

Fordham International Law Journal

Volume 23, Issue 3

1999

Article 5

Terminal Dues Under the UPU Convention and the GATS: An Overview of the Rules and of Their Compatibility

Alessandra Perrazzelli*

Paolo R. Vergano†

*

†

Terminal Dues Under the UPU Convention and the GATS: An Overview of the Rules and of Their Compatibility

Alessandra Perrazzelli and Paolo R. Vergano

Abstract

Technical issues pertaining to re-mailing and terminal dues are not within the scope of this analysis. Similarly, no reference will be made to otherwise crucial aspects of the EC's competition law arising from REIMS II and the matters that are currently being litigated in the European Court of Justice. Our attention will focus on a potential conflict that has only recently been considered. This issue of legal compatibility relates to the necessity that terminal dues be measured against the fundamental "Most-Favored-Nation" ("MFN") principle of the World Trade Organization ("WTO") as provided by the General Agreement on Trade in Services ("GATS").

TERMINAL DUES UNDER THE UPU CONVENTION AND THE GATS: AN OVERVIEW OF THE RULES AND OF THEIR COMPATIBILITY

*Alessandra Perrazzelli**
*and Paolo R. Vergano***

INTRODUCTION

Terminal dues¹ have evolved from a simplified form of payment for weight imbalances in mail exchanges to a system that, for the largest mail exchanges, provides payment for work performed, as measured by the number of items delivered. At the 1994 Seoul Congress, the Universal Postal Union (“UPU” or “Union”) adopted the principle that payment for bulk or commercial mail should be linked to the prices customers pay in the country of delivery. This evolution followed the specific changes that occurred in the market and in the regulatory environment. One of these changes has been the sharp increase in the offering and use of services such as hybrid mail,² or re-mailing.

Re-mailing, in particular, involves the shipment of bulk mail from one country (“A”) to the national post office of another country (“B”), where it is posted either back to country A, to destinations within country B, or to destinations in a third country (“C”). These techniques are known, respectively, as ABA, ABB, and ABC re-mailing.³ Re-mailing was introduced because

* Partner, O'Connor and Company, European Lawyers, Brussels, Belgium.

** Associate, O'Connor and Company, European Lawyers, Brussels, Belgium. The authors would like to thank Professor Joel R. Reidenberg of the Fordham University School of Law, Uta Klinkers of the European Commission, and Francesca Coratella of Poste Italiane S.p.A. for their assistance and encouragement. The opinions expressed in this Essay, however, are the authors' own.

1. Terminal dues are defined as the remuneration of universal service providers for the distribution of incoming cross-border mail comprising postal items from another Member State or from a third country.

2. A hybrid mail service is a new value added postal service that combines the processing of communications in electronic form with the handling of normal physical letters. This service has developed in response to technological change and increasing competition from alternative methods of communication. However, at least at one stage of the value chain of hybrid mail, traditional physical letters still exist and need to be handled and, ultimately, delivered.

3. In the ABA re-mailing, the mail originating in Country A is transported by pri-

postal costs and post office efficiency vary from country to country.

Re-mailing allows businesses that depend on bulk or direct mail⁴ to purchase the most competitive and efficient service from wherever they are located. Several postal operators, however, have argued that re-mailing constitutes an abuse of the terminal dues mechanism by domestic senders who send their mail items—which are generally addressed to addressees in the senders' home country or to a third country—*via* a foreign postal company where the postal costs are lower. These issues concerning re-mailing and terminal dues recently have become the focal points of attention and negotiation within the UPU and the European Community ("EC"). The Commission for the European Communities ("Commission") has been notified of an October 31, 1997 agreement on terminal dues among postal operators, the Agreement for the Remuneration of Mandatory Deliveries of Cross-Border Mails ("REIMS II"). Various cases also are pending in the European Court of Justice.

Technical issues pertaining to re-mailing and terminal dues are not within the scope of this analysis. Similarly, no reference will be made to otherwise crucial aspects of the EC's competition law arising from REIMS II and the matters that are currently being litigated in the European Court of Justice. Our attention will focus on a potential conflict that has only recently been considered. This issue of legal compatibility relates to the necessity that terminal dues be measured against the fundamental "Most-Favored-Nation" ("MFN") principle of the World Trade Organization ("WTO") as provided by the General Agreement on

vate companies to Country B and put into the postal system there in order to be sent *via* the traditional international postal system back to Country A, where the final addressee resides. ABB re-mailing occurs where mail originating in Country A is transported by private companies to Country B and put into the postal system there for delivery to final addressees in Country B. Finally, ABC re-mailing takes place when mail originating in Country A is transported by private companies to Country B and put into the postal system there for forwarding *via* the traditional international postal system to Country C, where the final addressee resides.

4. Direct mail is a communication consisting solely of advertising, marketing, or publicity material. It is comprised of an identical message, except for the addressee's name, address, and identifying number, as well as other modifications that do not alter the nature of the message. Direct mail is sent to a significant number of addressees, to be conveyed and delivered at the address indicated by the sender on the item itself or on its wrapping.

Trade in Services ("GATS").⁵

I. THE GENERAL AGREEMENT ON TRADE IN SERVICES

The 1994 GATS forms part of Annex 1 to the WTO Agreement⁶ and is a binding international agreement for all WTO Members. It establishes a multilateral framework of principles and rules to govern trade in services and commitments to liberalize existing barriers to trade and investment services. The GATS is modelled after the General Agreement on Tariffs and Trade,⁷ but the only fundamental obligation that the WTO Members have undertaken with respect to all services is that of the MFN treatment.⁸ The commitments that individual Members list in their Schedules determine the majority of GATS obligations.

The GATS consists of three main elements. The first element is a basic framework Agreement and includes the general obligations and disciplines. The second element consists of a number of Annexes to the Agreement that establish special or different rules for particular types of services. The third element consists of Schedules that set out each Member's specific market access concessions.⁹

The fundamental obligations under the Agreement are split between Parts II and III of the GATS. The disciplines found in Part II, "General Obligations and Disciplines," generally apply to

5. General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): General Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M. 44 (1994) [hereinafter GATS].

6. General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Agreement Establishing the Multilateral Trade Organization [World Trade Organization], Dec. 15, 1993, 33 I.L.M. 13 (1994).

7. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 STAT. A-3, 55 U.N.T.S. 187.

8. In general, Most-Favoured-Nation Treatment ("MFN") is trade treatment accorded to the nation that is treated most favorably. The General Agreement on Trade in Services ("GATS") states, "[w]ith respect to any measure covered by this Agreement, 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." GATS, *supra* note 5, art. II, ¶ 1, 33 I.L.M. at 49. The interpretation of this provision is based on guidelines offered by similar exercises conducted in the past with respect to MFN and MFN-type obligations of the General Agreement on Tariffs and Trade.

9. The basic framework Agreement itself does not provide for market access to any particular service sector. Specific market access commitments only result from each Member's GATS Schedule.

all services covered by the GATS, regardless of whether a Member has listed any specific service sector concession in its Schedule. The provisions of Part III, "Specific Commitments," apply only to those service sectors expressly mentioned in a Member's Schedule.¹⁰

Articles I and XXVIII of the GATS provide definitions relating to the scope of the Agreement. The GATS applies to those measures by Members affecting trade in services. Trade in services is the supply of a service from each of the following: (1) the territory of one Member into the territory of any other Member (cross-border supply); (2) in the territory of one Member to the service consumer of any other Member (consumption abroad); (3) by a service supplier of one Member, through commercial presence in the territory of any other Member (commercial presence); (4) or 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).

The term "services" includes any service in any sector, except for services supplied in the exercise of a governmental authority. The exception is defined as any service that is supplied neither on a commercial basis, nor in competition with one or more service suppliers. For purposes of the GATS, "measures by Members" are those taken by central, regional, or local governments and authorities, and by non-governmental bodies exercising powers delegated by such authorities.

Non-governmental measures and practices by private individuals or legal persons are outside the scope of the GATS. Certain restrictive business practices of service suppliers that restrain competition and indirectly restrict trade in services, however, are covered by Article IX of the GATS. This is the case for those monopolies and exclusive services suppliers that are either authorized or formally established by a WTO Member in a way that substantially prevents competition in a particular service sector.

Article I of the GATS provides that governmental measures need not restrict trade in services, but merely affect it.¹¹ A "measure" is any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or

10. Under the GATS, each Member need only grant market access and national treatment to the services sectors of its choosing.

11. See GATS, *supra* note 5, art. I, ¶ 1, 33 I.L.M. at 49.

any other form. The use of the term "affecting" reflects the intent of the drafters to give a broad scope of application to the GATS. The reach of the GATS is therefore widened to governmental measures that directly or indirectly impact provisions of services.

II. *THE UNIVERSAL POSTAL UNION*

The UPU, with headquarters in Berne, Switzerland, is the specialized institution of the United Nations that regulates the universal provision of postal services.¹² The Union has 189 member countries. The Constitution of the UPU¹³ is the fundamental act containing the organic rules of the Union. It is a diplomatic act that is ratified by the competent authorities of each member country. The Constitution need not be renewed for each Congress. Amendments to it can only be made in Congress and are recorded in an Additional Protocol that is also subject to ratification.

The provisions relating to the application of the Constitution of the UPU and the operation of the Union are contained in the General Regulations of the UPU. The Universal Postal Union Convention¹⁴ ("UPU Convention") and its Detailed Regulations provide the common rules applicable to the international postal services and the provisions concerning the letter-post services. They are binding on all member countries. Special Agreements and their Detailed Regulations govern branches of the international postal service other than the letter-post. They are only binding on those countries that are parties to the Agreements.

The Detailed Regulations of the UPU Convention are not treaties. They are agreements concluded at the postal administration level. The 1994 Seoul Congress transferred the power of enacting and amending the Detailed Regulations to the Postal Operations Council.

12. Postal services are the services involving the clearance, sorting, transport, and delivery of postal items.

13. Constitution of the Universal Postal Union, July 10, 1964, 16 U.S.T. 1291, 611 U.N.T.S. 7, [hereinafter UPU Constitution].

14. Universal Postal Union Convention, July 11, 1952, *reprinted in* MANUAL OF THE UNIVERSAL POSTAL CONVENTION 1.1 (International Bureau of the Universal Postal Union 1995), *available in* <<http://www.upu.int/manuals/an/Convention/convention.pdf>> (on file with the *Fordham International Law Journal*).

The UPU holds a Congress every five years to review the UPU Convention and its framework for the operational relations between the various national postal administrations. Under the UPU Convention, the members of the UPU agree to provide domestic delivery services for incoming cross-border mail.¹⁵

III. *APPLICABILITY OF THE GATS TO THE POSTAL SECTOR AND TO SPECIFIC AGREEMENTS BETWEEN POSTAL OPERATORS*

Postal services are deemed to be covered by the GATS even if, in light of the definition the GATS gives to "measures by Members," the services provided by those postal operators that are still governmental monopolies would seem to fall within the exercise of governmental authority as defined by Article I of the GATS.¹⁶ Postal operators are governmental monopolies only in some countries. In others they have been fully or partly privatized, or they may compete with private commercial operators in some of their service areas. The postal operators are often charged with the obligation of providing universal service and are granted a monopoly (the reserved area) to be able to afford it.

The issue of whether postal services fall under the GATS cannot be clearly and affirmatively resolved by mere reference to the Agreement and by interpreting its provisions. Nevertheless, the GATS can definitely be considered to cover the bulk of the services offered in the postal sector. In this respect, the UPU has expressly stated that the "GATS applies to postal services."¹⁷

A different question is whether the GATS applies to specific agreements between postal operators, such as terminal dues agreements. In these cases, the answer will first depend on the specific service covered by the Agreement. It will also depend on whether the particular service is neither supplied in the exer-

15. With respect to the scope and objectives of the Union, Article 1 of the UPU Constitution provides that "The countries adopting this Constitution comprise, under the title of the Universal Postal Union, a single postal territory for the reciprocal exchange of letter-post items. Freedom of transit is guaranteed throughout the entire territory of the Union." UPU Constitution, *supra* note 13, art. 1, 16 U.S.T. at 1294, 611 U.N.T.S. at 64.

16. See GATS, *supra* note 5, art. I, ¶ 3(c), 33 I.L.M. at 49 ("A service supplied in the exercise of governmental authority means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.").

17. See UPU CA 1998-Doc.17, point 2.

cise of governmental authority, nor in competition with one or more service suppliers. As mentioned above, some of these agreements are not concluded directly by the Member countries' respective governments, but rather by their postal operators. Consequently, there seems to be a number of arguments on both sides regarding the question of whether, for example, terminal dues are private arrangements outside the scope of governmental measures, as provided by the GATS.

Continuing with the terminal dues example, it seems appropriate to refer to a January 1999 working note¹⁸ by the Commission. This document reached the conclusion that there are two possibilities for terminal dues under the GATS. First, they "could be considered out of the scope of GATS if they are payments between operators and therefore they are not measures of a Member in the GATS."¹⁹ Second, "it could nevertheless be argued that since terminal dues are negotiated between WTO Members in the UPU, the GATS may apply to them."²⁰

We have seen how the GATS broadly defines the concept of a governmental measure to include action "in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form."²¹ At other levels, the assumption that GATS obligations apply to terminal dues is clearly grounded in their classification as governmental measures. For example, the UPU's Postal Operations Council clearly stated that "compliance with the WTO's Most-Favoured-Nation requirement would prevent members from applying different terminal dues based on the country of origin of mail,"²² and reached the conclusion that several regional terminal dues proposals would have conflicted with the MFN principle. This approach presupposes the applicability of the GATS to terminal dues arrangements.

It is officially the Member governments, on behalf of the individual postal operators, that agree to and are bound by the terms of the UPU Convention. Their agreement is expressed through acts that amount to governmental measures and that

18. *Working Note on Postal/Courier Services Regarding the Preparation on GATS 2000*, DG1/M1/UK D(99), January 25, 1999.

19. *Id.*

20. *Id.*

21. See GATS, *supra* note 5, art. XXVIII, ¶ (a), 33 I.L.M. at 65.

22. UPU Postal Operations Council Document, World Round Table on Terminal Dues, Geneva, February 3-4, 1999, CEP TR 1999.1-Doc.1.

undermine the possible argument that the arrangements established in the UPU framework are the results of postal operators acting in non-governmental capacities. In the example of the terminal dues arrangement, this approach leads to the conclusion that the terminal dues regime, whether global or regional, falls within the scope of applicability of the GATS.

For this reason, some legal instruments and mechanisms agreed upon under the UPU Convention might be legally incompatible with certain rules and provisions of the GATS. Our analysis will limit itself to those provisions of the UPU Convention that offer clear examples of this danger.

IV. *TERMINAL DUES UNDER THE UPU CONVENTION AND THE GATS: POSSIBLE CONFLICTS OF LAW*

Prior to 1969, postal administrations did not directly compensate each other for the delivery of international mail since it was assumed that each mail item generated a reciprocal response, resulting in a broad balance of traffic. This assumption of equilibrium became obsolete, however, as imbalances developed and sharp differences in postal operators' costs and efficiency were highlighted.

The UPU reacted to these developments in 1969 by introducing a mechanism that provided remuneration for the costs of handling and delivering cross-border mail in the country of destination. The fees that must be paid for these services are commonly referred to as "terminal dues." The method used consisted of fixing a rate per kilogram that was the same for all postal operators concerned.

In practice, however, this system proved to be unsatisfactory because it did not properly reflect the cost structures of the individual operators. Furthermore, it was inherently flawed since it ignored the real cost of delivery. For example, such a mechanism could not account for the fact that it is cheaper to deliver one item of mail weighing one kilogram than fifty letters weighing twenty grams each.

These inadequacies led the postal administrations of several countries to call for changes. A number of European countries worked out a different formula in the framework of the European Conference of Postal and Telecommunications Administrations. This was only one step forward, but no effective and relia-

ble system ever resulted. At the EC level, several public postal operators entered into two subsequent REIMS agreements, REIMS I in 1995 and REIMS II in 1997. REIMS I linked the terminal dues to domestic tariffs on a European-wide basis and REIMS II introduced a system of quality-of-service standards used to calculate the terminal dues.

Two articles of the UPU Convention deserve careful analysis to determine whether their provisions might be in conflict with WTO principles or with specific rules of the GATS. They are Article 25 on "Posting Abroad of Letter-Post Items" (which concerns issues of re-mailing) and Article 49 on "Terminal Dues."

Paragraphs 1 through 3 of Article 25 of the UPU Convention allow for a postal administration to refuse to forward or deliver the so-called "ABA re-mailing" letter-post items. In particular, Article 25 provides that "[a] member country shall not be bound to forward or deliver to the addressee the 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."²³ Furthermore, "[t]he administration of destination may claim from the sender and, failing this, from the administration of posting, payment of the internal rates."²⁴ Paragraph 4 of Article 25 provides that a member country C has the right to refuse to forward or deliver the "bulk re-mail" posted in country B by residents of country A, should an appropriate remuneration at the rate normally paid by country A, but not at the lower rate paid by country B, not be made.

Article 49 of the UPU Convention deals with terminal dues and contains a number of provisions that would seem to be in conflict with the GATS. In particular, paragraph 3 of Article 49 appears to grant preferential treatment to developing countries in relation to the so-called "revision mechanism."²⁵ Similarly, paragraph 6 provides that "[a]ny administration may waive wholly or in part the payment provided for under 1,"²⁶ *i.e.*, the terminal dues, while paragraph 7 stipulates that "[t]he administrations concerned may, by bilateral or multilateral agreement,

23. Universal Postal Convention, *supra* note 14, art. 25, ¶ 1.

24. *Id.* ¶ 3.

25. *Id.* art. 49, ¶ 3.

26. *Id.* art. 49, ¶ 6.

apply other payment systems for the settlement of terminal dues accounts."²⁷ The issues of compatibility of these two articles of the UPU Convention with the GATS are easily identifiable and trigger the question of whether this conflict of law can be cured by reference to general principles of international law, by agreement at the WTO or UPU level, or, eventually, through recourse to WTO dispute settlement procedures.

In particular, Article 25 of the UPU Convention seems to be inconsistent with GATS Article II on the MFN Treatment and with Article VIII on Monopolies and Exclusive Service Suppliers. In fact, although the right for a postal administration to refuse, under Article 25 of the UPU Convention, to forward or deliver "ABA re-mailing" letter-post items is optional, and seemingly not per se in contrast with GATS, it may infringe the MFN principle insofar as, in absence of any justification, country X could exercise its right of refusal with respect to country Y and not towards country Z. Such discrimination, even if merely theoretical, would be clearly inconsistent with WTO and GATS rules. Furthermore, if Article 25 were to be used by a WTO Member's public postal operator to refuse re-mail, then it could conflict with GATS Article VIII, which prohibits abuse of a dominant position by monopolists outside the area of reserved services.²⁸

Similarly, exercise of the right provided for by paragraph 4 of Article 25 would prove inconsistent with the MFN principle and would amount to a breach of WTO and GATS commitments. In fact, if country Z only allowed re-mailing from residents of X, it would unjustifiably discriminate between countries X and Y. This difference in treatment would not be based on costs, but instead simply would depend on the status of a country as a re-mailer.

With respect to the preferential treatment that Article 49 of the UPU Convention grants to developing countries, it should be noted that the GATS does not provide an exception to MFN based on developing country status. Therefore, the UPU Convention can be interpreted as granting industrialized countries

27. *Id.* art. 49, ¶ 7.

28. *See* GATS, *supra* note 5, art. VIII, ¶ 2, 33 I.L.M. at 54 (providing that where monopolist or exclusive service provider 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").

treatment that is less than favorable than that for developing countries. For this reason, this mechanism is another violation of the MFN principle and of WTO law.

Along the same lines, paragraphs 6 and 7 of Article 49 are potential infringements of GATS Article II, regarding MFN treatment, insofar as an administration may waive the payment of the terminal dues with respect to one country wholly or in part. Furthermore, they are potential infringements to the extent that the administration concerned may, by bilateral or multilateral agreement, apply other payment systems for the settlement of terminal dues accounts, again with respect to a specific country or group of countries. These acts would clearly amount to unjustified discrimination and would put the UPU Convention in conflict with the GATS and WTO law.²⁹

V. *ISSUES OF PUBLIC INTERNATIONAL LAW*

In 1998, the UPU produced a document³⁰ ("UPU Memo") regarding the obligations arising from the GATS in the international postal context. The fundamental issue addressed by the UPU in its memorandum was the legal relationship existing between the GATS and the UPU Convention. The UPU Memo referred to possible incompatibilities between GATS provisions and Articles 25 and 49 of the UPU Convention. The Memo reached the conclusion that, "in case of conflict between international treaties, it should be noted that the most recent agreements generally prevail over older ones; similarly, special provisions prevail over general ones."³¹ These two rules of public international law are, respectively, Article 30 of the Vienna Convention on the Law of Treaties³² ("Vienna Convention") and the so-called "lex specialis rule."

The first rule is derived from Article 30 of the Vienna Con-

29. GATS applies to bilateral or multilateral (regional) terminal dues schemes because such schemes are implemented on the basis of Article 49.7 of the UPU Convention, which is, by itself, a governmental measure in the sense of Article I, paragraph 3 of the GATS. Since their implementation is conducted pursuant to the authority of a governmental measure, terminal dues schemes would clearly fall within this definition.

30. "Obligations Arising from the General Agreement on Trade in Services" (Agenda Item 8), Memorandum by the Secretary-General, Dec. 16, 1998, UPU Document CA 1999-Doc. 8 [hereinafter UPU Memo].

31. *Id.*

32. Vienna Convention of the Law of Treaties, May 23, 1969, art. 30, 1155 U.N.T.S. 331, 339 [hereinafter Vienna Convention].

vention and broadly states that, with respect to the general question of the relationship of rights and obligations of States parties to successive treaties relating to the same subject matter, the more recent agreement prevails. In the case at hand, it is clear that the subject matter of the two treaties is the same. On one side, in fact, the general principles of the GATS, *i.e.*, the MFN treatment, apply to governmental measures affecting international postal services; on the other side, the UPU Convention is an intergovernmental agreement that also applies to international postal services. Postal services are the partial and exclusive subject matter of both the GATS and the UPU, respectively.

The result of the application of Article 30 of the Vienna Convention to the relationship between the GATS and the UPU Convention is that for each GATS/UPU Member State, a careful analysis of when its respective rights and obligations under the GATS and Congress' most recent revision of the UPU Convention were entered into force is necessary. That, along with the fact that not all UPU parties are WTO/GATS Members, and that both the GATS and the UPU Convention periodically are revised legal instruments, would make it very difficult to establish, on a country-specific basis, what treaty is most recent.

As for the second rule, the general principle is that when a general and a more specific provision both apply at the same time, preference must be given to the special provision. This rule is not reflected in the Vienna Convention, but is an additional interpretative tool that occasionally is applied in public international law.

In the case of the GATS/UPU conflict of law, the "lex specialis rule" is merely supplementary to Article 30 of the Vienna Convention. The first rule therefore must be read in conjunction with the provision of Article 26 of the Vienna Convention. According to Article 26, each treaty must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."³³

In this regard, the context must be intended as the overall WTO framework of international trade regulation and liberalization. The GATS is one of the backbones of the WTO system, while the UPU Convention, although adhered to by a larger

33. *Id.* art. 26, 1155 U.N.T.S. at 339.

number of parties, can be considered as a multilateral agreement that applies only to one major services sector, *i.e.*, the postal services. The UPU purpose is a single objective, *i.e.*, the creation and regulation of a global postal area, while the GATS pursues the establishment of a multilateral framework of principles and rules for trade in all services sectors.

In light of these considerations, it seems natural to reach the conclusion that, insofar as the objects and purposes of the WTO Agreement and the GATS are broader than those of the UPU Convention, WTO and GATS provisions must prevail over the conflicting rules of the UPU. This reasoning is reinforced by the fact that the GATS did not exclude postal services from its global and comprehensive competence, as was done for other sectorial agreements. In this regard, the possibility that some provisions of the UPU Convention be considered special under the "lex specialis rule" and, as such, be given prevalence over those of the GATS, seems a highly improbable conclusion.³⁴

VI. LESSONS FROM THE TELECOMMUNICATIONS SECTOR

Although postal services are very different in nature and in their technological dimension from the telecommunications services, a few considerations can be made with respect to the WTO telecommunications negotiations. Until recently, in most countries of the world, the telecommunications sector operated under a legal monopoly where one or few operators held the exclusive rights to provide telecommunications services. WTO negotiations on the liberalization of this sector were only completed in February 1997.

In particular, the liberalization of the telecommunications sector was completed through the publication of a Fourth Protocol attached to the GATS. One of the relevant traits of this process was the circulation of a Reference Paper on regulatory principles. As a result of this Reference Paper, almost all of the countries participating in the negotiations agreed to enter into additional commitments concerning regulatory principles applicable to the sector.

The Reference Paper was drafted and agreed upon as a non-binding legal document. The idea was to get all the differ-

34. The UPU Memorandum elaborated upon this argument. See UPU Memo, *supra* note 30, ¶ 25.

ent parties to agree on including, for the first time, pro-competitive regulatory disciplines within the GATS. In fact, because of the special features of the telecommunications markets, the WTO Members involved in the negotiations agreed on the necessity to adopt pro-competitive regulatory rules in order to liberalize the sector.

One of the successful features of the Reference Paper has been its flexibility. In particular, it would have been impossible to agree upon including the Reference Paper directly in an annex on telecommunications services because the WTO Members involved in the negotiations were not politically keen on adopting individual commitments to liberalize the sector if the regulatory principles were to be legally binding. In practice, however, the Reference Paper has been adopted in its entirety, *i.e.*, without amendments or exceptions, by most of the countries that scheduled individual commitments.

It should be noted that while negotiating the Reference Paper, the WTO Members agreed to leave the established system of accounting rates out of the scope of its regulatory principles.³⁵ In addition, and more importantly, a "gentlemen's agreement" was concluded to ensure that no WTO Member would challenge the accounting rates system in existence at least until the next round of multilateral trade negotiations in services. This approach could probably provide a sensible solution to a possible WTO agreement on postal services that takes into account the particular needs and concerns of postal operators with regard to issues such as re-mailing and terminal dues.

CONCLUSION

Problems of compatibility between provisions of the UPU Convention and rules of the GATS have started to arise and are

35. The rationale behind the decision to leave the established system of accounting rates out of the scope of the regulatory principles was that even though the accounting rates system contradicts the principles of trade liberalization embodied in the GATS and specifically referred to in the Reference Paper, negotiators thought that the mere liberalization of the national markets would automatically lead to the disappearance of the accounting rates system as soon as other carriers would begin providing international service connection outside the scope of the accounting rates system. An automatic transposition of this reasoning to the postal services sector cannot occur because of the sharp differences between the two sectors. It is clear, however, that the postal services sector will eventually need to be granted similar derogations to the GATS liberalization process.

bound to become serious issues of negotiation both at the UPU level and during the upcoming GATS 2000 Round of Multilateral Trade Negotiations on services. There might even be the need for litigation under traditional principles of international law to determine which body of rules has competence and priority with respect to postal services. A WTO Member might also decide to refer the matter to a WTO panel operating in the framework of the WTO dispute settlement procedures.

It seems clear from this analysis that there are potential and real conflicts between the two agreements. The easier approach would be for the UPU Congress to introduce a new clause in the revision of the UPU Convention directly addressing its relationship to the WTO Agreement. This would increase legal certainty and provide the WTO with the legal basis and means to achieve a comprehensive and equitable solution to the problems of terminal dues and re-mailing. A realistic and fair solution, in fact, would need to take into account the goals of developing countries and the objective differences in costs and quality of service existing even among industrialized countries.

There are various approaches within the GATS to secure a similar outcome. One possible avenue would be to reach a sort of "gentlemen's agreement," as accomplished in the telecommunications services sector, not to pursue litigation under WTO dispute settlement procedures in cases of effective discrimination caused by "WTO-illegal" UPU or bilateral rules on terminal dues and re-mailing. This solution, however, would not be legally sound and would not provide a high degree of reliability.

A more formal and legally binding alternative would be for WTO Members to commit to a "peace clause" similar to the one provided by Article 13 of the Agreement on Agriculture in the area of agricultural subsidization. Such a mechanism has proved quite successful, even though it has not solved the problem, but merely postponed it. The legal security and reliability of such a provision would be, however, much greater than the one offered by a "gentlemen's agreement."

Another approach would be for WTO Members to adopt a specific exception to the MFN principle for postal services and, specifically, to take account of the peculiar aspects of re-mailing and of the necessity for the terminal dues mechanism. This option seems difficult to support, as it would establish a very dan-

gerous precedent in terms of the efficacy and reach of the MFN principle.

Similarly dangerous—and not quite advisable—would be to have the national postal operators, whether public or private, rather than the governments, conclude a specific agreement on terminal dues. This agreement would not necessarily be exempt from WTO rules and would, once again, create a dangerous and legally complicated precedent. It would amount to a legal *escamotage* and not to a serious and lasting solution.

Another possible avenue that would need, however, to be carefully weighed and conceived (under WTO rules and case law), would be to agree to a postal tariff rate quota. Tariff rate quotas are the mechanisms that provide a transition from a rigid system of quantitative restrictions to one of pure tariffication in agricultural trade. This transition has not been smooth, but at least it is moving in the right direction.

With respect to terminal dues, a system could be devised whereby countries are allowed to re-mail within an agreed-upon limit or tonnage of mail—basically, a quota. Should this limit be exceeded, additional duties would come into play and the terminal dues would amount to the actual cost of mailing in the country of delivery. As mentioned previously, this system could prove to be a step backwards in WTO terms and would probably be difficult to manage, but could result in a practical solution to the legal conflict between the GATS and the UPU. It would also be an answer to the threat which re-mailing represents for the postal operators of many countries.