

# **The GATS and Canadian Postal Services**

**By Scott Sinclair**

**ISBN: 0-88627-262-9**

**March 2001**

## Contents

<b>Executive Summary .....</b>	<b>3</b>
<b>Introduction .....</b>	<b>12</b>
<b>Section 1 Canadian postal services and the public interest .....</b>	<b>14</b>
Canada Post's universal and community service obligations .....	14
Competitive services and the financial sustainability of Canada Post .....	16
Foreign-owned commercial providers and Canadian postal services .....	17
The foreign courier industry's trade policy offensive .....	19
Lessons for Canada's GATS negotiating strategy .....	20
<b>Section 2 The existing GATS and Canadian postal services .....</b>	<b>21</b>
Are postal services covered by the GATS? .....	21
GATS general rules and Canadian postal services .....	23
(i) The GATS Most-Favoured-Nation (MFN) Rule, Article II .....	23
(ii) Monopolies and state enterprises, GATS Article VIII .....	25
Lessons from NAFTA: the UPS investment challenge .....	27
GATS specific commitments and Canadian postal services .....	29
(i) National treatment .....	29
Mail transportation by air .....	30
Services delivered by the national postal administration .....	31
Revisiting the UPS NAFTA investor-state challenge .....	32
(ii) Market Access .....	34
<b>Section 3 The GATS 2000 renegotiations: issues for Canadian postal services .....</b>	<b>36</b>
How could GATS coverage of postal services be expanded? .....	36
(i) Increasing GATS coverage directly .....	36
(ii) Reclassifying services: increasing coverage by stealth .....	37
(iii) Imposing new restrictions on domestic regulation .....	38
(iv) Could GATS e-commerce rules pry open postal services? .....	40
Adapting to new technologies .....	40
The looming GATS e-commerce challenge .....	42
Other negotiating issues .....	43
(i) Subsidies .....	43
(ii) Government procurement .....	44
(iii) Air cargo services .....	45
<b>Conclusion .....</b>	<b>47</b>
<b>Appendix 1: .....</b>	<b>51</b>
<b>Appendix 2: .....</b>	<b>55</b>
<b>Endnotes .....</b>	<b>56</b>
<b>References: .....</b>	<b>61</b>

# Executive Summary

## Introduction

This study analyses the implications for Canadian postal services of the existing General Agreement on Trade in Services (GATS) and the current Geneva-based negotiations to expand it. It finds that the Canadian negotiators have already carelessly exposed public postal services to attack under the existing GATS and that the ongoing negotiations to broaden and deepen the agreement pose further formidable risks.

### Canadian postal services and the public interest

The GATS is an instrument for the benefit of international, private, commercial interests. To serve these interests, it restricts governments' ability to take measures that allegedly adversely affect the competitive opportunities available to foreign commercial service providers. The GATS restrictions are legally enforceable and backed up by powerful trade sanctions.

By contrast, the overarching purpose of the Canadian postal service is to provide high-quality, affordable postal services to all Canadians in all regions of this country. In order to achieve this public purpose, Canada Post, a crown corporation, has been granted an exclusive privilege to collect, transmit and deliver letter-mail. Hand in hand with this exclusive privilege come a range of universal and community service obligations.

There is a fundamental tension between the GATS and the current Canadian postal sys-

tem. The GATS primarily serves private interests, while the Canadian postal service and Canada Post exist to serve public purposes. The GATS restrictions pose formidable challenges to universal public services such as the Canadian postal service and to crown corporations such as Canada Post.

### Canada Post's universal and community service obligations

Parliament requires Canada Post to maintain services "that are comparable for communities of the same size." To meet this challenge, Canadians have invested through Canada Post in a network of postal facilities that covers the entire country — knitting its citizens together. In many communities in Canada's vast rural areas and in the north, the local post office is the most visible, and often the only, bricks-and-mortar presence of the Canadian government.

Parliament also gave Canada Post a broad mandate to provide a range of beneficial services to Canadians, many of which fall outside the reserved area of addressed letter-mail. Canada Post's community and universal service obligations impose financial costs that are not borne by its commercial competitors.

### Competitive services and the financial sustainability of Canada Post

To be financially viable Canada Post must provide services that complement its primary focus on letter-mail, which most agree will gradually be eroded over time by electronic communication. This inevitably brings Canada Post into competition with private companies in certain areas.

The largest of these private sector service providers are foreign-owned with the ability to enforce international treaty rules, including those contained in the GATS. Consequently, the impact of existing GATS rights and any proposals to expand or enhance GATS rights must be carefully examined to ensure that they do not undermine, directly or indirectly, the ability of Canada Post to fulfill its broad public service mandate.

### **Foreign-owned commercial providers and Canadian postal services**

Canada Post operates within a mixed public-private postal system. Canada Post has the sole responsibility for the collection, handling and delivery of addressed letter-mail. But outside this reserved service area, Canada Post operates in a highly competitive marketplace.

Multinational courier companies provide a range of delivery services including, but not limited to, express letter and parcel delivery. The express courier industry is growing rapidly worldwide, reporting average annual growth rates of 20% for the past two decades. U.S.-based express courier companies — among the world's largest and most dominant — are particularly active in Canada. In the opinion of the U.S. industry, "Canada represents the most open market for U.S. courier services (USITC, 1995: p.12)."

Despite this commercial success, extremely rapid growth and supportive Canadian government regulation, the foreign express courier industry has adopted a highly confrontational stance towards Canada Post and the Canadian government. Essentially, the for-

ign courier industry's goal is to force Canada Post out of express delivery and other competitive services.

Another vision with strong public support, especially in rural Canada and the North, is that Canada Post must continue to play a vital role not only in its core letter-mail services but as a strong federal government presence providing a range of beneficial services to Canadians in all regions.

The industry's view has been fully debated and clearly rejected by the Canadian government and the public in favour of a more balanced policy built around Canada Post's existing public service mandate. But rebuffed through the democratic policy-making process, the multinational courier industry has turned to closed-door negotiations and trade treaty litigation to achieve its policy ends.

### **The foreign courier industry's trade policy offensive**

The multinational courier industry's strategy involves using existing international commercial agreements — including NAFTA and the GATS — to challenge Canadian government postal regulation and to gain the upper hand in sectors where foreign couriers compete with Canada Post. Their attack is three-pronged.

The first prong is under NAFTA. On January 19, 2000 United Parcel Services (UPS) sued Canada under the NAFTA's controversial investor-state procedures. UPS claims that the Canadian government has breached its NAFTA obligations by failing to effectively regulate UPS's competitor, Canada

Post. UPS is seeking damages of at least (US) \$160 million.

The second prong is directed toward the GATS. Through concerted global lobbying, and the support of key governments, the courier industry has succeeded in making postal and express delivery services one of the central topics of the ongoing World Trade Organization (WTO) GATS negotiations in Geneva.

The third prong takes aim at the long-established framework for regulating international postal services through the Universal Postal Union (UPU), a specialized agency of the United Nations. The WTO, and specifically the GATS, is regarded by the multinational courier industry as far more amenable to its commercial interests than the UPU.

### **Lessons for Canada's GATS negotiating strategy**

International courier corporations have explicitly targeted the renegotiation of the GATS to advance their own interests and regulatory objectives. The UPS NAFTA investor-state case is a clear warning of what lies ahead if the GATS is expanded without regard to the broad public interest mandate of the Canadian postal service. The Canadian government faces a determined, sophisticated and litigious adversary. A passive, or worse a complicit, negotiating strategy is entirely unacceptable.

## **The existing GATS and Canadian postal services**

### **Are postal services covered by the GATS?**

In principle, the GATS covers all services except those “*supplied in the exercise of governmental authority.*” But GATS Article I:3c defines such excluded services very narrowly as “any service which is supplied *neither* on a commercial basis *nor* in competition with one or more service suppliers (emphasis added).”

Measures taken by Canada Post, a government-owned corporation, are clearly covered by the GATS. Certain services of Canada Post, such as express delivery, that are offered in competition with commercial providers are also clearly covered. The more difficult issue is whether Canada Post's monopoly letter mail services are covered.

While there are solid *policy* and *domestic legal* arguments that Canada Post does not provide addressed letter-mail services on a purely commercial basis, it is improbable that such arguments would carry much weight within the GATS context or the WTO dispute settlement process. Certainly, the opinion of several legal experts who have examined the issue and the WTO secretariat itself is that the vast majority of postal services would not benefit from the Article I:3 exclusion. On balance, *it is prudent to assume that a WTO panel would find that Canadian postal services, including those services falling within the exclusive privilege, are covered — in principle — by the GATS.*

## GATS general rules and Canadian postal services

### (i) The GATS Most-Favoured-Nation (MFN) Rule, Article II

Certain GATS rules apply automatically to all services. The MFN rule, for example, requires that the best treatment given to *any* foreign service provider must be accorded “immediately and unconditionally” to *all* foreign service providers.

Shockingly, the GATS MFN restrictions conflict with the multilateral rules that ensure the delivery of international mail. For over a century, international postal services have been regulated through the UPU. Under UPU rules, member countries, including Canada, agree to accept international mail posted in any member country and to deliver it to its final destination anywhere around the world.

The inconsistency occurs in two main areas: the compensation that countries pay each other for processing and delivering inbound international mail (called “terminal dues”) and rules adopted by the UPU to govern “re-mailing” which occurs when mail is transported in bulk from one country to be posted in another. Basically, these UPU rules give MFN-inconsistent preferences to developing countries and discretion to post offices to prevent commercial re-mailers from exploiting these preferences by transporting bulk mail abroad to be posted in a country with low terminal dues.

There is no evidence that the WTO officials or GATS negotiators ever alerted postal authorities or the UPU to this conflict while

the GATS was being negotiated. When the GATS was signed, no member government listed MFN exceptions pertaining to international postal regulations. Meanwhile, international corporate lobbyists who well understood the leverage GATS rules would provide them, were closely consulted.

### (ii) Monopolies and state enterprises, GATS Article VIII

GATS Article VIII requires that “a monopoly supplier of a service must not be allowed to act inconsistently with a member government’s MFN obligations or any specific commitments, nor to abuse its monopoly position (WTO, Oct. 1999: p. 6).” In 1994, Canada listed courier services under the GATS. By doing so, Canada triggered the GATS anti-monopoly provisions. This decision foolishly exposed the Canadian government to GATS complaints that Canada Post abuses its letter-mail monopoly position to compete unfairly in competitive services such as express delivery. Foreign-owned courier companies have repeatedly accused Canada Post of abusing its monopoly position through cross-subsidization. But such charges have consistently been rejected by impartial reviews under domestic law.

### Lessons from NAFTA: the UPS investment challenge

In its NAFTA lawsuit UPS alleges that Canada Post uses its letter-mail to “leverage” its position in the competitive portions of its activities. The extreme policy implications of UPS’s legal arguments are that Canada Post’s letter-mail operations and its competitive services must be completely segregated. Their logical outcome is the break-up of Canada Post. This unprec-

edented case is more than just a money grab by a foreign corporation. It is a deliberate challenge to Canadian public policy calculated to pressure the Canadian government into marginalizing the Canadian postal service.

These NAFTA allegations provide key insights into the arguments that could be mounted under the GATS. Unfortunately, Canada's commitments covering courier services appear to have opened it to similar attack under the GATS monopoly restrictions.

## **GATS specific commitments and Canadian postal services**

The most intrusive provisions of the GATS apply only to those services that a government lists in its country schedule. The market access provision (Art. XVI) prohibits six types of measures from being applied to foreign services or suppliers in scheduled sectors. The national treatment article (Art. XVII) requires that any foreign service or service supplier be given treatment no less favourable than that given to domestic services and providers.

### **(i) National treatment**

How services are classified is critical to defining the scope and extent of GATS-enforceable specific commitments. In 1994, Canada did not cover postal services *per se*. But Canada, almost alone among developed countries, almost fully covered courier services. Consequently, where the line is drawn between (uncovered) postal services and (covered) courier services is a critical issue.

There are two key interpretive issues that arise from the unique, and complicated, manner that postal and courier services are classified under the GATS and the related UN classification system (the provisional UN CPC).

First, air transport services are mostly excluded from the GATS. Arguably, this means that courier services provided through air transportation are not included under Canada's specific commitments. Secondly, the UN CPC classifies similar services differently according to whether they are provided by the national postal administration or a private provider. This critical distinction, which allows Canada to argue that only private express delivery services are covered by Canada's GATS commitments, is at risk.

### **Revisiting the UPS NAFTA investor-state challenge**

National treatment requires that every specific advantage given to a domestic service or service provider be extended to a like foreign service or service provider. Already, there is no policy discrimination between foreign and Canadian private courier companies. What the foreign multinationals seek is a GATS-enforceable right to the advantages afforded to Canada Post — without being encumbered by its public service obligations.

Once again, the NAFTA UPS investor-state dispute illustrates the arguments that would be made by foreign courier companies under the GATS. The core of UPS's long list of national treatment complaints under NAFTA is that it is disadvantaged by being denied access to Canada Post's infrastructure.

If Canada Post's courier services are considered covered under Canada's specific commitments, then GATS national treatment would entitle foreign courier services and providers to the most favourable treatment given to the courier services of Canada Post. This would turn the Canadian public postal system upside down.

### (ii) Market access (Article XVI)

Like national treatment, the GATS market access rules apply only to those services that a government has specifically listed. In sectors where market access commitments are made, members are prohibited from placing "limitations" on, among other things, the "number of service suppliers," "total value of service transactions" and the "number of service operations." These are *absolute prohibitions*. Any numerical limits on services or service suppliers or limitations on the legal form of suppliers are prohibited outright, *whether they are discriminatory or not*.

Minimum service obligations would violate GATS Article XVI. Service obligations prohibited by GATS article XVI might include requirements that courier service providers have at least one outlet in rural or northern communities; that a minimum number of persons be employed to ensure communities are served adequately and requirements for minimum numbers of mail boxes, counter service, or for regular, scheduled deliveries and pick-ups.

When Canada listed "courier services" in 1994, it only exempted "economic needs tests" in two provinces. All other minimum service obligations would violate GATS Article XVI. Consequently, if the multinational

courier service industry were ever successful in forcing Canada Post to withdraw from courier services, Canadian governments could not GATS-consistently ensure that minimum standards of courier service were maintained — even in rural areas or the Canadian north.

## Section 3: The GATS 2000 renegotiations: issues for Canadian postal services

During the ongoing negotiations there will be strong pressure to tighten GATS rules and to apply them to an increasing number of service sectors. Postal service systems in Canada and throughout the world will be under intense scrutiny, and efforts to constrain government regulatory ability in the postal services sector will take many forms.

### (i) Increasing GATS coverage directly

The heart of the negotiations will be pressure from governments and corporations to get other governments to fully cover more services by listing them in country schedules. There may certainly be pressure from some quarters to directly cover postal services. So far, however, only six WTO member governments have scheduled specific commitments covering postal services. It appears improbable that more than a handful of countries would agree to such a controversial step during the current round.

The negotiating and lobbying strategy of the multinational courier industry implicitly acknowledges this political reality. Instead of trying to persuade governments to directly cover "postal services" in country schedules, the industry and its allies have

focused on a number of indirect methods for expanding coverage.

### **(ii) Reclassifying services: increasing coverage by stealth**

One of these key flanking strategies is to reclassify postal and courier services to narrow the scope of the former and expand the latter. The multinational courier industry and its principal ally, the U.S. government, have astutely fixed on reclassification of postal and courier services as the best strategy for significantly increasing GATS coverage of postal and related services.

Postal and express delivery services are one of just five priority areas selected for reclassification. The risks entailed in these secretive discussions are greatest for countries such as Canada that have already covered courier services. The first casualty of any reclassification would be the distinction between public and private delivery of postal and courier services. All Canada's negotiating efforts should be bent toward preserving this vital distinction.

### **(iii) Imposing new restrictions on domestic regulation**

GATS Article VI:4 calls on "the Council for Trade in Services, or any appropriate bodies it may establish," to develop any "necessary disciplines" to ensure that "measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade." These proposed "disciplines" are explicitly targeted at *non-discriminatory* regulatory measures.

Powerful corporate lobbies argue that "pro-competitive" regulatory reform should be a major focus of the new GATS negotiation. Multinational courier companies hope to use the domestic regulation talks to get preferential customs treatment. They also want to end post offices' role as governments' delegated representatives at the UPU.

### **(iv) Could GATS e-commerce rules pry open postal services?**

Public post offices must adapt to the significant challenges and opportunities posed by the rapid growth of new information technology. While new information technologies will undoubtedly put pressure on Canada Post's traditional letter-mail services, they do not lessen its public interest mandate. Rather, these developments will result in new demands, community obligations, and universal service needs that can best be met through an improved public postal service.

Horizontal rules on e-commerce could affect a great many public measures and a wide range of service sectors, including postal services. Multinational courier groups have already tried to link their specific policy reform objectives to the e-commerce agenda under the GATS. The implications of e-commerce and the changes that it will inevitably bring to postal services need to be fully and publicly debated. For this reason alone, the highly secretive WTO is a poor choice as a negotiating forum for e-commerce rules.

## **Other negotiating issues**

Other pertinent GATS negotiating topics include subsidies, procurement and air

transport services. The GATS already covers subsidies, but also includes a commitment to *develop further disciplines on subsidies*. Because Canada Post is subsidized to provide certain services to Canadians, any new disciplines could adversely affect its ability to maintain and enhance services to Canadians.

The GATS also calls for further negotiations on procurement. Canada Post's procurement is already covered by the WTO Agreement on Government Procurement. For this reason, the specific GATS negotiations on procurement are unlikely to result in any further significant policy changes for Canada Post.

There are also continuing GATS negotiations to cover air transport services. A sectoral agreement on air transport services could pose significant risks for Canada's postal system. The federal government could, in future, be forced to fall back on the current exclusion of air transport services as an element in its defence in the event of a GATS challenge. Given the aggressive stance of the multinational courier industry, the Canadian government would be wise to specifically instruct its negotiators to resist a sectoral agreement covering air cargo services.

## Conclusion

Canada's trade policy objectives and negotiating strategy must be servants of democratic policy direction. The broad public policy mandate given by Parliament to Canada Post is clear. The Canadian postal service has multifaceted — and evolving — community and universal service obligations. To fulfill its mandate and service ob-

ligations, Canada Post must provide a range of services beyond its core letter-mail services.

Foreign, multinational, private courier companies have been very commercially successful in Canada. They report extraordinary rates of growth. They freely acknowledge that Canada provides one of the most supportive regulatory environments for their industry in the developed world. But, still dissatisfied, the multinational industry has aggressively lobbied for sweeping domestic postal reform. Their goal is to force Canada Post out of express delivery and other competitive services.

Restricting Canada Post to core letter-mail services would destine the Canadian public postal service to gradual erosion and decline. Having driven Canada Post from the field of competitive services, the profitable aspects of letter-mail services would be ripe for commercialization. The public postal service would be left with the expensive responsibility of serving those Canadians — poor, disabled, or living in Canada's rural areas or the north — that could not be serviced profitably by the private sector. Universal public postal services would be a sham.

This barren future for the postal service has been rejected in open, democratic, policy debate. Frustrated by this rebuff, the foreign courier industry has attempted an end run around the democratic policy-making process by litigating and lobbying to achieve its domestic policy reform goals through international commercial agreements such as NAFTA and the GATS.

This study concludes by urging that Canada's GATS negotiating strategy be brought in line with the vital public policy objectives set by Parliament for Canada Post and the country's postal system. Canada's negotiators must vigorously counter the demands to further tighten GATS restrictions on postal and related services that are now being negotiated.

Canadian GATS negotiators should be clearly instructed to:

- oppose expanded coverage of postal and related services.
- oppose classification changes that would expand coverage.
- oppose the proposed restrictions on domestic regulation.
- prevent air cargo services from being included in the GATS, and
- to critically examine any proposals to regulate e-commerce through the GATS.

Given the immediacy of these threats, it would be irresponsible not to insist that the Canadian government take these steps. But these are merely stopgap measures.

The multiplicity of threats posed by the GATS to the Canadian public postal system demonstrate that it is a deeply, flawed agreement hostile to public service systems and to regulation in the public interest. These structural flaws must also be addressed. At a minimum, this would require that:

- Article I:3 be amended to effectively exclude from the agreement mixed public-private, social service systems.
- GATS Article XVI which constrains the non-discriminatory exercise of regulatory authority should be excised; and

- the provisional application of GATS Article VI (Domestic Regulation) should be eliminated and negotiations to develop new restrictions on non-discriminatory domestic regulations terminated.

Instead of negotiations to broaden and deepen the GATS, there should be a thorough and detailed assessment of its many defects from a public interest perspective. Such an assessment should lead to proposals for concrete changes to address these problems.

Even with these fundamental reforms, it is highly questionable whether the GATS is an appropriate agreement to regulate services internationally. It may have been too irrevocably shaped by the narrow, commercial interests that conceived and guided its creation — in almost total secrecy and obscurity — to be redeemed even by fundamental structural amendments. Regrettably, the GATS has been, from its inception, an illegitimate treaty.

The GATS should eventually be replaced by a far more balanced set of rules that supports public interest regulation, universal health and social services, environmental protection, and other public and social goods — not merely private, commercial interests. If the GATS cannot be radically reformed to better reflect the public interest, then it should be relentlessly criticized, strongly resisted, and eventually shunted aside to make way for more progressive multilateral rules.

# Introduction

Negotiations now underway in Geneva on the General Agreement on Trade in Services (or GATS) have the potential to radically restructure the role of government worldwide. These extraordinarily broad negotiations are taking place behind closed doors in close consultation with international corporate lobbyists. They are designed to expand the global “services” treaty that was adopted in 1994, facilitating international business by further constraining democratic governance. If successful, they would extend well beyond trade, subjecting a far greater degree of government decision-making to oversight and interference by the WTO.

The GATS negotiations threaten many aspects of democratic governance at all levels in Canada. In particular, the existing GATS and the negotiations to expand it pose a serious and imminent threat to the current Canadian postal system and its broad public service mandate. Postal and express delivery services are explicitly targeted for further commercialization in this round of negotiations, and intense international pressure will be brought to bear against Canada Post and the Canadian government’s regulatory ability in the postal and express courier service sectors.

The purpose of this paper is to explore what’s at stake for Canada’s postal system in these GATS negotiations and to suggest how Canadians and the Canadian government can best address these challenges to safeguard the public interest.

The paper is subdivided into three sections:

## **Section 1: Canadian postal services and the public interest**

This section highlights the overarching importance of the Canadian postal service’s public purpose — to provide high-quality, affordable postal services to all Canadians in all regions of the country. It describes the fundamental tension between this vital *public* purpose and the GATS, which is first and foremost an instrument for the benefit of international *private*, commercial interests. It considers Canada Post’s universal and community service obligations, the competitive services it provides, and its financial sustainability. The section also profiles the policy aims of the foreign express courier industry in Canada and its confrontational stance toward the Canadian government. Finally, it describes the concerted efforts of the foreign courier industry to bypass Canada’s democratic decision-making process by using the secretive processes of international commercial agreements — including NAFTA and the GATS negotiations — to coerce governments and the Canadian public into acceding to its self-interested policy reform objectives.

## **Section 2: The existing GATS and Canadian postal services**

This section describes how the public interest mandate of the Canadian postal system is already exposed to threat by the existing GATS. The section explains the practical implications of the most important GATS rules that now apply to Canada Post and government regulation of the Canadian postal system. It outlines the importance of the powerful Most-Favoured-Nation obligation, which applies automatically to all service sectors; GATS constraints on the activities of monopolies and state enterprises; and the agreement’s onerous National Treatment

and Market Access obligations, which apply conditionally in service sectors that member governments specify. This section also considers the types of arguments that foreign courier companies are likely to advance, under GATS rules. This analysis draws on arguments from the investor-state challenge, under NAFTA's similar rules, that United Parcel Services, Inc. (UPS) has recently mounted against Canada.

### **Section 3: The GATS 2000 renegotiations: issues for Canadian postal services**

This section describes the increased risks that are posed to Canada's postal system by the ongoing renegotiation to broaden and deepen the GATS. It highlights the pressure on governments to increase GATS coverage directly, by expanding the number and extent of commitments already made, to remove limitations on existing commitments, and to lock in commitments so that future governments cannot reverse them. This section also focuses on efforts to reclassify services — thereby expanding GATS coverage

by stealth — and the consequences this could have on Canada's postal system. The section outlines the serious ramifications of plans to impose new restrictions on domestic regulation; the potential for GATS rules on e-commerce to pry open Canada's postal system; and the significance of related services negotiations on subsidies, government procurement and air cargo services.

The paper concludes by urging that Canada's GATS negotiating strategy be brought in line with the vital public policy objectives set by Parliament for Canada Post and the country's postal system. It notes that future conflict between international commercial interests and Canada Post's public service mandate will require Canada to vigorously counter proposals to further tighten GATS restrictions on postal and related services that are now being negotiated. Protecting the public interest in this sector will also require rolling back certain provisions and coverage of the existing GATS agreement and, ultimately, its replacement by far more balanced rules for the multilateral regulation of services.

# Section 1

## Canadian postal services and the public interest

There is a fundamental tension between the GATS and the current Canadian postal system.

The General Agreement on Trade in Services (or GATS) is first and foremost an instrument for the benefit of international private, commercial interests.<sup>1</sup> To serve these interests, it restricts governments' ability to take measures that allegedly adversely affect the competitive opportunities available to foreign commercial service providers. The GATS restrictions are legally enforceable and backed up by powerful trade sanctions.

The overarching purpose of the Canadian postal service is to provide high-quality, affordable postal services to all Canadians in all regions of this country.<sup>2</sup> In order to achieve this public purpose, Canada Post, a crown corporation, has been granted an exclusive privilege to collect, transmit and deliver letter-mail.<sup>3</sup> Hand in hand with this exclusive privilege come a range of universal and community service obligations. Some of these obligations are mandated by law; others are grounded in the expectations of Canadian citizens and their political representatives who rightly demand the highest standards of excellence from this crucial public service.

In short, the GATS primarily serves private interests whereas, by contrast, the Canadian postal service and Canada Post exist to serve public purposes. It is therefore unsurprising that the GATS restrictions pose formidable

challenges to universal public services such as the Canadian postal service and to the role of crown corporations such as Canada Post. The purpose of this paper is to explore and explain these challenges and potential conflicts and to suggest how Canadians and the Canadian government can best address them to safeguard the public interest and ensure the future vitality of Canada Post and of Canadian postal services.

### Canada Post's universal and community service obligations

In 1981 the Parliament of Canada gave Canada Post a broad public service mandate:

- “(1) The objects of the Corporation are
- (a) to establish and operate a postal service for the collection, transmission and delivery of messages, information, funds and goods both within Canada and between Canada and places outside Canada;
  - (b) to manufacture and provide such products and to provide such services as are, in the opinion of the Corporation, necessary or incidental to the postal service provided by the Corporation; and
  - (c) to provide to or on behalf of departments and agencies of, and corporations owned, controlled or operated by, the Government of Canada or any provincial, regional or municipal government in Canada or to any person services that, in the opinion of the Corporation, are capable of being conveniently provided in the course of carrying out the other objects of the Corporation.”<sup>4</sup>

Canada Post's mandate gives it the authority to provide a range of beneficial services to Canadians, many of which fall outside the reserved area of addressed letter-mail. Parliament was far-sighted in recognizing that Canada Post would require such a broad mandate in order to be socially relevant, financially viable, and, above all, to provide high-quality postal and related services to the Canadian public (Parliament of Canada, 1981).

One of the pillars of the Canadian postal service's universal obligations is that Parliament has required Canada Post, in law, to maintain services "that are comparable for communities of the same size (Parliament of Canada, 1981)." Canada's immense territory combined with its modest population give it a population density of just 3.4 people per square km, by far the lowest among the G-7 countries (CUPW, June 2000, p. 13). To meet this geographical challenge, Canadians have invested through Canada Post in a network of postal facilities that covers the entire country — knitting its citizens together. In many communities in Canada's vast rural areas and in the north, the local post office is the most visible, and often the only, bricks-and-mortar presence of the Canadian government.

Other basic elements of Canada Post's service obligations, while not legally mandated, are firmly rooted in high community and public expectations. For example, while there is no legal requirement that postal rates be the same throughout the country, this is, in practical terms, a binding commitment entrusted to Canada Post. Even within densely populated urban areas, Canadians have high expectations regarding the fre-

quency of collection and delivery, the proximity of postal boxes and post offices and other issues related to the quality of the service. Canadians also demand that the highest standards of security and confidentiality be applied in the handling of their mail.

Moreover, Canada Post is subject to political oversight and democratic direction. The federal cabinet has the authority to direct Canada Post on fundamental matters such as the setting of postal rates and regarding specific standards of service across the country. For example,

- Standard letter-mail rates are set by regulation. Increases in the price of the basic letter rate must be approved by the federal cabinet which has directed that these must be less than inflation, not implemented more than once a year and announced at least six months in advance.
- Public outcry over post office closures and the proliferation of private postal retail outlets convinced the Federal government in February 1994 — after an eight-year grassroots, public campaign — to put a moratorium on the closure of rural post offices.
- The federal cabinet has also approved specific service levels and standards for rural Canada that are monitored independently of Canada Post.
- Following a public review of Canada Post's mandate, the Minister responsible for Canada Post directed that Canada Post respect the wishes of Canadians who, for environmental conservation

reasons, do not want to receive unaddressed advertising mail.

- The government has also directed Canada Post to operate on a financially self-sustaining basis and asked Canada Post to aim to return an annual dividend in the form of a payment into the general revenues of the federal government.

As these instances make clear (Public Works Canada, April 1997), the federal government regularly directs Canada Post on matters, both fundamental and operational, of importance to Canadians.

Taken together, all these examples demonstrate that the universal service and community obligations of Canada Post can not be construed narrowly. They are broad, evolving and are subject to democratic oversight and direction. Meeting these non-commercial obligations has necessitated substantial investment by Canadians in the Canadian postal service and continues to impose a financial burden on Canada Post.

### **Competitive services and the financial sustainability of Canada Post**

The full range of formal and informal obligations that flow from its public interest mandate and democratic accountability have important financial implications for Canada Post. The prices that Canada Post charges for most of its exclusive privilege services are regulated and, as noted previously, increases are kept below the rate of inflation. At the same time, each of its community and universal obligations imposes financial costs — costs that are not borne by its commercial competitors.

As at least one outside analysis has emphasized, to be financially viable Canada Post must be active in providing services that complement its primary focus on letter-mail, which most agree will gradually be eroded over time by electronic communication.<sup>5</sup> Such analysis emphasizes the potential synergies available if Canada Post is obliged to keep abreast of technological developments and to develop new products and services in emerging areas such as electronic communications and commerce. Advances in customer service will require constant updates and capital investment in sophisticated technologies (TD Securities Inc, 1997: *passim*). Conversely, if Canada Post is denied the ability to grow into new areas, its long-term prospects for financial sustainability are poor, and it will be forced to rely on increases in basic postage rates to augment dwindling revenues.<sup>6</sup>

A viable strategy that seeks to take advantage of Canadians' considerable investment in the postal infrastructure to lever economic efficiencies and to provide new, enhanced services for Canadians will inevitably bring Canada Post into competition with private companies in certain areas. The largest of these private sector service providers are foreign-owned with the ability to enforce international treaty rules, including those contained in the GATS. Consequently, the impact of existing GATS rights and any proposals to expand or enhance GATS rights must be carefully examined to ensure that they do not undermine, directly or indirectly, the ability of Canada Post to fulfill its broad public service mandate.

## Foreign-owned commercial providers and Canadian postal services

Canada Post operates within a mixed public-private postal system. Canada Post has the sole responsibility for the collection, handling and delivery of addressed letter-mail. But outside this reserved service area, Canada Post operates in a highly competitive marketplace.

Multinational courier companies provide a range of delivery services including, but not limited to, express letter and parcel delivery. Within Canada, as in most other countries, large multinational companies dominate inter-city and international delivery, while hundreds of smaller, local courier companies concentrate mainly on same-day local express delivery (World Trade Organization, June 1998: p. 6).

The express courier industry is growing rapidly worldwide, reporting average annual growth rates of 20% for the past two decades (WTO, 1998, p. 1). U.S.-based express courier companies — among the world's largest and most dominant — are particularly active in their neighbour to the north.<sup>7</sup> In 1995 the United States International Trade Commission (USITC) studied major U.S. trading partners GATS commitments. After extensive interviews with U.S. express courier industry representatives, the commission reported that *in the opinion of the U.S. industry*, "Canada represents the most open market for U.S. courier services (USITC, 1995: ch. 5, p.12)." The report observed that "Canada imposes few restrictions and provides for, among other things, inter-provincial and intra-provincial trucking privileges... and the temporary entry and stay

of intra-corporate transferees (USITC, 1995: ch. 5, p.12)."

Despite this commercial success, extremely rapid growth and supportive Canadian government regulation, the foreign express courier industry has nevertheless adopted a highly confrontational legal and lobbying stance towards the Canadian government. The courier industry policy reform goals are clearly defined. According to government documents released under Access to Information, the Canadian Courier Association (CCA) aims to:

- "stop Canada Post from operating in both competitive and monopoly markets,
- transfer all courier services out of Canada Post and into Purolator, and
- provide CPC with a clear mandate in terms of specific commercial goals (Public Works Canada, Oct. 1999)."

According to the same official documents, UPS, which dominates the Canadian Courier Association, "believes that the only resolution is for [Canada Post] to be totally removed from the courier and parcel business (Public Works Canada, Jan. 2000)."

These industry concerns and lobbying objectives are not new; they have been expressed forcefully by courier industry lobbyists for many years. For example, the industry's views were argued during the Canada Post Mandate Review conducted by George Radwanski. Some of the key recommendations of the Mandate Review reflected the industry position — suggesting, for example, that Canada Post should withdraw from competitive services,<sup>8</sup> sell its in-

terests in Purolator, and focus on core letter-mail services.

The Mandate Review, however, did not adequately reflect the concerns of thousands of Canadians who support a very different vision of the future of public postal service. Representatives of Canada's rural areas and the north argued strongly that their regions would be the first to suffer if commercial interests came to dominate Canadian postal services.<sup>9</sup> While the Mandate Review did respond to these concerns by recommending that the moratorium on rural post office closings be extended indefinitely and that the government direct Canada Post to improve service in Canada's rural areas, its contradictory vision of a much diminished public postal service effectively undercut the long-term viability of achieving and sustaining these goals. Mr. Radwanski's report, in effect, constitutes a "blueprint for easing the government out of its responsibility to provide public postal service (CUPW 2000: p. 8)."

The federal government wisely rejected, on balance, the radical reorientation of the public postal service advocated by the private courier industry and supported, in part, by the Radwanski report. The government announced that Canada Post would not withdraw from competitive services. It directed that postage rates not be increased as suggested by the Mandate Review. It announced that Purolator would not be divested and that Canada Post itself would not be privatized. The government also directed Canada Post to improve the quality of services in a range of areas, especially regarding service standards in rural areas and the Canadian north.

In a democracy, it is natural and healthy that there should be different, and competing, philosophical visions of the role and future of a crucial public service such as the postal service. As we have seen, one vision, characteristic of the commercial courier industry and of the Mandate review, is that Canada Post should focus on its core business of letter-mail delivery and withdraw from other activities. If the demand for core letter-mail services is eclipsed by other information technology, then Canada Post should exit the stage.

Another vision with strong public support is that Canada Post must continue to play a vital role not only in its core letter-mail services but as a strong federal government presence providing a range of beneficial services to Canadians in all regions, especially in rural Canada and the North. To fulfill this role, Canada Post must be empowered to adapt to a changing commercial and technological environment. Canada Post must innovate and pursue opportunities to provide excellent core services and to add other services desired by Canadians in all regions of the country. The former vision, while a legitimate expression of the industry's narrow interests, has been fully debated and, so far, rejected as public policy in favour of a more balanced policy vision built around Canada Post's existing public service mandate.

What is new, unhealthy and arguably illegitimate in a modern democracy, is the deliberate effort by the foreign-dominated commercial courier industry, nationally and globally, to use international trade and investment agreements to achieve its domestic policy reform objectives through secretive, extra-parliamentary means. Rebuffed

in open public debate, the industry has turned to trade litigation and behind-closed-doors negotiations to sidestep the public policy-making process, stifle public debate, and to coerce governments and the Canadian public into acceding to its policy reform objectives. It remains to be seen whether the Canadian government will provide international leadership to protect the public interest or whether it will, through these complex treaty negotiations, quietly advance commercial interests in a manner that would be politically untenable in an open, democratic forum.

### **The foreign courier industry's trade policy offensive**

The commercial courier industry's trade policy strategy involves using existing international commercial agreements — including NAFTA and new international negotiations, in particular the GATS — to challenge Canadian government postal regulation and to gain the upper hand in sectors where foreign couriers compete with Canada Post.

One powerful prong of the industry's aggressive trade policy strategy is the current NAFTA investor-state challenge by UPS. On January 19, 2000 UPS served a notice of intent to submit a claim to arbitration under chapter 11 of the NAFTA (Appleton & Associates, 2000). UPS claims that the Canadian government has breached its NAFTA obligations by failing to effectively regulate UPS's competitor Canada Post. UPS is reportedly seeking damages of at least (US) \$160 million, plus costs and tax consequences (Inside U.S. Trade, April 28, 2000).

UPS alleges that the Canadian government has violated various provisions of NAFTA chapters 11 (Investment), 12 (Cross-Border Trade in Services) and 15 (Competition Policy, Monopolies and State Enterprises.) As will be discussed in more detail later in the paper, the UPS claim concerns Canada Post's alleged abuse of its monopoly position, cross-subsidization of competitive courier products by its monopoly letter services, and a range of other discriminatory advantages supposedly afforded to Canada Post. On April 19, 2000, UPS served its "statement of claim" formally beginning the NAFTA arbitration process. This key document and others related to the NAFTA investor-state case remain secret; neither UPS nor the Canadian government will release them to the public.

Another important prong of industry lobbying is directed toward the ongoing GATS negotiations in Geneva, which will be discussed in section 3. This industry pressure has already yielded results. Acting through their global lobbying associations, the courier industry has succeeded in making postal and express delivery services one of the central topics of the WTO GATS negotiations. For example, postal and express delivery services is one of five priority "clusters" of services that are currently the subject of key classification discussions in Geneva. The international courier industry has been greatly assisted in its efforts by the Organization for Economic Cooperation and Development (OECD) and developed country negotiators within the WTO.

In a third prong of its attack, the express courier industry has taken aim at the long-established framework for regulating international postal services through the Univer-

sal Postal Union, a specialized agency of the United Nations. The WTO, and specifically the GATS, with its strongly commercializing bent, is regarded by the multinational courier industry as far more amenable to its purposes.

This aggressive corporate trade policy calls for a firm and effective response from the Canadian government. It is the responsibility of the Canadian government and its negotiators to ensure that international trade rules and negotiations do not permit commercial interests to undermine the parliamentary mandate given to Canada Post, to advance their private interests at the expense of the public interest, to foreclose or prejudge domestic postal policy reform options, or, as in the case of NAFTA, to expose the Canadian public to significant financial liabilities or trade sanctions.

### **Lessons for Canada's GATS negotiating strategy**

The UPS NAFTA case should, at the very least, suggest the need for far greater caution and, better still, for a re-evaluation of the Canadian government's support for expanding further GATS restrictions affecting postal services. Most signs, unfortunately, indicate that Canadian trade negotiators have either taken a passive approach to this vital sector or have been helping to lay the

groundwork for expanding GATS restrictions affecting postal services.

International corporate interests have become highly active in the WTO to achieve their regulatory objectives. As one well-placed observer notes, "Private carriers in particular have increased their visibility in a variety of international fora including the World Trade Organization (WTO), in order to achieve their preferred reform objectives in the postal industry, both in the United States and worldwide (Alverno, 2000: p. 1)."

These corporations appear to have come to expect sympathy and support among the commercial ministries that wield authority at international trade negotiating tables. To date, they have not been disappointed even though, as in the UPS NAFTA case, some of these companies have turned around and used their newly won rights to sue these same governments.

The GATS is now a central focus of corporate trade policy efforts. International courier corporations have explicitly targeted the renegotiation of the GATS to advance their own interests and regulatory objectives. The Canadian government is confronted with a determined, sophisticated and aggressive corporate trade strategy. A passive, or worse a complicit, negotiating strategy is therefore unacceptable.

## Section 2

### The existing GATS and Canadian postal services

#### Are postal services covered by the GATS?

An examination of the concrete implications of any international commercial treaty begins with the issue of whether its provisions apply to the sector in question. In the case of the impact of the GATS on Canada's postal system, the answer is not exactly straightforward.

GATS articles I (Scope and Definition) and XXVIII (Definitions) together define the scope and coverage of the GATS. In principle, the GATS restricts almost all *government measures* affecting any service except those *“supplied in the exercise of governmental authority.”*

First, it is quite clear that federal government actions regulating Canada Post are “measures” covered by the GATS. Article I:3 states that covered measures include those taken by any level of government. Article XXVIII defines measures very broadly as “any measure ... whether in the form of a law, regulation, rule, procedure, decision, administrative action or any other form.” This broad definition would catch any measure taken by the federal government that affected Canada Post and Canadian postal services.

Second, it is clear that the administrative policies and practices of Canada Post itself are also “measures” covered by the agree-

ment. Article I:3 states that covered measures include those taken by non-governmental bodies acting in the exercise of delegated authority. Because it is a crown corporation subject to governmental direction, measures taken by Canada Post would be covered by the GATS. Already, in the Canadian periodicals case, lower postal rates for Canadian magazines that were administered by Canada Post were found to be measures covered by WTO rules (WTO, Mar. 1997).

In that case, the WTO panel rejected the Canadian government's arguments that, because Canada Post is an independent entity whose operational decisions are not subject to direct governmental control, “commercial” decisions taken by Canada Post are not “measures” covered by the GATT. Rather, the panel concluded “the pricing policy of Canada Post is a governmental measure.” Moreover, the panel ruled “First, in view of the control exercised by the Canadian Government on ‘non-commercial’ activities of Canada Post, we can reasonably assume that sufficient incentives exist for Canada Post to maintain the existing pricing policy on periodicals. Second, ... Canada Post's operation is generally dependent on Government action. This leads us to the conclusion that Canada Post's pricing policy on periodicals can be regarded as governmental regulations or requirements within the meaning of Article III:4 of GATT 1994 (WTO, Mar. 1997: p. 78).” Similar reasoning would apply in determining what other kinds of measures are covered under the GATS.

A third, basic “threshold issue” is whether Canadian postal services, or some portion of them, are excluded by virtue of the GATS exclusion of “services supplied in the exer-

cise of governmental authority.”<sup>10</sup> Article I:3c defines such excluded services very narrowly as “any service which is supplied *neither* on a commercial basis *nor* in competition with one or more service suppliers (emphasis added).” This means that if *either* condition specified in Article I:3 is met, then the GATS applies. In other words, if a governmental service is provided on a commercial basis then it is subject to GATS restrictions; similarly, if a governmental service is supplied in competition with any other suppliers then it is likewise subject to the GATS.

Because all areas of postal service other than the collection, transmission and delivery of letters are open to competition, most Canadian postal services do not fall within the narrow “governmental authority” exclusion and so are covered by the GATS. For example, in its express courier activities Canada Post competes with other suppliers; this, and Canada Post’s other non-monopoly service operations, obviously fall within the coverage of the GATS.

The more difficult question is whether addressed letter-mail services, where Canada Post has an exclusive privilege, are covered by the GATS. As noted, to be fully excluded as a service supplied in the exercise of governmental authority, these letter-mail services would have to be provided neither on a commercial nor a competitive basis.

Taking the latter condition first, no other suppliers are permitted to compete directly with Canada Post providing addressed letter-mail services.<sup>11</sup> While there is some competition in letter-mail services, it is allowed only under strict conditions. Private carriers can deliver letters of an urgent nature under the 500 gram limit, but only at regu-

lated rates that are set at three times the regular rate for letters weighing fifty grams. Therefore, for non-expedited, addressed letter-mail, there are strong arguments that it is not delivered “in competition with one or more service suppliers.”

The critical remaining issue is whether letter-mail delivery is provided “on a commercial basis.” This is not defined in the GATS. But this condition is clearly more problematic. Postage is charged for addressed letter mail and this alone could be deemed by the WTO to put the service on a commercial basis. Other arguments that a WTO panel might use to assert that even letter-mail services are delivered on a commercial basis would include that Canada Post is a commercial crown corporation. In most years, revenues from letter-mail services result in a surplus for Canada Post. Canada Post also periodically returns a dividend to its “shareholder” — the government of Canada.<sup>12</sup>

Alternatively, arguments that letter-mail services are not delivered on a commercial basis might include that Canada Post is subject to restrictions that do not apply to purely commercial enterprises. The federal government puts pricing restraints and service obligations on Canada Post that are not commercial in nature. An important distinction could also be drawn between CPC’s mandate to operate on “self-sustaining financial basis” and a purely commercial mandate. Even more fundamentally, Canada Post’s overriding purpose is to operate a postal service for the benefit of all Canadians, which contrasts starkly with a private corporation’s primary goal of maximizing shareholder value.

It is not possible to predict confidently how a WTO panel might rule if confronted with these or similar arguments. However, while there are solid *policy* and *domestic legal* arguments that Canada Post does not provide addressed letter-mail services on a purely commercial basis, it is improbable that such arguments would carry much weight within the GATS context or the WTO dispute settlement process.

Certainly, the opinion of several legal experts who have examined the issue is that the vast majority of postal services would not benefit from the Article I:3 exclusion. Perrazzelli and Vergano, for example, conclude that “that GATS can definitely be considered to cover the bulk of the services offered in the postal sector (Perrazzelli and Vergano, 2000: 741).” The Universal Postal Union, the United Nations body that regulates the provision of postal services, is even more blunt — stating simply that “the GATS applies to postal services (cited in Perrazzelli and Vergano, 2000: 741).” And, significantly, the WTO Secretariat’s opinion is that “Postal services of a Member, whatever the status of the postal supplier, would be services covered by the GATS so long as, *and which is usually the case*, they are supplied on a commercial basis (WTO, 1998: 2, emphasis added).”

On balance, therefore, *it is prudent to assume that a WTO panel would find that Canadian postal services, including those services falling within the exclusive privilege, are covered — in principle — by the GATS.*

## **GATS general rules and Canadian postal services.**

### **(i) The GATS Most-Favoured-Nation (MFN) Rule, Article II**

Certain GATS rules are general obligations that apply automatically to all services. The MFN obligation, contained in GATS Article II, is one of these general obligations. It therefore already applies unconditionally to Canadian postal services. MFN requires that the best treatment given to *any* foreign service provider must be accorded “immediately and unconditionally” to *all* foreign service providers.

Generally speaking, this powerful provision has the potential to consolidate forcefully any future privatization or commercialization that involves foreign service providers. Indeed, any advantage acquired by a single foreign provider must be extended to all, thus increasing the constituency having a vested interest in promoting further commercialization and in resisting any efforts by future governments to reverse market-opening reforms.

More immediately, however, the GATS MFN restrictions raise serious issues concerning the international regulation of postal services. Long before the GATS was created, or even conceived, international postal services were regulated by multilateral agreement. The Universal Postal Union (UPU), headquartered in Berne, Switzerland, is the specialized agency responsible for regulating international postal services. Under UPU rules, the territories of its 189 member countries are treated as a single postal territory. Member countries agree to accept international mail posted in any member

country and to deliver it to its final destination anywhere around the world.

Since the advent of the GATS in 1994, concerns have arisen about potential conflict between GATS provisions and the rules and regulations of the UPU. The potential inconsistency occurs in two main areas: the compensation that countries pay each other for processing and delivering inbound international mail (called "terminal dues") and rules adopted by the UPU to govern "re-mailing" which occurs when mail is transported in bulk from one country to be posted in another.

Prior to 1969, postal administrations were not compensated for delivering in-bound international mail. Instead, it was assumed that every in-bound letter elicited a reply, resulting in a rough balance in international mail exchanges. In 1969 the UPU acknowledged that this "balanced mail exchanges between countries" concept was invalid (U.S. GAO, 1996: p. 34) and that it disadvantaged national post offices in the larger developed countries who were receiving much higher volumes of in-bound international mail.

In 1969, the UPU devised "terminal dues" as the means to compensate postal administrations for the net costs incurred in delivering in-bound international mail.<sup>13</sup> Terminal dues are the arrangements by which national postal administrations reimburse each other for the services provided handling and delivering international mail posted in another member country (cf. Perrazzelli and Vergano, 2000: p. 736 n1). Canada Post, as a UPU member, collects postage revenues on outbound international mail. But, like other national postal administrations, it is com-

pensated for the delivery of in-bound international mail through the "terminal dues" system.

In order to buffer poorer countries from the impact of the new terminal dues structure, the UPU adopted a two-tier system. A higher "terminal dues" rate was applied to developed countries that shipped a high volume of international mail, than to developing countries with smaller volumes.<sup>14</sup> As awareness of the GATS has grown, it has been recognized that there may be an incompatibility between the unconditional GATS MFN obligation and this preferential treatment for developing countries. As the UPU notes "compliance with the WTO's Most-Favoured-Nation requirement would prevent members from applying different terminal dues based on the country of origin mail (UPU: Feb. 1999)."

Moreover, the differential fees structure led to the growth of "re-mailing" where bulk mail is transported abroad to be posted in a country with low terminal dues. For example, mail prepared for delivery in the U.S. is transported to a developing country with low terminal dues, such as the Dominican Republic, and mailed back to the U.S. at a fraction of U.S. domestic postal rates (U.S. GAO, 1996: pp. 34 ff.).<sup>15</sup> Re-mailing can result in large revenue losses for developed country postal administrations (U.S. GAO, 1996: pp. 34 ff.).

In effect, private sector re-mailers took advantage of the preferential arrangements intended to ensure affordable international mail services to residents of poorer countries, to engage in a form of dumping. Acting independently and through the UPU, national postal administrations took steps

to combat re-mailing. At its 1994 Congress the UPU adopted the principle that “payment for bulk or commercial mail should be linked to the prices customers pay in the country of delivery (Perrazzelli and Vergano, 2000: p. 736).” Regulations regarding re-mailing also gave national postal administrations a right of refusal to forward or deliver so-called A-B-A re-mail that was designed to take advantage of lower terminal dues in another country.

These steps were intended to combat the abuse of the system by re-mailers and staunch the loss of revenues to national postal administrations in developed countries, while preserving the lower postal rates afforded to mail from *bona fide* residents of poorer countries. Such measures, which differ depending on the source and ultimate destination of mail, are also exposed to potential challenge under the GATS MFN article. As some legal experts have observed, even if these rights of refusal are not exercised and the MFN violation is merely hypothetical, they would still violate GATS rules (Perrazzelli and Vergano, 2000: p. 745).

When the GATS was signed, members had a one-time opportunity to list exceptions to their MFN obligations. No member government listed MFN exceptions pertaining to international postal regulations. The potential conflicts between the new GATS and the long-established system for regulating international mail were apparently not understood. Since then, as awareness has grown, national postal administrations and the UPU have paid more attention to these potential conflicts. The UPU has requested observer status in the current WTO GATS negotiations and a draft memorandum of understanding providing for greater cooperation

between the UPU and the WTO has been prepared (UPU, 2000).

However, the possibility of conflict remains. The GATS unconditional MFN obligations pose a clear threat to the long-standing international regime that has successfully regulated international mail. There is no indication that the WTO officials or GATS negotiators ever alerted postal authorities or the UPU to these potential conflicts while the GATS was being negotiating. Meanwhile, international corporate lobbyists who well understood the leverage GATS rules would provide them, were closely consulted through lobby organizations such as the U.S. Coalition for Service Industries. This failure to inform or to consult those directly affected raises serious questions about the legitimacy of GATS restrictions whose implications were poorly understood and inadequately publicized at the time the treaty was signed and ratified.

#### **(ii) Monopolies and state enterprises, GATS Article VIII**

Like MFN, the GATS Article VIII restricting monopolies and state enterprises falls within Part II of the GATS “General Obligations and Disciplines.” However, unlike MFN which applies *unconditionally* to all services whether scheduled or not, certain aspects of Article VIII apply *conditionally* only to listed services. The GATS restrictions on monopolies are best understood as hybrid provisions combining features of general obligations and specific commitments. As summarized by the WTO secretariat, GATS Article VIII requires that “a monopoly supplier of a service must not be allowed to act inconsistently with a member government’s MFN obligations or any specific com-

mitments, nor to abuse its monopoly position (WTO, Oct. 1999: p. 6)."

Article VIII.1 states that monopoly service providers are directly constrained by MFN and any specific commitments. This provision includes an element of redundancy, making doubly certain that international agreements entered into by Canada Post, which represents Canada in the Universal Postal Union, are restricted by MFN.

With respect to monopolies and specific commitments, Article VIII.2 provides that "where a monopoly supplier competes, whether directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights *and which is subject to that Member's specific commitments*, the member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments (GATS Article VIII.2, emphasis added)."

These restrictions have important implications for Canadian postal services. Canada has made no specific commitments covering postal services *per se*. But, unlike most other developed countries, Canada made extensive GATS commitments in the courier services sector. *By listing courier services as one of its GATS specific commitments, Canada triggered the application of the 'abuse of monopolies' provisions contained in Article VIII.2. This decision has thus exposed the Canadian government and Canada Post to GATS complaints that it abuses its letter-mail monopoly position to compete unfairly in competitive services such as express delivery.*

Such charges, although they have never been substantiated under domestic law, are an article of faith among the private express

courier industry. These firms, led by the largest foreign-owned courier companies, have repeatedly accused Canada Post of abusing its monopoly position through cross-subsidization. Specifically, they have charged that Canada Post uses revenues from its exclusive privilege letter operations to subsidize its express courier operations.<sup>16</sup>

Despite these recurring industry complaints, impartial investigations and reviews have consistently concluded that there is no cross-subsidization of Canada Post's courier services by revenues from its basic letter-mail services. In 1993, when reviewing the acquisition of a controlling interest in Purolator Courier by Canada Post, the National Transportation Agency concluded that "there is no evidence to support the allegation that cross-subsidization between Canada Post would occur as a result of the proposed transaction (National Transportation Agency, Sept. 1993: p. 7)." A concurrent review of the acquisition by the Competition Bureau of Canada reached the same conclusion (Competition Bureau, Nov. 1993). Similarly, in its 1997 review of Canada Post, TD Securities "did not find any evidence of cross-subsidization from CPC to Purolator during the course of our review (TD Securities Inc, April, 1997: p. 17)."<sup>17</sup> Finally, Canada Post's auditors are required to report specifically on any potential cross-subsidization between Canada Post and Purolator and have never reported any evidence that it occurs. Indeed, in Canada Post's most recent annual report, the auditors conclude that the "market or competitive grouping of services has not been cross-subsidized using revenues from exclusive privilege sources (Canada Post, 2000: p. 30)."

Although inquiries under domestic law using standard accounting practices emphatically conclude that there is no cross-subsidization or abuse of Canada Post's monopoly position, a WTO panel applying GATS methodologies could well reach a different conclusion. And the prospect that multinational courier companies will use international commercial treaties to pursue these claims is far from hypothetical.

### **Lessons from NAFTA: the UPS investment challenge**

As noted previously, United Parcel Services Inc., the world's largest courier company, is currently suing the government of Canada for at least (US) \$160 million under NAFTA chapter 11. While the public has been denied access to the key legal documents related to the case, the "notice of intent" indicates that many of the allegations of NAFTA-inconsistent practices involve charges that Canada Post uses its monopoly of letter-mail services to "leverage" its position in the competitive portions of its activities. These allegations under the NAFTA provide key insights into the types of arguments that could be mounted under the similar "monopolies and state enterprises" provisions of the GATS.

In its NAFTA notice of intent, UPS makes a long list of charges, alleging that "Canada Post's acts of cross-subsidization of its courier business ... include, but are not limited to:

- "Allowing couriers to deposit Xpresspost courier packages into any of the thousands of Canada Post letter mail postal boxes located across Canada.

- Hiring letter carriers whose salaries are paid for by Canada Post's monopoly, to pick up Xpresspost packages from the above postal boxes and transport them in vehicles that form part of the infrastructure of the Canada Post monopoly.
- Sorting Xpresspost, SkyPak and Priority courier packages at Canada Post's letter mail monopoly sorting facilities across the country.
- Transporting Xpresspost, SkyPak and Priority courier packages across Canada on aircraft chartered by Canada Post's letter mail monopoly and/or trucks leased or owned by said monopoly.
- Hiring letter carriers whose salaries are paid for by Canada Post's monopoly to deliver Xpresspost packages to their destinations.
- Storing Xpresspost, SkyPak and Priority courier packages at Canada Post letter mail facilities across Canada for customers who may not be present to accept delivery (or for oversized packages).
- Storing Xpresspost, SkyPak and Priority Courier services at thousands of retail locations across Canada that belong to, or are leased by, Canada Post's letter mail monopoly.
- Precluding facilities at Canada Post retail outlets from selling any express product other than Canada Post's. This unfairly restricts competition and investment opportunities for other courier providers thereby creating a monopolistic retail outlet base for Canada Post.
- Reducing the need to collect account receivables from Xpresspost customers by permitting those customers to use postal stamp meters (ordinarily reserved for letter mail) to affix postage to Xpresspost packages.

- Operating accounts receivable collection services for Xpresspost, priority post and SkyPak.
- Operating privileged pick up services for business clients at preferred rates by employees paid for by the Canada Post monopoly.
- Having the regulatory definition of letter changed from 450 grams to 500 grams in order to expand its letter mail monopoly.
- Subsidizing the development costs of its new e-commerce business with revenues earned from its letter-mail monopoly.
- Pricing Xpresspost and Priority courier services at rates that are often below the cost of providing such services as compared to other delivery products offered by private sector couriers in Canada.
- Subsidizing the development of its subsidiary, Purolator Courier Ltd. (Appleton and Associates, 2000: pp 4-5)"

The extreme policy implications of UPS's legal arguments are clear. These arguments imply that to avoid the charge that it "abuse[s] ... its dominant position," Canada Post's letter-mail operations and its courier and other non-monopoly services must be completely segregated.<sup>18</sup> The operational consequences of such watertight separation within a single corporate entity would be absurd and crippling. The obvious policy outcome of this line of attack is the break-up of Canada Post, and ultimately the divestiture of all of its operations other than core letter-mail services.

Defending itself in the UPS investor-state dispute will result, at a minimum, in significant legal and administrative costs for the government of Canada and Canada Post. The potential liability if UPS should prevail

is much greater and must also be provided for. *But this unprecedented case is more than just a money grab from the Canadian taxpayer by a foreign corporation. It is a deliberate challenge to Canadian public policy and is calculated to pressure the Canadian government into marginalizing the Canadian postal service in order to advance UPS's corporate interests and strategy. Unfortunately, Canada's GATS commitments regarding courier services appear to have opened Canada Post and the Canadian public to a similar line of attack under the GATS monopolies restrictions.*

The final relevant subsection is VIII.4 which provides that if "a member grants monopoly rights regarding the supply of a service covered by its specific commitments" then it must compensate other members for their lost benefits under the GATS. Any decision by a future Canadian government to expand Canada Post's monopoly would therefore be subject to WTO-adjudicated compensation claims. This might mean, for example, if Canada were to increase the rate that courier companies must charge when delivering urgent letters (currently set at no less than three times the rate for standard letters weighing less than 50 grams), then another WTO member could demand compensatory adjustment on behalf of its affected courier service providers. This might entail Canada offering to make commitments in other services markets, or if a satisfactory solution could not be negotiated, facing trade sanctions from other WTO members. This provision would inflate the financial cost of reversing even a partial privatization or commercialization of any part of the Canada Post system and make bringing once-privatized services back within the public sphere far more difficult.

The MFN and monopolies restrictions of GATS, combined with Canada's existing commitments covering courier services, create the clearest current exposure of Canadian postal services to potential GATS challenge. But the implications of this exposure pale next to the threats inherent in the direct, or even indirect, application the GATS national treatment article to Canadian postal services. The next section of this paper considers the implications of the national treatment provision and Canada's existing specific commitments for Canada Post and Canadian postal services.

### **GATS specific commitments and Canadian postal services**

The most intrusive provisions of the GATS, national treatment (Art. XVII) and market access (Art. XVI), apply only to those services that a government has listed in its country schedule. The market access provision prohibits six types of measures from being applied to foreign services or suppliers in scheduled sectors. The national treatment article requires that any foreign service or service supplier be given treatment no less favourable than that given to domestic providers in the committed sectors.

GATS rules are intended to apply to every conceivable way (or "mode") of supplying or consuming a service internationally — whether through cross-border communications (mode 1), international consumer travel (mode 2), foreign investment (mode 3), or international labour mobility (mode 4).<sup>19</sup> Governments may list different (or no) commitments under different modes and include "limitations" exempting otherwise inconsistent measures. Therefore, to understand the extent of Canada's commitments

regarding postal and courier services one must examine the detailed commitments in Canada's country schedule.

#### **(i) National treatment**

How services are classified is critical to defining the scope and extent of GATS-enforceable specific commitments. As will be discussed, this is especially true in the case of postal and courier services. The first step in assessing the implications of the GATS national treatment article, therefore, is to analyze the classification system used by Canada to describe and delineate its specific commitments.

While the schedules of each country are the definitive documents for interpreting their specific GATS commitments, GATS services commitments are classified according to a document developed during the Uruguay Round known as the Services Sectoral Classification List (or W/120).<sup>20</sup> W/120 classifies services at quite a high level, without breaking them down into detailed categories and sub-categories. Each category in W/120 is, however, cross-referenced to a more detailed classification system developed by the United Nations, the UN Provisional Central Product Classification (the Provisional CPC). Although the use of W/120 was not mandatory, most WTO members,<sup>21</sup> including Canada, adopted W/120 and the Provisional CPC as the basis for their GATS scheduling.<sup>22</sup>

Currently, mail and parcel delivery services are classified in the W-120 under sub-classes "A. Postal services" and "B. Courier services" which both fall within Class 2 "Communication services." (The W/120 classification list is reproduced in Appendix 1.) The

corresponding CPC classifications are postal services (7511) which is further subdivided into four subclasses: postal services related to letters, postal services related to parcels, post office counter services, and a residual category, "other" postal services and "Courier Services" (7512) which is subdivided into "multi-modal courier services" and "other courier services." Significantly, "mail transportation by air" is excluded from the CPC classification of courier services (WTO, June 1998). Instead, these services are classified separately under Mail transportation by air (73210). (The relevant CPC classifications are reproduced in Appendix 2.)

Canada has made no commitments under postal services (7511) *per se*. But Canada, almost alone among developed countries, has made nearly full commitments under courier services (7512). In Canada's schedule under courier services, Modes 1 and 2 are fully committed (i.e. marked "none"), with no limitations. Under Mode 3, Canada is also fully committed with no limitations other than for Nova Scotia and Manitoba who both have exempted "economic needs tests" related to certain criteria. Canada's commitments under mode 4 are "unbound," meaning that, while it currently applies no restrictions, it reserves the right to apply restrictions in future on the supply of courier services by "movement of natural persons."

There are two critical interpretive issues that arise from the unique, and complicated, manner that postal and courier services are classified under the W-120 and the provisional CPC. The first relates to the separate classification of "mail transportation by air" in the CPC and the unique GATS treatment of air transportation issues. The second is-

sue relates to the treatment of postal and courier services in the provisional CPC, which explicitly, and perhaps uniquely, distinguishes between services delivered by the national postal administration and those delivered by private firms.

### **Mail transportation by air**

Much of the intercity and international express courier traffic, where foreign express courier companies are most active, is delivered by air. Air transport services is one of the few service sectors that the GATS singles out for special treatment. The GATS Annex on Air Transport Services carves out traffic rights and services related to traffic rights from the GATS. In other words, the GATS simply does not apply to these rights and services.

But article 3(b) of the same annex states that the GATS shall apply to measures affecting the "selling and marketing of air transport services." The WTO Secretariat in its discussion of the implications of this for postal and courier services states only, and rather obliquely, that "it is likely that the exclusion of most air transport services by the GATS Annex on Air Transport... has an impact on courier services commitments undertaken (WTO, June 1998, p. 3)."

The practical implications of this exclusion for air cargo services and air courier services are difficult to discern precisely. Air traffic rights, including air cargo rights, are excluded by the GATS. But once a foreign air cargo provider acquires air traffic rights, it is entitled to GATS protection in the "selling and marketing of air transport services." Through a network of bilateral agreements Canada has provided air traffic rights to foreign air cargo couriers and, because Canada

has made commitments under courier services these courier services and companies may enjoy GATS-enforceable rights to “sell and market their services” within Canada. On the other hand, Canada has made no specific commitments under “Mail transportation by air” (73210).<sup>23</sup> Arguably, this means that courier services provided through air transportation are not included under Canada’s specific commitments.

### **Services delivered by the national postal administration**

A further feature of the provisional CPC that may provide the government of Canada with a critical bulwark against GATS national treatment challenges is that the CPC classification of postal and courier services is built around the traditional distinction between public postal services and private delivery services. The provisional CPC defines “the pick-up, delivery and transport services” of letters, parcels and other printed matter as Postal services (7511) when they are “rendered by the national postal administration.” The CPC defines similar “pick-up, delivery and transport” services of letters, parcels and packages as “courier services” (7512) if they are rendered by service providers “other than the national postal administration.” As the WTO secretariat, again rather obliquely, observes, “(t)he distinction between these [items listed under courier services] and similar UNCPC items under postal services is that these are presumed to be services that can be provided by suppliers other than national postal administrations (WTO, June 1998: p.2 n1.)”

In short, the CPC classifies similar services differently according to whether they are provided by the national postal administra-

tion or a private carrier. This critical distinction between the public and private provision gives Canada a firm basis to argue that only those express delivery provided by private service providers are covered by Canada’s specific GATS commitments.

If this classification stands up, the standard for national treatment of foreign courier service providers would not be the best treatment applied to “the national postal administration” — Canada Post — but the best treatment given to Canadian private courier companies. This unusual feature of the UNCPC definitions of postal and courier services may thus provide the Canadian government and Canada Post with its best defence against a host of complaints of discriminatory treatment by foreign courier companies. While it is precarious, this protection — together with the public/private distinction upon which it is based — must be defended by all means.

Having considered the relevant classification issues, it is important to turn to the significance of the national treatment obligation itself. National treatment entails that every specific advantage given to a domestic service or service provider must be extended to a like foreign service or service provider. The WTO Secretariat describes very clearly the effects of GATS national treatment commitments in a particular sector, “a foreign supplier ... will enjoy virtually free access to that market if given national treatment, since this by definition *will remove any regulatory advantage enjoyed by the domestic service supplier* (WTO, Oct. 1999: p. 8. emphasis added).” Foreign courier companies already have access to any advantage given to Canadian private courier companies; there is no discrimination. The prize

they seek is a GATS-enforceable right to all the advantages enjoyed by Canada Post — a right that would, of course, be unencumbered by the universal and public service obligations of Canada Post.

### Revisiting the UPS NAFTA investor-state challenge

Once again, the NAFTA UPS investor-state dispute provides practical insights into the types of arguments that would be mounted by foreign courier companies against the Canadian government and Canada Post under the comparable GATS national treatment provision.

The core of UPS's national treatment arguments under NAFTA chapter 11 is that it is disadvantaged by being denied access to Canada Post's infrastructure. The notice of intent states that, "Canada Post established and maintains a distribution system under government authority delegated to it in connection with its postal monopoly. This system includes air and land transportation fleets, postal sorting and distribution carriers, retail postal outlets, a network of mail storage containers and a workforce of postal carriers." (Appleton & Associates, 2000: p. 7). UPS alleges that Canada violates NAFTA's national treatment obligation because Canada Post permits access to its distribution system for its own courier products while denying this access to UPS Canada and other courier service investors.

UPS chronicles a long list of such regulatory advantages that it is convinced Canada Post enjoys and that it seeks to extend to foreign courier companies or to eliminate. Its allegations include the following:

- "UPS customers cannot use letter mail boxes to send prepaid packages as Xpresspost customers can. UPS packages cannot be sent across Canada as part of domestic mail shipments, or delivered by letter carriers, as can Xpresspost or Priority Courier packages.
- Canada has also failed to provide national treatment ... by administering, operating assuming all unfunded liabilities and negotiating the terms of the pension plan that governs Canada Post employees, including those employees who render service to Xpresspost, Priority courier, and the parcel business of Canada Post while not providing such privileges to UPS.
- Canada Post's parcel importation services enjoy better treatment from Canada than that afforded by Canada to packages imported by UPS. This difference in treatment includes the following practices:
  - Canada Customs officials are less stringent in their enforcement of customs rules and regulations at Canada Post facilities; and
  - Canada Customs has taken on the responsibility for clearing imported packages for Canada Post.
  - Currently, Canada Post has been provided with an unfair advantage not offered to its competitors. Under NAFTA article 1102, UPS and its investment in Canada, are entitled to the best treatment available from customs officials for parcel importation. This best treatment is being enjoyed exclu-

sively by Canada Post's parcel importation services.

- Canada has failed to provide national treatment to the Investor and its investment regarding the importation of packages into Canada. These failures include, but are not limited to, the following measures:
  - Requiring Canada Customs to pay Canada Post a payment for each package imported into Canada via the postal system, that is not paid to businesses in direct competition with Canada Post.
  - Providing Canada Post with preferential access to Canada customs staff and facilities.
  - Performing Canada Customs staff operations on site at a nominal or no cost to Canada Post. In particular, customs staff are provided to Canada Post during the evenings and weekends at some locations without cost to Canada Post.
  - Failing to charge duties and taxes to Canadian importers on many packages which are in fact dutiable or taxable.
  - Storing packages imported into Canada at premises owned or operated by Canada Post's letter mail monopoly so as to accommodate Canadians not present to accept delivery (Appleton & Associates, 2000: paras. 17-24)."

These NAFTA claims parallel allegations made by the international courier lobby groups in arguing for strengthened protection under the GATS.

Whatever the merits of the NAFTA allegations, Canada could be exposed to similar charges under the GATS. A critical question is "what sets the baseline for national treatment?" If the courier activities of Canada Post are deemed to be covered under Canada's specific commitments, then foreign courier services and foreign courier service providers are entitled by the GATS national treatment provision to the most favourable treatment given to the courier services of Canada Post. Alternatively, if the courier activities of the national postal administration, Canada Post, are *not* covered under Canada's specific commitments, then foreign courier companies are entitled merely to the best treatment given domestic private courier companies. The latter interpretation poses few policy issues, but the former would turn the Canadian public postal system upside down.

Even if a WTO panel accepts that the provisional CPC classification system sets the treatment given to domestic private courier companies as the baseline for national treatment, this may not be sufficient to protect Canada Post from challenge under the GATS national treatment provisions.

In 1993, Canada Post acquired control of Purolator Courier Ltd., a private express delivery courier company. Canada Post today owns 94% of Purolator. Consequently, the outcome of a national treatment complaint might depend on the status a WTO panel ascribes to Purolator.<sup>24</sup> Is Purolator part of "the national postal administration?"

Or is it a private, domestic service supplier? If the latter, then the treatment that Canada Post accords Purolator becomes the baseline for establishing “most favourable treatment” under the GATS national treatment obligation, exposing Canada and Canada Post to the same broad range of allegations made by UPS under NAFTA.

Canada Post management has sent out mixed signals regarding the status of Purolator. It has gradually increased its stake in the company to the point that it owns nearly all of it. But management has also denied that this constitutes a “merger” of the two entities.<sup>25</sup> From a GATS-protection perspective, however, the more clearly that Purolator is integrated within “the national postal administration,” the better.

## (ii) Market Access

Like the national treatment obligation, the GATS market access obligations (Article XVI) are intrusive provisions that apply only to those services that a government has listed in its country schedule. In sectors where market access commitments are undertaken, members are prohibited from placing “limitations” on, among other things, the “number of service suppliers,” “total value of service transactions” and the “number of service operations.”<sup>26</sup> The GATS “market access” provisions are *absolute prohibitions*. Any numerical limits on services or service suppliers or limitations on the legal form of services suppliers are prohibited outright, *whether they are discriminatory or not*.

“Numerical limitation” is not defined in the GATS. However, the word’s ordinary meaning is likely to apply. To limit is to set “the greatest or smallest amount permissible or

possible.”<sup>27</sup> Hence, the GATS Article XVI would prohibit government measures that set upper *or lower* limits on the number of service suppliers, total number of service operations, total number of persons employed and so on.

Minimum service obligations would therefore violate GATS Article XVI. Service obligations prohibited by GATS article XVI might include, among others:

- requirements that postal or courier service providers have at least one outlet, depot, counter service, or office in rural or northern communities.
- requirements that a minimum number of persons be employed to ensure adequate servicing of communities or regions.
- requirements for minimum numbers of mail boxes, counter service, or regular, scheduled (e.g. daily, weekly) deliveries or pick-ups.
- restrictions on the weight and price of express shipments (such as those for letters of an urgent nature that are designed to maintain the exclusive privilege).

When a government schedules a sector for coverage under the GATS, it has a one-time opportunity to exempt existing, non-conforming measures by describing them in its country schedule. When Canada listed “courier services” under the GATS it inscribed only two limitations pertaining to “economic needs tests” applicable in Nova Scotia and Manitoba. Any other, existing minimum service obligations and all new ones pertaining to courier services would therefore violate GATS Article XVI.

*Consequently, if the multinational courier service industry were ever successful in forcing Canada Post to withdraw from courier services, Canadian governments could not GATS-consistently introduce new, non-discriminatory measures to ensure that minimum standards of courier service were maintained even in rural areas*

*or in the north. Ironically (at least from the perspective of GATS proponents in the courier industry) this draconian prohibition further strengthens the policy and public interest imperative that Canada Post continue to provide a broad range of express delivery services that are available to Canadians in all parts of the country.*

## Section 3

### The GATS 2000 renegotiations: issues for Canadian postal services

#### How could GATS coverage of postal services be expanded?

The main purpose of the GATS 2000 negotiations is to broaden and deepen the existing agreement. Governments and corporations can be expected to exert intense pressure on all member governments to tighten GATS rules and to ensure that they apply to an increasing number of service sectors. Postal service systems in Canada and throughout the world will be subject to intense scrutiny and negotiation, and efforts to constrain government regulatory ability in the postal services sector are likely to take many forms.

#### (i) Increasing GATS coverage directly

The heart of the upcoming GATS 2000 negotiations will be pressure from governments and corporations to get other governments to fully cover more services by listing them in country schedules. There may certainly be pressure from some quarters to directly cover postal services in this round of GATS negotiations.

These demands will include:

- expanding the number and extent of specific commitments in national schedules,

- removing or reducing existing limitations within already-committed sectors, and
- binding more new and existing commitments so that future governments cannot reverse them.

To date, however, only six WTO member governments have scheduled specific commitments regarding postal services, and only two of these entail significant coverage (World Trade Organization, 1998: p. 6). Because of the central role played by public postal service providers and strong public support for the public provision of such services, directly listing postal services under the GATS will be far too politically sensitive for most member governments, including Canada, to consider seriously. It appears improbable that more than a handful of countries would agree to such a controversial step during the current round of negotiations.

The negotiating and lobbying strategy of the multinational courier industry implicitly acknowledges this political reality. Instead of trying to persuade governments to directly cover “postal services” in country schedules, the industry and its allies have focused on a number of indirect methods for expanding coverage. These alternative strategies include: reclassifying services in a way that results in significant new GATS coverage and advocating the adoption of “horizontal negotiating approaches,” that, if agreed to, would apply certain GATS restrictions to all services. “E-commerce” is a prominent target for a horizontal approach, one which could have serious ramifications in politically sensitive sectors such as postal services. Keeping abreast of how these “flanking strategies” develop as negotia-

tions proceed may be one of the most difficult challenges for defenders of the public interest in the Canadian postal system.

### **(ii) Reclassifying services: increasing coverage by stealth**

The multinational courier industry and its principal ally, the U.S. government, have astutely fixed on reclassification of postal and courier services as the best strategy for significantly increasing GATS coverage of postal and related services. Because of the political sensitivity of postal services in most countries, requesting that governments make specific commitments that directly cover postal services would probably result in only uneven and incremental new coverage. By contrast, reclassifying postal and courier services to narrow the scope of the former and expand the latter would lay the groundwork for a potentially significant increase in GATS coverage of postal, courier and related services.

Consequently, classification issues comprise the most critical set of discussions pertaining to postal services in the current GATS negotiations. These supposedly neutral and technical classification talks are so important that, functionally, they amount to a renegotiation of GATS coverage of postal and related services.

The classification technique favoured by the multinational courier industry to leverage greater GATS coverage involves proposals to “cluster” commercially targeted services together for GATS negotiating purposes. Any subsequent commitments would then apply to the entire cluster, even though the various services might currently be classified in different parts of the W/120 and/or

the CPC. This cluster approach to classification has been strongly promoted by the OECD’s Trade Committee of which Canada is an active member.

Currently, there is no separate classification for “express delivery services” in the W/120. The multinational courier industry has charged that “the current classification of the express delivery services sector under the Uruguay Round’s Services Sectoral Classification List fails to reflect the true nature of express delivery services which should be reclassified ... (Canadian Courier Association, 1999, p. 3; cf. European Express Organization, 1999).” The industry lobby has proposed a new description of the “express delivery services sector” that would incorporate all the elements that they view as integral to their business, from collection, transportation, storage and warehouse, cargo handling, air cargo, electronic data interchange, on-line information systems and perhaps other services that are currently classified separately under W/120.

The concerted industry campaign to reclassify postal and courier services has already borne fruit. Postal and express delivery services are one of the five priority areas that have been taken up for detailed examination by the WTO Committee on Specific Commitments.<sup>28</sup> How this classification issue is resolved will bias subsequent negotiations on postal services and have significant implications for the ability of public post offices to maintain and enhance universal, affordable, basic postal services.

Despite their importance, these classification negotiations are proceeding in total secrecy. Very detailed discussions of proposals to reclassify postal and courier services are

currently underway in the WTO Committee on Specific Commitments (CSC). These discussions include key issues such as “the identification of a separate sub-sector for express delivery services, the relationship between courier services and express services, the role of state monopolies in postal services, the distinction between basic and value-added services and the relationship between express delivery services and air transport services (WTO, CSC, June 2000).” Unfortunately, and unacceptably, the specifics of these proposals are secret and discussions continue behind closed doors.

The consequences — and risks — entailed in this secretive process are greatest for countries such as Canada that have already made extensive specific commitments to cover courier services. Thirty-three WTO members, including Canada, have undertaken specific commitments regarding courier services (WTO, 1998: p. 6). As already noted, Canada’s commitments regarding courier services are extensive. If the efforts to redefine “postal” and “courier” services are successful, then Canadians could find that GATS coverage of postal and related services has been expanded by stealth. Because no formal change in Canada’s GATS schedule would occur, public and parliamentary debate could be sidestepped or, because it occurs long after the critical decisions have been made, be moot.

One of the first casualties of any reclassification would doubtless be the distinction between public and private delivery of postal and courier services that is inherent in the provisional CPC. As we have seen, this distinction provides an important basis for Canada to defend the Canadian public postal service and Canada Post from poten-

tial GATS challenges. For the most part, the CPC and the W-120 classify services on vertical, mutually-exclusive lines. But in the case of postal and courier services, the provisional CPC classifies identical services such as parcel or letter delivery differently depending on whether they are provided by the “national postal administration” or private service providers.

All Canada’s negotiating efforts should be bent toward preserving this vital distinction between public and private delivery. Canadian negotiators should be directed to oppose any reclassification scheme that eliminates or weakens it. Indeed, given the aggressive stance of UPS in particular and the multinational courier industry in general against Canadian public postal policies, the Canadian government should not be cooperating at all in reclassification exercises that will only intensify these attacks. While Canada’s specific positions and interventions remain secret, Canadian negotiators have inexplicably supported the WTO committee taking up postal and courier services reclassification as a priority matter.

### **(iii) Imposing new restrictions on domestic regulation**

GATS Article VI:4 calls on “the Council for Trade in Services, or any appropriate bodies it may establish,” to develop any “necessary disciplines” to ensure that “measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade (GATS Article VI:4).” The Working Party on Domestic Regulation has been formed to fulfill this mandate and negotiations are now well underway in Geneva.<sup>29</sup>

These proposed “disciplines” are explicitly targeted at *non-discriminatory* regulatory measures, so that even if a regulatory measure treats local and foreign services and service providers equally it could still be ruled a violation of the GATS.<sup>30</sup> Under the proposed constraints on domestic regulation, governments would be compelled to demonstrate, first, that non-discriminatory regulations were “necessary” to achieve a WTO-sanctioned legitimate objective and, secondly, that no less commercially burdensome alternative measure was available.

Certain restrictions on domestic regulation already apply provisionally in those sectors where governments have made specific commitments. However, the intention of Article VI is to develop new, more elaborate restrictions that may apply generally, or horizontally, to all service sectors.

Powerful corporate lobbies on both sides of the Atlantic, including the U.S.-based Coalition of Service Industries (CSI) and the European Services Forum (ESF), attach high importance to expanding the GATS domestic regulation provisions. The ESF, for example, argues that “regulatory reform that is ‘pro-competitive’ should be a major focus of the new GATS negotiation, as a new concept in the WTO approach.”<sup>31</sup>

Multinational courier companies are well represented in both the CSI and the ESF.<sup>32</sup> The proposed restrictions that they support seriously threaten the broad authority of governments to enact and enforce environmental, consumer and other public interest regulations.<sup>33</sup> But these multinationals are also focused on very specific, concrete postal policy reform objectives that they aspire to

advance through WTO-enforced “pro-competitive” re-regulation.

First, private carriers allege that customs practices and procedures are unnecessarily burdensome on their ability to provide international courier services. They object to what they view as time-consuming customs procedures and unnecessary restrictions on their ability to use their own fleets, warehouses and employees for customs clearance. They allege that, given the time-sensitive nature of courier services, they are disadvantaged when jurisdictions do not have special, streamlined procedures applying specifically to courier products.<sup>34</sup>

Whatever the merits of these allegations, it is questionable that the WTO is the appropriate forum to address them. These concerns no doubt apply equally also to other time-sensitive products clearing customs including, for example, fresh flowers or perishable produce. The administrative and financial costs of singling out the courier industry for preferential customs treatment would be borne by governments. These concerns could more appropriately be met by general customs reform through appropriate international organizations. As the WTO Secretariat itself acknowledged in 1998, “many national efforts aimed at customs reform and streamlining more generally, are helping to address some of the issues raised here with respect to courier services. Moreover, the World Customs Organization, now in the process of reviewing its Convention, has under consideration some amendments aimed at simplifying customs procedures affecting postal and courier services (WTO, June 1998: p. 13).”

A second complaint of the multinational courier lobby is that “the national postal services benefit unfairly from their status as government entities and their position as designated national representatives to the UPU and its deliberations. They argue that the public postal suppliers’ role in the UPU places them in the position of being, at once, regulators and competitors (World Trade Organization, June 1998: p. 9).” This allegation is, in effect, another aspect of the industry challenge to the preeminent role of public postal systems, the terminal dues structure and other measures taken by the UPU to control re-mailing.<sup>35</sup>

GATS Article VI:2a already requires that Members establish “judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall in fact provide of an objective and impartial review.” This article could conceivably be employed to argue that the regulatory and operational functions of postal services be separated. In any event, multinational courier companies are seeking to strengthen GATS Article VI to force such a separation in future.<sup>36</sup>

This courier industry push has already had some success within some important WTO member countries. The private courier industry lobbied for the Office of the United States Trade Representative (USTR) to replace the U.S. Postal Service as the United States official representative at the UPU. This was resisted by the postal service and

other agencies who perceived the USTR as too closely identified with the interests of private courier companies. The compromise eventually agreed to was that the U.S. would be represented at the UPU by the U.S. State Department.

The courier industry continues to press the U.S. and other governments on these regulatory matters. In late October 2000, United Parcel Service (UPS) vigorously lobbied its congressional allies to append to a U.S. trade bill provisions that would: (1) require the Department of State to adopt and advocate a “pro-competitive” policy regarding the customs treatment of official mail and non-governmental express goods, (2) empower the Secretary of State to treat for this customs parity, (3) grant the Postal Rate Commission full authority over international postal rates and services, and (4) provide the Rate Commission with subpoena authority to carry out these provisions.<sup>37</sup>

The ongoing deliberations on domestic regulation are clearly among the most important aspects of the current GATS negotiations. These GATS provisions already have the potential to seriously curtail the legitimate regulatory ability of governments at all levels; their extension could also pose specific threats to the integrity of the Canadian postal system.

#### **(iv) Could GATS e-commerce rules pry open postal services?**

##### **Adapting to new technologies**

It is universally acknowledged that to survive public post offices must adapt to the significant challenges and opportunities posed to traditional postal services by the

rapid growth of new information technology. Growth in letter mail volumes is widely expected to decrease as fax, e-mail and other, newer information technologies offer alternative means of communication for individual consumers, organizations, businesses and governments.

Some commentators, especially those representing the public postal services' private competitors, have seized on these technological trends to argue that public postal administrations will inevitably shrink and should be phased out as traditional letter-mail services decline in relative importance.<sup>38</sup> Many national post offices, however — including Canada Post — are “determined to capitalize on emerging growth areas in communications and physical goods distribution and to gain a significant share of the rapidly growing e-retailing business (Canada Post, 2000: p. 3).”<sup>39</sup>

As discussed in section 1 of this paper, the financial health and sustainability of Canada Post depends on its ability to operate successfully in a range of services. Meeting its public interest mandate also entails applying these principles in an era of rapid technological development. While new information technologies will undoubtedly continue to put pressure on Canada Post's traditional letter-mail services, these developments do not lessen the public interest role of and rationale for Canada Post. These developments do in fact require Canada Post to adapt to meet the changing needs of the public. This will entail new service demands, enhanced community obligations, and emerging universal service needs that can best be met through an improved public postal service. For example,

- As e-commerce grows Canada Post's extensive delivery network best positions it to ensure that physical delivery of products ordered on-line is readily available to Canadians living in all parts of the country.
- As a range of government services and information are accessed, provided or supported through information technology, Canada Post can play an important role in ensuring that these government services are provided equitably, efficiently, and securely through a public institution that is universally accessible to all Canadian citizens.
- The Canadian government could extend the security protections enshrined in the current CPC Act to cover electronic equivalents of mail so that the public security of all mail delivered through Canada Post, including electronic mail, is assured.
- Canada Post also has a responsibility to ensure that the substantial number of Canadians who continue to rely mainly on traditional letter mail services are not neglected or left behind by the increasing salience of new information technologies.
- Canada Post could also play a critical role in narrowing the inequality gap in access to information technology by providing public access to the Internet and other information technologies through its dense network of postal outlets. This might ensure that these enhanced services are available to all Canadians wherever they live, regardless of disability, and whether or not they have the eco-

conomic means to access these technologies privately.

- Finally, ensuring that Canada Post continuously improves its services and the quality of products to Canadians helps sustain the value of Canadians' considerable past investment in the development of a national public postal service.

### The looming GATS e-commerce challenge

The broad topic of e-commerce has also been an important preoccupation of the WTO. In May 1998, WTO Ministers established a work program to examine how existing agreements apply to electronic transmissions, to identify any new issues and to analyze the effects of electronic commerce on trade and development. At the same time WTO Ministers agreed to continue for one year moratorium on applying customs duties to electronic transmissions.

Some of the issues being examined in the work program are:

- The classification of products transmitted electronically as goods or services.
- The application of various modes of service delivery.
- The application to electronic commerce of WTO agreements related to telecommunications services.

This work program continues, but because of the impasse in Seattle, the ministerial mandate on e-commerce issues was not expanded, as certain governments, including the United States, had hoped. Given the continuing obstacles to setting a broader WTO agenda, the built-in negotiations on the GATS are now the most likely vehicle for

renewed rule-making on e-commerce in the WTO.

While little has so far emerged publicly about ongoing work on the GATS and e-commerce, these negotiations warrant close and careful monitoring. "E-commerce" is a very broad, nearly all-encompassing concept. It could include any kind of commercial transaction using communications technology: whether business-to-consumer, business-to-business, business-to-government, or even government to citizen. Together, services and e-commerce cover most of the economy, not just some subsectors of the overall economy. As a consequence, what happens in the GATS in relation to e-commerce could be of utmost importance.<sup>40</sup>

New GATS rules governing e-commerce have already been promoted as a possible set of horizontal restrictions. The European Services Forum, for example, is advocating an "e-commerce cluster" to include "sectors that are critical to initiating and completing an e-commerce transaction, including all forms of commercial communications (advertising, sales promotion, direct marketing etc.), computer, data processing and software services, telecommunication services, certain transport and delivery services, certain financial services and some distribution services (ESF, 2000: p. 2)."

Horizontal rules on e-commerce could affect a great many public measures and a wide range of service sectors, including postal services. Commitments on e-commerce could trigger further spurious claims of abuse of dominant market position by Canada Post's competitors. It could limit governments in fairly regulating new types of postal products, such as hybrid mail,

which combines features of electronic transmission with physical delivery. And it could handicap public postal providers because GATS restrictions would not apply, or would apply only in a much attenuated form, to their private competitors.

The GATS e-commerce agenda is still undeveloped, but bears careful scrutiny. Multinational courier groups have already tried to link their specific policy reform objectives to the e-commerce agenda under the GATS.<sup>41</sup> The implications of e-commerce and the changes that it will inevitably bring to postal services need to be fully and publicly debated. Workers, consumers, and regulators along with a range of other affected interests need to be full participants in this critical debate. For this reason alone, the highly secretive WTO is a poor choice as a forum. Moreover, because the WTO privileges commercial interests over other interests it is too biased an institution to be trusted to forge new international regulations governing e-commerce and postal services. Unfortunately, it is for these very reasons that multinational courier companies favour it as a venue.

## Other negotiating issues

### (i) Subsidies

GATS Article XV states that “Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade distortive effects.”

Sometimes misunderstood, Article XV is *not* an exemption for subsidies. Rather, it is a

commitment *to develop further disciplines on subsidies*. Subsidies are measures as defined by the GATS.<sup>42</sup> Therefore, the GATS national treatment obligation already applies to subsidies, in any sector where specific commitments have been made. Likewise, the GATS most-favoured nation provision also already applies to subsidies in all sectors (unless a specific MFN exemption has been lodged).<sup>43</sup>

Article XV discussions aim to develop “further disciplines” to avoid the “trade-distortive effects” of subsidies to services and services suppliers. These could take the form of new rules authorizing countervailing measures against “unfairly subsidized” services. However, adapting countervailing duty measures taken against unfairly traded goods to “trade in services,” as broadly defined by the GATS, will be far from straightforward. It is far more likely that the talks will focus on developing new restrictions on subsidies that go beyond the already applicable national treatment and MFN obligations.

There is no formal deadline for completing the negotiations on subsidies. The GATS subsidies discussions are still at a very preliminary stage. No substantive proposals, merely discussion papers, have been tabled yet in Geneva. There is not even an agreed definition of subsidy in the GATS. But the subsidy discussions involve very sensitive matters and could readily become quite controversial. It is quite likely that additional subsidies restrictions will be part of any overall GATS package that is eventually negotiated. The implications for postal services and, indeed, a broad range of publicly funded or supported services, must be carefully considered.

The Canadian government no longer provides direct financial assistance to Canada Post's general operations. The Canadian postal reform of 1981 that created Canada Post Corporation eliminated the annual operating deficits of the former Post Office department. Under the CPC Act, Canada Post was directed "to conduct operations on a self-sustaining basis while providing a standard of service that will meet the needs of Canada's people and that is similar for communities of the same size (Parliament of Canada, 1981)." It recorded its first operating surplus in 1989 and in several years since then has paid dividends to the federal government.

Canada Post is, however, subsidized to provide certain services to Canadians. For example,

- The Canadian government subsidizes Canada Post to provide mail services to the blind.
- The Canadian government subsidizes Canada Post's delivery of perishables and food supplies by air to northern, mainly indigenous communities with no year-round surface transportation.
- Canadian Heritage supports the mailing costs of paid circulation Canadian magazines and small community newspapers.
- Canada Post is also subsidized to deliver free of charge letters and regular information updates between Members of Parliament and Canadian citizens.

Another potential issue relates to taxation. Since 1994, Canada Post Corporation has paid Canadian income tax. Nevertheless,

allegations regarding Canada Post's tax status have reportedly been raised by UPS as a national treatment issue in its NAFTA investor-state case.

Any new restrictions on subsidies or even the development of an agreed definition of subsidies under the GATS could have significant implications for Canadian postal services. The Canadian government must ensure that it retains the flexibility to maintain required services to Canadians, such as the northern food service, that may be delivered by Canada Post and to finance new, targeted services in future.

## **(ii) Government procurement**

GATS Article XIII provides that the most-favoured nation, national treatment and market access obligations of the GATS "shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale." This article also requires further negotiations on government procurement in services, which were scheduled to begin by January 1, 1997.

For most countries, government procurement falls outside WTO obligations. Government procurement of goods is excluded from the GATT national treatment obligation.<sup>44</sup> As noted, the principal obligations of the GATS do not apply to government purchases of services. An Agreement on Government Procurement (GPA) was signed at the same time as the Uruguay round agreement, but joining this so-called "plurilateral" agreement is optional for

WTO members. The membership of the GPA consists largely of developed countries.<sup>45</sup>

Canada has signed the WTO GPA. The federal government covered Canada Post under both the GPA and the NAFTA procurement chapter. Both these agreements specify detailed tendering procedures that must be followed by covered entities including Canada Post. These agreements also prohibit the consideration of “offsets,” which the GPA defines as “measures used to encourage local development or improve balance of payments accounts by means of domestic content, licensing of technology, investment requirement, counter-trade, or similar requirements.”<sup>46</sup>

Canada Post’s procurement of goods, services and construction — over specified thresholds — is already covered by the GPA.<sup>47</sup> For this reason, the specific GATS negotiations on procurement, where a core of developing countries have already signaled that they will resist GPA-type restrictions on services procurement, are unlikely to result in any further significant policy changes for Canada Post.

### **(iii) Air cargo services**

As noted previously, the GATS singles out air transport services for special treatment. The GATS Annex on Air Transport Services excludes traffic rights and services related to traffic rights from the GATS. Only three areas of air transport are now covered by the GATS: aircraft repair and maintenance services, computer reservations system services and the selling and marketing of air transport services.<sup>48</sup>

Sectoral negotiations aimed at covering air transport services are, however, continuing under the auspices of the WTO Council on Trade in Services. Because of the complex network of bilateral and regional agreements governing air traffic rights and services, these talks promise to be long and difficult. Recognizing the obstacles to a general sectoral agreement, certain international business lobbies have begun lobbying for a more limited agreement to cover air cargo services.

The Paris-based International Chamber of Commerce (ICC), for example, “supports the idea that air cargo transportation should be treated as a trade matter (ICC, 1998: p. 2).” The ICC policy statement observes that “(w)hile the overall liberalization of the air transport sector may be a long-term objective, the International Chamber of Commerce firmly advocates an agreement covering air cargo services in the short term (ICC, 1998: p. 3).” The ICC also proposes a novel application of MFN that would require every WTO member to provide “all members the elements of its most favourable bilateral [air transport] agreement, on the basis of mirror reciprocity.”

Given the aggressive and litigious stance adopted by multinational courier companies toward Canada Post and the federal government, the conclusion of a sectoral agreement on air transport services could pose significant risks for Canada’s postal system. The federal government could, in future, be forced to fall back on the current exclusion of air transport services as an element in its defense in the event a multinational courier company were to mount a GATS challenge. It is also conceivable that a sectoral agreement on air transport services could trigger

new GATS charges against Canada Post's express delivery operations. It could be argued, for example, that these operations benefit from advantages that violate the GATS national treatment provisions or that Canada Post abuses its dominant monopoly position when it provides express services

in competition with multinational courier companies relying mainly on air express delivery. For these reasons, the Canadian government would be wise to specifically instruct its negotiators to resist any sectoral agreement covering air cargo services.

# Conclusion

Canada's trade policy objectives and negotiating strategy must be servants of democratic policy direction. The broad public policy mandate given to Canada Post is clear. The Canadian postal service has multifaceted — and evolving — community and universal service obligations. The Canadian government has based its postal policies on the recognition, affirmed by independent analysts, that to fulfill its mandate and service obligations, Canada Post needs to provide a range of services beyond its core letter-mail services.

Foreign, multinational, private courier companies have been very commercially successful in Canada. They report extraordinary rates of growth. They freely acknowledge that Canada provides one of the most supportive regulatory environments for their industry in the developed world. But, still dissatisfied, the multinational industry has aggressively lobbied for sweeping domestic postal reform. Stripped to its bare essentials, their policy is to force Canada Post out of express delivery and other competitive services.

Restricting Canada Post to core letter-mail services would destine the Canadian public postal service to gradual erosion and decline. Having driven Canada Post from the field of competitive services, the profitable aspects of letter-mail services would be ripe for commercialization. The public postal service would be left with the expensive responsibility of serving those Canadians — poor, disabled, or living in Canada's rural areas or the north — that could not be served profitably by the private sector. Universal public postal services would be a sham-

bles. Moreover, the GATS would prohibit Canadian governments at all levels from introducing new minimum service obligations in the express delivery sector vacated by Canada Post.

This barren future for the postal service has been rejected in open, democratic, policy debate. Frustrated by this rebuff, the foreign courier industry has attempted an end run around the democratic policy-making process by litigating and lobbying to achieve its domestic policy reform goals through international commercial agreements such as NAFTA and the GATS.

On trade policy matters, it should by now be obvious to the Canadian government that it faces a determined, sophisticated and litigious adversary in the foreign, multinational courier industry. UPS's NAFTA investor-state case is a clear warning of what lies ahead if the GATS is expanded or revised without regard to the broad public mandate of the Canadian postal service.<sup>49</sup>

There are a few postal policy reforms that could be taken by Canada Post to insulate itself from GATS attack. From a "GATS-proofing" perspective, fully integrating Purolator into the national postal administration would be prudent. It would reduce the possibility that complainants could argue that the treatment of Purolator by Canada Post sets the standard for national treatment of private courier services enforceable under the GATS. But apart from this relatively minor operational change, the trade policy challenges confronting Canadian postal services are external. These challenges require a revamping of Canada's GATS negotiating strategy and objectives —

and, ultimately, radical revision of the GATS itself.

Immediate steps must be taken to ensure that Canada's GATS negotiating objectives and strategy support, and certainly that they do not subvert, the prospects for successfully achieving the policy objectives set by Parliament and the federal Cabinet for Canada Post and the postal service. As an urgent matter, Canada's negotiating strategy must be brought into line with these vital public policy objectives.

To avoid future conflict between commercial interests and Canada Post's public service mandate, Canadian negotiators must be given clear political direction to vigorously counter proposals for further GATS restrictions on postal and related services. It will also require rolling back certain provisions and coverage of the existing GATS and, eventually, its replacement by far more balanced rules for the multilateral regulation of services.

Because of its strong bias in favour of commercial interests, the GATS is the wrong place to regulate postal services multilaterally. International postal services are already successfully regulated through the UPU. The GATS must defer to these far more balanced rules.

---

As the issues discussed in section 2 of this paper make clear, the ability of the Canadian postal service system to fulfill its public interest mandate is already considerably exposed under the existing GATS agreement. In particular, Canadian negotiators' decision to list courier services under the GATS was reckless. Canada Post is already

fully subject to Canadian competition law. Canada's GATS negotiators should have been aware of the persistent, but insupportable, complaints by foreign courier companies regarding Canada Post's alleged abuse of dominant monopoly position. The ill-advised decision to list courier services may yet trigger allegations against Canada Post under the GATS monopolies and state enterprises provisions — allegations that will be decided not under Canadian domestic law but under these untested provisions of the GATS.

The limited, but crucial, protections for Canadian postal services that occur in the GATS — especially the exclusion for air cargo services and the distinction between public and private delivery in the UN Provisional CPC — appear to be more a product of happenstance than of any deliberate foresight on the part of Canada's Uruguay Round GATS negotiators. Both of these key protective features are under threat in ongoing GATS negotiations.

Canadian negotiators should be specifically directed to defend the critical distinction between public and private delivery of postal and related services in the UN Provisional CPC. They should also be directed to reject any reclassification of GATS postal and express delivery services that would lessen Canada's already tenuous protection of its ability to defend the public interest mandate and activities of its national postal administration from GATS challenge. And given the litigious stance of the foreign, multinational courier industry, Canadian officials should also be directed not to cooperate in any efforts to bring air cargo services under the GATS coverage.

Given these imminent threats, it is inexplicable that Canada, as a key member of the OECD Trade Committee and of the WTO Committee on Specific Commitments, has helped initiate a WTO process that gives priority to reclassifying postal and express courier services. The results of this process will likely further expose the Canadian government, Canada Post and the public postal service system to GATS challenge.

Also — whether through ineptitude, carelessness or design — the long-standing UPU regime for the international regulation of postal service has inexcusably been exposed to erosion and challenge under the MFN and domestic regulation provisions of the GATS. Canada should strongly advocate whatever remedial steps or new initiatives are necessary to remove the GATS threat to the UPU provisions on terminal dues, re-mailing, or other matters pertaining to its international regulation of postal services.

The GATS negotiations currently underway in Geneva could, of course, make matters much worse for Canada Post and the Canadian public postal services. If, through direct coverage, reclassification of postal and courier services or other devices, national treatment were deemed to apply directly to Canada Post, then every specific “advantage” accorded to Canada Post would have to be made available to its private competitors. The operational and financial costs that this would impose on the Canadian government and Canada Post would make it very difficult or impossible for Canada Post to fulfill its universal and community service obligations — obligations that are not borne by its private competitors.

There are certain features of the existing GATS that must be rolled back or eliminated to fully protect the public interest mandate of the Canadian postal service. The absolute prohibition by GATS Article XVI of non-discriminatory limitations, including minimum community service obligations, is an unacceptable diminution of democratic regulatory authority. This feature of the GATS should be eliminated, or, at the very least, amended to apply only to clearly discriminatory measures in scheduled sectors.

GATS Article I:3 is *not* an effective exclusion for services provided in the exercise of governmental authority. It has been defined and qualified so restrictively that it is nearly empty. The Canadian government should insist that it be replaced by a new exclusion that would effectively carve out from the GATS the mixed public-private systems that Canadians rely on to deliver health, education, social and other services, including postal services.

---

The foregoing analysis suggests several short-term steps to protect the Canadian public postal system from further exposure to GATS challenge. Canadian negotiators should be clearly instructed to:

- oppose expanded coverage of postal and related services.
- oppose classification changes that would expand coverage.
- oppose the proposed restrictions on domestic regulation.
- prevent air cargo services from being included in the GATS, and

- to critically examine any proposals to regulate e-commerce through the GATS.

Given the immediacy of these threats, it would be irresponsible not to insist that the Canadian government take these steps. But it should be clear that these would be mere stopgap measures.

The multiplicity and variety of threats posed by the GATS to the Canadian public postal system indicate deeper, structural flaws in the GATS agreement — problems that render it inimical to a variety of public service systems and to regulation in the public interest.

These deep, structural flaws must also be addressed. At a minimum, this would require that:

- Article I:3 be amended to effectively exclude from the agreement mixed public-private, social service systems.
- GATS Article XVI (Market Access) which constrains the non-discriminatory exercise of regulatory authority should be excised; and
- the provisional application of GATS Article VI (Domestic Regulation) should be eliminated and negotiations to develop new restrictions on non-discriminatory domestic regulations terminated.

Instead of negotiations to broaden and deepen the GATS, there should be a thorough and detailed assessment of its many

defects from a public interest perspective. Such an assessment should lead to proposals for concrete changes to address these problems.

Even with these fundamental reforms, it is highly questionable whether the GATS is an appropriate agreement to regulate services internationally. It has, perhaps, been too irrevocably shaped by the narrow, commercial interests that conceived and guided its creation — in almost total secrecy and obscurity — to be redeemed even by fundamental structural amendments. Regrettably, the GATS has been, from its inception, an illegitimate treaty.

If services are to be regulated multilaterally, the GATS should eventually be replaced by a far more balanced set of rules that value and support public interest regulation, universal health and social services, environmental protection, and other public and social goods not just private, commercial interests. The focus of international rule-making should be shifted from measures that regulate only what governments do to measures that also regulate corporations. There is a pressing need to replicate the regulatory and redistributive functions of the nation-state at the international level. If the GATS cannot be radically reformed to better reflect the public interest, then it should be relentlessly criticized, strongly resisted, and eventually shunted aside to make way for more progressive multilateral rules.

# Appendix 1

## Services Sectoral Classification List

(MTN.GNS/W/120, 10 July 1991)

Note by the Secretariat

The secretariat indicated in its informal note containing the draft classification list (24 May 1991) that it would prepare a revised version based on comments from participants. The attached list incorporates, to the extent possible, such comments. It could, of course, be subject to further modification in the light of developments in the services negotiations and ongoing work elsewhere.

### SECTORS AND SUB-SECTORS CORRESPONDING CPC (PROVISIONAL)

#### 1. BUSINESS SERVICES Section B

##### A. Professional Services

- a. Legal Services 861
- b. Accounting, auditing and bookkeeping services 862
- c. Taxation Services 863
- d. Architectural services 8671
- e. Engineering services 8672
- f. Integrated engineering services 8673
- g. Urban planning and landscape architectural services 8674
- h. Medical and dental services 9312
- i. Veterinary services 932
- j. Services provided by midwives, nurses, physiotherapists and para-medical personnel 93191
- k. Other

##### B. Computer and Related Services

- a. Consultancy services related to the installation of computer hardware 841
- b. Software implementation services 842

c. Data processing services 843

d. Data base services 844

e. Other 845+849

##### C. Research and Development Services

- a. R&D services on natural sciences 851
- b. R&D services on social sciences and humanities 852
- c. Interdisciplinary R&D services 853

##### D. Real Estate Services

- a. Involving own or leased property 821
- b. On a fee or contract basis 822

##### E. Rental/Leasing Services without Operators

- a. Relating to ships 83103
- b. Relating to aircraft 83104
- c. Relating to other transport equipment 83101+83102+83105
- d. Relating to other machinery and equipment 83106-83109
- e. Other 832

##### F. Other Business Services

- a. Advertising services 871
- b. Market research and public opinion polling services 864
- c. Management consulting service 865
- d. Services related to man. consulting 866
- e. Technical testing and analysis serv. 8676
- f. Services incidental to agriculture, hunting and forestry 881
- g. Services incidental to fishing 882
- h. Services incidental to mining 883+5115
- i. Services incidental to manufacturing 884+885(except for 88442)
- j. Services incidental to energy distribution 887
- k. Placement and supply services of Personnel 872
- l. Investigation and security 873
- m. Related scientific and technical consulting services 8675
- n. Maintenance and repair of equipment (not including maritime vessels, aircraft) 633+

- or other transport equipment) 8861-8866
- o. Building-cleaning services 874
- p. Photographic services 875
- q. Packaging services 876
- r. Printing, publishing 88442
- s. Convention services 87909\*
- t. Other 8790

## **2. COMMUNICATION SERVICES**

- A. Postal services 7511**
- B. Courier services 7512**
- C. Telecommunication services**
  - a. Voice telephone services 7521
  - b. Packet-switched data transmission services 7523\*\*
  - c. Circuit-switched data transmission services 7523\*\*
  - d. Telex services 7523\*\*
  - e. Telegraph services 7522
  - f. Facsimile services 7521\*\*+7529\*\*
  - g. Private leased circuit services 7522\*\*+7823
  - h. Electronic mail 7523\*\*
  - i. Voice mail 7523\*\*
  - j. On-line information and data base retrieval 7523\*\*
  - k. electronic data interchange (EDI) 7523\*\*
  - l. enhanced/value-added facsimile services, incl. store & forward, store & retrieve) 7523\*\*
  - m. code and protocol conversion n.a.
  - n. on-line information and/or dataprocessing (incl. transaction processing) 843\*\*
  - o. other.
- D. Audiovisual services**
  - a. Motion picture and video tape production and distribution services 9611
  - b. Motion picture projection service 9612
  - c. Radio and television services 9613
  - d. Radio and television transmission services 7524
  - e. Sound recording n.a.
  - f. Other

E. Other

## **3. CONSTRUCTION AND RELATED ENGINEERING SERVICES**

- A. General construction work for buildings 512**
- B. General construction work for civil engineering 513**
  - Installation and assembly work 514+516
  - Building completion and finishing work 517
  - Other 511+515+518

## **4. DISTRIBUTION SERVICES**

- A. Commission agents' services 621**
- B. Wholesale trade services 622**
- C. Retailing services 631+632 6111+6113+6121**
- D. Franchising 8929**
- E. Other**

## **5. EDUCATIONAL SERVICES**

- A. Primary education services 921**
- B. Secondary education services 922**
- C. Higher education services 923**
- D. Adult education 924**
- E. Other education services 929**

## **6. ENVIRONMENTAL SERVICES**

- A. Sewage services 9401**
- B. Refuse disposal services 9402**
- C. Sanitation and similar services 9403**
- D. Other**

## **7. FINANCIAL SERVICES**

- A. All insurance and insurance-related services 812\*\***
  - a. Life, accident and health insurance services 8121
  - b. Non-life insurance services 8129
  - c. Re-insurance and retrocession 81299\*
  - d. Services auxiliary to insurance (including brokering and agency services) 8140

**B. Banking and other financial services**  
(excl. insurance)

- a. Acceptance of deposits and other repayable funds from the public 81115-81119
- b. Lending of all types, incl., inter alia, consumer credit, mortgage credit, 8113 factoring and financing of commercial transaction
- c. Financial leasing 8112
- d. All payment and money transmission services 81339\*\*
- e. Guarantees and commitments 81199\*\*
- f. Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:
  - money market instruments (cheques, bills, certificate of deposits, etc.) 81339\*\*
  - foreign exchange 81333
  - derivative products incl., but not limited to futures and options 81339\*\*
  - exchange rate and interest rate instruments, including 81339\*\*
  - products such as swaps, forward rate agreements, etc.
  - transferable securities 81321\*
  - other negotiable instruments and financial assets, including bullion 81339\*\*
- g. Participation in issues of all kinds of securities, including 8132 under-writing and placement as agent (whether publicly or privately) and provision of service related to such issues
- h. Money brokering 81339\*\*
- i. Asset management, such as cash or portfolio management, all forms of collective 8119+\*\* investment management, pension fund management, custodial depository and trust services 81323\*

- j. Settlement and clearing services for financial assets, incl. securities, derivative 81339\*\* or 81319\*\* products, and other negotiable instruments
- k. Advisory and other auxiliary financial services on all the activities listed in 8131 or Article 1B of MTN.TNC/W/50, incl. credit reference and analysis, investment and 8133 portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy
- l. Provision and transfer of financial information, and financial data processing and 8131 related software by providers of other financial services

**C. Other**

**8. HEALTH RELATED AND SOCIAL SERVICES**

(other than those listed under 1.A.h-j.)

- A. Hospital services 9311**
- B. Other Human Health Services 9319**  
(other than 93191)
- C. Social Services 933**
- D. Other**

**9. TOURISM AND TRAVEL RELATED SERVICES**

- A. Hotels and restaurants (incl. catering) 641-643**
- B. Travel agencies and tour operators services 7471**
- C. Tourist guides services 7472**
- D. Other**

**10. RECREATIONAL, CULTURAL AND SPORTING SERVICES**

(other than audiovisual services)

- A. Entertainment services (including theatre, live bands and circus services) 9619
- B. News agency services 962
- C. Libraries, archives, museums and other cultural services 963
- D. Sporting and other recreational services 964
- E. Other

## **11. TRANSPORT SERVICES**

### **A. Maritime Transport Services**

- a. Passenger transportation 7211
- b. Freight transportation 7212
- c. Rental of vessels with crew 7213
- d. Maintenance and repair of vessels 8868\*\*
- e. Pushing and towing services 7214
- f. Supporting services for maritime transport 745\*\*

### **B. Internal Waterways Transport**

- a. Passenger transportation 7221
- b. Freight transportation 7222
- c. Rental of vessels with crew 7223
- d. Maintenance and repair of vessels 8868\*\*
- e. Pushing and towing services 7224
- f. Supporting services for internal waterway transport 745\*\*

### **C. Air Transport Services**

- a. Passenger transportation 731
- b. Freight transportation 732
- c. Rental of aircraft with crew 734
- d. Maintenance and repair of aircraft 8868\*\*
- e. Supporting services for air transport 746

### **D. Space Transport 733**

### **E. Rail Transport Services**

- a. Passenger transportation 7111
- b. Freight transportation 7112

- c. Pushing and towing services 7113
- d. Maintenance and repair of rail transport equipment 8868\*\*
- e. Supporting services for rail transport services 743

### **F. Road Transport Services**

- a. Passenger transportation 7121+7122
- b. Freight transportation 7123
- c. Rental of commercial vehicles with operator 7124
- d. Maintenance and repair of road transport equipment 6112+8867
- e. Supporting services for road transport services 744

### **G. Pipeline Transport**

- a. Transportation of fuels 7131
- b. Transportation of other goods 7139

### **H. Services auxiliary to all modes of transport**

- a. Cargo-handling services 741
- b. Storage and warehouse services 742
- c. Freight transport agency services 748
- d. Other 749

### **I. Other Transport Services**

## **12. OTHER SERVICES NOT INCLUDED ELSEWHERE 95+97+98+99**

The (\*) indicates that the service specified is a component of a more aggregated CPC item specified elsewhere in this classification list.

The (\*\*) indicates that the service specified constitutes only a part of the total range of activities covered by the CPC concordance (e.g. voice mail is only a component of CPC item 7523).

## Appendix 2: CPC provisional code 751

### Hierarchy:

- Section: 7 - Transport, storage and communications services
- Division: 75 - Post and telecommunications services
- **Group: 751 - Postal and courier services**

### Breakdown:

Group 7511 is divided into the following Classes:

- 7511 - Postal services
- 7512 - Courier services

7511 - Postal services is divided into the following Subclasses:

- **75111 - Postal services related to letters:** Services consisting of pick-up, transport and delivery services of letters, newspapers, journals, periodicals, brochures, leaflets and similar printed matters, whether for domestic or foreign destinations, as rendered by the national postal administration.
- **75112 - Postal services related to parcels:** Services consisting of pick-up, transport and delivery services of parcels and packages, whether for domestic or foreign destinations, as rendered by the national postal administration.
- **75113 - Post office counter services:** Services rendered at post office counters, e.g. sales of postage stamps, handling of

certified or registered letters and packets, and other post office counter services.

- **75119 - Other postal services:** Mailbox rental services, "poste restante" services, and public postal services not elsewhere classified. Exclusion: Services related to postal giro and postal savings accounts are classified in class 8111 (Services of monetary intermediaries).

7512 - Courier services is divided into the following Subclasses:

- **75121 - Multi-modal courier services:** Services consisting of pick-up, transport and delivery services, whether for domestic or foreign destinations of letters, parcels and packages, rendered by courier and using one or more modes of transport, other than by the national postal administration. These services can be provided by using either self-owned or public transport media. Exclusions: Courier services for mail by air are classified in subclass /73210 (Mail transportation by air).
- **75129 - Other courier services:** Other courier services for goods, not elsewhere classified, e.g. / trucking or transfer services without storage, for freight.

Source: United Nations Provisional Central Product Classification available at : <http://esa.un.org/unsd/cr/registry/regcst.asp?Cl=9&Lg=1>.

## Endnotes

1. Cf. "The GATS is ... first and foremost an instrument for the benefit of business...." Towards GATS 2000, European Commission web-site on services ([www.gats-info.eu.int](http://www.gats-info.eu.int)).
2. The Canada Post Corporation Act of 1981 sets out the basic mandate of Canada Post and the Canadian postal service.
3. For the purposes of the exclusive privilege, letter-mail is defined as items weighing less than 500 grams.
4. *Canada Post Corporation Act of 1981*.
5. See TD Securities Inc. and Dresdner Kleinwort Benson, "Summary Report To The Minister Responsible For Canada Post Corporation Regarding Canada Post Corporation," April 17, 1997.
6. Ibid. "Adopting a strategic vision such as that proposed by the Mandate Review [denying Canada Post the ability to compete commercially in a wide range of businesses] would severely constrain CPC's future growth and probably lead to a weakening of its financial position over time as demand for the products within the exclusive privilege business recedes." p. 20.
7. Official data showing the U.S. corporations' share of the Canadian express courier market is not available. Large, integrated U.S. companies established in Canada include Federal Express Corp. and United Parcel Service (UPS).
8. The Mandate Review estimated that exiting competitive services would cost Canada Post lost revenues of between \$80 million and \$250 millions per year. To offset these lost revenues it recommended that the courier industry should pay a "compensatory contribution" to Canada Post by being required to affix a first-class postal stamp on all courier shipments.
9. See remarks by Rural Dignity and Makivik Corporation quoted in CUPW (2000). For example, indigenous peoples organizations in Canada's north stated that "Given the enormous distances between settlements and the low populations, [Canada's north] would also [be] one of the last areas a profit-oriented postal delivery service would fix on as having potential for revenue-generating income. We know that as those seeking profit as a primary objective come into the picture ... it is our areas that will suffer most grievously." Quoted in CUPW 2000, p. 5.
10. Cf. Alverno (2000) for a discussion of this "threshold issue." Alverno observes that the issue of whether the portion of the postal market reserved to national postal authorities is covered by the GATS "has yet to be definitively resolved (Alverno, 2000, p. 3 n4)."
11. While it is probable that addressed letter mail is not supplied in competition with one or more service suppliers, in the absence of a definition of "competition" this cannot be definitively assumed. For example, it is possible that other services such as fax, e-mail, and data networks might, in certain circumstances, be considered by the WTO to be competitive or directly substitutable services to addressed letter mail.
12. These arguments are bolstered by the broad definition ordinarily given to "commercial." The Oxford English Dictionary, for example, defines the term in part as "(e)ngaged in commerce" or "[o]f or pertaining to commerce (*Oxford Eng-*

- lish Dictionary*, 1998, Clarendon Press, Oxford, Vol. III)." Similarly, Webster's defines "commercial" as "concerned with commerce" (*Webster's Encyclopedic Dictionary*, 1988, Lexicon, New York, p. 196). In the absence of a specific definition of the term in the GATS, a panel would probably rely on the ordinary, plain meaning of the term. Accordingly, it seems quite likely that a WTO dispute settlement panel would consider Canada Post's letter-mail services to be "provided on a commercial basis."
13. "Terminal dues have been defined as "the remuneration of universal service providers for the distribution of incoming cross-border mail comprising postal items from another Member state or from a third country (Perrazzelli and Vergano, 2000: p. 736 n1)."
  14. Specifically, a higher rate applied to countries that shipped more than 150 metric tons per year (threshold countries), while those that shipped below this volume (non-threshold countries) were charged a lower rate. For further details see GAO, 1996: p. 34 ff. The terminal dues structure was amended by the UPU Beijing Congress in 1999. Terminal dues are now generally calculated on the basis of cost rather than volume, but terminal dues on mail going from a developing country to a developed one are still set a fixed rate lower than the developed country's actual costs provided that mail volumes do not exceed the set threshold. This preferential regime for developing countries remains at odds with the GATS MFN rule.
  15. This practice, where mail prepared for delivery in country A is transported to country B and posted back to country A, is referred to as ABA re-mailing. ABC re-mailing occurs when foreign mailers in country A, which has a cost-based terminal dues arrangement with country C, route mail destined for country C through a third developing country B which has lower terminal dues.
  16. Canada Post's express courier products include Xpress Post, Priority Post and Purolator. Skypak no longer exists.
  17. TD Securities also observed that "It was apparent that Canada Post and Purolator have an arms-length relationship with separate cost and revenue centres. Furthermore we found no evidence to suggest that CPC is funding Purolator's capital expenditures." (TD Securities Inc, April, 1997: p. 17)
  18. This logic is clear, for example, because the UPS attack is aimed not just at Purolator, but at the whole range of Canada Post's express delivery. And also because UPS has directly challenged the role of Canadian postal workers, asserting that it is inappropriate for those employed in delivering letter mail services to play any role in the provision of express delivery services.
  19. These modes are known as cross-border supply (mode 1), consumption abroad (mode 2), commercial presence (mode 3) and presence of natural persons (mode 4).
  20. World Trade Organization, Document MTN.GNS/W/120 dated 10 July 1991.
  21. The United States did not use the UN CPC as a basis for its GATS scheduling.
  22. Since the Uruguay round agreements were signed the UN CPC has been revised and in 1998 replaced by a more recent version, the United Nations Central Product Classification version 1 (CPC v. 1). One of the main differences of CPC v. 1 from the earlier Provisional CPC is a more detailed breakdown of services, particularly business services. There has

- been some discussion about whether the revised CPC v. 1 should become the classification system used in the upcoming GATS negotiations. Full adoption of CPC v. 1 is unlikely, however, in part because the United States does not use the UN classification systems.
23. The U.S. schedule explicitly restricts its commitments under courier services to land-based courier services. Negotiations on air transport services generally are continuing under the auspices of the Council On Trade In Services.
  24. On Dec. 1, 1993, Canada Post Corporation purchased a 75 % interest in Purolator. In January 1999, Canada Post Corporation purchased an additional interest in Purolator from Onex, increasing its ownership in Purolator to 95.81 %. Today, Canada Post Corporation owns 93.8 % of Purolator (source: CUPW Research Department).
  25. For example, testifying before a parliamentary Committee on April 22, 1999, Canada Post President and Chief Executive Officer André Ouellet stated that "There is no merger. Canada Post and Purolator have and will continue to operate independently of each other."
  26. GATS Article XVI.2 reads: 2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:
    - (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
    - (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
    - (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
    - (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
    - (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
    - (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.
  27. Canadian Oxford Dictionary, Oxford University Press, 1998. See entries for "limit" and "limitation."
  28. WTO, "Report of the Committee on Specific Commitments to the Council for Trade in Services," S/CSC/4, 26 October 1999, para. 3.
  29. An earlier working group on professional services produced Article VI disciplines for professional regulation in the accountancy sector. But because of negotiators' frustration with slow movement on a sector-by-sector basis, the professional services working group was transformed into the WTO Working Group on Domestic Regulation and

- given a horizontal mandate to develop general rules that would apply to all service sectors.
30. In fact, the GATS Article VI disciplines are intended to apply *exclusively* to non-discriminatory measures. So even if a regulatory measure were wholly consistent with the tough nondiscrimination rules of the GATS (Articles II and XVII) and did not violate the market access prohibitions (Article XVI), it could still be overturned under the proposed domestic regulation restrictions.
  31. "Declaration Of The European Service Industries Towards The Millennium Round," in *The World Trade Brief*, WTO Ministerial conference, published by Agenda Publishing in association with the WTO. November 1999.
  32. UPS is a member of the CSI; Federal Express Corporation, DHL Worldwide Express, TNT Express Worldwide and 80 other courier companies are members of the Air Courier Conference of America — an affiliate member of the CSI. ESF members include the following postal and express delivery service companies and associations: Sweden Post, Deutsche Post AG, La Poste, DHL Worldwide Network SA, TNT Post Group, European Express Association and PostEurop.
  33. Many of these broader issues are considered in: Sinclair, S. "GATS: How the World Trade Organization's new 'services' negotiations threaten democracy," (CCPA, 2000), esp. Chapter 4, pp. 75-81.
  34. It should be re-emphasized that the proposed restrictions on domestic regulation apply exclusively to *non-discriminatory* regulations. Therefore, additional complaints by the multinational courier companies that national post offices enjoy *preferential* customs treatment would not be handled under the proposed restrictions. Such allegations, although closely related, would be handled as potential violations of national treatment obligation, or as an abuse of dominant monopoly position.
  35. See discussion of the GATS Most-Favoured-Nation Rule, Article II in section 2 of this paper.
  36. Cf. "In a fully liberalized express delivery services sector, governments would have clearly defined responsibility to ensure separation of commercial and regulatory functions at inter-governmental organizations such as the Universal Postal Union." (Canadian Courier Association , 1999: p. 8)
  37. The trade legislation, H.R. 2614, was passed without the amendments desired by UPS.
  38. See, for example, the recent book by the Cato Institute, which, according to its promotional literature "argues the case for privatization" of the U.S. Postal Service. Edward Hudgins, ed., *Mail at the Millennium*, (Cato Institute, 2000)
  39. In fact, Canada Post has set out to become a world leader in providing electronic delivery services. It has developed a range of new e-postal services including EPOST, the world's first electronic post office providing Internet-based secure messaging to deliver bills, statements, forms, government services, and targeted advertising to Canadians, an Internet-based secure file transfer and authentication service, and sophisticated electronic tracking of physical parcel delivery. Canada Post Corporation (2000). "A Vision For The Millennium: Annual Report 1999-2000." Available at [www.canadapost.ca](http://www.canadapost.ca).

40. I wish to acknowledge the input of my colleague, Marc Lee of the CCPA-BC, on these points.
41. For example “To realize [e-commerce’s] full potential it is therefore imperative that no regulatory or structural impediments are erected, or where they already exist, that they are removed. ... In particular the commercial success of electronic commerce depends to a large extent on: “efficient reliable, fully liberalized delivery networks; the reform of customs procedures; a raising of *de minimus* levels to facilitate the commerce in low value goods; and full market access for air cargo carriers (Canadian Courier Association, 1999: p. 9).”
42. There is, however, no definition of subsidy in the GATS. The GATT rules on goods define a subsidy as a financial contribution (or any form of income or price support) by a government, or any public body within the territory of a member, which confers a benefit. See the WTO Agreement on Subsidies and Countervailing Measures, Article I.
43. By covering subsidies, the GATS negotiators departed sharply from the usual approach under previous international treaties. The NAFTA and the WTO rules on goods, for example, both exempt subsidies. NAFTA’s services chapter does not apply to subsidies and grants (Article 1201.2d) and NAFTA’s investment rules specifically exclude subsidies and grants from national treatment and most-favoured nation obligations (NAFTA Article 1108.7). GATT rules on goods also exempt production subsidies from national treatment obligations. Under both the NAFTA and the GATT 1994, governments may therefore offer such subsidies exclusively or on a preferential basis to domestic goods or producers. By covering subsidies under national treatment and MFN, the GATS has thus gone significantly further than previous international commercial treaties.
44. GATT Article III:8(a) excludes government procurement from the national treatment obligation.
45. Membership of the GPA includes the United States, Canada, the member states of the EU, Japan, Hong Kong Israel, Singapore, Norway, and Switzerland and some developing countries that have recently acceded to the WTO. While Canada is a member of the GPA, the agreement now applies only to federal government procurement; it does not cover Canadian provincial and local government procurement. Some other countries have covered certain subnational procurement.
46. WTO-GPA, note to para. 1 of Article XVI. Cf. NAFTA Article 1006.
47. The current GPA thresholds are \$261, 200 for goods and services and \$10,000,000 for construction.
48. GATS Annex on Air Transport Services, Article 3.
49. A detailed consideration of the potential impact of the proposed Free Trade Area for the Americas (FTAA) agreement on the Canadian postal system is beyond the scope of this paper. However, it seems likely such an FTAA will be based on the service and investment provisions — including the controversial investor-state dispute settlement procedure — contained in NAFTA. This can be expected to increase the number of potential corporate litigants and intensify pressure against Canada’s postal system.

## References

- Alverno, Anthony (2000), "Achieving Postal Reform Through The World Trade Organization." Draft paper delivered to the 8<sup>th</sup> Conference On Postal And Delivery Economics, Vancouver June 6, 2000.
- Appleton & Associates (2000). "Notice of Intent to Submit a Claim to Arbitration under section B of chapter 11 of the North American Free Trade Agreement. United Parcel Service of America Inc. v. Government of Canada. January 19, 2000.
- Canada Post Corporation (2000). "A Vision For The Millennium: Annual Report 1999-2000." Available at [www.canadapost.ca](http://www.canadapost.ca).
- Canadian Courier Association (1999). "Position Statement Of The Canadian Courier Association 'CCA' Regarding The Inclusion Of Postal And Express Delivery Services In GATS 2000." April 27, 1999.
- Competition Bureau (Nov. 1993). "News Release And Backgrounder." November 26, 1993.
- European Express Organization (1999). "Position Statement Regarding The Inclusion Of Postal And Express Delivery Services In GATS 2000." October 1, 1999. <http://www.euroexpress.org/papers>.
- European Services Forum (2000). "Second European Services Forum Position Paper On GATS And Electronic Commerce," 16 June 2000.
- Inside U.S. Trade (April 28, 2000). "UPS Files New NAFTA Investment Dispute Against Canada."
- International Chamber Of Commerce (1998), "Policy Statement: Air Cargo And The WTO," prepared by the Committee on Air Cargo Transport, document no. 322-3/5 Rev.3, 25 September, 1998.
- National Transportation Agency (Sept. 29, 1993). "National Transportation Agency Of Canada Decision On The Proposed Acquisition Of Purolator By Canada Post," Press release and decision.
- Parliament of Canada (1981), "Canada Post Corporation Act," Parliament of Canada, 1981.
- Perrazzelli, Alessandra and Paolo R. Vergano (2000), "Terminal Dues Under The UPU Convention And The GATS: An Overview Of The Rules And Of Their Compatibility." *Fordham International Law Journal*, Vol. 23:736.
- Public Works Canada (Jan. 2000). Memorandum and attachment regarding "Canadian Courier Association Concerns," Public Works and Government Services Canada, Jan. 20, 2000, released under Access to Information.
- Public Works Canada (Oct. 1999). "Memorandum Regarding 'Canadian Courier Association Report,'" Public Works and Government Services Canada, Oct. 7, 1999, released under Access to Information.
- Public Works Canada (April 1997). "Marleau Outlines Plans for Canada Post," News Release and Backgrounder, April 23, 1997.
- Sinclair, Scott (2000). *GATS: How The World Trade Organization's New 'Services' Negotiations Threaten Democracy*, Canadian Centre for Policy Alternatives, 2000.
- TD Securities Inc (1997), "Summary Report to The Minister Responsible for Canada Post Corporation regarding Canada Post Corporation," April 17, 1997.

- Union Network International, (2000), "E-Commerce: The Impact On Postal Services," Postal Documents 2000, Agenda Item 8, April 7, 2000.
- United Nations (1991), "Provisional Sector Product Classification (the Provisional CPC), Statistical Papers, series M, no. 77, 1991.
- Universal Postal Union (2000), "Draft Memorandum Of Understanding between the Universal Postal Union and the World Trade Organization," UPU Council of Administration, CA EP REL OMC 2000.1Rapport.Pièce 1, August 6, 2000.
- Universal Postal Union (Feb., 1999), UPU Postal Operations Council Document, World Round Table on terminal dues, Geneva, February 3-4, 1999, CEP TR 1999.1-Doc.1. cited in Perrazzelli and Vergano (2000).
- U.S. Coalition of Service Industries (August 5, 1999), Statement of Dean O'Hare, President and Chief Executive Officer, Chubb Corporation, and Chairman, Coalition of Service Industries, "Testimony Before the Subcommittee on Trade of the House Committee on Ways and Means Hearing on the United States Negotiating Objectives for the WTO Seattle Ministerial Meeting."
- U.S. GAO (1997), "Postal Reform In Canada: Canada Post Corporation's Universal Service And Ratemaking," U.S. General Accounting Office, GAO/GGD-97-45BR, March 1997.
- U.S. GAO (1996), "Unresolved Issues In The International Mail Market," U.S. General Accounting Office, GAO/GGD-96-51, March 1996.
- U.S. GAO (1996), "U.S. Postal Service: Unresolved Issues In The International Mail Market," U.S. General Accounting Office, GAO/GGD-96-51, March 1996.
- U.S. International Trade Commission (1995). "General Agreement On Trade In Services: Examination Of Major Trading Partners' Schedule Of Commitments (Canada, European Union, Japan, And Mexico. Investigation No. 332-358. USITC publication 2940. December 1995.
- World Trade Organization (July 1991), "Services Sectoral Classification List," Note by the Secretariat, MTN.GNS/W/120, 10 July, 1991.
- World Trade Organization (March 1997), "Canada Certain Measures Concerning Periodicals," Report Of The Panel, WT/DS31/R, 14 March 1997).
- World Trade Organization (June 1998), Council for Trade in Services, "Postal And Courier Services," Background Note by the Secretariat, S/C/W/39, 12 June 1998.
- World Trade Organization (December 1998), "Communication From The United States: Express Delivery Services," Council for Trade in Services, S/C/W/79, 8 December, 1998.
- World Trade Organization, (October 1999). Secretariat, Trade in Services Division, "An Introduction To The GATS," mimeo.
- World Trade Organization, CSC (June 2000). Committee on Specific Commitments (CSC), "Report Of The Meeting Held On 23 And 24 May 2000." S/CSC/M/15 29 June 2000.