remailing is regarded as international mail from country B to country A. Similarly, the form described as ABB non-physical remailing is regarded as international mail from country A to country B. The form described as ABCA remailing is then regarded as ABC remailing. In other words, the electronic transport or communication of the contents of mail items is not regarded as a mail flow.[180]

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[179] Campbell, Terminal Dues and Remail, 11-12.

[180] Campbell, Terminal Dues and Remail, 12-13.

Anti-remail measures pursuant to Article 43, Universal Postal Convention

Article 43, Universal Postal Convention, allows postal administrations to adopt measures against the practice of remailing.

Article 43 (1)-(3), Universal Postal Convention, relates to ABA remaling. Article 43 (1), Universal Postal Convention, provides that 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 a foreign country with the object of profiting by the more favourable rate conditions there. According to Article 43 (2), Universal Postal Convention, this applies without distinction both to letter post items made up in the sender's country of residence and then carried accross the frontier and to letter post items made up in a foreign country. In other words, the release from the obligation to forward letter post items contained in paragraph 1 applies, according to paragraph 2, to both physical and non-physical remailing. Article 43 (3), first sentence, Universal Postal Convention, determines that the administration of destination may claim from the sender or, failing this, from the administration of posting, payment of the internal rates.

Article 43 (4), Universal Postal Convention, relates to ABC remailing. It provides that 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. Article 43 (4), second sentence, Universal Postal Convention, provides that the administration of destination may claim from the administration of posting payment commensurate with the costs incurred; this payment may not exceed 80 % of the domestic tariff for equivalent items or 0.14 SDR per item plus 1 SDR per kilogram.

Assessment of the practice of remailing and anti-remail measures from the perspective of the GATS (Articles II and XVII)

Article XVII (1), GATS, requires national treatment of services and services suppliers of other Members.

ABA-Remailing

It may be considered that the adoption of anti-remail measures with respect to ABA remailing, pursuant to Article 43 (1)-(3), Universal Postal Convention, is inconsistent with this requirement as the supplier of postal services from country A are treated differently from the supplier of postal services from country B: while mail from country B which has been forwarded to country A by a supplier situated in B must be forwarded and delivered by the service supplier in country A, 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 a foreign country (Article 43 (1) Universal Postal Convention.

First of all, it has to borne in mind that Article XVII GATS only applies to services, in respect of which specific commitments have been made by the Members. As described above, only very few countries have made such commitments, yet, so that in most instances a violation of Article XVII GATS cannot be demonstrated.

But even if a country has made a commitment to grant national treatment it seems doubtful whether Article 43 (1) Universal Postal Convention would be contrary to this obligation. Insofar it seems most relevant, that it is not the service supplier of another Member which is discriminated against, but the domestic service supplier. Hence it follows, that the anti-remailing provision in Article 43 (1) Universal Postal Conventions only allows for a less favourable treatment of the Members own services and service suppliers. As follows from the wording of Article XIVV (1) GATS such a reverse discrimination does not seem to be sanctioned under the national treatment obligation.[181]

Moreover, it is very doubtful whether Article 43 Universal Postal Convention itself is inconsistent with Article XVII GATS. According to the practice of GATT Panels, legislation mandatorily requiring the executive authority to impose a measure inconsistent with the

[181] Also cf. Smit, GATS-Prinzipien, 23.

General Agreement are itself inconsistent with the Agreement as such, whether or not an occasion for the actual application of the legislation had arisen.[182]

In this respect, it must be observed that in Article 43 (1)-(3), Universal Postal Convention, anti-remail measures are regulated as exceptions to the obligation to forward and deliver incoming cross-border mail. The Members are thus not barred from nevertheless forwarding and delivering such mail.

Some legal experts seem to argue that even if the right of refusal provided for in Article 43 Universal Postal Convention is not exercised by a Member, a violation of GATS would still exist[183]. This opinion however does not seem to reflect the view taken by the Panels and the Appellate Body in WTO dispute settlement. According to the respective dispute settlement practice, such clauses which do not explicitly mandate discrimination between countries may only be scrutinized under GATT / GATS provisions as long as they "introduce discrimination between countries". Insofar, the prior recognition and the impact of discrimination should be prima facie evidence of an Article I (1) GATT violation.[184]

On the assumption that these statements of the Panels are in principle also applicable to the GATS[185], it might be argued, that Article 43 Universal Postal Convention itself recognizes a differential treatment with regard to ABA-remailing. For an inconsistency with Article XVII it would furthermore be necessary that a discrimination effectively arises in practice, which is the case as several Members have adopted such anti-remail measures. However, as such reverse discriminations do not constitute an infringement of Article XVII GATS, Article 43 Universal Postal Convention does not seem to violate the National Treatment obligation.

ABC-Remailing

[182] Panel Report, *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footware from Brazil*, DS/18/R, adopted on 19 June 1992, 6.13.

[183] Perrazzelli/Vergano, Overview, 745.

[184] Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted on 2 July 1998, 7.17 et seq.

[185] Moos, Bindung, 203.

With regard to Article 43 (4), Universal Postal Convention, which relates to ABC remailing, a separate examination of the GATS conformity seems worthwhile. Article 43 (4) Universal Postal Convention provides that 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. Article 43 (4), second sentence, Universal Postal Convention, provides that the administration of destination may claim from the administration of posting payment commensurate with the costs incurred; this payment may not exceed 80 % of the domestic tariff for equivalent items or 0.14 SDR per item plus 1 SDR per kilogram.

Accordingly, the suppliers of postal services from country A are treated differently from the supplier of postal services from country B: while mail from country B which has been forwarded to country C by a supplier situated in B must be forwarded and delivered by the service supplier in country C, a member country shall not be bound to forward or deliver to the addressee letter-post items which senders residing in country have posted to country B in order to have them posted again to country C. Such differential treatment of services / service suppliers from countries A and B with regard to the forwarding and delivery of incoming cross-border mail might conflict with the obligation to MFN treatment according to Article II (1) GATS.[186]

Article II (1), GATS, provides that, with respect to any measure covered by the GATS, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country. As already elaborated above in detail, the measures of Members which serve to apply Article 43 Universal Postal Convention have to be regarded as measures affecting trade in services. Moreover, as no differences between the two suppliers with regard their services (transport of letter post items), their end uses, the consumers' tastes and habits and neither the service's properties, nature and quality can be asserted, the service suppliers have to be considered as "like service suppliers" within the meaning of Article II (1) GATS. Finally, if and to the extent of which incoming mail from a service supplier that

[186] Cf. Alverno, Measures related to ETOEs, 6.

remails its letters via the territory of another Member is not forwarded or delivered in the same way as mail initially originating from that country, a less favourably treatment exists.[187]

Yet again, it has to be observed that also Article 43 (4) Universal Postal Convention does not explicitly mandate such discrimination but eventually only introduces such discrimination. Therefore it remains doubtful if Article 43 (4) Universal Postal Convention itself has to be regarded inconsistent with Article II (1) GATS.[188]

Articles III, GATS, (transparency) and VI, GATS, (domestic regulation) do not seem relevant for assessing the practice of remailing and anti-remail measures.

Assessment of the practice of remailing and anti-remail measures from the perspective of GATT 1994 (ArticleS III (4) and XI (1))

As regards the assessment of the practice of remailing and anti-remailing measures under Articles III (4) and XI (1), GATT 1994, the same considerations apply *mutatis mutandis*. With respect to physical ABA remailing, it seems appropriate that anti-remail measures are not inconsistent with Articles III (4), and XI (1), GATT 1994, because a reverse discrimination of domestic service suppliers is not sanctioned under these GATT provisions either. In any case, such measures – even if inconsistent with GATT provisions seem to qualify for an exemption according to Article XX (d), GATT 1994.[189] With regard to non-physical ABA remailing, it seems appropriate to consider that anti-remail measures are inconsistent with Articles III (4) and XI (1), GATT 1994, in so far as products from other Members are affected indirectly.

With regard to ABC-remailing a violation of the MFN obligation contained in Article I (1) GATT could be assumed. However, it must be observed that in Article 43 (1)-(3) and (4), Universal Postal Convention, anti-remail measures are regulated as exceptions to the obligation to forward and deliver incoming cross-border mail and the Members are not obliged to adopt anti-remailing measures . Therefore, an inconsistency between Article 43,

[187] Smit, GATS-Prinzipien, 23; Luff, Regulation, 78; Sinclair, Postal Services, 25.

[188] Cf. Sinclair, Postal Services, 25.

[189] Luff, Regulation, 68.

Universal Postal Convention, and Articles III (4) and XI (1), GATT 1994, itself only arise if the view is taken that this provision at least "introduces" an unlawful discrimination.

Assessment of the practice of remailing and anti-remailing measures from the perspective of EC law relating to postal services

There is no conflict possible between Article 43 of the Universal Postal Union Convention and EC law as Article 43 does not force any Party to apply anti-remail measures. It only *allows* postal administrations to adopt measures against the practice of remailing. Whatever the position of EC law on anti-remail measures there could thus not be a conflict between the two sets of rules. For the sake of the argument, we will, however, discuss hereafter whether EC law allows (as Article 43 does) postal operators to engage into anti-remail measures. We will specifically refer to two cases involving Deutsche Post, one judgment of the ECJ (Deutsche Post I) and a decision of the Commission (Deutsche Post II).

In Case C-147/97 (Deutsche Post I), the ECJ considered the question whether the practice on the part of Deutsche Post to demand internal postal rates with respect to non-physically remailed postal items was contrary to Article 86, EC, in conjunction with Articles 49 and 82, EC.[190] The Court recognized that the grant to a body such as Deutsche Post of the right to treat international items of mail as internal post in the cases referred to in Articles 25 (1) and (2), Universal Postal Convention 1989, creates a situation where that body may be led, to the detriment of users of postal services, to abuse its dominant position resulting from the exclusive right granted to it to forward and deliver those items to the relevant addressees.[191] Accordingly, according to the Court, it was necessary to examine the extent to which the exercise of such a right was necessary to enable a body such as Deutsche Post to perform its task of general interest pursuant to the obligations flowing from the Universal Postal Convention and, in particular, to operate under economically acceptable conditions.[192]

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[190] Joined Cases, C-147/97 and C-148/97, *Deutsche Post I*, 2000 ECR I-825, 36.

[191] See *Deutsche Post I*, 48.

[192] See *Deutsche Post I*, 49.

As a result of this examination, the ECJ found that it was justified, pursuant to Article 86 (2) EC, in the absence of an agreement between the postal services of the Member States concerned fixing terminal dues in relation to the actual costs of processing and delivering incoming cross-border mail, to charge internal postage on cross-border mail posted by senders resident in that Member State with the postal services of another Member State.[193] Because the terminal dues rates did not adequately correspond to the costs of processing and delivering incoming cross-border mail, an obligation to forward and deliver such mail would jeopardise the task of general interest entrusted to Deutsche Post.[194] On the other hand, in so far as the applicable terminal dues covered the costs of processing and delivery of incoming cross-border mail, they had to be deducted from the internal rate, which already comprises a component relating to those costs.[195]

In its Decision 2001/892 (Deutsche Post II), the Commission considered that the practice of Deutsche Post, consisting of: (i) frequently intercepting incoming cross-border letter mail; (ii) surcharging incoming cross-border letter mail; and (iii) frequently delaying, for extensive periods of time, the release of incoming cross-border letter mail which has been intercepted, constituted abuse of a dominant position within the meaning of Article 82 EC.[196] In particular, the Commission considered that this practice involved discrimination between equivalent transactions,[197] amounted to a constructive refusal to supply,[198] involved the imposition of

[193] *Deutsche Post I*, 50-55.

[194] *Deutsche Post I*, 50-51: If a body such as Deutsche Post were obliged to forward and deliver to addressees in Germany mail posted in large quantities by senders resident in Germany using postal services of other Member States, without any provision allowing it to be financially compensated for all the costs occasioned by that obligation, the performance, in economically balanced conditions, of that task of general interest would be jeopardised. The postal services of a Member State cannot simultaneously bear the costs entailed in the performance of the service of general economic interest of forwarding and delivering international items of mail, which is their responsibility by virtue of the Universal Postal Convention, and the loss of income resulting from the fact that bulk mailings are no longer posted with the postal services of the Member State in which the addressees are resident but with those of other Member States.

[195] *Deutsche Post I*, 56-60.

[196] Decision 2001/892/EC (COMP/C-1/36.915 – Deutsche Post AG – Interception of cross-border mail), OJ L 331, 15.12.2001, 40-78, 104; 120.

[197] Decision 2001/892/EC, 121-134.

[198] Decision 2001/892/EC, 135-154.

unfair selling prices,[199] and amounted to a limitation of production, markets and technical development.[200]

An important element in this assessment was the "material definition" of the concept of sender that Deutsche Post relied on. On the basis of this material definition of the concept of sender, the person who appears to address himself to the addressee – based on the overall appearance of the postal item including its contents – is assumed to be the sender. According to the Commission, such assessment criteria are incompatible with EC law, because, in order to identify the sender of a postal item it is necessary to find the person who has produced the item and the person that is responsible for it. If the sender is inferred from the appearance of the postal item, normal cross-border mail is erroneously classified as virtual A-B-A remail.[201] In other words, the Commission found that the practice of Deutsche Post related to normal cross-border mail and was not, physical or non-physical, A-B-A remail.

The two cases discussed above allow us to reach some conclusions with respect to the assessment of remailing and anti-remail measures under Article 82 EC in conjunction with Article 86 EC. Pursuant to Deutsche Post I, anti-remail measures may be taken by a postal administration to the extent that such measures are necessary to ensure the service of general economic interest entrusted to the postal administration. It is thus legitimate for a postal incumbent providing universal service to charge the internal rate to remailed items (physical or non-physical), although the terminal dues should be deducted from that rate. By contrast, in Deutsche Post II, the Commission decided that Deutsche Post had infringed Article 82 by intercepting, surcharging, and delaying letter mailings from the UK sent by senders outside Germany but containing a reference in its content to an entity residing in Germany. Central in the reasoning of the Commission was the fact that these letter mailings did not constitute remailed items, but normal cross-border mail.

IV.5 Extra-territorial offices of exchange

[199] Decision 2001/892/EC, 155-167.

[200] Decision 2001/892/EC, 168-178.

[201] Decision 2001/892/EC, 28-29; 112; 118-119.

Description of extra-territorial offices of exchange

An extra-territorial office of exchange (ETOE) may be defined as an office of exchange established and operated by or in connection with a postal administration of a member country in another member country (the host member country). The activity of an ETOE may take different forms. For example, an ETOE may compete with the postal administration of the host member country for outgoing mail to other member countries. Although outgoing mail can be received from other member countries, it seems likely that outgoing mail originates in the territory where the ETOE is established. An ETOE may also receive mail from postal administrations of other member countries and exchange it with the postal administration of the member country where it is established. Thus, ETOEs may receive mail from any member country and despatch mail to any member country. It may be observed that, in so far as an ETOE exchanges mail with the postal administration of the member country where it is established, its added value consists of the proximity between the postal administration of the host member country and the ETOE.[202]

To analyse the concept of ETOE, the following hypothetical relations between the postal administrations of member countries A, B and C may be considered: The postal administration of member country B has established an ETOE in member country A. The activity of this ETOE may be limited to exchanging mail with the postal administration of member country A. It may also extend to outgoing mail to other member countries, including member country C. If this is the case, the ETOE of member country B established on the territory of member country A competes with the postal administration of member country A for outgoing mail. The postal administration of member country B may also have established an ETOE on the territory of member country C. The activity of this ETOE may be limited to exchanging incoming mail with the postal administration of member country C. It may also extend to delivering incoming mail on the territory of member country C. If this is the case, the ETOE competes with the postal administration of member country C for incoming mail.

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[202] Alverno, Measures relating to ETOEs, 1-2.

ETOEs appear to be commonly used in the process of remailing. If member country B is a developing country, mail despatched by the ETOE established by the postal administration of member country B to the postal administration of member country C is subject to the terminal dues rates applying to developing countries. If member country A is a developed country, mail despatched by the postal administration of member country A to the postal administration of member country C would be subject to the terminal dues rates applying to developed countries. If member country C is a developed country, the difference in terminal dues rates based on Article 49 in comparison with Article 48, Universal Postal Convention, would make remailing via the ETOE attractive. If member country C is a developing country, the difference in terminal dues rates based on Article 51 in comparison with Article 50, Universal Postal Convention, would make remailing via the ETOE attractive.

The question of the status of ETOEs under the Acts of the UPU has been a recurrent, complex and divisive issue, involving both the Council of Administration and the Postal Operations Council. The Council of Administration addressed the issue through its Management of the Work of the Union Project Team, which set up a Working Group to study the question. In the Postal Operations Council, the Terminal Dues Action Group coordinated the work of the Standards Board and Committee 3 in this field. As the Report of the Council of Administration on ETOEs to the 23rd Congress indicates, this work has concentrated both on the relation between the postal administration operating the ETOE and the host member country and the position of a postal administration receiving mail despatched through an ETOE. The debate concerning the status of ETOEs in the UPU bodies has resulted in two positions regarding the treatment of ETOEs: according to one position, ETOEs should be assimilated to postal administrations and fall under the Acts of the UPU; according to the opposed position, ETOEs should be regarded as private operators which fall outside the scope of the Acts of the UPU. In the Report of the Council of Administration to the 23rd Congress, this divergence has resulted in two sets of proposals being made to Congress: (1) according to one set of proposals, ETOE activities are authorized under the Acts of the UPU (Proposals 20. 15.91 and 20. 15.92); (2) according to another set of proposals, ETOE activities are to be dealt with under national legislation and assimilated to private operators (Proposals 7 and 8).[203]

[203] Council of Administration report, Extraterritorial Office of Exchange (ETOES) (Congrès-Doc 51), 17.

Assessment of ETOEs from the perspective of the GATS (Article II (1) and Article XVI)

The question may be raised whether the establishment and operation of ETOEs is consistent with the MFN obligation contained in Article II (1), GATS. Article II (1), GATS, requires that, with respect to any measure covered by the GATS, each Member accords immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

As regards the establishment of ETOEs, Article II (1), GATS, would seem to require that Members do not discriminate between ETOEs of postal administrations of different Members. In other words, if member country A admits the establishment and operation of an ETOE by the postal administration of member country B, the principle of non-discrimination contained in Article II (1), GATS, requires that it admits the establishment and operation of ETOEs by the postal administrations of other member countries, for example member country D. This presupposes that the ETOE established and operated by the postal administration of country B and ETOEs established and operated by other member countries are like service suppliers and that the services provided by the ETOEs concerned are like services.[204]

Similarly, if member country C admits mail despatched by the ETOE established and operated by the postal administration of member country B, member country C must also admit mail despatched by other ETOEs established and operated on the territory of member country A, in so far as the ETOEs concerned are like service suppliers and provide like services.[205]

If ETOEs are involved in the practice of remailing, their assessment is connected to the question whether remailing and anti-remail measures are consistent with the MFN obligation contained in Article II (1), GATS. If the terminal dues system is considered inconsistent with the MFN obligation contained in Article II (1), GATS, it seems appropriate to consider that measures adopted by member country C to oppose ABC remailing, and which aim to ensure the integrity of the terminal dues system, are also inconsistent with the MFN obligation contained in Article II (1), GATS.

[204] Alverno, Measures related to ETOEs, 4-5.

[205] Alverno, Measures related to ETOEs, 5.

If member country C accepts ABC remailing in general, the question arises whether member country C can refuse to accept remailing via ETOEs. This is dependent on the question whether ETOEs and postal administrations are like suppliers and whether ETOEs and postal administrations provide like services.[206] If such a degree of liberalization has been achieved in member country A, in accordance with Part IV, GATS, it seems appropriate to regard the ETOE established and operated by the postal administration of member country B and the postal administration of member country A, in accordance with Article XVII (1), GATS, as like service suppliers and as providing like services.

A further question may arise if member country A allows the ETOE established and operated by the postal administration of member country B to compete for outgoing mail. In that situation, can member country A prevent a private operator based in member country D from competing for outgoing mail? This is dependent on the question whether the ETOE and the private operator are like service suppliers and whether the ETOE and the private operator provide like services.[207] If such a degree of market opening has been achieved in member country A, in accordance with Part IV, GATS, it seems appropriate to regard the ETOE established and operated by the postal administration of member country B and the private operator based in member country D, in accordance with Article XVII (1), GATS, as like service suppliers and as providing like services.

IV.6 Postal technical assistance

Description of postal technical assistance

Article 1 (3), Constitution of the UPU, provides that the UPU shall take part, as far as possible, in postal technical assistance sought by its member countries.

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[206] Alverno, Measures related to ETOEs, 6-7.

[207] Alverno, Measures related to ETOEs, 7-9.

Assessment of postal technical assistance from the perspective of the GATS (Articles II (1), III and XXV)

Article XXV, GATS, provides for the possibility of technical cooperation with developing countries. There are no indications of inconsistency between Article 1 (3), Constitution of the UPU, and Articles II (1), III, or XXV, GATS.

IV.7 Non-admission of postal items

Description of provisions relating to non-admission of postal items

Article 25, Universal Postal Convention, allows for the non-admission and prohibition of postal items in several categories. Article 25 (1), Universal Postal Convention, determines that postal items not fulfilling the conditions laid down in the Convention and in the Regulations shall not be admitted. Article 25 (2), Universal Postal Convention, prohibits the insertion of, *inter alia*, the following articles in all categories of postal items:

- narcotics and psychotropic substances;
- explosive, flammable or other dangerous substances and radioactive materials, except biological substances sent in letter post items in accordance with Article 44, Universal Postal Convention, and radioactive materials sent in letter post items in accordance with Article 26, Universal Postal Convention;
- obscene or immoral articles;
- documents having the character of current and personal correspondence exchanged between persons other than the sender and the addressee;

Article 25 (4), Universal Postal Convention, prohibits the insertion in postal parcels of documents having the character of current and personal correspondence exchanged between the sender and the addressee and of correspondence of any kind exchanged between persons other than the sender and the addressee.

Assessment of provision relating to non-admission of postal items from the perspective of the GATS (Articles XVII (1), VI, XIV and XIV ^{bis})

The non-admission of particular postal items from abroad might contravene the Members' obligation to national treatment according to Article XVII (1) GATS if respective commitments for postal services have been undertaken and corresponding restrictions do not exist for purely domestic mail.

In case such restrictions apply to both, domestic and international mail, a violation of Article XVII (1) GATS would not occur; however, the measure could possibly be scrutinized under Article VI GATS, which relates to non-discriminatory measures creating unnecessary barriers to trade. The normative content of Article VI GATS, however, is rather vague[208]. Several commentators seem to argue that in particular Article VI (4) and (5) GATS contain a general principle of proportionality, according to which a domestic regulation is only compatible with this provision if such measure is not more burdensome than necessary.[209] It has to observed yet, that paragraph (4) and (5) only apply to qualification requirements and procedures, technical standards and licensing requirements. Therefore, only with regard to such measures a necessity test is provided for in Article VI GATS so that this provision cannot be regarded as a rule introducing a general necessity test for domestic regulations.[210] As the security regulations with respect to the non-admission of postal items can neither be regarded as qualification or licensing requirements nor as technical standards, these regulations seem to be in accordance with Article VI GATS.

Even if a conflict of such regulations with GATS provisions (e.g. Article XVII) is assumed, the regulations would be justified under Articles XIV and XIV ^{bis} GATS, according to which exceptions are made for measures necessary to protect human, animal or plant life or health (Article XIV (b)), for measures necessary to secure compliance with laws or regulations relating to privacy and safety (Article XIV (c)) and for actions necessary for the protection of its essential security interests relating to fissionable and fusionable materials (Article XIV ^{bis}

[208] Cf. Moos, Bindung, 278-280.

[209] Cf. the literature referenced by Moos, Bindung, 273.

[210] Moos, Bindung, 278.

(b)). The articles the insertion into letters and parcels of which is forbidden – and which are listed above – seem to qualify for these exemptions.

As a result, the provisions in the Universal Postal Convention with regard to the non-admission of specific postal items are not inconsistent with the GATS.

Assessment of provision relating to non-admission of postal items from the perspective of the GATT 1994 (Article XI (1))

In effect, the same considerations apply with regard to the GATT: the question may be raised whether the provisions relating to non-admission of postal items and prohibitions are consistent with Article XI (1), GATT 1994, in so far as they prohibit or restrict the importation of products.

It must be noted however that the provisions of Article 25 Universal Postal Convention qualify for the exceptions contained in Article XX, GATT 1994, relating, for example, to (*a*) public morals, (*b*) human life or health and (*d*) laws or regulations not inconsistent with the provisions of GATT 1994. There does not appear to be a divergence between the provisions of Article 25, Universal Postal Convention, and Article XX, GATT 1994.[211]

IV.8 Weight limits

Description of provisions relating to weight limits

Article 10, Universal Postal Convention, specifies weight limits. With regard to letter post items, Article 10 (2), Universal Postal Convention, makes a distinction between a system based on the speed of treatment and a system based on the contents of the items. With regard to the first category, Article 10 (3), Universal Postal Convention, distinguishes between priority and non-priority items and establishes a weight limit of 2 kilogram, 5 kilogram for

[211] Similarly Luff, Regulation, 60-62; 69.

items containing books and pamphlets and 7 kilogram for literature for the blind. With regard to the second category, Article 10 (4), Universal Postal Convention, distinguishes between letters and postcards (LC) and printed papers, literature for the blind and small packets (AO), and establishes a weight limit of 2 kilogram for letters and postcards and small packets, 5 kilogram for printed papers and 7 kg for literature for the blind.

With respect to postal parcels, Article 10 (6), Universal Postal Convention, provides that the exchange of postal parcels, the weight of which exceeds 20 kilogram, is optional, with a maximum weight of 50 kilogram.

Assessment of the provisions determining weight limits from the perspective of the GATT 1994 (Article XI (1))

The question may be raised whether the provisions determining weight limits may be regarded as a prohibition or restriction on the exportation or importation of products within the meaning of Article XI (1), GATT 1994.

To address this question, it must be observed that those weight limits do not as such prohibit or restrict the exportation or importation of products. In so far as those weight limits hinder the exportation or importation of products, it must be observed that other means of transportation remain available. Those weight limits may be seen in connection with the organization of the international postal service, which may require standardization of postal items and postal parcels.

In fact, pursuant to Article 2 (4), *Agreement on Technical Barriers to Trade*, if applicable to postal items and postal parcels, it is considered desirable if Members of the WTO adhere to international standards. It may be noted, furthermore, that, at the EC level, Article 3 (6), Directive 97/67, refers, with respect to postal items, to the maximum and minimum dimensions for postal items determined in the Universal Postal Convention.

Accordingly, we conclude that the weight limits contained in Article 10, Universal Postal Convention, are not inconsistent with Article XI (I), GATT 1994.[212]

Assessment of the provisions determining weight limits from the perspective of the TBT (Article II (2))

Additionally, the weight limits can be scrutinized under Article II (2) TBT which requires Members to ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective. According to Annex 1, No 1 "technical regulations" are documents which lay down product characteristics, which may under more include or deal exclusively with packaging. As the weight limits refer to the characteristics of the parcel it has to be regarded as technical regulation.

Legitimate objectives in the sense of Article II (2) TBT are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. Even though not explicitly mentioned in Article II (2) TBT, a legitimate interest for the adoption of weight limits might be the facilitation of mail transport and delivery. As a consequence, the weight limits would not infringe Article II (2) TBT.

IV.9 Exceptions to freedom of transit

Description of provisions relating to freedom of transit and exceptions relating thereto

In accordance with Article 1 (1), second sentence, Constitution of the UPU, freedom of transit must be guaranteed throughout the single postal territory. According to Article 2 (1), Universal Postal Convention, the principle of the freedom of transit carries with it the

[212] Similarly Luff, Regulation, 63.

obligation for each postal administration to forward always by the quickest routes and the most secure means which it uses for its own items, closed mails and à découvert letterpost items which are passed to it by another postal administration.

Article 2 (2), Universal Postal Convention, allows member countries not participating in the exchange of letters containing perishable biological substances or radioactive substances and letter post items which do not satisfy the legal requirements governing the conditions of their publication or circulation in the member country of transit, not to admit those items in transit à découvert. Article 2 (3), Universal Postal Convention, provides that freedom of transit for postal parcels to be forwarded by land and sea routes shall be limited to the territory of the member countries taking part in this service. Article 2 (4), Universal Postal Convention, provides that freedom of transit for air parcels shall be guaranteed, but that member countries which do not operate the postal parcel service shall not be required to forward air parcels by surface.

Assessment of provisions relating to freedom of transit and exceptions relating thereto from the perspective of the GATT 1994 (Article XI (1))

The question may be raised whether the provisions relating to freedom of transit and exceptions relating thereto are consistent with Article XI (1), GATT 1994.

In addressing this question, it may be noted that Article V, GATT 1994, contains provisions relating to freedom of transit of products. Article V (2), first sentence, GATT 1994, provides that there shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. It may be observed that the provisions of GATT 1994 relating to freedom of transit of products and the provisions of the Universal Postal Convention relating to freedom of transit of letter post items and postal parcels are consistent in this respect.

As regards the consistency of the exception relating to perishable biological substances and radioactive substances with Article XI (I), GATT 1994, it must be observed that that provision does not seem to be applicable, since these exceptions do not relate to the importation or exportation of products. In any event, this exception seems to be covered by

Article XX (b), GATT 1994. The same seems to apply, *mutatis mutandis*, to the exception relating to letter post items which do not satisfy the legal requirements relating to publication or circulation, which may be covered by Article XX (a) or (d), GATT 1994.

The extent of freedom of transit relating to postal parcels is dependent on the commitments which member countries have assumed in this area. This may affect the freedom of transit relating to products, but is necessarily connected to the principle of consent.

Furthermore, it must be recognized that the provisions relating to freedom of transit of letter post items and postal parcels, on the one hand, and relating to products, on the other hand, remain separate regimes. Thus, if restrictions of freedom of transit are justified in accordance with Article 2 (2)-(4), Universal Postal Convention, other means to provide freedom of transit for products may remain open.

It may be concluded that regimes relating to freedom of transit of letter post items and postal parcels and relating to freedom of transit of products are not inconsistent.[213]

IV.10 Unilateral measures relating to freedom of transit

Description of unilateral measures relating to freedom of transit

Article 2 (5), Universal Postal Convention, provides that if a member country fails to observe the provisions regarding freedom of transit, other member countries may discontinue their postal service with that member country.

Assessment of unilateral measures relating to freedom of transit from the perspective of the DSU (Article 23)

[213] Similarly, Luff, Regulation, 63-64.

The question may be raised whether unilateral measures relating to freedom of transit are consistent with the provisions of the DSU. According Article 3 (7), s. 5 DSU, the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis another Member shall be subject to authorization by the DSB and shall be the last resort that the DSU provides to the Member in disputes over the conformity of specific measures with the agreements. Moreover, Article 23 (2) (c) DSU stipulates that in cases when Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements, the Member shall follow the procedure set forth in Article 22 (Suspension of Concessions) to determine the level of suspension of concessions or other obligations and obtain DSB authorization.

Article 2 (5) Universal Postal Convention however seems to allow an unconditional discontinuation of postal services – without the need to request the establishment of a Panel or any authorization beforehand. It may thus be asked whether member countries of the UPU, when confronted with a member country which fails to fulfil its obligations relating to freedom of transit, are required to bring this dispute before the DSB and request its authorization in accordance with the rules and procedures of the DSU.[214]

In addressing this question, it must be noted that the Acts of the UPU contain distinct mechanisms for the settlement of disputes between postal administrations. Pursuant to Article 114 (2), General Regulations, the parties involved may seek an opinion from the International Bureau. This procedure is dependent on the consent of all parties involved and does not lead to a binding decision. Further, pursuant to Article 32, Constitution of the UPU, disputes between postal administrations of member countries concerning the interpretation of the Acts of the UPU or the responsibility imposed on a postal administration by the application of the Acts of the UPU shall be settled by arbitration. This procedure does not depend on the consent of all parties involved and leads to a binding decision. Article 129, General Regulations, contains further provisions relating to the arbitration procedure, providing for the selection and appointment of arbitrators and decision-making. In this procedure, the International Bureau has a duty to intervene if a postal administration does not appoint a postal

[214] Luff adopts the position that the authorization of such unilateral measures is inconsistent with Article 23, DSU; Luff, Regulation, 64.

administration as arbitrator[215] or if the arbitrators fail to designate a postal administration in the event of a tie[216].

However, from a WTO perspective, the question whether the discontinuance of postal services with the respective member state has to be scrutinized in accordance with the DSU procedure depends on the examination whether the discontinuance amounts to a suspension of a concession or other obligations under the agreements covered by the DSU on a discriminatory basis vis-à-vis another Member.

The discontinuance of postal services towards one other Member may violate several obligations under the covered agreements, in particular the obligations to MFN treatment under Articles I (1) GATT and II (1) GATS, as like products / service suppliers of one Members are treated differently and in fact less favourable than the products / service suppliers of other countries in respect of which the postal services are continued. Moreover, the obligation to national treatment in the sense of Articles III GATT and XVII GATS might be violated.

Therefore, it seems appropriate to consider that other WTO Members and also the DSB would apply the DSU and the covered agreements (GATT and GATS in particular) to the discontinuance of postal services according to Article 2 (%) Universal Postal Convention, even if the postal administration disrupting the international postal service seeks the reinstatement of the freedom of transit as provided for in Article 2 (1), Universal Postal Convention or draws the consequences from this disruption and the settlement of a respective dispute may also be strived at pursuant to the procedure of Article 32, Constitution of the UPU. Insofar, it has been observed that WTO rules have an “all-affecting” character, which means that even disputes with a relatively limited trade aspect can be brought before the WTO[217] and consequently, Article 23, DSU, may ‘attract’ jurisdiction if a dispute can be formulated within the terms of the covered agreements[218], which is the case, here. Moreover, the Appellate Body stated that an international tribunal [and accordingly also the DSB] “is

[215] Article 129 (2), General Regulations.

[216] Article 129 (5), General Regulations.

[217] Pauwelyn, Public International Law, 553.

[218] Marceau, Conflicts of Norms and Conflicts of Jurisdictions, 1100-1105.

entitled to consider the issue of its own jurisdiction on its own initiative".[219] Therefore, it seems very likely that a Panel or the Appellate Body would apply the respective WTO agreements and the DSU to the measures at issue. Accordingly, it shall be concluded that a discontinuance of postal services according to Article 2 (5), Universal Postal Convention, without the observance of DSU rules, in particular without prior authorization of the DSB would violate Articles 3 (7), and 23 (2) (c), DSU.

IV.11 The practice of the UPU of the representation of member countries by postal administrations

The role of postal administrations in the work of the UPU

Pursuant to Article 104 (3), General Regulations, member countries of the Postal Operations Council are represented by a qualified official of the postal administration. Pursuant to Article 22 (5), Constitution of the UPU, and Article 104 (9.2), General Regulations, the Postal Operations Council is designated as responsible for drawing up and revising the Regulations. In the context of the UPU, the practice of representation of member countries by postal administrations is considered appropriate in view of the proximity between the content of the Regulations and the operations of the postal administrations. The 1994 Seoul Congress recognized to a certain extent that some member countries required the separation of regulatory functions and operational and commercial functions, and adopted the principle that these member countries would have the option of designating officials representing the regulatory function and the operational and commercial function.

Apart from their participation in the work of the Postal Operations Council, postal administrations are provided with the possibility of making and considering proposals concerning the Acts of the Union.[220] The Council of Administration[221] and the Postal

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[219] Appellate Body Report, *United States – Anti Dumping Act of 1916*, /WT/DS136/AB/R, adopted on 26 September 2000, 54.

[220] Article 29, Constitution of the UPU.

[221] Article 102 (6.22), General Regulations.

Operations Council[222] may also formulate proposals as indicated in Article 122, General Regulations. The Postal Operations Council is charged with examining proposals submitted by postal administrations pursuant to Article 121, General Regulations. Proposals relating to the Regulations are considered by the Postal Operations Council[223]; other proposals are dealt with by postal administrations[224].

As regards the setting of standards relating to the universal postal service, the Memorandum on Universal Postal Service Obligations and Standards takes account, to a certain extent, of market liberalization, recognizing a diversity of regulators, universal postal service providers (plural) and other postal service operators.[225]

Assessment of the representation of member countries by postal administrations from the perspective of GATS (Articles III and VI)

The question may be raised whether the representation of member countries by postal administrations is consistent with Article III, GATS, and Article VI, GATS. As regards the compatibility of the practice of representation by postal administrations with Article III, GATS, it may be observed that Article III, GATS, has been interpreted in the sense of requiring transparency in a formal sense and does not seem relevant for this question.

As regards Article VI, GATS, it may be noted that Article VI (1), GATS, requires that in sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. Furthermore, Article VI (2), GATS, requires that each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the

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[222] Article 104 (9.5), General Regulations.

[223] Article 122 (2), General Regulations.

[224] Article 122 (1), General Regulations.

[225] International Bureau, Memorandum on Universal Postal Service Obligations and Standards, 32.

prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services.

Article VI (2), GATS, does not require the separation of the regulatory and the operational functions, but requires that Members of the WTO provide for the possibility of review of administrative decisions affecting trade in services. Therefore, Article VI (2), GATS, does not require the separation of regulation and operation. With respect to Article VI (1), GATS, it could be argued that the reasonable, objective and impartial administration of measures of general application affecting trade in services presupposes that such measures are established in an unbiased manner.[226] This assumption is supported by the fact that for telecommunications services, the requirement of a separation of the regulatory body from any supplier of basic telecommunications services is explicitly provided for in the specific commitments of the Members; in particular in Section 5 of the Reference Paper which states that the regulatory body shall be separate from, and not accountable to, any supplier of basic telecommunications services and that the decisions of and the procedures used by regulators shall be impartial with respect to all market participants.[227] The fact that the Reference Paper is an additional commitment, suggests that the separation of regulation and operation is not already required by Article VI (1), GATS.

It may be concluded that the involvement of postal administrations in the work of the UPU is not inconsistent with Articles III or VI, GATS, in the absence of specific commitments.

Assessment of the representation of member countries by postal administrations from the perspective of Article 82, EC, and Article 22, Directive 97/67

The question may also be raised whether the representation of member countries by postal administrations pursuant to Article 104(3), General Regulations, is consistent with Article 82, EC, and Article 22 Directive 97/67.

[226] Luff, Regulation, 81.

[227] Moos, Bindung, 289-290.

The combination of regulatory and operational functions within an undertaking on which special or exclusive rights are conferred, in so far as the regulation extends to sectors falling outside the scope of the special or exclusive rights, has been considered by the ECJ has incompatible with EC law.[228] For instance, in *GB-Inno-BM*,[229] the Court considered that in markets open to competition, the combination of regulatory and commercial functions, amounts to a violation of Article 86(1) and 82, EC in so far as this delegation, to an authority which has a dominant position for the supply of telecommunications equipment of the power to grant approval for such equipment, constituted a strengthening of that dominant position.[230] This position is reflected in Article 22, Directive 97/67, which explicitly requires the separation of the regulatory and operational functions.[231]

There is thus a clear tension between Article 104(3), General Regulations and EC law, especially considering that the Postal Operations Council has regulatory functions. Whether there is a real conflict essentially depends on whether the Member States could be placed in a position whereby they would not be able to comply with both their obligations under UPU rules and EC law. However, this does not seem to be the case as the 1994 Seoul Congress recognized to a certain extent that some member countries required the separation of regulatory functions and operational and commercial functions, and adopted the principle that these member countries would have the option of designating officials representing the regulatory function and the operational and commercial function.

Thus, although the philosophy of UPU rules in terms of participation of postal administrations in regulatory debates is poorly in line with EC law, the flexibility introduced by the Seoul Congress avoids the risks of conflict between UPU rules and EC law. However, as it will be

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[228] Case C-202/88, France/Commission, 1991 ECR I-1223, 51; Case C-18/88, GB/Inno/BM, 1991 ECR I-5941, 26; Case C-91/94, Tranchant, 1995 ECR I-3911, 17-19.

[229] Case C-18/88, (1991) E.C.R. I-5491. As pointed out by the Court of Justice: "(a) system of undistorted competition, as laid down in the Treaty, can be guaranteed only if the equality of opportunity is secured as between the various economic operators. To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect is tantamount to conferring upon it the power to determine at will which terminal equipment may be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors".

[230] For a similar approach see Case C-202/88, France v. Commission, (1991) E.C.R. I-1223.

[231] See also European Commission, Green Paper on Services of General Interest, Annex, 41; Geradin/Humpe, Analysis of Directive 97/67, 115-117.

argued below, it would be helpful to formally authorise Member Countries of the UPU to send representatives of postal ministries or postal regulators to the Postal Operations Council in place of representatives of the postal administrations.

IV.12 External competence of the EC in the field of postal services

In addressing the issue of the scope of EC external competence in the field of postal services an initial distinction needs to be made between (i) the existence of such competence and (ii) its nature, i.e. the question as to whether such competence is exclusive. Exclusive competence has the effect of excluding unilateral Member State action in the external field. Non-exclusive, or shared, competence also has implications for Member State external actions and these will be considered below.

The starting point for any discussion of EC external competence is the principle of conferred or attributed powers. It follows from Article 5 EC (which states that the Community is to act within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it therein) that the Community has only those powers which have been conferred upon it. This principle of conferred powers must be respected in the international action as well as in the internal action of the Community.[232] Powers may be conferred either expressly or impliedly. It is appropriate to consider first the existence and scope of express external powers in the field of postal services, and then to consider implied powers.

Express external competence in the field of postal services. Express competence may be derived from Article 133(5) EC. This provision as amended by the Treaty of Nice brings within the scope of the EC's common commercial policy (CCP) the negotiation and conclusion of agreements in the field of trade in services. The term 'services' in Article 133(5) EC is not defined and an ambiguity exists as to whether it refers to services in the sense in which that term is used in Title III Chapter 3 of the EC Treaty, or whether it should rather be defined with reference to the meaning of services in GATS Article I. In sectoral

[232] Opinion 2/94 of 28 March 1996, paras 23-24.

terms, the outcome of this question may be less important, as 'postal services' fall within the scope of both the EC Treaty provisions on services[233] and the GATS.[234] However, in terms of mode of supply of services, the issue is of significance: services, within Article I(2) GATS, covers four modes of supply, including supply through commercial presence (Mode 3) which within Title III EC Treaty includes the concept of 'establishment' (Chapter 2) as well as 'services' (Chapter 3).[235] Thus 'services' under GATS is a broader concept than 'services' under Title III EC Treaty.

The drafting history of Article 133(5) and the use of the term 'trade in services' suggests that the term services in this provision is linked to the GATS in terms of modes of supply and thus carries a broader meaning than elsewhere in the EC Treaty, in particular in Article 49 EC.[236] This is supported by the structure of Article 133(5) itself, which perpetuates a distinction made by the European Court of Justice in *Opinion 1/94* between different modes of supply of services with reference to Article I(2) GATS. The ECJ distinguished between Mode 1 services, which were found to fall within the existing scope of the CCP, and the other three modes of supply which in the Court's view did not, at the current state of development of the Treaty.[237] The amended version of Article 133(5) provides that paragraphs (1)-(4) shall apply to agreements in the field of trade in services insofar as these are not already covered by those paragraphs. Thus, mode 1 services ('cross-frontier supplies'), which according to the Court of Justice are already covered by paragraphs (1)-(4), are treated separately from modes 2, 3 and 4 ('consumption abroad', commercial presence' and 'presence of natural persons'). The legal implications of this distinction, which will be considered below, render it necessary to determine to what extent postal services may be delivered by mode 1 supply.

[233] See for example Joined Cases C-147/97 and C-148/97, *Deutsche Post I*, 2000 ECR I-825.

[234] See for example Communication from the European Communities and their Member States to Members of the Council for Trade in Services, on 'GATS 2000: Postal and Courier Services', S/CSS/W/61, 22 March 2001. It should be noted, however, that the question of classification of postal services for the purposes of GATS is still under debate.

[235] The distinction between establishment and services is discussed in cases 205/84 *Commission* v. *Germany* [1986] ECR 3753; C-221/89 *Factortame No2* [1991] ECR I-3905; C-55/94 *Gebhard* [1995] ECR I-4165.

[236] Cremona, M., 'A Policy of Bits and Pieces? The Common Commercial Policy after Nice' 4 *Cambridge Yearbook of European Legal Studies* (2002) 61, at 69-70.

[237] Opinion 1/94 of 15 November 1994, paras 43-45.

To what extent are postal services capable of being delivered by mode 1 supply? Mode 1 supply is defined in Article I(2) GATS as the supply of a service 'from the territory of one Member into the territory of any other Member'. As explained by the Court of Justice, cross-frontier supply does not involve any movement of natural persons; 'the services is rendered by a supplier established in one country to a consumer residing in another. The supplier does not move to the consumer's country; nor conversely does the consumer move to the supplier's country.'[238] It might appear from this that international mail services provided by a national supplier to a customer in that Member State (for example, UK's Royal Mail sending mail overseas for a UK-resident customer) do not fall within mode 1, since the State of establishment of the supplier and the State of residence of the customer are the same. However, for a number of reasons this may be too narrow an approach:

1. Within Directive 97/67 the term 'cross-border mail' is defined more broadly to include mail from or to another Member State or from or to a third country.[239]
2. This type of international mail service, in distinction to modes 2-4, clearly does not involve the cross-border movement of natural (or legal) persons and is thus in line with the substance of the Court of Justice's approach.
3. This type of international mail service, although provided contractually between a supplier and customer in the same Member State, is only possible as a result of the (reciprocal) obligations deriving from the UPU on the national postal authority in the transit and destination States, for which payments are made (terminal dues).

For these reasons, the better view would appear to be that this type of postal service can be regarded as mode 1 supply. As explained above, mode 1 services were held by the Court to fall within what may be termed the 'traditional' CCP, prior to the Treaty of Nice amendments. They are thus governed by Article 133(1)-(4) without qualification. The wording of Article 133(5) preserves this position: hence, EC competence in relation to these postal services is exclusive,[240] and decisions are taken by qualified majority vote in the Council of Ministers.

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[238] Opinion 1/94 of 15 November 1994, para 44.

[239] Directive 97/67, Article 2(11).

[240] Opinion 2/91 of 19 March 1993 at para 8: 'The exclusive nature of the Community's competence has been recognized by the Court with respect to Article 113 of the Treaty [now Article 133]. … It follows from that line of authority that the existence of such competence arising from a Treaty provision excludes any competence on the part of Member States which is concurrent with that of the Community, in the Community sphere and in the international sphere.'

Postal services and modes 2-4 supply. Other types of postal service, on the other hand, may fall within other modes of supply. Physical remailing, for example, involving transport of mail items to another State for mailing on (ABA, ABB, ABC) could involve mode 2 supply by the supplier in State 'B' to the customer resident in State 'A'(consumption abroad). Where - following liberalisation of outgoing cross-border mail - an out-of-State supplier offers services to a customer in a Member State this may be by way of mode 3 or 4 supply (commercial presence or presence of natural persons). These types of supply of postal services fall within Article 133(5), and thus form part of the post-Treaty of Nice CCP, but subject to a number of qualifications contained in para. (5) itself and para. (6). In the field of postal services, two issues are important in this regard:

1. Article 133(5) appears to rule out exclusivity by providing that '*This paragraph shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organisations insofar as such agreements comply with Community law and other relevant international agreements*.'
2. Article 133(5) only covers agreements in the field of trade in services; it does not cover autonomous EC measures.

The possibility of exclusive EC competence to conclude international agreements relating to modes 2-4 supply of postal services. An initial point should be made: the shared competence established by Article 133(5) does not require the Community and Member States always to act together. Subject to the 'cultural exception' in para.(6), the Community may act alone. However the Community's competence to act does not thereby exclude that of the Member States, and mixed agreements may be concluded. At first sight the non-exclusivity of EC competence under Article 133(5) seems clear. The right of Member States to maintain and conclude agreements with third countries and international organisations is not to be affected. However, this right is subject to compliance with Community law and it has been argued that the reference to Community law here includes the application of the '*AETR* doctrine' of exclusivity.[241] If this view is correct,[242] then it will be necessary to apply

[241] Case 22/70 *Commission v. Council (AETR)* [1971] ECR 263.

[242] As argued by Krenzler H.G. and Pitschas C., 'Progress or Stagnation? The Common Commercial Policy after Nice' (2001) 6 *European Foreign Affairs Rev.* 291 at 306-7.

the *AETR* tests for exclusivity, as explained in the *Open Skies* cases,[243] and as set out below. As in the case of implied powers, exclusivity is dynamic and may grow as Community competence is exercised, internally or externally. However the better view appears to be[244] that within Article 133(5) compliance with Community law does not entail the possible incremental reduction of Member State competence, but rather puts a constraint upon its exercise based upon Article 10 EC (see full discussion below). Thus competence in relation to modes 2-4 supply will remain shared.

Autonomous EC action in relation to postal services. As already stated, Article 133(5) applies only to the negotiation and conclusion of agreements. Autonomous measures, where they affect the position of third country suppliers, may be adopted on the basis of 'internal' legal bases, including Articles 47(2), 49(2), 52, 55 and 95 EC. Indeed the existing directives on postal services (Directives 97/67/EC and 2002/39/EC), based on Articles 47(2), 55 and 95, contain provisions relating to postal services to and from third countries (cross-border mail and terminal dues as defined in Article 2(11) and (15) of Directive 97/67) and the authorisation of postal service suppliers (non-reserved services under Article 9 of Directive 97/67) which may include undertakings not established in the Community (Directive 97/67, recital 45).

According to the *Open Skies* cases,[245] the Community institutions have the power to adopt common rules providing for concerted action in relation to third countries or which prescribe the Member States' approach to third countries.[246] So the EC would be competent to adopt more extensive autonomous measures with respect to postal services and third countries,

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[243] C-467/98 *Commission v. Denmark*; C-468/98 *Commission v. Sweden*; C-469/98 *Commission v. Finland*; C-471/98 *Commission v. Belgium*; C-472/98 *Commission v. Luxembourg*; C-475/98 *Commission v. Austria*; C-476/98 *Commission v. Germany*.

[244] Cremona M., 'A Policy of Bits and Pieces? The Common Commercial Policy after Nice' 4 *Cambridge Yearbook of European Legal Studies* (2002) 61, at 86; Herrmann C.W., 'Common Commercial Policy after Nice: Sisyphus would have done a better Job' 39 *Common Market Law Review* (2002) 7 at 20. Holdgaard argues that the *Open Skies* cases support this view, in that they imply that in specific cases a Treaty-based sectoral allocation of competence might preclude the dynamism of the *AETR*-effect, although in his view this outcome appears contrary to the rationale for the *AETR* doctrine: Holdgaard R., 'The European Community's Implied External Competence after the Open Skies Cases' (2003) 8 *European Foreign Affairs Rev.*365 at 386.

[245] See for example C-476/98 *Commission v. Germany*, para 112.

[246] This was done in relation to air transport services: see Council conclusions of 5 June 2003.

including action within the framework of the UPU and measures concerning competition policy within the sector.[247] Of course, measures adopted on the above legal bases will need to establish the need for action in terms of the objectives of those Treaty provisions, in particular the establishment and functioning of the internal market.[248]

Exclusivity of EC competence outside the CCP. To what extent is Community competence to enact autonomous measures in the field of postal services on the basis of implied powers an exclusive competence? It should first be noted that exclusive external competence on the basis of Opinion 1/76 would not apply here. The provisions in the postal services Directives concerning third countries are limited, and the Directives are thus not 'inextricably linked' to relations with third countries; neither is it the case that internal competence can only be exercised at same time as external competence.[249]

Here, exclusivity, if it exists, will flow from the so-called *AETR* doctrine. Under this doctrine, as recently explained in the *Open Skies* cases,

> 'each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations towards non-member countries which affect those rules or distort their scope; and that, as and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards non-member countries affecting the whole sphere of application of the Community legal system.'[250]

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[247] Recital 45 of Directive 97/67 recognises that the Directive '*does not, in the case of undertakings which are not established in the Community, prevent the adoption of measures in accordance with both Community law and existing international obligations designed to ensure that nationals of the Member States enjoy similar treatment in third countries*'.

[248] Opinion 2/91 of 19 March 1993 at para 7: 'whenever Community law created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community had authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection.'

[249] C-476/98 *Commission v. Germany*, paras 87-88.

[250] C-476/98 *Commission v. Germany*, para 103. It should be noted that, as transport services, including air transport, are expressly excluded from Article 133 EC, the conclusion of international agreements as well as the possibility of autonomous measures is considered a matter of implied powers. In the case of postal services,

The circumstances under which exclusivity may arise under this doctrine may be summarised thus:

- where the international commitments fall within the scope of the common rules, or in any event within an area which is already largely covered by such rules;[251]
- whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries;[252]
- where the Community has achieved complete harmonisation in a given area, because the common rules thus adopted could be affected within the meaning of the *AETR* judgment if the Member States retained freedom to negotiate with non-member countries.[253]

In the case of postal services, the relevant Directives do not contain provisions specifically relating to the treatment of nationals of third countries or expressly conferring on the Community institutions powers to negotiate with third countries.[254] However, as we have seen, the Directives do cover cross-border postal services, including mail to and from third countries, the provisions on terminal dues apply to post coming from third countries, and the rules relating to the authorisation conditions for undertakings providing postal services in the Community are not limited to those established within the Community. By establishing harmonised criteria for the provision of the universal service, setting common quality of service objectives for intra-Community cross-border mail, establishing common principles for tariff-setting within the universal service and in relation to terminal dues, and the establishment of national regulatory authorities, certain aspects of the postal services sector may be said to be 'largely covered' by Community rules.

However, although it may thus be argued that Community competence is exclusive in respect of certain aspects of the (autonomous) regulation of postal services, it would be difficult to

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these principles apply to autonomous measures as the conclusion of agreements is now covered by Article 133 EC.

[251] C-476/98 *Commission v. Germany*, para 108, citing *AETR* judgment, para 30 and Opinion 2/91, para 25.

[252] C-476/98 *Commission v. Germany*, para 109, citing Opinion 1/94, para 95 and Opinion 2/92, para 33.

[253] C-476/98 *Commission v. Germany*, para 110, citing Opinion 1/94, para 96 and Opinion 2/92, para 33.

[254] Note, however, that such negotiation is not excluded: see Directive 97/67, recital 45, above note 16.

argue that this internal legislation can exclude Member State competence to enter into international agreements, in the light of Article 133(5), subparagraph 4, which expressly preserves that right. It is more fruitful to identify the ways in which the compliance with Community law required by that subparagraph constrains the exercise of Member States' competence. This is considered below.

Implications of exclusive competence. Insofar as EC external competence is exclusive, the Member States do not fulfil their Community law obligations by undertaking or even ensuring substantive compliance with internal legislation.[255] The adoption of Declaration VIII at the 1999 Beijing Conference, does not therefore affect the Member States' Community obligations in areas of exclusive competence, which are not limited to avoiding conflict.[256] In such areas it is necessary to identify not conflict but overlap between EC legislation and UPU rules.

Interpretation by the Court of Justice. To the extent that the matters covered by the UPU are now within Community competence, it could be argued that the European Court of Justice has jurisdiction to interpret UPU treaties and Acts, Regulations etc even though the EC as such is not a party.[257] Indeed in *Deutsche Post I* the ECJ did interpret the Universal Postal Convention.[258]

Constraints on Member State action: Solidarity and cooperation obligations. As we have seen, where EC competence is exclusive Member State compliance is not a matter of avoiding conflict but of a lack of authority to act at all. In contrast, where competence is shared, as is likely in cases of modes 2-4 supply of postal services, a number of duties constrain the Member States in the exercise of their own competence. First among these, and flowing from

[255] C-476/98 *Commission v. Germany*, para 127.

[256] The Declaration, if interpreted as a Reservation, may protect the Member States from liability to other UPU Members if they were to apply Community rules in preference to UPU rules in case of conflict.

[257] C.f. Case 267-269/81 *Amministrazione delle Finanze dello Stato v SPI SpA* [1983] ECR 801.

[258] Joined Cases C-147/97 and C-148/97, *Deutsche Post I*, 2000 ECR I-825.

the requirement of unity in the international representation of the Community, as well as from Article 10 EC, is the duty of cooperation, of close association between the Member States and the Community in managing the negotiation and conclusion of international agreements and the fulfilment of international obligations.[259] This duty is of special importance where action is envisaged within the framework of international organisations of which the Community itself is not a member, albeit possessing external competence in the field.[260] Such is the case with respect to the UPU. In addition, Article 19 TEU, although placed in Title V relating to the common foreign and security policy, imposes a general obligation on Member States to coordinate their action within international organisations. Coordination within the UPU structures should be facilitated by the Commission which, under Article 302 EC, has a duty to ensure appropriate relations with the UN and its specialised agencies, of which the UPU is one.

More specifically and currently, coordination is required in preparation for the UPU Congress taking place in autumn 2004, in order to ensure that the regulatory model adopted by the Community is not compromised by UPU commitments. Particular emphasis should be placed on the need for UPU rules and procedures to recognise regulatory systems which require a separation of regulatory and operation functions (c.f. Article 104(3) UPU General Regulations). Other issues have already been identified by the Commission.[261] An overall EC-Member State common position will of course need to be agreed.

Consideration might be given to pressing for a change to the UPU Constitution to allow for EC membership. However, given the non-exclusive nature of Community competence over at least part of the UPU's activities, EC membership will not replace Member State membership but would operate alongside it, as with the WTO. That being the case, cooperation procedures would need to be agreed in order to manage business within the UPU, and the practical difference as compared with the current position would be small.

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[259] Cases 3,4,6/76 *Kramer* [1976]ECR 1279 at paras 42-45; Opinion 2/91 of 19 March 1993 at para 36; Opinion 1/94 of 15 November 1994 at paras 106-108. See generally, Klabbers in Cannizzaro (ed.), *The European Union as an Actor in International Relations* (Kluwer 2002).

[260] Opinion 2/91 of 19 March 1993 at paras 5 and 37.

[261] Communication from EC and MS to Members of the Council for Trade in Services, on 'GATS 2000: Postal and Courier Services', S/CSS/W/61, 22 March 2001, para 46.

It will also be important to ensure that both Member State and EC offers and commitments made in the framework of GATS negotiations match UPU commitments as well, of course, as the requirements of the EC postal services regulatory regime.[262] This may be said to be a specific example of the duty imposed on Member States in the exercise of their shared competence in the field of trade in services under Article 133(5) EC. It will be recalled that the Member States' continuing right to conclude agreements with third countries and international organisations is subject to the requirement that such agreements comply with 'Community law and other relevant international agreements'. Thus Member State powers within GATS negotiations should be exercised in conformity with both existing EC legislation and Treaty obligations in relation to postal services, and with existing UPU obligations. Likewise, Member State activity within the UPU is required to be exercised in conformity with Community law and existing GATS obligations.[263] This obligation on the Member States derives from the EC Treaty (Article 133(5)) and is not subject to international law norms as to treaty priority.

Finally, the constraint imposed on Member State activity by Article 307 EC must be mentioned. This provision relates to international agreements to which a Member State is party and which came into force prior to the entry into force of the EEC Treaty (1 January 1958), or that State's accession to the EEC/EC/EU ('prior agreements'). It strikes a balance between the need to preserve the rights of third countries and the obligations of Member States towards the Community legal order.[264] Article 307(1) thus provides that the rights of third countries and the obligations of the Member State(s) concerned shall not be affected by the provisions of the EC Treaty. Article 307(2), on the other hand, requires Member States to take the necessary steps to eliminate any incompatibilities between the prior agreement and the Treaty. Member States are to assist each other to that end and where appropriate adopt a common attitude. Paragraph (1) does not permit a Member State to continue to assert rights it may have under a prior agreement to the extent that these are incompatible with the EC Treaty; rather it permits the Member State to rely on Article 307 as a defence to a breach of

[262] Ibid. para 5.

[263] C.f. Declaration VIII adopted by the Member States at the 1999 UPU Beijing Conference; see text above at note 25.

[264] Case 812/79, *Attorney General v. Juan C. Burgoa,* [1980] ECR 2787, para. 6; Case C-158/91, *Ministère Public v. Levy,* [1993] ECR I-4287, para. 11; Case C-62/98, *Commission v. Portuguese Republic,* [2000] ECR I-5171, para. 43.

Community law obligations in cases where such an act is necessary to give effect to its prior obligations and the rights of third countries.[265] Paragraph (2), on the other hand, imposes an obligation on the Member State to renegotiate, and if necessary denounce, a prior agreement insofar as the agreement is incompatible with its Community law obligations. It should be noted that although Article 307 only applies to prior agreements, the possibility of incompatibility with Community law may arise at some later stage as a result of developments in Community law and policy. In such a case the obligation contained in Article 307(2) will arise at that later date.[266] The obligation set out in Article 307(2) is effectively an obligation of result: to eliminate the incompatibilities, not merely to make best efforts to do so:
'although … the Member States have a choice as to the appropriate steps to be taken, they are nevertheless under an obligation to eliminate any incompatibilities existing between a pre-Community convention and the EC Treaty. If a Member State encounters difficulties which make adjustment of an agreement impossible, an obligation to denounce that agreement cannot therefore be excluded.'[267]
Applying these principles to the UPU, it is clear that the Founding Treaty of the UPU, which dates from 1874 (Treaty of Berne), would be a prior agreement. However its current Constitution was agreed in 1964 and there have been a number of Additional Protocols since, as well as General Regulations revised at regular Congresses, in particular the Beijing Congress in 1999. Whether these are prior agreements depends on their date and on the date of accession of the Member States. As the Court of Justice pointed out in the *Open Skies* cases, Article 307 will not apply to agreements that have been amended or revised following 1 January 1958 or the date of a Member State's accession to the EU. In the case against Germany, for example, the Court held that an agreement concluded between Germany and the United States in 1996, amending an earlier 1955 agreement, had created 'new and significant international commitments' for Germany. Article 307 does not apply to amendments which Member States make to prior agreements by entering into new commitments after the entry into force of the EC Treaty (or their accession to the EU).[268]

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[265] Case 10/61, *Commission v. Italy*, [1962]ECR 1; Case 812/79, *Attorney General v. Juan C. Burgoa*, [1980] ECR 2787, para. 9.

[266] Case C-62/98, *Commission v Portuguese Republic*, [2000] ECR I-5171; Case C-84/98, *Commission v Portuguese Republic*, [2000] ECR I-5215.

[267] Case C-84/98, *Commission v Portuguese Republic*, [2000] ECR I-5215, para.58. The obligation is however subject to the requirement of compliance with international law: Ibid. at para 40; see also Case C-62/98, *Commission v Portuguese Republic*, [2000] ECR I-5171, Opinion of AG Mischo at para 62.

[268] C-476/98 *Commission v. Germany*, para 69.

The applicability of Article 307 thus has to be determined on a case by case basis in relation to each Member State. That said, Article 307(2) is an explicit expression of the general obligation on Member States to comply with Community law, and the Court of Justice has held that such an obligation may require, as a matter of Community law, the non-application of an international agreement, in the context of a bilateral agreement entered into by a Member State, not before its accession to the Community, but prior to the exercise of Community competence in the field.[269]

[269] Case 181/80, *Procureur général près la Cour d'Appel de Pau and others v. José Arbelaiz-Emazabel,* [1981]ECR 2961, paras 30-31.

PART V POTENTIAL IMPLICATIONS AND RELATIVE SIGNIFICANCE

V.1 Overview of conclusions

The conclusions arrived at in Part IV may be summarized as follows:

- The concept of the single postal territory is not inconsistent with the GATS and is not inconsistent with EC law relating to postal services;
- The concept of a universal postal service is not divergent from the GATS and is not divergent from EC law relating to postal services;
- The terminal dues system, in particular the application of different charges, is to a certain extent inconsistent with the GATS and in principle also with the GATT 1994, the inconsistency with Article I GATT may however be "waived" by the Enabling Clause; the terminal dues system and the REIMS II Agreement are not inconsistent;
- Anti-remail measures relating to ABA physical remail seem consistent with the GATS and GATT 1994; anti-remail measures relating to ABA non-physical remail seem inconsistent with the GATS and the GATT 1994; anti-remail measures relating to ABC remailing are inconsistent with the MFN obligations under the GATS and the GATT; anti-remail measures relating to both physical and non-physical ABA-remail are consistent with EC law;
- Measures related to ETOEs may be inconsistent with the GATS if those measures apply the terminal dues system;
- The provisions relating to non-admission of postal items are not inconsistent with the GATS and the GATT 1994 unless they are applied unequally to like services or service suppliers;
- The provisions determining weight limits are not inconsistent with the GATT 1994 or the TBT;
- The provisions relating to freedom of transit and exceptions relating thereto are not inconsistent with the GATT 1994;

- Unilateral measures relating to freedom of transit according to Article 2 (5) Universal Postal Convention may be inconsistent with the DSU;
- The representation of member countries by postal administrations is not inconsistent with the GATS or EC law;
- The EC has an exclusive competence in the field of postal services in so far as provisions of the Constitution of the UPU or of the Universal Postal Convention affect the provisions of Directives 97/67 and 2002/39.

V.2 The interface between the WTO and the UPU

From this overview, it may be seen that, with respect to the interface between the Constitution, rules and practice of the UPU and the WTO rules, several inconsistencies and divergences can been identified.

It has to be borne in mind, however, that in most cases the Constitution, rules and practice of the UPU do not mandate a particular behaviour of the UPU Members but only leave them the discretion to adopt measures which are inconsistent with WTO rules. Insofar, the UPU regulations themselves cannot be scrutinized under the agreements covered by the WTO. Only the measures taken by the Members in order to make use of their discretion or to implement particular rules UPU rules maybe subject to WTO disciplines.

V.3 The interface between the UPU and EC law relating to postal services

With respect to the interface between the UPU and EC law relating to postal services, two remarks should be made.

The first relates to the external competence of the EC in the field of postal services. While the EC has an external competence which is exclusive to the extent that international agreements concluded by the Member States affect internal measures based on the internal competence, in particular Directives 97/67 and 2002/39, the UPU recognises the Member States as member

countries and does not provide for the possibility of membership of the EC. This results in an unclear situation regarding the role of the Member States in the UPU. Within the context of the UPU, it must be recognized that the competence of the Member States in postal matters is dependent on the competence of the EC in the field of postal services.

The second remark relates to the possibility of mutual conflict between UPU rules and EC law relating to postal services. Despite the fact that these two sets of rules pursue different objectives (to introduce competition in the provision of postal services, whereas the UPU does not seek to introduce competition between postal service providers), the risk of conflict is limited by the fact that UPU rules often provide for rights (e.g. Article 43 of the UPU Convention) rather than obligations, for formal exemptions were there is a conflict (e.g. Article 47(8) of the UPU Convention), or even in some cases for informal exemption (e.g. the Seoul Congress option regarding the representation of the Member Countries in the UPU). In this latter case, it would be helpful if UPU rules could be modified to formally authorize Member Countries to substitute representatives of postal administrations by representatives of the ministries in charge of overseeing postal services or of the postal regulator where such a regulator exists.

PART VI CONCLUSIONS AND RECOMMENDATIONS

VI.1 Conclusions and recommendations relating to the interface between the UPU and the WTO

With respect to the interface between the UPU and the WTO, we arrive at the following conclusions and recommendations.

Article 10, Constitution of the UPU, which provides that the UPU may, in order to secure close cooperation in the international postal sphere, collaborate with international organizations having related interests and activities, and Article V (1), Agreement establishing the WTO, which provides that the General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO, in conjunction with Article XXVI, GATS, which provides that the General Council shall make appropriate arrangements for consultation with the United Nations and its specialized agencies as well as with other intergovernmental organizations concerned with services, form the basis for continuous interaction between both international institutions where their activities are interrelated. Such interaction may take the form of, but is not dependent on, the conclusion of a formal memorandum of understanding, as proposed by the UPU.

Such interaction seems most clearly required if incoming cross-border mail is liberalized. Such liberalization would clearly affect the terminal dues system, because it would constitute an alternative to the international postal service organized within the framework of the UPU in the form of the terminal dues system. At the same time, such liberalization may continue to require the regulation of a universal postal service at the international level, which is not automatically ensured by the liberalization of trade in postal services. That role of ensuring the provision of an international universal postal service might be assigned to the UPU, which, in its current form, seeks to ensure the provision of an international universal postal service in the form of the terminal dues system.

A remark may be added about the solutions that have commonly been proposed in connection with the position that the terminal dues system is inconsistent with the MFN obligations contained in Article II (1), GATS, and Article I (1), GATT 1994. If this position is adopted, it is commonly and simultaneously admitted that, even if the terminal dues system would move further to a system in which terminal dues are related to the actual costs of delivery, it would be desirable or necessary to continue to distinguish between developing and industrialized, so that inconsistency with the GATS and the GATT 1994 might remain to the extent of which the terminal dues are prescribed by governments or postal administration – and must consequently be considered "measures by a Member - and are not only applied by private service suppliers. It is then commonly suggested that the terminal dues system could be made compliant, in the context of the WTO, with the GATS and the GATT 1994 by concluding a gentlemen's agreement, as has been done in the field of trade in telecommunications services with respect to accounting rates[270], or similarly to adopt a 'peace clause' comparable to Article 13, Agreement on Agriculture[271], or to seek a waiver pursuant to Article IX (3), Agreement establishing the WTO[272]. It must be observed, however, that such solutions do not actually change the terminal dues system, but merely seek to ensure that the terminal dues system is cosmetically coherent with the GATS and the GATT 1994 and does not give rise to dispute settlement under the DSU, which is considered undesirable.

As soon as substantial commitments in postal services have been undertaken by the Members and the liberalization of postal services has increased significantly, internal regulatory measures and therefore the provision on domestic regulation set forth in Article VI GATS will become ever more important.[273] Thus, it seems appropriate to suggest to the Council for Trade in Services to develop disciplines as provided for in Article VI (4) GATS in order to create operative and binding rules under which regulatory measures with regard to postal services maybe scrutinized effectively.[274]

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[270] Perrazzelli/Vergano, Overview, 748-751; International Bureau, Terminal Dues, 12; Luff, Regulation, 86.

[271] Perrazzelli/Vergano, Overview, 748-751.

[272] International Bureau, Terminal Dues, 12; Luff, Regulation, 86.

[273] Cf. Council for Trade in Services, Communication from Switzerland, S/CSS/W/73 from 4 May 2001, 12.

[274] Cf. Smit, GATS-Prinzipien, 34-36.

Moreover, with respect to a universal postal service it seems advisable in order to remove any uncertainty about the admissibility of the scope and the requirements of such service to follow the example in basic telecommunications and draft a reference commitment that Members can take over in their specific commitments and that describes the material and procedural requirements (objectivity, transparency etc.). The same shall apply correspondingly with respect to the independence of the regulatory authority.

Finally, with regard to a possible discontinuance of postal services according to Article 2 (5), Universal Postal Convention, UPU Members should observe the DSU rules, in particular obtain the prior authorization of the DSB according to Articles 3 (7), 23 (2) (c), DSU.

VI.2 Conclusions and recommendations relating to the interface between the UPU and EC law relating to postal services

With respect to the interface between the UPU and EC law relating to postal services, we reach the following conclusions and recommendations.

In view of existing external competence of the EC in the field of postal services, which is most likely shared with MS, unless internal measures such as Directives 97/67 and 2002/39 have achieved complete harmonisation over a number of fields, the Member States should commit to co-ordinate their work within the UPU with the EC. This requirement of co-ordination may be based on the duty of co-operation provided for under Article 10 EC, which applies whenever an external competence is shared between the EC and the Member States or when actions of the Member States may affect internal measures adopted by the EC.[275]

In addition to this, Member States of the EC might promote the possibility of membership of the EC in the UPU. This might bring a number of benefits. First, even though the risk of conflict between the UPU and EC law is limited, EC membership would probably neutralise the risks of divergences between the two frameworks. Second, membership of the EC in the UPU could also bring benefits from the perspective of the UPU. In the current situation, as the EC is not a member of the UPU, the UPU and its non EC member countries have to accept the

[275] See Opinion 2/91, 36; Opinion 1/94, §108; Opinion 2/00, §18.

unclear situation that the commitments adopted by EC Member States are conditional upon the division of external competence between the EC and its Member States. Membership of the EC in the UPU, although it does not dispose of the inherent problem of the division of the external competence within the EC, should at least increase transparency within the UPU regarding the position of and relation between the EC and the Member States.

As part of the duty to co-operate, the Member States should also seek to ensure that the separation of the regulatory and operational functions is recognized within the context of the UPU. At present, Article 104 (3) of the General Regulations, requires that the representatives of the members of the Postal Operations Council are appointed by their postal administrations and are qualified officials of their postal administrations. In a situation where the regulatory and operational functions are separated, it seems most appropriate that the representation of member countries in the Postal Operations Council is transferred to the national regulatory authority for the postal sector.

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