

The GATS Implications for Postal Services

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Introduction

Postal and express delivery services are central topics in the ongoing WTO GATS negotiations in Geneva. The priority given to these sectors is largely due to the efforts of the multinational express delivery industry, which has been very active in making its views known to key WTO governments.

Up until now, only a handful of governments have made specific GATS commitments covering postal services and relatively few have agreed to cover courier services. In my view, this cautious approach is understandable. The GATS and the ongoing negotiations to expand it pose considerable challenges to public postal services and postal administrations.

The multinational express delivery industry has a well-defined policy reform agenda that it hopes to advance through the GATS. It is important that postal administrations also carefully consider the implications of the GATS for their policies and mandates and engage on that basis in these negotiations.

Therefore, I commend you for your work in this area and for organizing this seminar.

The GATS governmental authority exclusion

The first step in examining GATS implications is analyzing whether, and to what extent, postal services fall under the treaty.

In principle, the GATS covers all services except those "supplied in the exercise of governmental authority." But GATS Article I:3c defines such excluded services narrowly as "any service which is supplied *neither* on a commercial basis *nor* in competition with one or more service suppliers (emphasis added)." These key terms are left undefined and have been subject to varying interpretations.

For example, New Zealand argues forcefully that: "there appear to be few examples of postal services supplied 'neither on a commercial basis nor in competition with one or more service suppliers.' Most, if not all, postal regimes would charge their consumers a fee for their services."¹

By contrast, the Canadian government finds New Zealand's interpretation "perplexing" and insists that: "it is our view that postal services provided by Canada Post in fulfillment of the universal service obligation for delivery of letter mail are 'services supplied in the exercise of governmental authority.'"²

Significantly, the opinion of WTO Secretariat's background paper on postal services is that: "Postal services of a Member, whatever the status of the postal supplier, would be services covered by the GATS so long as, *and which is usually the case*, they are supplied on a commercial basis (emphasis added)."³

It is reasonably clear that where national postal administrations compete with the private sector in areas outside their reserved monopoly area, that these activities are covered, in principle, by the GATS. There are contending views over whether even those postal services within the reserved area may be provided "on a commercial basis" and consequently covered.

It is difficult to rely firmly on an exclusion that is highly qualified and subject to conflicting interpretations even by WTO member governments. As some commentators have noted, the scope of this exclusion may well vary from government to government depending on the extent of competition or commercialization.⁴ Certain competitive activities of public postal administrations are obviously covered and so may be some reserved activities. Consequently, it is prudent to assume that, in many instances, publicly provided postal services fall within the scope of the GATS.

Most-favoured nation treatment (MFN)

Certain GATS rules apply automatically to all services. The most important of these "top-down" rules is most-favoured nation treatment (Article II). This rule requires that the best treatment given to *any* foreign service or service provider must be accorded "immediately and unconditionally" to *all* like foreign services or service providers.

Remarkably, as you are all well aware, the GATS MFN restrictions appear to conflict with the multilateral rules that ensure the delivery of international mail. The Universal Postal Union (UPU) rules on terminal dues give preferences to developing countries and discretion to postal administrations to prevent commercial re-mailers from exploiting these preferences. Both are possible MFN violations.

When the GATS was signed in 1994, members had a one-time opportunity to list exceptions to their MFN obligations. No WTO member government listed MFN exceptions pertaining to international postal regulations. This one-time opportunity has now passed.

In my view, this failure to properly insulate multilaterally agreed UPU rules raises some serious questions about the legitimacy of unconditional GATS restrictions whose implications were not widely understood when the treaty was negotiated and ratified.

I expect that this potential conflict is what first drew the attention of the UPU to the GATS. It graphically demonstrates the extraordinary scope of the new generation of commercial treaties such as the GATS. It also underlines the need for postal operators and regulators to pay careful attention to all aspects of international trade treaties and negotiations affecting services. Again, I commend your initiative in examining the GATS implications for postal services. Hopefully, it will avoid similar mishaps in the current round.

There is, however, much more to the GATS than MFN. The treaty's implications for postal and related services are far broader.

National treatment and market access

The most forceful GATS provisions – market access (Article XVI) and national treatment (Article XVII) – apply only to those service sectors (or sub-sectors) that a government has explicitly agreed to cover by listing them in its country schedule. When commitments are made, the government also has a one-time opportunity to limit its commitments or to protect otherwise non-conforming measures by inscribing these “limitations” in its schedule.

As already noted, governments have so far made relatively few GATS specific commitments covering the postal and courier sectors. But, in the current round, there will undoubtedly be pressure on governments to make more GATS commitments in these sectors. In all likelihood, most countries will probably remain reluctant to list postal services **per se**. The pressure to list related services such as courier services will be greater. *But it is essential to recognize that listing courier and related services can have important implications for postal administrations, even if postal services themselves are not listed.*

Briefly, the GATS market access provision (Article XVI) prohibits several types of non-discriminatory, mostly quantitative restrictions from being applied to foreign services or suppliers in scheduled sectors. The most important feature of this provision for the postal sector is that it prohibits limits on the number of suppliers in committed sectors. This means that in committed sectors, any monopolies must be listed as a non-conforming measure or lost. Caution is obviously called for before making any specific commitments that cover, even in part, activities within the monopoly privileges of the postal operator.

The national treatment article requires that any foreign service or service supplier be given treatment no less favourable than that given to like domestic services or providers.

The issue of likeness is obviously a critical one. If national treatment entails simply that foreign, *private* postal or courier providers are entitled to the same treatment as domestic, *private* postal or courier providers, then it probably raises few policy concerns for national postal administrations. If, however, national treatment is interpreted to mean that the advantages afforded to *public* postal administrations must be extended to foreign *private* providers, then that is another matter entirely. GATS-enforceable rights for private providers to access the regulatory and funding advantages accorded to public postal operators – while unencumbered by their universal and public service obligations – would raise more serious issues regarding the continued viability of public postal services in many countries.⁵

Classification issues

This leads directly to the issue of classification. How services are classified is critical to defining the scope and extent of GATS-enforceable specific commitments. This is particularly true of postal and courier services.

There are a number of proposals to revise the current classification of postal and courier services under the GATS. Reclassification is far from a mere technical matter. It is a crucial negotiating issue with serious implications for GATS coverage.

Currently, GATS commitments are classified according to a document developed during the Uruguay Round known as the Services Sectoral Classification List (or W/120).⁶ Each category in W/120 is cross-referenced to a more detailed classification system developed by the United Nations, the UN Provisional Central

Product Classification (the provisional CPC). Although the use of W/120 was not mandatory, most WTO members (with the notable exception of the United States) adopted W/120 and the provisional CPC as the basis for their GATS scheduling.

Importantly, the provisional CPC classification of postal and courier services is built around the traditional distinction between public postal services and private delivery services. For example, the provisional CPC defines “the pick-up, delivery and transport services” of letters, parcels and other printed matter as Postal services (7511) when they are “rendered by the national postal administration.” The provisional CPC defines similar “pick-up, delivery and transport” services of letters, parcels and packages as 'courier services' (7512) if they are rendered by service providers “other than the national postal administration.”⁷

In short, the provisional CPC classifies similar services differently depending on whether they are provided by the national postal administration or a private carrier. This unusual feature of the provisional CPC significantly insulates national postal administrations against possible GATS challenges that their activities violate market access or national treatment.

The multinational courier industry, however, has focused on reclassification of postal and courier services as a strategy for increasing GATS coverage. The first casualty of any reclassification would be the vital distinction between public and private delivery of postal and courier services. In fact, the US and the EC have tabled proposals in Geneva that, while they differ in other respects, would eliminate the distinction between public and private delivery of postal and courier services in just this way. Such a reclassification would have especially serious consequences for countries that have already made specific commitments in courier services under the GATS.

This critical distinction between the public and private provision gives governments (even those that have already listed courier services) a firm basis to argue that only those courier services provided by private service providers are covered by specific GATS commitments. If the provisional CPC classification stands up, the standard for national treatment of foreign courier service providers would not be the best treatment applied to “the national postal administration” but the best treatment given to private courier companies. This unusual feature of the provisional CPC definitions of postal and courier services may thus provide governments and postal administrations with significant policy flexibility. While it is not watertight, this protection –together with the public/private distinction upon which it is based – should not be lightly discarded.

Monopolies and state enterprises

The GATS rules on monopolies are probably the most significant GATS restrictions for public postal administrations.⁸ GATS Article VIII.2 requires governments to ensure that a monopoly supplier of a service does not “abuse its monopoly position” when competing in services outside the scope of its monopoly but subject to that government’s specific commitments.

Most postal administrations are monopoly suppliers of certain services, such as carrying addressed letter-mail. Many also compete in non-monopolized markets, such as express parcel delivery. Consequently, when a government lists services in which its postal administration competes, this triggers the GATS abuse of monopolies rule – even when no commitments have been made covering postal services *per se*.

The GATS does not define what the key term “abuse” means.⁹ But an extraordinary case involving *substantively* similar NAFTA rules provides insight into the US express delivery industry’s view of what constitutes anti-competitive practices.¹⁰

In January 2000, United Parcel Service of America Inc. (UPS) launched a claim under chapter 11 of the NAFTA. UPS claims that the Canadian government has breached its NAFTA obligations by failing to effectively regulate UPS’s competitor Canada Post. UPS is reportedly seeking damages of at least \$160 million US, plus costs and tax consequences.¹¹

UPS charges that Canada Post leverages its letter-mail monopoly to compete unfairly in the courier business (which is outside the monopoly). UPS accuses Canada Post of cross-subsidizing courier services by: allowing customers to deposit courier packages in postal boxes; allowing letter carriers to pick up and transport courier packages; storing undelivered courier packages at letter-mail retail facilities; selling courier products at letter-mail retail outlets; and so on.¹²

The clear policy implication of the UPS case is to force Canada Post either to ensure watertight separation of its letter-mail and courier operations or to withdraw from courier services. This is not simply a trade dispute; it is an attempt to use a trade agreement to change Canadian domestic public policy to suit a single set of interests.

Interestingly, in the current negotiations toward a US-Chile free trade deal, the US express delivery industry is reportedly “pushing for text that will prevent the Chilean post office from subsidizing a competitive express delivery service in Chile or giving such a service other unfair advantages, *even though the Chilean post office does not currently have an express delivery service* (emphasis added).”¹³ Apparently, the US industry wants model language that will make it easier to press other countries for similar commitments in the planned Free Trade Area of the Americas and at the WTO.

In sum, when a country makes GATS commitments covering sectors (or sub-sectors) where its national postal administration competes with foreign service providers, that country may find itself under pressure to reform its postal administration. In this way, the GATS becomes -- inappropriately in my view -- a means to bypass domestic policy-making processes, which normally reflect a broader range of interests.

Domestic Regulation

Another important aspect of the GATS negotiations that should concern UPU members are the negotiations under Article VI.4 to develop disciplines on certain non-discriminatory regulatory measures such as those relating to licensing requirements and technical standards. These negotiations, along with a mooted reference paper approach, have been promoted as means to advance a so-called “pro-competitive” regulatory framework. The multinational express delivery industry hopes, among other things, to achieve better customs treatment, to ensure the separation of postal operators and regulators, and, perhaps, to gain access rights to public postal infrastructure.

The goal of improved customs procedures may be a legitimate one. But using a “necessity test” developed under Article VI.4 to achieve this raises broader public concerns about applying WTO-enforced balancing tests to, for example, environmental and other fields of regulation. A less controversial option would be to agree to specific customs reforms that could be entered as additional commitments under GATS Article XVIII. By contrast, decisions about the organization of postal operators and regulators are properly domestic policy decisions. Finally, if a reference paper-style approach articulating multilaterally agreed rules governing postal and related services is needed, then a forum such as the UPU arguably has far more appropriate expertise and competence than the WTO.

Conclusions

The postal sector and public postal services are undergoing major changes around the world. In many countries, the traditional role of public postal administrations is being reconsidered and in certain countries radically restructured.

Yet the mandate of public postal services to deliver high-quality postal and related services to all persons and regions at uniform, affordable prices remains a vital one – for reducing social inequality, lessening regional disparities, creating social stability and providing a firm foundation for broadly-based economic development.

It is difficult to achieve this mandate in much of the world, especially in developing countries. New investment, foreign aid and technical assistance, and revitalization of public postal services are all required. Obviously, there is no single formula or one-size-fits-all solution.

Foreign service providers or foreign postal administrations may well play an important and valuable role in reform and revitalization of postal and related services, especially in countries where public services have deteriorated from lack of resources and investment. However, it should not be assumed that this will always or necessarily be the case.

Foreign service providers, public or private, are not likely to assume voluntarily the public interest mandate of public postal administrations. Fulfilling this mandate will require investment in improved public services, rebuilding national postal administrations, and a strong regulatory capacity for governments where the private sector assumes new roles.

It is sensible for governments, in the north and the south, to maintain their options to reinvest and reregulate where market-driven reforms of the sort facilitated by the GATS do not succeed. Because relatively few commitments have been made, most WTO member governments retain a fair degree of policy flexibility over postal and courier services. But the GATS, like all international trade treaties, can be an unforgiving instrument if public policies are inadvertently exposed to challenge. And once commitments are made, they are subsequently very difficult to qualify or withdraw.

My message today is a straightforward one: mind your policy flexibility under the GATS. By all means experiment with new models of postal services. Learn from your own and others' reforms: from the successes *and* the failures. But do not burn your policy bridges behind you.

End notes

¹ World Trade Organization, Council for Trade in Services, “Communication from New Zealand: Negotiating Proposal for Postal/Courier Services, November 6, 2001, para. 17, S/CSS/W/115.

² Letter from Don Stephenson, director-General, trade Policy, Department of Foreign Affairs and International Trade to Deborah Bourque, 3rd National Vice-President, Canadian Union of Postal Workers, Feb. 19, 2002.

³ World Trade Organization, “Postal and Courier Services: Background Note by the Secretariat, June 12, 1998, S/C/W/39, p. 2.

⁴ Letter from David Hartridge, WTO Director, Trade in Services, to Director-General Thomas E. Leavey, Universal Postal Union, May 4, 1999, quoted in “Impact on the Universal Postal Union and its members of the World Trade Organization and its General Agreement on Trade in Services,” UPU International Bureau, Berne 2001, p. 7.

⁵ For example, the multinational express delivery industry has argued that restricting their access to letter mail boxes is discriminatory treatment and that government postal services receive preferential customs treatment.

⁶ World Trade Organization, Document MTN.GNS/W/120 dated 10 July 1991.

⁷ As the WTO secretariat, rather obliquely, observes, “[t]he distinction between these [items listed under courier services] and similar UNCPC items under postal services is that these are presumed to be services that can be provided by suppliers other than national postal administrations (WTO, op. cit., June 1998: p.2 n1.)”

⁸ GATS Article VIII requires governments to ensure that the activities of a monopoly supplier of postal services conform with the MFN treatment rule. In addition, governments must ensure that a monopoly supplier of postal services -- in the supply of the monopoly service -- conforms with any specific commitments.

⁹ The chief US GATS negotiator during the Uruguay Round noted that “[a]fter considerable debate, ‘abuse’ was left undefined ...” Richard B. Self, “General Agreement on Trade in Services,” in Terence B. Stewart, ed. *The World Trade Organization: the Multilateral Trade Framework for the 21st Century and US Implementing Legislation*, (Washington: American Bar Association, 1996), p. 532-3.

¹⁰ NAFTA Article 1502(3)(d) requires NAFTA parties to ensure that monopolies do not engage in “anti-competitive” practices in non-monopolized markets. Procedurally, the NAFTA and the GATS differ significantly. The NAFTA’s investment provisions can be invoked directly by investors, while dispute settlement under the GATS is strictly government to government. UPS is attempting to directly invoke Article 1502(3)(d), even though the NAFTA investor-state dispute settlement rules appear to preclude it from doing so. See NAFTA Article 1116(1)(b).

¹¹ Inside US Trade, April 28, 2000.

¹² Appleton and Associates, “Notice of Intent to Submit a Claim to Arbitration under Section B of Chapter 11 of the North American Free Trade Agreement,” UPS Inc. vs. Government of Canada, January 19, 2000, available at <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-e.asp#UPS>.

¹³ Inside US Trade, January 11, 2002.

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