

July 5, 2011

TOWARDS A UNITED STATES POSITION AT THE
DOHA CONGRESS OF THE UNIVERSAL POSTAL UNION

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Note: This paper was prepared and is submitted by me to the Advisory Committee on International Postal and Delivery Services of the U.S. Department of State in my capacity as a member of that Committee. This paper presents my personal views only and should not be construed to represent the views of any client of mine or of any other Committee member. The purpose of this paper is stimulate discussion and new thinking about possible U.S. initiatives at the Doha Congress of the UPU. Committee members and public participants in Committee meetings are invited to use this paper as they deem appropriate (it contains no confidential information). For the convenience of readers, I have placed many of the documents referenced in this paper on my website at www.jcampbell.com under the heading "UPU Doha Congress." Questions or comments may be addressed to me at jcampbell@jcampbell.com.

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SUMMARY

This paper proposes that the United States support inclusion of *four* new or revised articles in Universal Postal Convention to be negotiated at the 2012 Doha Congress of the Universal Postal Union (UPU). Exposition of these proposals and the reasons why they merit U.S. support is divided into five sections.

Section 1 recalls how the United States has led the world in developing innovative, procompetitive policies in areas of international commerce closely related to the postal and delivery services to be addressed at UPU Doha Congress. Successful U.S. initiatives include development of the General Agreement on Trade in Services (1996), fundamental reform of the regulatory framework for basic telecommunications (1997), and liberalization of international aviation through “open skies” agreements. In 2006, in ongoing trade negotiations, the U.S. joined the European Union, Japan, and New Zealand in seeking commitments to liberalize access to competitive postal and delivery service markets.

Section 2 summarizes overlapping criteria of three primary legal regimes which the U.S. position at the UPU Doha Congress must satisfy. *First*, the International Trade and Investment Act of 1984 directs the U.S. government, coordinated by the U.S. Trade Representative, “*to reduce or to eliminate barriers to, or other distortions of, international trade in services.*” *Second*, the Postal Accountability and Enhancement Act of 2006 established a pro-competitive national policy towards “international postal services and other international delivery services” and directed the Department of State to formulate appropriate policies and negotiate intergovernmental agreements in coordination with the USTR and other agencies. Such agreements may not create undue or unreasonable preferences for the Postal Service nor apply import and export laws in an unequal manner to competitive products. *Third*, the antitrust laws prohibit the Postal Service and other federal agencies from participating in an international agreement that restrains competition in any market outside the scope of the U.S. postal monopoly. These three legal regimes are substantively consistent and mutually reinforcing.

Section 3 reviews U.S. interests at stake in the UPU Doha Congress. Most directly affected are providers of postal and delivery services. Three large U.S. operators account for about 42 percent of the global cross-border market in documents and small parcels: FedEx (19%), UPS (16%), and the Postal Service (7%). In addition, smaller American firms supply specialized international delivery services. As users, American companies, organizations, and individuals need an efficient and reliable system of international postal and delivery services. Since American activities span the globe, the needs of American service providers and users are not limited to services to and from the U.S. Finally, UPU agreements constitute an important element of a broader U.S. effort to create, as Ambassador Ron Kirk has put it, “a world where services are traded freely.”

Section 4 describes *four* specific proposals that, it is suggested, the U.S. advance in the UPU Doha Congress. While consistent with U.S. policies, law, and interests, these proposals are also intended to be realistic and capable to garnering support of other UPU member countries. The four proposals are:

- 1) To establish just and reasonable pricing *principles*, instead of fixing specific prices, for delivery of postal items exchanged between *industrialized* countries.
- 2) To clarify the scope of the *customs privileges* conferred by the Convention and Regulations of the Postal Operations Council and to *exclude commercial items* unless conveyed by a reserved service in the origin country.
- 3) To ensure that the Convention provides a *complete statement* of principles established by governments to govern the exchange of documents and parcels and to define and clarify *the delegation of authority* to the Postal Operations Council to adopt implementing Regulations.
- 4) To establish a framework for a *voluntary* reciprocal liberalization of *market access* for international postal and delivery services provided under *competitive* conditions.

Section 5 briefly discusses implementation of these proposals at the Doha Congress. Since the proposals are (i) derived from reform principles shared with the European Union and other industrialized countries and (ii) do not pose a direct challenge to the interests of developing countries, it appears feasible to gain the support of the former and acquiescence of the latter. If, however, a majority of developing countries oppose these proposals, then industrialized countries can accomplish most of the substantive reforms by establishing what the UPU calls a “Restricted Union.” Section 5 also lists additional issues that the U.S. may wish to address either by substantive proposals or by initiating preparatory studies.

1 U.S. POLICIES TOWARDS INTERNATIONAL TRADE IN SERVICES

At the April 7, 2011, meeting of the Advisory Committee on International Postal and Delivery Services, the Department of State invited submission of considered views on what positions the United States should advocate at the Congress of the Universal Postal Union (UPU) to be held convened in October 2012 in Doha, Qatar. This paper (in section 4) suggests that the U.S. support inclusion of four new or revised articles in the 2012 edition of the Universal Postal Convention. These proposals appear to be consistent with, and indeed compelled by, U.S. trade policies (reviewed section 1), U.S. law (section 2), and U.S. commercial interests (section 3). Section 5 discusses implementation of these proposals at the Doha Congress and additional issues that could be addressed.

Free trade in services has been the cornerstone of U.S. international economic policy since enactment of the International Trade and Investment Act in 1984. U.S. leadership has been instrumental in rolling back antiquated protectionism in international service sectors. A landmark achievement was agreement on the General Agreement on Trade in Services (GATS) in the Uruguay Round of trade negotiations that ended in 1994. In September 2010, Ambassador Ron Kirk, the U.S. Trade Representative, summed up U.S. policy as follows:

Our ultimate goal to create a world where services are traded freely. For the United States, services are a priority in every discussion we have —whether it is at the bilateral, regional, or multilateral level — and in every forum —ranging from working group consultations to formal free trade agreements. In all of these fora we are working to create a fair and open services trading environment that allows game-changing technology and innovation to prosper.¹

In the last two decades, the U.S. has played an especially effective role in reforming the rules for the two international service sectors most closely related to international postal and delivery services: telecommunications and aviation. In each case, ultimate success resulted from sustained cooperation between the United States and the European Union and, within the U.S. government, coordination between executive departments and regulatory authorities.

In international telecommunications, the principal reform measure was the 1997 Agreement on Basic Telecommunications, a multilateral agreement worked out within the World Trade

¹Ambassador Ron Kirk, United States Trade Representative, “Remarks to Coalition of Service Industries 2010 Global Services Summit” (Sep 22, 2010) (emphasis added).

Organization (WTO). Two key elements in the negotiations were efforts of the Federal Communications Commission (FCC) to reform “settlement rates” and development of a “reference paper” that embodied regulatory principles suited to the telecommunications market.

“Settlement rates” are charges levied by a telecommunications operator for delivering incoming international telephone calls. In many countries, a national telephone monopolist would charge exorbitant settlement rates for delivering calls originating in the U.S., yet, because of domestic deregulation in the 1980s, U.S. telecommunications operators were unable to earn monopoly profits on incoming international calls. In 1995, the FCC estimated that about 70 percent of the \$5.4 billion that U.S. telephone companies annually paid to foreign operators was, in effect, a subsidy from American consumers to foreign monopolists and their customers. With EU acquiescence, the FCC unilaterally capped settlement rates that U.S. carriers could pay foreign telephone monopolists. This substantially undercut the benefits these countries received by staying out of a multilateral agreement.

The telecommunications “reference paper” was a second major innovation. It expanded upon the basic GATS commitments by listing six additional regulatory principles that WTO member countries could incorporate in their schedules of commitments. Adhering to these principles would effect a genuine market opening in the global telecommunications sector. The six principles of the reference paper were: (i) safeguards to prevent anticompetitive practices; (ii) a right of interconnection between operators; (iii) a right to require universal service; (iv) transparency of licensing criteria; (v) use of non-discriminatory and objective criteria to allocate scarce resources such as frequency spectrum; and (vi) establishment of independent regulators. As one author has put it, the reference paper became “a measuring stick of what the top industrialized and industrializing countries judged to be efficient market management.”²

The U.S. and European Union persuaded 69 countries to join the WTO’s Basic Agreement on Telecommunications. The agreement substantially liberalized domestic and international telecommunications services in national markets accounting for 99 percent of world revenues. In March 1997, U.S. Trade Representative Charlene Barshefsky triumphantly reported to a House subcommittee, “*the United States has effectively exported American values of free competition,*

²Peter F. Cowhey and Jonathan D. Aronson, *Transforming Global Information and Communications Markets: The Political Economy of Innovation* (2009) at 164.

*fair rules and effective enforcement to global telecom services markets.”*³

In international aviation, the U.S. has likewise pro-actively promoted competition by a combination of regulatory decisions and intergovernmental negotiations. The regulatory thrust focused on repeal of the immunity from U.S. antitrust laws which the International Air Transport Association, a trade association of virtually all international airlines, had enjoyed since the 1940s. In 2006, the U.S. Department of Transportation issued a “show cause” order demanding interested parties to explain why antitrust immunity should be maintained for IATA agreements fixing interline rates. An “interline” rate is a rate for international air transportation provided successively by two or more airlines. An interline rate may apply to either passenger or cargo transportation. In 2007, the DOT concluded that agreements between airlines setting interline rates for passengers and cargo were *per se* violations of U.S. antitrust law.⁴ DOT rejected the claim that interline agreements were necessary to create a product that airlines were unable to offer individually.⁵ DOT pointed out that each airline could individually establish “interlineable” rates for onward carriage of passengers or cargo, thus allowing originating carriers to develop through fares independently by incorporating the interlineable rates of other carriers.⁶ DOT was especially concerned that IATA conferences allowed airlines to influence charges in markets which they did not serve directly.⁷ DOT’s condemned conference negotiations that did not directly set the level of passenger fares but nonetheless agreed on “fare or rate levels . . . ,

³Statement of Ambassador Charlene Barshefsky WTO Basic Telecom Agreement Testimony before the House Commerce Committee — Subcommittee on Telecommunications, Trade & Consumer Protection (March 19, 1997). <http://www.state.gov/documents/organization/65881.pdf> (Jun. 3, 2011).

⁴Order 2007-3-27 (Mar. 30, 2007) at 37 (passenger fares), 48 (cargo rates).

⁵DOT rejected IATA's argument that cargo interline agreements are necessary to provide through cargo services: “We see no reason why the availability of interline cargo service would significantly decline without tariff conferences. Interline cargo service is available in U.S. domestic and transborder markets even though no IATA tariff conferences exist for them.” *Id.* at 47.

⁶*Id.* at 28 (“An airline can publish fares that are interlineable or combinable for interline travellers with fares offered by other airlines”).

⁷*Id.* at 35 (“The tariff conferences additionally reduce competition because IATA's procedures enable airlines to bargain over fares and to punish airlines that offer unacceptably low fares, as we explained in our show-cause order. Order 2006-7-3 at 34-36. The IATA bylaws allow a member airline to vote on, and veto, interline fare proposals applicable to markets that that airline does not even serve. Allowing airlines to vote on fares being set for markets served only by different airlines gives member airlines the ability to block fares that may indirectly compete with the airline's own fares in other markets”).

conditions of service . . . , and price applicability conditions.”⁸ A subsequent case further illuminates the strict limits on acceptable price coordination. In 2008, DOT accepted — but did not grant antitrust immunity to — an IATA agreement that adopted an algorithm for establishing certain interline fares. In so doing, DOT made clear that it accepted the agreement only because the algorithm was based on market fares freely established by airlines and implementation of the algorithm did not involve discussions between airlines.⁹

While moving against inter-airline agreements designed to reduce competition, the U.S. has, since 1992, pressed foreign governments for bilateral “open skies” aviation agreements. An open skies agreement allows an air carrier from either country to provide passenger and cargo transportation between any point in one country and any point in the other country without limits on rates or frequencies. Crucially, an open skies agreement also includes “beyond rights” — authority to transport passengers or cargo to third countries. Beyond rights open the door to creation of efficient regional and global networks. As one of the main inducements for negotiations, DOT declared that, if an open skies agreement was in place, it would grant antitrust immunity to alliances between U.S. carriers and the air carriers from the other country, thus providing foreign carriers improved access to the U.S. market.¹⁰

In 2007, in the biggest open skies agreement to date, the U.S. and the European Union liberalized air transportation services between United States and all 27 EU member states. Most significantly from the standpoint of postal and delivery services, the agreement includes strong protections for multimodal operations.¹¹ So long as airlines and freight forwarders are operating “in connection with international air transportation,” they can also provide surface transportation and still access airport customs facilities. For example, if FedEx carries express items from the U.S. to Europe by air, it can clear customs centrally and truck the express items anywhere in

⁸Id. at 39.

⁹Order 2008-8-4 (Jul. 7, 2008) at 4. DOT described the new agreement as “a mechanistic, computer-driven process that involves no direct contact between carriers” and a process that would “involve no direct contacts between carriers, and the process is open to participation by non-LATA carriers”. Id. at 6.

¹⁰Alan P. Dobson and Joseph A. McKinney, “Sovereignty, Politics, and U.S. International Airline Policy,” *J. Air Law & Commerce*, Vol. 74, pp. 527-52 (2009). For a comprehensive analysis of U.S. aviation policies and the development of international airline alliances, see Angela Cheng-Jui Lu, *International Airline Alliances: EC Competition Law/US Antitrust Law and International Air Transport* (2002).

¹¹U.S.-EU Air Transport Agreement (Apr. 30, 2007), Art. 10(10). <http://www.state.gov/e/eeb/rls/othr/ata/e/eu/114768.htm> (Jun. 4, 2011).

Europe without separately applying for trucking authority or other permits that would otherwise be required by EU member states. The open skies agreement thus overrides restrictions on the operation of road vehicles or airport access embedded in local and national regulations and creates an “end-to-end” regulatory regime.¹²

A recent study has reported that liberalization of international air services has generated “significant additional opportunities for consumers, shippers, and the numerous direct and indirect entities and individuals affected by such liberalization.”¹³ In March 2011, the U.S. concluded its one hundredth bilateral open skies aviation agreement. In celebration, Secretary of State Hillary Clinton observed, “*Open Skies agreements not only allow us to cross great distances . . . but also to open up markets, create jobs, allow people in far-removed countries to interact, share information, and build businesses together.*”¹⁴

The U.S. and the European Union have also collaborated in efforts to liberalize international postal and delivery services. As part of the Doha Round of trade negotiations in the WTO, in March 2006, the U.S. and European Union joined Japan and New Zealand to distribute a “plurilateral request” to other WTO member countries. The request asked for “*new and improved commitments that reflect meaningful progress toward full market access and national treatment for delivery services in the area of Postal and Courier Services, including Express Delivery.*”¹⁵ In particular, the request asked addressees to commit themselves to “substantially unrestricted market access” and “effective national treatment” for all postal and delivery services “carried out under competitive conditions.” The request also alluded to the possibility of a postal version of the telecommunications reference paper, an idea proposed separately by the EU in January 2005,

¹²In June 2010, the U.S. and European Union agreed to an extension or “second stage” of the 2007 agreement. See <http://www.state.gov/r/pa/prs/ps/2010/06/143593.htm> (Jun. 4, 2011). The United States has also sought to develop a multilateral air transportation agreement that does not depend upon a formal union of states like the EU. In 2001, the United States announced the Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT) with New Zealand, Singapore, Brunei, and Chile; it was later joined by Samoa, Tonga, and Mongolia.

¹³InterVISTAS-ga2, *The Economic Impact of Air Service Liberalization* (2006), p. ES-2. http://www.intervistas.com/4/reports/2006-06-07_EconomicImpactOfAirServiceLiberalization_FinalReport.pdf (Jun. 4, 2011).

¹⁴“Remarks at a Ceremony Celebrating the Negotiation of Agreements Between the United States and 100 Open Skies Partners” (Mar. 30, 2011). <http://www.state.gov/secretary/rm/2011/03/159389.htm> (Jun. 3, 2011).

¹⁵United States Trade Representative, “Collective Request for Postal and Courier Services, including Express Delivery” (unpub., undated).

by asking addressees to consider commitments in excess of those normally involved in GATS negotiations. Such additional commitments, the request proposed, should address “unreasonable practices by dominant suppliers”; “ensure that licensing requirements are transparent and reasonable”; and “where a specifically committed service is subject to sectoral regulation, ensure that the regulatory body is separate from and not accountable to any supplier of such a service.”

The plurilateral request of March 2006 represents a seminal step towards development of a viable U.S. position at the 2012 Doha Congress of the UPU. Although the WTO’s Doha Round as a whole has progressed little since March 2006, the plurilateral request remains an official, high level statement of principles for future governance of international postal and delivery services that has been endorsed by representatives of 30 industrialized countries. These 30 countries represent about *68 percent* of all international letter post services and (probably) a roughly similar share of international parcel and express services. The plurilateral request thus offers an already agreed platform for U.S. proposals at the UPU Doha Congress.

2 U.S. LEGAL FRAMEWORK FOR INTERNATIONAL AGREEMENTS ON POSTAL AND DELIVERY SERVICES

From a U.S. perspective law, an intergovernmental agreement governing international postal and delivery services must satisfy the overlapping — and mutually reinforcing — criteria of three primary legal regimes: trade law, postal law, and antitrust law.

2.1 Trade law

The International Trade and Investment Act of 1984 added to the objectives of the U.S. international trade negotiations: “*to reduce or to eliminate barriers to, or other distortions of, international trade in services (particularly United States service sector trade in foreign markets), including barriers that deny national treatment and restrictions on the establishment and operation in such markets.*”¹⁶ The act delegated primary responsibility for implementation to the Office of the U.S. Trade Representative, which was directed to “*develop (and coordinate the implementation of) United States policies concerning trade in services*”.¹⁷ The Department of

¹⁶Act of October 30, 1984, Pub. L. No. 98-573, § 305(a)(1), 98 Stat. 2948, *codified* 19 U.S.C. § 2114a(a)(1)(A) (2009). The International Trade and Investment Act was enacted as Title III of Pub. L. No. 98-573.

¹⁷19 U.S.C. § 2114c(1)(A) (2009).

Commerce was directed to establish a “service industries development program” that would, inter alia, analyze information pertaining to the international operations and competitiveness of U.S. service industries including information with respect to “treatment of services under international agreements of the United States.”¹⁸ The 1984 act defined “services” broadly to include “economic activities whose outputs are other than tangible goods” and added a list of service sectors explicitly included.¹⁹ In 1998, following an investigation by the General Accountability Office (GAO),²⁰ Congress amended the act by adding “*postal and delivery services*” to the list of services explicitly included in the trade in services program.²¹

2.2 Postal law

International postal service for the general public began in 1840s when Congress first authorized the Postmaster General to conclude international agreements to facilitate international postal services. For three decades, the scope of international postal service depended upon the number of countries with whom the United States had bilateral postal agreements. After the founding of the Universal Postal Union in 1875, the scope of international postal service expanded as countries joined the UPU.

Nonetheless, to this day, U.S. postal law provides that the Postal Service is authorized but not obliged to provide an worldwide international postal service for the general public. The international service obligation of the Postal Service is stated as follows:

The Postal Service shall plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees. The Postal Service

¹⁸19 U.S.C. § 2114b(1)(C)(v) (2009).

¹⁹19 U.S.C. § 2114b(5). The definition of “services” applies to “this section” which, in § 306 of the International Trade and Investment Act included provisions codified as 19 U.S.C. §§ 2114b and 2114c.

²⁰General Accounting Office, “U.S. Postal Service: Unresolved Issues in the International Mail Market” (Mar.1996).

²¹Act of October 21, 1998, Pub. L. No. 105-277, 112 Stat. 2681. This was an omnibus appropriations act. Section 101(h) enacted the Treasury and General Government Appropriations Act, 1999. Section 633 of this act, 112 Stat. 2681-523, amended section 407 of the postal law, 39 USC 407, and section 305(a) of the Trade and Tariff Act of 1984, 19 USC 2114b. In the same law, Congress transferred primary responsibility for formulation U.S. policy at the UPU from the Postal Service to the Department of State and adopted a sense of Congress resolution declaring that “It is the sense of Congress that any treaty, convention or amendment entered into under the authority of section 407 of title 39 of the United States Code, as amended by this section, should not grant any undue or unreasonable preference to the Postal Service, a private provider of postal services, or any other person.” These provisions were superseded by the Postal Accountability and Enhancement Act of 2006, which completely revised 407.

shall receive, transmit, and deliver throughout the United States, its territories and possessions, *and, pursuant to arrangements entered into under sections 406 and 411 of this title, throughout the world*, written and printed matter, parcels, and like materials and provide such other services incidental thereto as it finds appropriate to its functions and in the public interest.²²

Sections 406 and 411 refer only to military mail and mail conveyed for government agencies, respectively.

In 2006, the Postal Accountability and Enhancement Act²³ (PAEA) comprehensively revised the postal law as it relates to international services. Prior to the PAEA, section 407 of Title 39 dealt only with negotiation and conclusion of “international postal agreements” — i.e., agreements pertaining to the activities of the U.S. Postal Service. The PAEA revised section 407 so that it refers more broadly to intergovernmental agreements relating to “international postal services *and other international delivery services*.” Thus, after PAEA, section 407 is no longer limited to agreements facilitating the international operations of the Postal Service.

Section 407 is divided into five subsections. Subsection (a) establishes, for the first time, a statement of U.S. policy towards international postal and delivery services. Subsections (b), (c), and (d), define the authorities of the Secretary of State, the Postal Regulatory Commission, and the U.S. Postal Service, respectively. Subsection (e) prescribes rules for the equal application of import and export laws — in particular, customs law — to competitive postal services offered by the Postal Service and to similar delivery services offered by private U.S. companies.

The statement of policy in subsection (a) sets out four substantive and procedural objectives:

(1) to promote and encourage communications between peoples by efficient operation of international postal services and other international delivery services for cultural, social, and economic purposes;

(2) to promote and encourage unrestricted and undistorted competition in the provision of international postal services and other international delivery services, except where provision of such services by private companies may be prohibited by law of the United States; and

(3) to promote and encourage a clear distinction between governmental and operational responsibilities with respect to the provision of international postal

²² 39 U.S.C. § 403(a) (2009) (emphasis added).

²³Postal Accountability and Enhancement Act, Pub. L. No. 109-435, 120 Stat. 3198 (2006).

services and other international delivery services by the Government of the United States and by intergovernmental organizations of which the United States is a member.

(4) to participate in multilateral and bilateral agreements with other countries to accomplish these objectives.

Subsection (b) provides that the Secretary of State “*shall be responsible for formulation, coordination, and oversight of foreign policy related to international postal services and other international delivery services and shall have the power to conclude postal treaties, conventions, and amendments related to international postal services and other international delivery services.*” The delegation is limited, however, by other provisions of section 407. At the outset paragraph (b)(1) provides that the Secretary may not conclude any intergovernmental agreement that “*would, with respect to any competitive product, grant an undue or unreasonable preference to the Postal Service, a private provider of international postal or delivery services, or any other person.*”

The term “competitive product” refers to a distinction between “market dominant” and “competitive” products introduced by the PAEA. Competitive products are products “in the sale of which the Postal Service exercises sufficient market power that it can effectively set the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products.”²⁴ Products covered by the postal monopoly cannot be considered competitive products. Market dominant products include all postal products which are not competitive products.

In carrying its responsibilities, the Secretary is also required to coordinate with other federal agencies and to give “full consideration to the authority vested by law or Executive order in the Postal Regulatory Commission, the Department of Commerce, the Department of Transportation, and the Office of the United States Trade Representative.” In the PAEA, the Postal Service is *not* treated as a government agency but as one of several interested parties with whom the Secretary is directed to maintain “appropriate liaison.” This treatment of the Postal Service reflects the objective, listed in paragraph (a)(3), to promote “a clear distinction between governmental and

²⁴39 U.S.C. § 3642(b)(1) (2009).

operational responsibilities . . . *by the Government of the United States.*”

Subsection (c) provides that the Secretary of State shall consult with the Postal Regulatory Commission and, in most instances, give effect to its views. The Postal Regulatory Commission is required to advise on any intergovernmental agreement that establishes a rate or classification for a market dominant product *prior to* conclusion of such agreement. The Commission is to determine whether such rate or classification is “consistent with the standards and criteria” established for domestic market dominant products of the Postal Service. In rendering its advisory opinion, the Commission is obliged by due process requirements and the Administrative Procedure Act to afford affected parties “the opportunity to be heard at a meaningful time and in a meaningful manner.”²⁵ Once the Commission’s advice is provided, the Secretary is obliged to ensure that the agreement is “consistent with the views submitted by the Commission” unless the Secretary determines that to do so would not be in the foreign policy or national security interest of the United States.

Subsection (d) authorizes the Postal Service to enter into agreements with foreign parties for the provision of international postal services. However, the Postal Service is prohibited from entering into an agreement with an agency of a foreign government unless such agreement is “solely contractual in nature” and does not “purport to be international law”. This limitation, too, reflects the objective set out in paragraph (a)(3) of achieving “a clear distinction between governmental and operational responsibilities . . . *by the Government of the United States.*”

Subsection (e) prescribes a level competitive playing field in the application of customs laws and other import and export controls. Specifically, subsection (e) requires that “the Customs Service and other appropriate Federal agencies shall apply the customs laws of the United States and all other laws relating to the importation or exportation of such shipments in the same manner” to competitive products of the Postal Service and similar shipments by private companies.” In addition, subsection (e) requires the Secretary of State to encourage foreign governments, “to the maximum extent practicable,” to give non-discriminatory customs treatment to competitive products and similar products of private operators exported from the

²⁵Postal Regulatory Commission, Rate and Service Changes to Implement Baseline Negotiated Service Agreement with Bookspan, Docket No. MC2005-3, at 82 n. 128, *quoting* Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

United States.

2.3 Antitrust law

The Postal Accountability and Enhancement Act of 2006 applied the antitrust laws to activities of the Postal Service outside the scope of the postal monopoly law (but omitted penalties against individual officers and employees). Specifically, section 409(e) of Title 39 provides:

(e)(1) To the extent that the Postal Service, or other Federal agency acting on behalf of or in concert with the Postal Service, engages in conduct *with respect to any product which is not reserved to the United States under section 1696 of title 18*, the Postal Service or other Federal agency (as the case may be) . . .

(B) shall be considered to be a person (as defined in subsection (a) of the first section of the Clayton Act) for purposes of—

(i) the antitrust laws (as defined in such subsection); and

(ii) section 5 of the Federal Trade Commission Act to the extent that such section applies to unfair methods of competition. *For purposes of the preceding sentence, any private carriage of mail allowable by virtue of section 601 shall not be considered a service reserved to the United States under section 1696 of title 18.*

(2) No damages, interest on damages, costs or attorney's fees may be recovered, and no criminal liability may be imposed, under the antitrust laws (as so defined) from any officer or employee of the Postal Service, or other Federal agency acting on behalf of or in concert with the Postal Service, acting in an official capacity. [emphasis added]

The antitrust laws apply not only to international *competitive* products but also to international *market dominant* products not within postal monopoly, i.e., (i) not covered by 18 U.S.C. § 1696 or (ii) covered by that provision but exempted by 39 U.S.C. § 601. Precisely which market dominant products fall within the scope of the postal monopoly is unclear because the postal monopoly law is, in the main, an 1872 statute with uncertain application to commerce in the twenty-first century. It is clear, however, that the postal monopoly includes the carriage of “letters” — as that term was used in the 1872 act — unless exempted by one of nine statutory exceptions to the monopoly. It is also undisputed that the postal monopoly does *not* include (i) the carriage of parcels (including what the UPU calls “small packets”); (ii) express services; or

(iii) outbound international services for the carriage of letters sent in bulk.²⁶

With respect to international postal and delivery services, U.S. antitrust law generally forbids agreements which are “in restraint of trade or commerce . . . with foreign nations.”²⁷ As noted above, in the context of international aviation, U.S. authorities have concluded that antitrust law prohibits a wide variety of agreements among air carriers establishing prices and practices for joint services. Although the U.S. has not applied the antitrust law to postal services, in the European Union the competition laws have been repeatedly applied to postal services, spawning directives and decisions that have reformed the postal sector and brought to an end all European postal monopoly laws.²⁸ Some of these decisions have involved provisions of the Universal Postal Convention or similar agreements between European postal service providers.

3 U.S. INTERESTS AT STAKE IN THE UPU DOHA CONGRESS

The intergovernmental agreements to be negotiated at the UPU Doha Congress affect directly American firms providing international postal and delivery services for documents and parcels weighing up to 20 kg. Service providers range from the large and well-established — such as the Postal Service, FedEx, and UPS — to smaller operators who provide newer or more specialized services. These agreements will also affect American users of international postal and delivery services — whether or not they use U.S. operators — and, in the case of commercial and institutional users, their customers or clients.²⁹ More indirectly, but significantly, the new UPU agreements will affect, positively or not, the broader trend towards free trade in delivery services.

The total size of the market affected by the UPU agreements is unknown. The best estimate

²⁶See generally, George Mason University, School of Public Policy, “Postal Monopoly Laws: History and Development of the Monopoly on the Carriage of Mail and the Monopoly on Access to Mailboxes,” Appendix C to Postal Regulatory Commission, *Report on Universal Postal Service and the Postal Monopoly* (2008). The scope of the current postal monopoly law is summarized in chapters 1 and 11.

²⁷See generally, U.S. Department of Justice and Federal Trade Commission, “Antitrust Enforcement Guidelines for International Operations” (Apr. 1995).

²⁸See generally, WIK Consult, *The Role of Regulators in a More Competitive Postal Market* (2009). This study was prepared for the European Commission and is available from http://ec.europa.eu/internal_market/post/studies_en.htm. Chapter 4 deals with the application of competition law and state aid provisions in the postal sector.

²⁹ Some provisions of UPU agreements marginally affect U.S. domestic delivery services. These provisions do not appear to have an appreciable effect on the conduct of the domestic U.S. market.

is provided by 2010 UPU study prepared by a consultant, Adrenale Corporation.³⁰ The Adrenale Report surveyed the market for the carriage of cross-border documents and parcels weighing up to 2 kg in 40 countries. Adrenale estimated that these 40 countries constituted about 85 to 90 percent of the global market and were representative of the whole. According the Adrenale Report, in 2008 total annual revenues in this 40-country group were about \$ 31 billion. This implies a total world market of \$35 to \$36 billion. Services for non-urgent letters account for about 30 percent of revenues, while services for parcels and express services account for the rest. The market was dominated by five operators who collectively shared almost three-quarters of the global market: Deutsche Post/DHL (21%), FedEx (19%), UPS (16%), TNT (9%), and U.S. Postal Service (7%). Of these five organizations, four are private companies; only the Postal Service is a government agency.³¹

The direct interest of American carriers can thus be estimated to be about \$14.5 to \$15 billion in annual revenues, about 42 percent of the global market. If parcels weighing more than 2 kg were included, it is likely that the share of U.S. carriers would be higher, perhaps significantly so. The interest of American carriers is not limited to services into and out of the United States. Since FedEx and UPS have worldwide operations, they are affected by UPU-related restrictions or distortions affecting cross-border services conducted wholly outside of the U.S. In addition, in many countries, acts of the UPU affect the development of domestic postal laws and may adversely affect American companies seeking to participate in such markets.

Although cast in the form of intergovernmental agreements, most of the content of UPU agreements consists of operational arrangements between public postal operators who act as agents or partners of the Postal Service. For the U.S. Postal Service in 2010, international mail apparently included about 608 million outbound items and 254 million inbound items, i.e., about 0.15 to 0.35 percent of total mail volume depending on whether the outbound or the inbound figure is used as the measure. Revenues from international mail operations appear to have been about \$ 2.4 billion, about 3.6 percent of total revenues, although much of this revenue is simply

³⁰Adrenale Corporation, *Market Research on International Letters and Lightweight Parcels and Express Mail Service Items* (2010)

³¹The German government still owns 31 percent of the Deutsche Post/DHL but ultimately intends to sell its shares.

passed through to international airlines and foreign post offices.³²

American companies that use international document and parcel delivery services are also directly affected by the agreements to be negotiated at the Doha Congress. They have a significant interest in the efficient functioning of international documents and parcel delivery services, whether or not supplied by American service providers. Their interest, too, is not limited to items sent to or from the United States but also includes services between foreign countries.

Individual American mailers also have a direct interest in the agreements of the Doha Congress. According to a recent survey by the UPU, “social mail” constitutes about 45 percent by volume and 24 percent by weight of outbound international mail sent from industrialized countries. The rest is “business mail.”³³ While households and individual users appear to be a minor portion of the market, they are obviously important to society and the nation. Their interest, however, is necessarily focused on shipments to and from the United States.

Finally, the relationship between UPU agreements and the broader American interest in free trade in services is less tangible but nonetheless significant. As the Coalition of Service Industries and U.S. Chamber of Commerce have recently pointed out state-owned enterprises threaten the fairness and efficiency of international commerce. The UPU agreements are a prime example of intergovernmental agreements which are designed to give special privileges to state-owned enterprises. Indeed, there is a significant risk of expanding these privileges through mission creep to commercial activities outside its traditional mission. At the 2008 Geneva Congress, the International Bureau proposed to extend the formal mission of the UPU by adding “*to contribute to fostering trade and promoting economic and social development worldwide.*” This expansive addition to the UPU charter was supported by a majority of delegates but failed to attain the requisite super-majority only because of determined opposition led by the United States. Nonetheless, there are ongoing efforts to integrate within the UPU structure, delivery

³²The Postal Service does not clearly state the volumes and revenues associated with international mail. Figures in the text are sums of product listings given in PRC, Annual Compliance Determination Report 2010, Table IV-7, pp. 31-32 (“Fiscal Year 2010 Volume, Revenue, Cost and Cost Coverage by Class Current Classification (Products”). In this table, the figure for inbound single piece mail international is incorrectly given as 34,000. A review of the PRC library reference LR-1 suggests that the correct figure should be 253,895,000 and this corrected figure has been included in the sums given in the text.

³³UPU, POC C1 TDG 2011.1–Doc 4a. Annex 2 (Apr. 13, 2011).

services which have historically operated largely outside the mandate of the UPU, such as those provided by the EMS Cooperative, a voluntary association of public postal operators. Then, too, acts of the UPU already give advantages to certain limited financial services of public postal operators, and there appears to be a possibility that these privileges may be expanded in Doha.

4 FOUR U.S. PROPOSALS FOR THE DOHA CONGRESS

The U.S. position at the Doha Congress must be consistent with national policies, laws, and interests. At the same, the U.S. position must take into account practical limitations. Neither the U.S. government nor governments of other industrialized countries can afford to maintain a large staff of experts in postal policy. The U.S. policy position must be relatively simple and easy to explain if it is to gain support of other governments.

With these criteria in mind, this section presents four proposals that, it is suggested, the U.S. could reasonably advance in the Doha Congress. All are envisioned as articles for the 2012 Universal Postal Convention. None would require amendment of the Constitution or General Regulations, a more difficult diplomatic undertaking. These four proposals do not break new ground. They adapt and extend concepts already embraced in domestic postal reforms in the United States and the European Union and build on principles set out in the plurilateral request advanced by the U.S. and European Union in the WTO's Doha Round. In sum, these proposals do not add up to the comprehensive reform of the UPU that the United States, rightly, called for in the 1999 Beijing Congress. But they would help to point the UPU in a new direction and resolve some of the major conflicts between the acts of the UPU and the more liberal economic regulatory policies of the United States, the European Union, and other industrialized countries.

4.1 Proposal 1: To establish just and reasonable pricing *principles*, instead of fixing specific prices, for delivery of postal items exchanged between *industrialized* countries.

In the UPU, *terminal dues* and *inward land rates* play roughly the same role that “settlement rates” and “interline fares” used to play in international telecommunications and aviation.

“Terminal dues” are what public postal operators charge each other for the delivery of inbound international letter post items (letters, advertisements, and small packets weighing up to 2 kg).

“Inward land rates” are what public postal operators charge each other for delivery of inbound international parcel post shipments. Both types of delivery charges are fixed by the UPU by

means of elaborate rate agreements that are unrelated to costs. The effect on international trade is distortive, inefficient, and anticompetitive. This has been known for a long time. More than 20 years ago, the Department of Justice observed,

*The current terminal dues structure produces distortions in the economic structure of the international mail system. Since terminal dues do not accurately reflect costs, the current system causes a subsidy to flow from some parties to others, provides artificial cost advantages to remailers in some cases and to postal administrations in others, and generally impairs the efficient operation of the international mail system.*³⁴

Since this analysis, the UPU has modified its approach towards terminal dues to provide higher rates for mail exchanged between industrialized countries than for mail conveyed to, from, or between developing countries. In 1999, the UPU committed to adjust terminal dues to “approach more closely the costs of the services rendered.”³⁵ However, more than a decade later UPU terminal dues are still fixed by agreement, still do not reflect costs, and still distort the economic structure of the international mail system causing a subsidy to flow from some parties to others.

The UPU terminal dues system cannot be reconciled with the requirements of U.S. policy and law. For postal items outside the letter monopoly, U.S. antitrust laws appear to pose an insurmountable obstacle to participation by the Postal Service or other federal agencies in the price-fixing arrangements of the UPU. The UPU terminal dues system is similar to the interline agreements between airlines condemned by the Department of Transportation as per se violations of U.S. antitrust laws. Similarly decisions of the European Commission leave no doubt that UPU terminal dues agreements are incompatible with European competition rules.³⁶ While U.S. antitrust principles are not identical to European competition rules, it is unlikely that scrutiny under U.S. antitrust laws would lead to an opposite conclusion.

³⁴Department of Justice, “Evaluating a Proposed Agreement on Terminal Dues,” p. 25. This undated study accompanied a letter dated March 1, 1988, from Charles F. Rule, Assistant Attorney General for Antitrust, Department of Justice, to Carol T. Crawford, Associate Director for Economics and Government, Office of Management and Budget (emphasis added).

³⁵UPU, 1999 Beijing Congress, Resolution C46/1999.

³⁶See Commission Decision of 23 October 2003, Reims II renotification, OJ L56, 24 Feb 2004, p. 76. The European Commission held that the Reims II terminal dues agreement was a price-fixing agreement under EU competition rules but found that it could qualify for a “public interest” exception only because it included several cost-based provisions wholly absent from UPU terminal dues provisions.

UPU terminal dues rates are also inconsistent with U.S. postal law. As far as inbound *market dominant* postal services are concerned, U.S. law requires that terminal dues rates must conform to the same principles that govern domestic postal services, yet the Postal Regulatory Commission reports that UPU terminal dues fall well short of the “attributable” (marginal) costs incurred by the Postal Service in delivering inbound international mail. If the Postal Service gave a U.S. company the same bulk mail rates that it gives the French Post Office, the practice would undoubtedly be condemned as illegal by the Commission.³⁷ In so far as *competitive* international postal services are concerned, postal law forbids U.S. participation in an agreement that affords the Postal Service an “undue or unreasonable preference.” Yet an agreement that guarantees one U.S. carrier of outbound mail a special low rate for delivery by foreign post offices and denies this rate to competing American carriers is no less an “undue or unreasonable preference” than would be, for example, an international aviation agreement that provided an especially low landing fees at foreign airports for one American airline while denying the same fees to other American airlines.

It is also apparent that the UPU terminal dues system fails to “to reduce or to eliminate barriers to, or other distortions of, international trade in services” as directed by U.S. trade law. Indeed, distortions caused by the UPU terminal dues agreements beget further distortions. UPU terminal dues create incentives for private carriers and commercially-minded post offices to bypass the normal international mail system by, for example, tendering international mail to a foreign post office rather than to the national post office in the territory where the mailer resides.³⁸ To deter bypass competition the UPU has adopted a series of measures which attempt to preserve the market for outbound international mail in each country for the designated operator

³⁷Postal Regulatory Commission, *Annual Compliance Determination Report 2010* at 132 (“For FY 2010, therefore, the Commission concludes that Inbound First-Class Mail International did not satisfy the ‘requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to each class or type of mail service.’ See 39 U.S.C. 3622(c)(2).”).

³⁸As is well known to postal officials, because UPU terminal dues are well below the delivery costs incurred by post offices in industrialized countries, the post offices typically set postage rates for outbound international mail well above the level justified by the terminal dues paid for delivery of outbound international mail. This practice creates a financial incentive for a larger mailer in country A to transport his mail to an intermediate post office in country B that will forward the mail to destination countries C, D, and E via the international postal system. Many foreign post offices are willing to provide such “re-mail” services for a charge equal to the UPU terminal dues rates plus a small profit since they would normally earn no revenues from international mail originating in country A.

appointed by the government of that country.³⁹ These market allocation measures, too, are anticompetitive and distortive. And because the UPU terminal dues system establishes different trading conditions for different countries, it is highly questionable whether the UPU terminal dues system is consistent with U.S. obligations under the General Agreement on Trade in Services.⁴⁰

The way to establish terminal dues and inward land rates that are consistent with U.S. law is well known. Since domestic rates are based on costs in most countries (including virtually all industrialized countries), charges for delivering inbound international mail should be aligned with the domestic postage that would be charged for similar delivery services. The result is not only cost-based but also non-discriminatory in the sense the foreign mailers do not pay more or (as now) less than U.S. mailers for the same services. This approach would be fully consistent with U.S. law. The Postal Service would be fully compensated for its services. And the broader needs of U.S. society in a liberal regime for international trade would be advanced.

Reforming the entire UPU terminal dues system, however, would be a tall diplomatic order. It would require negotiations with 190 other UPU member countries, the vast majority of whom are likely to resist cost-based reforms because they benefit from current distortions. Yet reforming the whole world is not needed to fix most of the problem. Most of the economic distortions induced by the UPU system of delivery charges can be eliminated by reforming relations with a much smaller group of countries, the industrialized countries. The UPU treats 28 countries as industrialized countries.⁴¹ Of these 28, probably only 3 public postal operators are

³⁹UPU measures to inhibit competition include (1) authorizing post offices to intercept or surcharge remail; (2) restrictions on the operation of extraterritorial offices of exchange; (3) limitations on access to International Mail Processing Center (IMPC) codes; and (4) prohibitions against setting outbound international postage rates between domestic postage rates.

⁴⁰The apparent incomparability between the most-favoured-nation requirements of the GATS and the UPU terminal dues system has been remarked by several authors. *See, e.g.,* David Luff, “International Regulation of Postal Services: UPU vs. WTO Rules,” in *The Liberalization of Postal Services in Europe*, edited by Damien Geradin (The Hague: Kluwer Law International, 2002). The reply of the UPU is offered in a study by WTI Advisors, “Implications of the GATS and the Doha-Round Negotiations on the Provision of Postal Services” (April 2007). At page 56, WTI opines that the UPU terminal dues provisions are consistent with GATS because post offices do not compete with one another. As legal proposition, this is hardly convincing; as a factual premise it is certainly incorrect.

⁴¹Omitting territories that are not UPU members in their own right (e.g., Gibraltar, Norfolk Island), the UPU industrialized countries are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Israel, Italy, Japan, Liechtenstein, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, United Kingdom, United States, and the Vatican.

substantial net winners from the UPU's system of non-cost-based terminal dues. One of these is the Postal Service, which, presumably, does not need to be persuaded to comply with U.S. law and policy. The effective subsidy which the Postal Service receives from other industrialized country post offices (the opposite of the problem which the FCC faced in international telecommunications) is, in any case, only on the order of \$60 to \$100 million annually, an insignificant factor in the Postal Service's \$75 billion annual budget. The other two major winners are Royal Mail (U.K.) and the Spanish Post Office. In neither case would loss of the terminal dues subsidy threaten the financial viability of the operator. On the other side of the coin, the cost of the net subsidy is born primarily by the post offices and mailers of Germany, Denmark, France, Ireland, Japan, the Netherlands, Norway, and Sweden.⁴² All in all, the cast of key actors necessary to reform the system of delivery charges among industrialized countries is small in number and like-minded in economic policy.

At the Doha Congress, therefore, the most feasible course would be to seek reform of the system of charges for inward delivery of letter post items and postal parcels *exchanged between industrialized countries*. For such mail, the United States should propose a provision that establishes *principles* rather than *prices*. This is not a novel idea. It is the same approach that Article 13 of the EU Postal Directive applies to terminal dues and inward land rates for intra-EU cross-border postal services. The new provision should ensure that inbound international mail will be delivered at the same rates as domestic mail where there is no effective alternative to the national post office. In brief, the new provision could include the following main points:

- 1) a commitment to grant operators and mailers from other countries non-discriminatory access to monopoly or government ensured universal postal services on the same terms as available to national residents;

⁴²A recent study which attempts to estimate the distortive effects of the UPU terminal dues suggests that in 2008, in the exchange of mail among industrialized countries, the U.S. Postal Service may have received a subsidy from the other post offices of about 63 million SDR, then worth about \$ 99 million. If, however, the Postal Service has a more cost-based terminal dues bilateral agreement with Canada Post (as it has historically), then the estimated subsidy is reduced to about \$ 59 million. James I. Campbell Jr., Alex Kalevi Dieke, and Martin Zauner, "Terminal Dues: Winners, Losers, and the Path to Reform," paper submitted to the 19th Conference on Postal and Delivery Economics in St. Helier, Jersey, June 1-4, 2011. All estimates in the model are rendered in SDRs, the unit of money used by the UPU. On September 30, 2008, one SDR was equal to about US\$ 1.573, and this is the exchange rate used in the text. It should be emphasized that this study only offers rough estimates of the effects of UPU terminal dues.

- 2) a commitment that providers of universal postal services will provide, for their primary services, simplified linear tariffs that are aligned to domestic tariffs and suited to the needs for foreign mailers;
- 3) a recognition that providers of universal postal services should be able to adjust tariffs and adopt alternative bilateral arrangements among themselves where such adjustments and arrangements are cost-justified and transparent; and
- 4) a commitment to ensure that compliance will be enforced by an impartial and effective regulatory authority.

A draft of a Convention Article X1 to implement Proposal 1 is provided in the Appendix to this paper.

It should also be noted that an agreement on principles rather than prices is well-suited to the procedural requirements of U.S. postal law. Under section 407(c), the Secretary of State cannot conclude an intergovernmental agreement specifying rates and classifications for market dominant products until *after* the Postal Rate Commission has rendered an opinion on whether the terms of the agreement are consistent with the principles governing domestic postal products. Before rendering an opinion, the Commission is, in turn, obliged to afford affected parties an opportunity to be heard at a meaningful time and in a meaningful manner. An agreement on pricing principles, rather than specific rates and classifications, will avoid the need for lengthy ex ante review of rates and classification specified in a draft Universal Postal Convention.

4.2 Proposal 2: To clarify the scope of the *customs privileges* conferred by the Convention and Regulations of the Postal Operations Council and to *exclude commercial items* unless conveyed by a reserved service in the origin country.

Customs and other border controls constitute the single most significant regulatory obstacle to development of international parcel and delivery services. In the early twenty-first century, governments in modern industrialized countries have found it necessary to introduce elaborate barriers to protect their citizens against a wide variety of external threats ranging from terrorism to drug trafficking to theft of intellectual property. In addition, customs authorities remain responsible for the more traditional task of collecting duties. International postal and delivery services must deal daily with increasingly strict border controls in a global market that is, in technological terms, no larger or more difficult to serve than the U.S. market in the mid-twentieth

century. One need only consider how customs and security controls at each state border would have affected the development of services of the U.S. Postal Service or FedEx or UPS to realize the enormous costs imposed by border controls on the global economy in the twenty-first century. For international shipments subject to border controls, the *service* that international postal and delivery services are selling is as much customs facilitation as collection, transportation, and delivery.

Border controls on shipments conveyed by international post, on the one hand, and by other delivery services, on the other, have evolved from two very different traditions. The Universal Postal Convention was originally limited to the letter post and excluded dutiable items. In the 1920s, “small packets” containing dutiable items were admitted into the letter post and simplified forms were introduced to allow mailers to provide customs declarations (now forms CN 22 and CN 23).⁴³ A separate UPU agreement governing the international parcel post likewise provided a simplified customs declaration. The customs form for parcels was apparently agreed between the UPU and the Customs Cooperation Council (now the World Customs Organization) in 1969, after which the customs declarations forms for the letter post and parcel post were merged. The United States did not join the UPU parcel post agreement until 1984.

The border controls applied to express companies are derived from procedures developed for general freight originally conveyed by ship. Like most government services, customs controls were administered during normal business hours. Express companies, however, required immediate clearance for time-sensitive shipments. After prolonged disputes with national customs officials, express companies were granted expedited customs clearance in many countries but assessed the costs of special facilities or employment of customs inspectors outside normal hours. In 1986, the United States took the lead and called upon the Customs Cooperation Council to consider the special needs of express traffic. In 1993, the Customs Cooperation

⁴³The 1920 Convention prohibited “articles liable to customs duty” from the international post. Universal Postal Convention (1920), Art. 18(d), 42 Stat. 1971, 1992. The 1924 Convention repeated this prohibition but added an exception, “Articles bearing letter postage may contain dutiable articles, in the event that the importation of such articles in the form of letters is permitted by the country of destination.” Universal Postal Convention (1924), Art. 34(9), 44 Stat. 2221, 2238. The 1924 Convention also introduced customs forms, Dter and Dquarter. *Id.*, Regulations Art. 9, 44 Stat. at 2280. The 1929 Convention introduced the new category “small packets” and declared that small packets could include dutiable items without prior approval of the country of destination. The 1929 Convention also renamed the 1924 customs forms as C1 and C2; these are recognizably the antecedents of what is now the CN 22 and CN 23. Universal Postal Convention (1929), Art. 38 and Regulations Art. 10, 46 Stat. 2523, 2544, 2589, 2667-68.

Council adopted official, although non-binding, guidelines for customs administrations in processing of express shipments.

In this manner, two customs channels evolved for clearance of what were in many cases *identical* shipments. Express carriers received fast but expensive customs clearance that relied upon their ability to collect shipment data in the origin country and present it to customs authorities by telecommunications prior to arrival of shipments at the port of entry. Because express companies were required to present data in computerized format and subject to substantial penalties in case of error, they normally paid the applicable duty on all shipments. In contrast, shipments of post offices were subject to a simpler procedure that was less costly but often slower. Post offices were not required to provide data in computerized format, did not make customs declarations themselves, and were immune from liability for erroneous declarations by mailers. Customs officials themselves calculated the applicable duty on postal shipments, and not infrequently, concluded that small amounts of duty are not worth the cost of administration. As a result, postal shipments were often cleared without payment of the applicable duty in many countries, including the United States.

The House Subcommittee on the Postal Service, chaired by Congressman John McHugh, began work in 1995 on what became in the Postal Accountability and Enhancement Act of 2006. After two years of hearings, Chairman McHugh proposed to divide postal products into two categories, market dominant and competitive, and allow the Postal Service to compete more vigorously in the market for competitive products. Express companies argued that greater commercial flexibility for competitive products must be balanced by equal application of laws generally and, in the case of international services, equal application of border control laws. In 1998, the U.S. Customs Service, at the request of the House Ways and Means Committee, reported on differences in the customs treatment of postal and express shipments.⁴⁴ In 2000, the House postal subcommittee devoted a whole day of hearings to the international aspects of postal reform. In testimony before the subcommittee, Postmaster General William Henderson explained the position of the Postal Service while drawing a distinction between his views and the prior testimony of Frederick W. Smith, Chairman and CEO of FedEx.

⁴⁴U.S. Customs Service, "A Review of U.S. Customs Treatment: International Express Mail & Express Consignment Shipments" (1998).

MR. HENDERSON [Postmaster General]. [W]hat Fred [Smith, Chairman of FedEx] was talking about, it is true, there are two ways in which you can approach or go through customs in foreign countries. . . . He has a commercial entrance which means that he manifests and he gets personalized treatment. . . .

The posts of the world just go through customs normally and 95 percent of our mail is someone mailing a package or a letter to someone overseas. To manifest or electronically manifest one piece is ridiculous. So there are two different systems but we don't act, for the most part, as a commercial entity. We did with GPL, Global Package Link with Japan, and we did electronically manifest that. Canada, for example, has a large shipping business in the United States and electronically manifest that. . . . *We are dealing household to household primarily in our international market right now and Federal Express is business to customer or business to business.*

MR. MCHUGH [Chairman]. *So would you support the theory that identical mail should be cleared in identical ways?*

MR. HENDERSON. *I would, absolutely.*⁴⁵

After considering relevant studies and the views of the Postal Service, FedEx, and other witnesses,⁴⁶ Congress approved a requirement for equal customs treatment for similar shipments of *competitive* products. The House committee report explained:

In light of studies conducted by the General Accounting Office and the former U.S. Customs Service, *subsection 407(e) requires the Bureau of Customs and Border Protection of the Department of Homeland Security to afford non-discriminatory access to U.S. customs procedures for both the Postal Service's Competitive products and similar products of U.S.-owned private carriers.* Since some foreign governments currently limit access to simplified customs procedures to government post offices—thus discriminating between the Postal Service and U.S. private carriers—the subsection *requires the Secretary of State "to the maximum extent practicable" to negotiate with other countries to make available customs procedures that do not discriminate between the Postal Service and U.S. private carriers while fully meeting the needs of all types of American shippers.*⁴⁷

The Senate Committee report echoed this policy and placed it in the larger context of its determination to ensure fair competition between the Postal Service and other companies in

⁴⁵*International Postal Policy: Hearing Before the Subcomm. on the Postal Service of the House Comm. on Government Reform, 106th Cong., 2d Sess., Ser. No. 106-133 (2000), p. 102 (emphasis added).*

⁴⁶See also, e.g., General Accountability Office, "U.S. Postal Service: Competitive Concerns about Global Package Link Service" (June 1988). This report was requested by Chairman McHugh and focused on differences or lack of differences in the customs treatment of global package link shipments in Canada, Japan and the United Kingdom. Global package link was a bulk parcel service designed for large retailers.

⁴⁷H.R. Rept. No. 109-66, 109th Cong., 1st Sess. (Apr. 28, 2005), p. 56 (emphasis added).

competitive markets:

*This legislation makes clear that the Postal Service is barred from using its rulemaking authority to put itself at a competitive advantage or put another party at a competitive disadvantage. In addition it is put on the same legal ground as its private sector competitors in seven key ways. . . . Fifth, U.S. customs law and any other laws related to the import and export of postal services are applied to the Postal Service's international postal products classified as competitive in the same manner that they apply to items shipped by the Postal Service's private sector competitors.*⁴⁸

The PAEA thus provides that U.S. customs laws and all other import/export controls *shall* be applied *in the same manner* to all competitive services and that the Secretary of State *shall* exert best efforts to obtain non-discriminatory treatment for competitive services under foreign customs laws *to the maximum extent practicable*.

(2) With respect to shipments of international mail that are competitive products within the meaning of section 3631 that are exported or imported by the Postal Service, the Customs Service and other appropriate Federal agencies *shall apply the customs laws of the United States and all other laws relating to the importation or exportation of such shipments in the same manner* to both shipments by the Postal Service and similar shipments by private companies.

(3) In exercising the authority under subsection (b) to conclude new postal treaties and conventions related to international postal services and to renegotiate such treaties and conventions, *the Secretary of State shall, to the maximum extent practicable, take such measures as are within the Secretary's control to encourage the governments of other countries to make available to the Postal Service and private companies a range of nondiscriminatory customs procedures* that will fully meet the needs of all types of American shippers. The Secretary of State shall consult with the United States Trade Representative and the Commissioner of Customs in carrying out this paragraph.⁴⁹

As paragraph (a)(4) of section 407 makes clear, the Secretary's duty to encourage other countries to introduce non-discriminatory customs procedures applies, inter alia, in the negotiation of multilateral agreements like the 2012 Universal Postal Convention.

Equal application of border controls to competitive products is self-evidently consistent with the larger goal of U.S. trade policy to promote free trade in services. It is also consistent with the approach of United States in the Doha Round of the WTO. The March 2006 plurilateral

⁴⁸S. Rept. No. 108-318, 108th Cong., 2d Sess. (Aug. 25, 2004), p. 28 (emphasis added).

⁴⁹39 U.S.C. § 407(e)(2) and (e)(3) (emphasis added).

request, issued nine months before PAEA was enacted, urged other governments to liberalize trade in postal services “carried out under competitive conditions”:

We recognize that government intervention may be necessary to ensure the universal supply of quality basic postal services, including through direct government-supplied services and the designation of monopolies and exclusive suppliers. Therefore, in making this request, we understand that the extent to which Members may be able to offer commitments on universal postal services will vary from one Member to another. *At the same time, we expect Members to be more forthcoming with strong commitments for activities that are carried out under competitive conditions.*

Five years after enactment of the PAEA and the plurilateral request in the Doha Round, the distinction drawn by Postmaster General Henderson in 2000 between the commercial shipments of express companies and the household-to-household shipments of post offices is blurring. New technologies continue to reshape the global market for postal and delivery services. In 2010, 62 percent of the Postal Service’s international mail revenues were earned from competitive, not market dominant products.⁵⁰ This percentage is likely to increase significantly. The Postal Service is expanding its range of competitive products and shifting more and more market dominant products to the competitive category. Similarly, a recent UPU study indicates that “business mail” constitutes to 55 percent by volume and 76 percent by weight of outbound international mail sent from industrialized countries.⁵¹ So the UPU itself is increasingly focused on the international parcel market. The Adrenale Report contrasted the services and market shares of public postal operators (“designated operators”) and private operators and highlighted the need for public postal operators to concentrate on “business-originated segments” in light of “a changed competitive landscape.”⁵² The Adrenale Report also pointed out that mailers “privately” recognize the implications of differences in customs treatment of postal packages, especially packages conveyed as “packets” in the letter post.⁵³

⁵⁰See the discussion of international mail revenues in note 33, above.

⁵¹UPU, POC C1 TDG 2011.1–Doc 4a. Annex 2 (Apr. 13, 2011).

⁵²Adrenale Report, p. 40 (“In recent years, DOs [designated operators] have responded to *the challenge of a changed competitive landscape* by sharpening their focus, improving their delivery performance, and providing added value to their customers. It is likely that DOs would regain market share in the growth area of B2C [business to consumer] light-weight post and parcel items. DOs are beginning to recognize the vital importance of meeting and even exceeding customer needs, *particularly in the business-originated segments.* [emphasis added]).

⁵³Adrenale Report, p. 61 (“In fact, business clients privately convey that they believe that *packets in the letter mail stream receive a more favorable treatment at Customs or perhaps undergo less scrutiny*” [emphasis added]).

Unfortunately, heightened security concerns threaten to exacerbate the legal and policy issues raised by dual customs procedures. In late 2010, the Department of Homeland Security (DHS) responded to two terrorist incidents by sharply increasing security controls for documents and parcels entering the United States. The new controls created major problems for all delivery services but especially for public postal operators. Remarkably, UPU officials claimed that U.S. security measures contravened the acts of the UPU: “*Security measures imposed unilaterally by the US contain many conflicts with the rules and regulations of the UPU Acts.*”⁵⁴ It appears that the UPU will now try to make the case for simplified and globally uniform security procedures that, like existing UPU customs procedures, would apply only to designated operators.

In sum, while the appropriate application of border controls to postal shipments raises legitimate questions, there can be no reasonable doubt about certain key points:

- Customs and other border controls are crucially important to postal and other international delivery services.
- Postal and other international delivery services are now actively competing for commercial shipments.
- Congress carefully considered differences in the customs treatment accorded postal shipments and similar shipments carried by private operators and directed that customs and other border controls should apply “in the same manner” to similar competitive shipments.

At the Doha Congress, therefore, the United States must support equal application of customs (and other border control) procedures to competitive products and avoid agreements to apply border controls in a manner that will restrain competition in services outside the scope of the U.S. postal monopoly. But how to do this as a practical matter given the long history of preferential customs procedures for public postal operators? The starting point should be the distinction between “commercial items” and other postal items. Under the 2008 Convention, mailers are must declare whether or not a postal shipment is a "commercial item" since the CN 22 and CN 23 customs forms require additional information for commercial items. The term *commercial item* is defined as follows: “*Commercial item means any goods exported/imported in*

⁵⁴UPU, International Bureau, “UPU Postal Security Policy, U.S. Security Measures, and Inter-Committee Security Group,” presentation to Postal Operations Council, Committee 2 (May 2, 2011) at slide 8.

*the course of a business transaction, whether or not they are sold for money or exchanged.”*⁵⁵

The UPU category of “commercial items” includes the bulk of what U.S. postal law classifies as competitive products.

Should the U.S. therefore propose that UPU customs provisions apply equally to commercial items conveyed by public postal operators and private competitors? No. Customs facilitation in a functioning competitive market is best handled by the World Customs Organization, not the UPU. There is a less controversial alternative. At the Doha Congress, the U.S. should propose that UPU customs provisions are inapplicable to commercial items unless such items are conveyed by a “reserved service” (i.e., within the postal monopoly) in the country of origin. This may be seen as a reasonable first step towards equal application of customs law. Non-application of UPU customs provisions would not automatically force other countries to give non-discriminatory customs treatment to all competitive shipments. Countries could continue to provide preferential customs treatment for postal shipments, but they would not be required to do so by the Universal Postal Convention. The matter would be left up to national customs administrations and their governments. At the same time, therefore, the United States should propose that the UPU and the World Customs Organization begin work immediately after the Doha Congress to develop simplified, uniform, and non-discriminatory standards for the customs clearance of low value commercial items of the sort previously benefitting from UPU customs procedures.⁵⁶ Since the 2012 Universal Postal Convention will not become effective until January 1, 2014, the WCO might be able to approve alternative, non-discriminatory guidelines for clearing low value commercial items by that date.

U.S. law also implies that customs procedures should apply equally, or at least without competitively significant preferences, to non-commercial items outside the postal monopoly — what Postmaster General Henderson has called household-to-household items. Roughly speaking, household-to-household documents and parcels would appear to fall within the market dominant category of Postal Service products. Nonetheless, household-to-household parcels (and

⁵⁵Letter Post Regulations (2010), Art. RL 152 CN 23 form.

⁵⁶This proposal does not imply that customs authorities should not draw reasonable distinctions between different types or classes of commercial items. But such distinctions, if appropriate, should be based on objective criteria related to the shipment and not on the identify of the operator and should be developed by the World Customs Organization not by the UPU.

even some documents) are outside the scope of the U.S. postal monopoly. Hence, the United States cannot agree to restrain potential competition. Nor is the evolution of future competition wholly outside the realm of possibility. FedEx and UPS already provide some household-to-household services within the United States. Given equal application of the customs laws, one could imagine these services being offered at the international level in industrialized countries and in developing countries with high concentrations of expatriate residents.

For international household-to-household items, the UPU arguably has a more legitimate role in specifying simplified customs procedures. One could consider household-to-household items as falling more within the traditional public services performed by public postal operators. Nonetheless, the task of developing appropriate global customs standards for household-to-household items appears more appropriately entrusted to the impartial World Customs Organization than to an organization like the UPU that is dedicated to the advancement of a particular class of international delivery services. The case for WCO coordination is even stronger when one considers the increasing importance of security concerns. Therefore, for household-to-household items, as well, the United States should propose that the UPU and the WCO work together to develop new customs guidelines. In the meantime, however, the U.S. could support continued application of UPU customs procedures since international household-to-household items now fall primarily within the sphere for market dominant products.

Customs provisions of the Convention should be also reformed in other respects. One major need is to clarify the authority of the Postal Operations Council and Council of Administration with respect to customs provisions. Under the current Convention, for example, there is no provision authorizing the POC to define customs declarations for postal shipments. The POC prepares these forms under the open-ended authority of the General Regulations, “to revise the Regulations of the Union within six months following the end of the Congress . . . [and] also amend the said Regulations at other sessions.”⁵⁷ Yet, the authority to issue what amounts to special customs forms for a select group of delivery services is obviously a matter which should be agreed by governments not merely by postal operators.

Still another problem is a lack of clarity about when UPU customs privileges apply. This

⁵⁷General Regulations (2008), Art. 104(9)(2).

ambiguity can have anticompetitive consequences. Consider the following example. If the Postal Service contracts with an American airline to fly parcels directly to Germany, German customs will clear the parcels using UPU procedures. If a second American airline proposes to fly European parcels to central hub in, say, Brussels, and truck the German-bound parcels to Germany, German customs will refuse to grant UPU customs privileges, thus causing substantial extra costs for the second airline. The outcome is a distortion of lawful competition between two American airlines. Or consider a second example. Suppose the Belgian post office establishes a branch office in Paris in compliance with French law, and the Parisian office collects parcels (possibly from Americans living in Paris) to transport to the U.S. (possibly by an American airline) for delivery to American addressees. Citing UPU resolutions, the Postal Service may refuse to allow customs clearance of these parcels using UPU customs privileges. The outcome is a distortion of lawful competition between two European delivery services in their trade with the U.S. If there is any public purpose served by providing special customs privileges for parcels tendered to designated operators, then these privileges should be applied without discrimination to all parcels lawfully tendered to a designated operator in the country of origin.⁵⁸

A draft of a revised customs article for the Universal Postal Convention to implement Proposal 2 is included in the Appendix as Article X2.

4.3 Proposal 3: To ensure that the Convention provides a *complete statement* of principles established by governments to govern the exchange of documents and parcels and to define and clarify *the delegation of authority* to the Postal Operations Council to adopt implementing Regulations

A fundamental obstacle to a simple, effective U.S. position at the UPU is the daunting complexity of the meetings, proposals, documents, and regulations surrounding all aspects of the work of the UPU.⁵⁹ It is exceedingly difficult, if not impossible, for the staff of a government

⁵⁸These examples are adapted from actual cases.

⁵⁹The last UPU Congress, held in Geneva in 2008, lasted three weeks and included more than 2,100 delegates. The Congress considered almost 1,000 pages of proposals and more than 1,000 pages of explanatory documents and reports. In the end, the Geneva Congress adopted or amended or authorized seven major intergovernmental agreements that take up 1,200 pages in the official published versions. In addition, delegates appointed or reappointed more than 80 officials to the Council of Administration, the Postal Operations Council, and International Bureau. Moreover, the Congress was only a culmination of four years of preparation by UPU committees. Each year the two major committees of the UPU, the Council of Administration and the Postal Operations Council, convene in sessions that last three weeks or more and include a large number of subcommittee meetings, studies, and proposals.

department with broad policy responsibility to evaluate this mass of materials. To permit policy makers to establish appropriate policies, it is necessary to isolate and simplify the *governmental* policies at stake and separate them from the purely operational issues.⁶⁰ Bringing all governmental principles together in one relatively short text will also allow policy makers to consult more effectively with affected parties.

The UPU itself has already taken strides in this direction. The last four UPU Congresses have adopted successive comprehensive revisions (called “recastings”) of the acts of the UPU. The goal has been to move purely operational provisions to the Regulations and leave only matters of governmental policy in the Convention. As a document of the 2008 Geneva Congress explained:

The recast of the Convention and its Regulations [by the 2004 Bucharest Congress] was *to ensure greater clarity in distinguishing between the governmental and operational roles of the Union and its bodies. The principles of the recast were that the Convention should contain principles established by governments, while the Regulations should contain the operational and commercial rules applied by the designated operators entrusted with fulfilling the obligations arising from the Acts without any changes of substance.*⁶¹

The current version of the Universal Postal Convention includes only 37 articles and takes up about 26 pages.

To ensure that the Convention embodies a *complete* statement of the “principles established by governments” two further elements should be added in a new article. First, the Convention should state explicitly that it and its implementing regulations constitute a complete statement of substantive rules governing the international postal service. In practice, this would mean that the Congress could no longer purport to establish substantive rules of international law by vague but popular resolutions such as those that condemn offices that public postal operators establish outside their national territories (extraterritorial offices of exchange or ETOEs). Second, the

⁶⁰The governmental policies presented by the international exchange of postal services are neither numerous nor especially difficult. Consider intergovernmental agreements that establish the legal framework for other international services. The reference paper to the WTO's Basic Telecommunications Agreement requires only 3 pages and arguably includes all of the concepts needed to give effect to U.S. policies in the international postal sector. The U.S.-EU Open Skies Aviation Agreement is only about 35 long pages. So is the General Agreement on Trade in Services.

⁶¹UPU, 2008 Geneva Congress, Doc 17 (‘Use of the term “postal administration” in the Acts of the Union), paragraph 23 (emphasis added).

Convention should explicitly delegate authority to appropriate bodies of the Union to adopt implementing regulations. An explicit delegation would require that Regulations adopted by the Postal Operations Council are limited to matters agreed in the Convention.

A carefully worded delegation of authority would also allow government policy makers, if they so decide, to limit the risk that POC Regulations are inconsistent with national law or other international conventions (such as the GATS). The risk of conflicting legal obligations has been recognized by several UPU member countries in formal declarations issued upon signing the Convention. Such declarations typically proclaim the supremacy of national law or the GATS. An especially important example is the declaration of the European Union:

The delegations of the member countries of the European Union declare that their countries will apply the Acts adopted by this Congress in accordance with their obligations pursuant to the Treaty establishing the European Community and the General Agreement on Trade in Services (GATS) of the World Trade Organization.⁶²

Since the obligations of Treaty Establishing the European Community and GATS (which is incorporated into EU law) are superior to commitments of the individual EU member states, this declaration effectively says that EU member states will treat EU law as superior to any provision of the Convention. While the intent of EU declaration is clear, it is may be legally insufficient under international law because it is not a formal reservation. For its part, the United States has not even gone so far as to declare an intention to comply with U.S. law and international commitments leaving open the possibility that the United States might accept the position that the Universal Postal Convention overrides U.S. law and other international commitments.

In the Appendix, a draft Article X3 provides one approach to implementing Proposal 3. The draft article would clarify the delegation of rulemaking authority to the Postal Operations Council and the level of guidance required by the Council of Administration (CA). The delegation limits the authority of the POC to Regulations “necessary to implement the provisions of this Convention.” It further limits the delegation by stating that the Regulations may not derogate from the legislation of any member country “in respect of anything which is not expressly provided for by this Convention.” This language reflects Article 24 of the Constitution

⁶²UPU, Declarations made on signature of the Acts of the 24th Congress (Geneva 2008), Article V, *Constitution General Regulations* (2010), p. A34.

which declares “The provisions of the Acts of the Union shall not derogate from the legislation of any member country in respect of anything which is not expressly provided for by those Acts.” In other words, Regulations of the POC should not override national law at all, whether expressly or not; only the Convention itself should have this possible legal effect. Further, the draft delegation in Proposal 3 provides that, similar to the declaration of the EU, POC Regulations cannot override obligations established by international conventions dealing with trade or customs.

The draft article would also move in the direction of separation of governmental and operational functions by providing an explicit role for the Council of Administration, the more governmental of the UPU’s two main permanent bodies. In the draft proposal, CA approval of POC Regulations would be required if the Regulations are to be binding on member countries or involve matters of fundamental policy or principle. Regulations binding on designated operators could be adopted without CA review. This arrangement echoes (but does not follow precisely) some of the early discussions in the UPU’s Reform of the Union Project Group. Draft Article X3 is only an illustration of the possibilities of an explicit delegation article.

4.4 Proposal 4: To establish a framework for voluntary opening of market access for international postal and delivery services provided under competitive conditions.

When the U.S., European Union, Japan, and New Zealand distributed the plurilateral request on postal and delivery services in the Doha Round, they were asking for one more concession to be placed on the table in a grand swap of concessions. At the end of a trade round, each WTO member country decides whether all of the concessions offered by trading partners are worth enough to it to justify a final commitment to the package of trade concessions that it is offering to others. In this process, liberalisation of postal and delivery services could be traded away for liberalisation in some other sector or taken off the table for reasons wholly unrelated to the desirability of creating a modern framework for the exchange of international postal and delivery services.

This potentially fatal complication in the GATS negotiation process was avoided in negotiations leading to fundamental reforms in the legal frameworks for international telecommunications and aviation. In the case of international telecommunications, the WTO’s Uruguay Round was extended by the addition of sector-specific negotiations. In the case of

international aviation, bilateral negotiations have always been limited to aviation issues. The advantages of sector-specific negotiations are apparent. All negotiators are addressing the same subject matter. With this focus, government policy makers have a better opportunity to develop a coherent regulatory framework suited to the needs of a particular sector.

With U.S. leadership, the UPU Doha Congress could serve as a sector-specific forum for achieving some of the goals of the plurilateral request presented to the WTO in 2006. As a vehicle for reform, the main disadvantage of the UPU is that it lacks the dispute resolution mechanisms of the WTO. And it will be difficult for the UPU to accept the “clean slate” that the WTO adopted in the Agreement on Basic Telecommunications. Nonetheless, something less than all-or-nothing reform may be feasible in the Doha Congress pending a more extensive services agreement at the WTO.

One approach could be to recast the plurilateral request as an *voluntary* provision in the new Universal Postal Convention. A new article on market access could offer a set of principles which UPU member countries could subscribe to if and when they are ready. The new article could, like the plurilateral request, be limited to competitive services, thus allowing each member country to determine for itself the scope of permissible competition. A UPU member country that subscribes to this article would grant to nationals of other countries on a reciprocal basis the same right to participate in competitive services as enjoyed by its own citizens and it would ensure a level playing field for all competitors. Even if such an article were added to the Convention and the list of initial subscribers were limited to the 30 countries that advanced the plurilateral request, the new article would reform a substantial proportion of the world’s cross-border postal services.

A UPU provision dealing with market access is not wholly unprecedented. For several decades, the Convention has included an article limiting the scope of remail. This is, in effect, a limitation on what the GATS calls “mode 2” market access. In the Bucharest Congress in 2004, the UPU went further. It adopted resolutions aimed at limiting the right of a designated operator to establish an office in a country other than its national territory. This is a restriction on what the GATS calls “mode 3” market access. If Convention can limit market access, then it should be possible for the Convention provide rules for opening market access among willing member countries.

A draft Article X4 that would implement Proposal 4 is included in the Appendix. It closely follows the terms of the 2006 plurilateral request of the United States, European Union, Japan, and New Zealand.

5 IMPLEMENTATION OF REFORMS AND ADDITIONAL ISSUES

As amendments to the Universal Postal Convention, the four proposals described in section 4 must be approved by a majority of delegates at the Doha Congress. Since approximately 85 percent of the delegates represent developing countries, their interests are not directly challenged in the four proposals. The terminal dues/inward land rates proposal (Proposal 1) is limited to items exchanged between industrialized countries, and the market access proposal (Proposal 4) is strictly voluntary. The customs proposal (Proposal 2) will have only limited implications for developing countries since their designated operators are not significant participants in competitive international postal markets. While the delegation proposal (Proposal 3) aims to clarify, to some extent at least, the roles of Congress, the Postal Operations Council, and the Council of Administration, developing countries are well represented in all bodies.

In order to win acceptance of these four proposals at the Doha Congress, therefore, the first step will be to gain the support of other industrialized countries, i.e., the countries most affected by the proposals. Since the proposals were developed from principles already shared by the United States, the European Union, and several other industrialized countries, it should not be unduly difficult to find agreement with the European Union and at least some other industrialized countries. This core group of industrialized countries will then have to solicit support from a sufficient number of developing countries. Since the proposals do not significantly impinge on the interests of developing countries and since developing countries depend upon industrialized countries to keep the UPU functioning, support from a majority of UPU members does not appear infeasible. In short, these four proposals have been crafted to be “doable” within the practical and political constraints of the UPU.

Of course, “doable” is not the same as “done.” The developing countries may refuse to

allow the industrialized countries to reform postal relations among themselves.⁶³ In such case, the UPU Constitution offer a viable alternative, the creation of a Restricted Union. Within a Restricted Union, governments of industrialized countries could implement Proposal 1 (terminal dues and inward land rates), Proposal 2 (customs), and Proposal 4 (market access) with respect to the conduct of postal and delivery services among themselves without the approval of the Doha Congress. Since a Restricted Union can adopt alternatives to articles of the Convention, it can also limit the applicability of the POC's Regulations insofar as they contravene national law or other international commitments (Proposal 3). A Restricted Union could thus accomplish most of the substantive reforms sought in these proposals. In preparing for the Doha Congress, therefore, the United States, the European Union, and other industrialized countries could, and probably should, prepare for establishment of a Restricted Union as an alternative strategy for implementing agreed reforms.

Although the proposals in section 4 would ameliorate the major distortions created by the UPU, they do not address the full range of public policy questions that merit attention. A short list of additional issues may help to emphasize the limited nature of these proposals.

- *Separation of governmental and operations functions.* Effective separation of governmental and operations functions would require a thorough revision of the Constitution and the General Regulations. In the long run, consideration should be given to treating governmental provisions of the UPU in a wholly separate intergovernmental agreement, perhaps as part of a broader services convention administered by the WTO.
- *Mission creep.* There is a legitimate need to assist public postal operators to adapt and diversify in a time of rapidly changing market conditions. At the same time, the UPU should not use governmental authority for wider commercial ends. A better balance needs to be found.
- *Fair competition between postal financial services and private financial services.* The Geneva Congress highlighted the potentially distorting role of the UPU in the development of global financial services. The proposals in section 4 do not specifically address the Postal Payment Services Agreement, but the United States could offer similar

⁶³ This is, of course, just the sort of anticompetitive procedure forcefully condemned by the Department of Transportation in its consideration of the price-fixing by IATA.

amendments for that agreement as well.

- *Standards for international postal services.* Standards can be anticompetitive, as is illustrated by the dispute over codes for International Mail Processing Centers. The standard setting authority of the UPU may need to be defined more carefully.
- *Support for postal services in developing countries.* Under the current Convention, the major form of assistance granted developing countries is low terminal dues rates for mail sent to industrialized countries. This system is subject to abuse by private operators and large mailers from industrialized countries, and its cost is unfairly allocated among industrialized countries. A better way should be found to direct appropriate levels of assistance to the governments of developing countries.⁶⁴
- *Obligation to appoint a designated operator.* Replacing the term “postal administration” with “designated operator” is more than a matter of semantics. It is a shift from “the responsible office of government” to “favored commercial operator.” As governments in many countries separate their national postal administrations from government, it is highly questionable these same governments should be required by international convention to confer a special governmental status on a “designated operator.” The concept of a designated operator needs to be reviewed at the UPU in much the same manner as it has been reviewed in the European Union.
- *UPU authority over domestic postal services.* In 1999 the UPU added an article to the Convention obliging member countries to maintain “quality basic postal services *at all points in their territory*, at affordable prices.” This was the first extension of the UPU’s authority into *domestic* postal services. As the twenty-first century progresses, however, it may be questioned whether the UPU should continue to require a country to bear the cost of a universal postal service that may not be needed by its own citizens.

The proposals set out in section 4 are, therefore, not exhaustive. The Department of State may wish to consider additional proposals to address some or all of the above topics either substantively or by initiating preparatory studies.

⁶⁴One suggestion is provided in James I. Campbell Jr., Alex Kalevi Dieke, and Martin Zauner, “Terminal Dues: Winners, Losers, and the Path to Reform,” paper submitted to the 19th Conference on Postal and Delivery Economics in St. Helier, Jersey, June 1-4, 2011.

APPENDIX
DRAFT AMENDMENTS TO
THE UNIVERSAL POSTAL CONVENTION

Proposal 1: Terminal dues and inward land rates among industrialized countries

Convention Article X1
Charges for delivery of letter post items and parcels conveyed between industrialized countries

- 1 This article shall apply to charges for the inward delivery of letter post items and parcels that are conveyed from a member country listed in Annex A to another country listed in Annex A and shall include, but not be limited to, letter post items and parcels conveyed by or on behalf of a designated operator, a non-designated operator, a mail consolidator, or an individual sender.
- 2 If a member country ensures that postal services for letter post items and parcels are provided to the general public and such services are provided under conditions of a legal monopoly or market dominance, then the member country shall ensure that the following principles are respected by one or more designated operators appointed by it:
 - 2.1 Access to the ensured services shall be provided at the same rates and under the same terms and conditions as available to national users of similar services for similar items, provided that such terms and conditions shall be relaxed if and to the extent they constitute an unreasonable barrier to access by foreign parties .
 - 2.2 For the principal ensured services, the designated operator(s) shall establish linear tariffs that are reasonably equivalent to the rates available to national users for similar services and similar items, provided that such linear tariffs that also be available national users and designed so they do not cause unreasonable diversion from domestic rates.
 - 2.3 Charges established under paragraphs 2.1 and 2.2 may include surcharges or discounts that are justified by differences in the costs of processing and delivering international items compared the costs of processing and delivering similar domestic items.
 - 2.4 Designated operators may, by bilateral or multilateral agreement, apply other payment systems for the delivery of inward postal items provided that differences in rates or terms and conditions from equivalent

national services shall be justified by differences in costs incurred.

- 2.5 The rates, discounts, and surcharges for inward postal delivery services listed above shall be transparent and shall not be unjustly or unreasonably discriminatory.
 - 2.6 No letter post item or parcel may be denied delivery, surcharged, otherwise given less favorable treatment on the basis of the country of origin.
- 3 Each member country listed in Annex A shall designate an impartial national regulatory body to ensure compliance with this article, and such regulatory shall be separate from, and not accountable to, any designated operator or non-designated operator.
 - 4 Any member country may join Annex A and participate in the application of this article by submitting a written declaration to Council of Administration and providing reasonable assurances that it will ensure appropriate implementation of this article.

Explanatory notes

- 1) This article is derived from (i) current Convention Arts 27 (terminal dues general provisions) and 28 (terminal dues target system); (ii) EU Postal Directive Article 13 (principles for terminal dues applicable to universal service between EU member countries); and (iii) the 2003 decision of the EU Commission defining public interest criteria for the Reims II agreement. Commission Decision of 23 October 2003, Reims II renotification, OJ L56, 24 Feb 2004, p. 76.
- 2) Paragraph 1 states that the scope of this article is, in effect, the “target” countries of the current Convention, i .e., the countries affected by current Article 28. The term “industrialized” is used instead of “target” because it is not intended that all other member countries must some day come under this article.
- 3) Paragraph 2.1 is essentially the same as current Article 27(4)(2).
- 4) Paragraph 2.2 provides for linear equivalents for all principle domestic universal services to avoid the possibility that a country might choose to linearize only a costly domestic universal service.
- 5) Paragraph 2.6, like the European Commission’s Reims decision, forbids resort to the anti-remail provisions of the Convention where the designated operator is reasonably compensated for delivery.

Proposal 2: Revised customs controls for postal items

Convention Article X2

Customs control

- 1 Designated operators of the countries of origin and destination shall be authorized to submit items to customs control according to the legislation of those countries.
- 2 The Postal Operations Council is authorized to prescribe standard forms, electronic message formats, or other documentation requirements for senders to use in providing information relating to the customs control of a postal item in the country of origin or the country of destination.
 - 2.1 Designated operators shall take all reasonable efforts to ensure that information provided by senders is accurate and complete.
 - 2.2 The Postal Operations Council may adopt such rules it deems appropriate to ensure the privacy and confidentiality of information provided by senders.
 - 2.3 Member countries shall not hold designated operators liable for information provided by senders relating to customs control or for decisions taken by customs authorities on examination of items submitted to customs control, provided that designated operators may voluntarily accept such liability.
 - 2.4 Regulations adopted by the Postal Operations Council relating to this article shall be binding on member countries if approved by the Council of Administration.
- 3 Similar postal items which are accepted for conveyance by a designated operator in an origin country shall be entitled to customs control by authorities in the destination country in the same manner.
- 4 This article shall not apply to the customs control of commercial items unless the conveyance of such commercial items is reserved by national law for a provider of universal postal services in the country of origin.
 - 4.1 A “commercial item” means any good exported/imported in the course of a business transaction, whether or not they are sold for money or exchanged.

Explanatory notes

- 1) Paragraph 1 is essentially the same as current Article 18(1).
- 2) In current Regulation RL 152 the POC prescribes forms for customs related information provided by senders and for the privacy of such information. However, no provision in the Convention authorizes the POC to adopt such regulations. Paragraph 2 authorizes such regulations.
- 3) Paragraph 2.3 is based on current Article 22(3): “Member countries and designated operators shall accept no liability for customs declarations in whatever form these are made or for decisions taken by the Customs on examination of items submitted to customs control.” Unlike the current Convention, under the proposal a designated operator may voluntarily accept liability under customs laws. This flexibility might enable designated operators to access better or faster customs procedures.
- 4) Paragraph 2.4 requires that customs regulations adopted by the POC must be approved by the Council of Administration. Additional review by the CA is permitted by General Regulation Article 104(9)(2) which defines the rulemaking authority of the POC as follows: “to revise the Regulations of the Union within six months following the end of the Congress *unless the latter decides otherwise*; in case of urgent necessity, the Postal Operations Council may also amend the said Regulations at other sessions; in both cases, the Operations Council *shall be subject to Council of Administration guidance on matters of fundamental policy and principle* [emphasis added].”
- 5) Paragraph 3 is intended to ensure that customs authorities in the destination country treat all incoming postal items received from a designated operator in a non-discriminatory manner. This would disallow a customs authority from discriminating between postal items that are shipped directly to a destination country and those that are shipped via an intermediary hub. It would also prohibit a customs authority from discriminating against postal items shipped to a destination country from an ETOE.
- 6) Paragraph 4 excludes customs control of commercial items from this article. The definition of commercial item is taken from current UPU form CN 23. Under current practice, it is the responsibility of customs authorities in the destination country to determine what is a “commercial item,” and this responsibility is unchanged by the proposal. Paragraph 4 does *not* prohibit individual member countries from allowing designated operators to use UPU postal customs documents in the application of its customs laws.

Proposal 3: POC to authority to adopt Regulations implementing the Convention

**Convention Article X3
Regulations implementing the Convention**

- 1 The Postal Operations Council is authorized to adopt such Regulations as may be necessary to implement the provisions of this Convention.
 - 1.1 Except as provided in paragraph 1.2, Regulations which establish mandatory or voluntary operational standards for designated operators shall become effective upon approval of the Postal Operations Council.
 - 1.2 Regulations which are binding on member countries or which are determined by the Council of Administration to involve matters of fundamental policy or principle shall become effective upon approval of the Council of Administration.
- 2 Provisions of the Regulations shall not —
 - 2.1 derogate from the legislation of any member country in respect of anything which is not expressly provided for by this Convention;
 - 2.2 derogate from the commitments of any member country pursuant to the agreements of the World Trade Organization or the World Customs Organization.
- 3 Except for the provisions of Restricted Unions and Special Agreements established under Article 8 of the Constitution, this Convention and the Regulations adopted pursuant to this article shall constitute the entire agreement between member countries with respect to the subject matter of this agreement and shall supersede all prior agreements, conventions, regulations, declarations, or other measures.

Explanatory notes

- 1) Paragraph 1.1 generally authorizes the POC to adopt Regulations which are binding on designated operators without further review. Almost all Regulations should be covered by this authority.
- 2) Paragraph 1.2 requires further review and approval by CA for certain POC Regulations. Additional review by the CA is permitted by General Regulation Article 104(9)(2) which defines the rulemaking authority of the POC as follows: “to revise the Regulations of the Union within six months following the end of the Congress *unless the latter decides otherwise*; in case of urgent necessity, the Postal Operations Council may also amend the said

Regulations at other sessions; in both cases, the Operations Council *shall be subject to Council of Administration guidance on matters of fundamental policy and principle* [emphasis added].”

- 3) Paragraph 2.1 provides that the Regulations may not override national law unless they implement a provision of the Convention which expressly overrides national law. This paragraph is derived from Constitution Article 24 which says, “The provisions of the Acts of the Union shall not derogate from the legislation of any member country in respect of anything which is not expressly provided for by those Acts.” The underlying premise is that only the Convention, which is approved by governments, and not the Regulations may derogate from national legislation.
- 4) Paragraph 2.2 says that the Regulations cannot derogate from provisions agreed by member countries in the agreements of the World Trade Organization or the World Customs Organization. This appears to be a reasonable limitation on the rulemaking authority of the POC and CA. Many member countries of the UPU, including the member countries of the EU, go further and declare that all provisions of the *Convention* (not only the Regulations) will be implemented in accordance with the provisions of the GATS. An alternative to this paragraph would be a separate article in the Convention defining the relationship between the Convention and the agreements of the WTO and WCO.

Proposal 4: Liberalization of market access for competitive services

Convention Article X4

Market access for competitive services

- 1 Except as provided in paragraphs 1.1 and 1.2, this article applies to services for the conveyance of all types of items and goods weighing up to 20 kg from a country listed in Annex B to another country listed in Annex B and includes, but is not limited to, conveyance services provided by designated operators, parcel delivery companies, couriers, express companies, and other international delivery services.
 - 1.1 This article does not apply to services that are reserved by law in the country of origin or the country of destination for a provider of universal postal services.
 - 1.2 This article does not apply to services for the conveyance of items or goods where such services are prohibited by national law in the country of origin or the country of destination for the protection of the public safety, public morals, national security, or intellectual property rights.
- 2 Each country listed in Annex B shall accord to services and service providers of every other country listed in Annex B unrestricted market access as provided in Article XVI of the General Agreement on Trade in Services except that market access may be limited to the extent that such limitations are —
 - 2.1 recorded in horizontal restrictions applicable to all services listed by that country in a schedule of commitments under of the General Agreement on Trade in Services; or
 - 2.2 applicable to substantially all domestic and foreign providers of all types of transportation and communications services in that country; and
 - 2.3 such specifically listed in Annex B.
- 3 Each country listed in Annex B shall accord to services and service providers of every other country listed in Annex B national treatment as provided in Article XV of the General Agreement on Trade in Services.
- 4 Each country listed in Annex B shall ensure that the following principles are respected with the respect to the regulation of the supply of the services listed in paragraph 1.
 - 4.1 Appropriate measures shall be introduced to ensure that dominant

suppliers cannot adversely affect the conditions of competition in such services to an unreasonable degree. Appropriate measures may include, but are not limited to, the application of accounting separation and disclosure requirements or rate regulation.

- 4.2 Authorization and licensing requirements for such services, if any, shall be transparent, reasonable, non-discriminatory, and objectively based.
 - 4.3 Sectoral regulation, if any, shall be vested in an impartial regulatory body that is separate from, and not accountable to, any supplier of such services.
5. Any member country may join Annex B and participate in the application of this article by submitting a written declaration to Council of Administration and providing reasonable assurances that it will ensure appropriate implementation of this article.

Explanatory notes

- 1) This article is derived from the plurilateral request of the United States; the European Union, Japan, and New Zealand submitted other countries in the WTO's Doha Round in January 2006.