

2003

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WEATHER MAY NOT STOP USPS, BUT SPECIAL INTERESTS WILL: THE BUSH ADMINISTRATION'S GATS OFFER SUPPORTS PRIVATE EXPRESS DELIVERY SERVICES BUT THREATENS TO STAMP OUT USPS

CATHERINE B. HARRINGTON*

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INTRODUCTION

Rapid technological advances in communications and transportation have spurred greater recognition of the need for open markets.¹ World and business leaders have concluded that

1. See The International Centre for Trade and Sustainable Development, *Trade and Transfer of Technology* 1 (recounting that World Trade Organization

technology has greatly expanded the realm of economic opportunities, making new trade relationships viable and desirable.² As a result, governments and organizations have made remarkable progress in not merely pursuing new multilateral and bilateral trade agreements, but also in exploring and creating more significant and unique trade relationships that cover a broader range of economic activities than ever before.³ The 1994 decision of the contracting parties to the General Agreement on Tariffs and Trade (“GATT”)⁴ to amend their provisional agreement to provide for the creation of a permanent trade organization dramatically demonstrates this point.⁵ The establishment of the World Trade Organization (“WTO”) represents an ambitious attempt to expand trade negotiations to include trade in both goods and services.⁶ The extraordinary

Members decided to commission research to study the relationship between trade and technology), at <http://www.ictsd.org/pubs/dohabriefings/dohal11-tradetech.pdf> (last visited Oct. 13, 2003).

2. See Press Release, Warren Lavorel, Address at the Coalition of Service Industries Conference (June 24, 1997) (emphasizing the importance of globalization and new technologies for economic growth and development), at http://www.wto.org/english/news_e/pres97_e/pr.htm (last visited Oct. 26, 2003).

3. See Scott L. Baier & Jeffrey Bergstrand, *International Trade in Services, Free Trade Agreements and the WTO*, in SERVICES IN THE INTERNATIONAL ECONOMY 157 (Robert M. Stern ed., 2001) (highlighting the recent explosion in free trade agreements, as evidenced in the fact that one-third of the roughly one hundred free trade agreements, covering a broad range of new issues negotiated in the last fifty years, were reached from 1990-1995).

4. General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187.

5. See Press Brief, World Trade Organization, Fiftieth Anniversary of the Multilateral Trading System [hereinafter Fiftieth Anniversary] (depicting the development of the GATT and WTO), available at http://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm (last visited Oct. 13, 2003); see also Daniel I. Fisher, Note, “Super Jumbo” Problem: Boeing, Airbus, and the Battle for the Geopolitical Future, 35 VAND. J. TRANSNAT’L L. 865, 871 (2002) (providing background regarding the development of multilateral trading systems). With twenty-three founding contracting nations, GATT entered into force on January 1, 1948, as a vehicle to promote tariff reductions in the trade of goods. *Id.* The contracting parties hoped to prevent the spiraling tariffs that they blamed for sparking the Great Depression. *Id.*

6. See World Trade Organization, *What is the World Trade Organization?* (summarizing the WTO’s broad aims to include negotiations in trade and services in an unprecedented manner), at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (last visited Oct. 22, 2003).

agreement, formulated under the GATT framework of the Uruguay Round negotiations,⁷ set the stage for more detailed, specific agreements pertaining to the trade issues surrounding agriculture, textiles, intellectual property, and services.⁸

The WTO continues to build upon the Uruguay Round achievements, striving for trade liberalization.⁹ Now as a larger organization with over 140 members, accounting for ninety-seven percent of world trade,¹⁰ the WTO is tackling one of the most politically sensitive aspects of world trade by forging ahead on the negotiations of the General Agreement in the Trade in Services¹¹ (“GATS”).¹² The WTO’s bold aim to focus international efforts on

7. See World Trade Organization, *Legal Texts: The WTO Agreements* (providing an outline and brief description of the various texts that culminated in the creation of the WTO), at http://www.wto.org/english/docs_e/legal_e/ursum_e.htm (last visited Oct. 13, 2003); see also World Trade Organization, *The Uruguay Round* [hereinafter *Uruguay Round*] (outlining key dates and events in the Uruguay Round negotiations), at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Oct. 13, 2003). The contracting GATT parties initiated the Uruguay Round of trade negotiations in Punta del Este, Uruguay in September 1986. *Id.* By the time the 1993 negotiations concluded in Geneva, Switzerland, 123 countries were participating, which, according to the WTO, secured its status as the largest trade negotiation ever. *Id.*

8. See World Trade Organization, *Overview: A Navigational Guide* (introducing crucial elements of the most prominent WTO agreements and giving brief background information on them), at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm (last visited Oct. 13, 2003).

9. See *Trading Futures*, THE CHRISTCHURCH PRESS, Apr. 7, 2003 (noting that the WTO’s GATS negotiations are making slow but positive progress).

10. See World Trade Organization, *The Organization* (providing an overview of the organization of the WTO, including a brief discussion of the structure and identification of its major goals), at http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr02_e.htm (last visited Oct. 13, 2003). The WTO continues to expand as about thirty other nations are currently negotiating for membership. *Id.*

11. General Agreement on Trade in Services, in Uruguay Round Final Act, Dec. 15, 1993, art. XIX, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 31, GATT Doc. No. MTN/FA, 33 I.L.M. 441130 (1994) [hereinafter GATS].

12. See MARKUS KRAJEWSKI, PUBLIC SERVICES AND THE SCOPE OF THE GENERAL AGREEMENT ON TRADE IN SERVICES 3 (2001) (noting that civil society

the progressive liberalization of trade in services concerns some groups because these efforts could potentially impact governments' provision of traditional public services.¹³ Interference with public services is generally considered the "third rail" of politics in many national and regional political contexts.¹⁴

In participating in GATS negotiations, the United States faces political and legal difficulties in both the domestic and international arenas that could threaten the process internally and damage the

groups fear the potential impact of GATS on local, regional, and national policies pertaining to economic and social development, environmental protection and even cultural objectives), available at <http://www.ciel.org/Publications/PublicServicesScope.pdf> (last visited Oct. 13, 2003). The WTO's political vulnerabilities were graphically displayed during the 1999 talks in Seattle, Washington when violent protests erupted, causing the WTO to suspend negotiations. *Id.*; see also Press Release, World Trade Organization, It is Vitals to Maintain and Consolidate what has Already Been Achieved (Dec. 7, 1999) (providing insight into WTO negotiators' disappointment about the suspension of talks due to the violent protests and their attempt to dilute the public relations disaster by pointing out that there have been other occasions when talks have been suspended, and the WTO continued to function), available at http://www.wto.org/english/news_e/pres99_e/pr160_e.htm#1 (last visited Oct. 13, 2003); see also David Postman & Mike Carter, *Police Switch to New Strategy: They Say Rough Protest Caught Them Off Guard*, SEATTLE TIMES, Dec. 1, 1999, at A1 (describing the massive protests in Seattle, Washington during the WTO talks and the police measures to limit activists' and opportunists' violent behaviors); ORG. FOR ECON. CO-OPERATION AND DEV., GATS: THE CASE FOR OPEN SERVICES MARKETS 13 (2002) [hereinafter ORG. FOR ECON. CO-OPERATION AND DEV.] (arguing that the GATS is in the center of the trade controversy because services impact a broad range of interests, triggering the broad opposition of many different civil society groups).

13. See KRAJEWSKI, *supra* note 12, at 4 (noting that "public services" usually include communications, transportation, postal and other crucial services, and that these areas could be subject to GATS restrictions).

14. See Rob Norton, *Rough Around the Edges; Why Does Paul O'Neill Make People So Hot Under the Collar?*, WASH. POST, Aug. 19, 2001, at B1 (describing the widespread shock at then Treasury Secretary O'Neill's unusual and politically dangerous statement belittling the importance of Social Security, a crucial government service that supports a substantial portion of the American population); see also Clifford Krauss, *Long Lines Mar Canada's Low Cost Healthcare*, N.Y. TIMES, Feb. 13, 2003, at A3 (reporting that the Canadian Parliament and private influences have traditionally avoided altering Canadian public health services). The expression "third rail" of politics alludes to the subway rail in most subway systems that is electrified, rendering it dangerous. *Id.*

process globally.¹⁵ GATS' broad scope will affect many sectors of the U.S. economy, which has sparked the interest of various affected communities and complicated negotiators' efforts.¹⁶ Of the many contentious issues that have emerged as domestic political hotspots, the provision of postal services through the United States Postal Service ("USPS"), presents unique challenges in the GATS context.¹⁷ Currently USPS enjoys a special legal status¹⁸ in American law as a

15. See Symposium, *Why Does the World Hate America? (A Symposium Of Views)*, 17 INT'L ECON. 24 (2003) (discussing the international perceptions of American foreign policy that threaten the U.S. international political position).

16. See International Brotherhood of Teamsters, *Trade in Services: How It Will Affect Teamsters Members* (outlining the International Brotherhood of Teamsters' opposition to GATS and arguing that the current protections for workers, including those concerning workplace safety, would be vulnerable to legal attack), at <http://www.teamster.org/governmt/tradeissues/gats/tradeinservices.htm> (last visited Oct. 13, 2003); see also GATSwatch, *Stop the GATS Attack* (providing an overview of international civil society objections to GATS and listing organizations throughout the world that object to GATS), at <http://www.gatswatch.org/StopGATS.html> (last visited Oct. 13, 2003).

17. See discussion *infra* Part II (explaining why GATS will apply to the USPS and highlighting key problems with USPS' operations complying with GATS).

18. See Postal Reorganization Act of 1970, Pub. L. No. 91-375, §§ 101(a), 401, 84 Stat. 719, 722-23, 39 U.S.C.A. § 101(a) and § 401 (West 2003) (describing the responsibilities of USPS to provide services on behalf of the U.S. government and granting the authority to the USPS to exercise unique government powers including the privilege of exercising the right of eminent domain); see also Press Release, White House, Statement by the Press Secretary (Dec. 11, 2002) (announcing the establishment of a bipartisan commission to examine challenges to the USPS and noting that the \$900 billion domestic mail industry effects all Americans), *available at* <http://www.whitehouse.gov/news/releases/2002/12/20021211-1.html> (last visited Oct. 13, 2003). Although it appears that the USPS will continue to enjoy a special relationship with the U.S. government, the extent of the USPS' elevated legal status is currently under attack. See PRESIDENT'S COMMISSION ON THE USPS, EMBRACING THE FUTURE: MAKING THE TOUGH CHOICES TO PRESERVE UNIVERSAL MAIL SERVICE ix-xix (July 31, 2003) [hereinafter COMMISSION REPORT] (discussing the need for reform of USPS and summarizing new models for USPS' organizational structure, including privatization), *available at* <http://www.treasury.gov/offices/domestic-finance/usps/pdf/freport.pdf> (last visited Oct. 15, 2003); see also Exec. Order No. 13,278, 67 Fed. Reg. 76,671 (Dec. 11, 2002) (establishing the Presidential Commission and specifically ordering the Commission to review USPS' structure and organization and provide recommendations for keeping the USPS efficient and sustainable), *available at* <http://www.ustreas.gov/offices/domestic-finance/usps/pdf/postalCommissionExecutiveOrder.pdf> (last visited Oct. 15,

result of its standing as a government entity, and its statutory monopoly in the areas of first-class and standard mail delivery, and access to customers' mailboxes.¹⁹ This 225 year-old institution enjoys these legal benefits because it provides universal postal

2003); Mike Causey, *Bush Administration is Eager to Privatize Federal Jobs*, WASH. TIMES, June 17, 2003, at A5 (commenting on the Bush administration's perceived drive to privatize jobs in federal agencies). Also, USPS' recent legal problems have highlighted that its ever expanding activities have potentially diluted its special legal protections under law. *Compare Flamingo Indus. (USA) Ltd. v. U.S. Postal Serv.*, 302 F.3d 985 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 2215 (May 27, 2003) (No. 02-1290) (considering the question of whether USPS is vulnerable to suit under domestic anti-trust laws that utilize the designation of a "person" now that USPS has arguably extended itself beyond its Congressionally required mandate), *with Sea-Land Serv. Inc. v. Alaska R.R.*, 659 F.2d 243, 245-46 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 919 (1982) (holding that the United States and its instrumentalities were not "persons" within the meaning of federal anti-trust law). *See* Petition for a Writ of Certiorari at 2-4, *USPS v. Flamingo Indus. (U.S.A) Ltd.*, 2003 WL 22330883 (No. 02-1290) (discussing the traditionally privileged position of the USPS).

19. *See* 18 U.S.C. §§ 1693-1699 (2003) (restricting the right to deliver mail to the USPS and providing for criminal sanctions); *see also* 18 U.S.C. § 1725 (2003) (limiting mailbox use to USPS employees and sanctioning punishment for unauthorized use); 39 U.S.C. § 601-606 (2003) (providing for instances when it is legal to carry letters outside the mail and establishing the police authority of the USPS); *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 128 (1981) (upholding USPS' right of exclusive access to customer mailboxes and finding that customers agreed to this restriction in exchange for postal service); U.S. GEN. ACCOUNTING OFFICE, *POSTAL SERVICE REFORM: ISSUES RELEVANT TO CHANGING RESTRICTIONS ON PRIVATE LETTER DELIVERY* 10 (Sept. 1996) [hereinafter *CHANGING RESTRICTIONS*] (analyzing the evolution of the 1934 statutory restrictions on mailbox access and noting that Congress sought to prevent the loss of postal revenues in passing these limitations), *available at* <http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPAddress=162.140.64.21&filename=gg96129b.pdf&directory=/disk/wais/data/gao> (last visited Oct. 14, 2003); U.S. GEN. ACCOUNTING OFFICE, U.S. POSTAL SERVICE: INFORMATION ABOUT RESTRICTIONS ON MAILBOX ACCESS 21 (May 1997) [hereinafter *MAILBOX ACCESS*] (emphasizing that USPS has used its authority to create Postal Regulations to expand the mailbox restriction, making it applicable to items hanging from mailboxes), *available at* <http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPAddress=162.140.64.21&filename=gg97085.pdf&directory=/disk/wais/data/gao> (last visited Oct. 22, 2003); Rick Geddes, *Opportunities for Anticompetitive Behavior in Postal Services*, AM. ENTER. INST. FOR PUB. POL'Y RESEARCH, June 1, 2003 (analyzing the USPS statutory monopoly and describing the USPS measures to defend this monopoly against infringement), *available at* http://www.aei.org/publications/filter,.pubID.17488/pub_details.asp (last visited Oct. 14, 2003).

services that have historically played a significant role in promoting national unity and serving important social functions.²⁰ The USPS' unique legal, cultural, and social status,²¹ and the international precedent related to the compliance of domestic postal services with international trade agreements make the problem of USPS' compliance with GATS very complicated.²² This issue increases the potential for domestic outcry that could possibly reignite hostilities for international trade organizations in a manner most graphically depicted during the WTO's 1999 Seattle talks.²³

This Comment considers the challenges U.S. policymakers face in reforming the USPS while seeking to balance both American obligations under the evolving GATS and domestic statutory and social responsibilities.²⁴ Part I discusses the GATS agreement and highlights language in the agreement that is difficult to apply to

20. See COMMISSION REPORT, *supra* note 18, at 1, 15 (praising the 225 year old institution for its contributions to American society and noting its cultural importance).

21. See *id.* at 1 (highlighting the important role the USPS has played in promoting national unity and facilitating the exchange of ideas and information); see also Nat'l Postal Museum, *The Post and the Press* (identifying the important role the USPS played in cultivating the active American newspaper media), at http://www.postalmuseum.si.edu/exhibits/2a2_postandpress.html (last visited Oct. 13, 2003). Americans often view the USPS as crucial to American First Amendment rights, which is an undeniably important component of the American identity. *Id.*; see also Gary B. Pruitt, The Newspaper Association of America, Testimony Before The President's Commission on the United States Postal Service 3-4 (Apr. 4, 2003) (describing the centuries old relationship between the USPS and the newspaper industry and noting the crucial importance of USPS' role in sustaining the forum for expressing American freedoms), at <http://www.treasury.gov/offices/domestic-finance/usps/testimony-docs/Pruitt.pdf> (last visited Oct. 22, 2003).

22. See discussion *infra* Part I.E (outlining the two major postal cases and revealing the legal constraints on the national postal service's operations).

23. See KRAJEWSKI, *supra* note 12, at 3-4 (discussing the difficulties in regulating services due to debate about definitions and the scope of the term "services" and vocal opposition from local and regional groups concerned about regulations); see also Neil King, Jr., *Leading the News: E.U. Asks U.S. to Revise Rules for Service Sector: Host of Regulations at Issue as Bush Seeks Freer Trade; Alarm Likely at Local Level*, WALL ST. J., Feb. 26, 2003, at A3 (revealing the European Union's displeasure with USPS' monopoly); Postman & Carter, *supra* note 12 (describing the protests in Seattle, Washington during the WTO talks).

24. See *infra* notes 25-30 and accompanying text (outlining the Comment's main focus and arguments).

national postal services.²⁵ Part II examines the lessons of two major international disputes regarding postal monopolies—the Deutsche Post AG (“Deutsche Post”) case in the European Union (“E.U.”), and the ongoing arbitration between the United Parcel Service (“UPS”) and Canada Post under the North American Free Trade Agreement (“NAFTA”).²⁶ Both of these examples are useful in identifying potential problems within national postal systems that complicate compliance with international competition laws.²⁷ Part III analyzes American obligations under GATS and under the current American offer and argues that, based upon the issues presented in the cases of Deutsche Post and Canada Post, USPS’ express delivery service operations are illegal.²⁸ This section also highlights specific problems with USPS’ operations that render it legally vulnerable under the GATS.²⁹ Finally, Part IV recommends how the USPS can manage its reforms to meet its international and domestic obligations.³⁰

25. See discussion *infra* Part I (summarizing the GATS agreement and highlighting contentious principles).

26. See discussion *infra* Part I.E (reviewing two major international postal decisions regarding abuse of monopoly position for their value as precedent for interpreting the GATS monopoly provisions and as potential examples of how the WTO might review a challenge to USPS operations).

27. See *id.* (highlighting some of the common problems in national postal system operations that have been found illegal under international agreements).

28. See discussion *infra* Part II (analyzing possible GATS implications for the USPS in light of the U.S. offer and issues presented in the Deutsche Post and Canada Post cases).

29. See discussion *infra* Part II.B (noting aspects of USPS’ operations that suggest it is abusing its monopoly powers, which constitutes an illegal behavior under the GATS agreement).

30. See discussion *infra* Part II (applying analysis of the U.S. GATS offer and solutions from the Deutsche Post litigation and analysis from the Canada Post arbitration to discuss recommendations to remedy the USPS’ potential legal difficulties in complying with GATS).

I. BACKGROUND

A. GATS: THE IMPORTANCE OF SERVICES AND SERVICE AGREEMENTS

GATS, which entered into force in January 1995,³¹ represents a unique effort to generate comprehensive reductions in the barriers to trade³² in services on an unprecedented scale³³ that could have extraordinary implications for the world economy.³⁴ Although authorities caution that the very nature of services renders it difficult to quantify their economic importance, World Bank economists believe that services are the fastest growing component of the

31. See World Trade Organization, *Understanding the WTO: The Agreements, Services: Rules for Growth and Investment* (summarizing the major features of the GATS agreement and advancing that its implementation in January 1995 represents the landmark achievement of the Uruguay Round), at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm (last visited Oct. 14, 2003).

32. See World Trade Organization, *The Case for Open Trade* [hereinafter *Case for Open Trade*] (outlining the most commonly cited arguments in support for free trade), at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm (last visited Oct. 24, 2003); see also ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 12, at 17-21 (rebutting arguments against free trade by providing statistical data about unrealized economic potential and possible economic gains). David Ricardo's theories addressing competitive advantage and the inefficiencies of protectionism guide economists in pursuing the goal of free trade that they believe will produce greater economic benefits. See *Case for Open Trade, supra* (providing an overview of major WTO arguments for free trade and highlighting David Ricardo's economic analysis).

33. See generally Government of Canada Competition Bureau, *Competition Policy Considerations in the GATS Negotiations* (explaining the GATS implications from the perspective of the Canadian government in order to solicit the opinions of the Canadian business sector about proposed Canadian negotiating positions and indicating that the Canadian government believes that the GATS agreement represents an extraordinary opportunity to pursue open service markets), at <http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02192e.html> (last visited Oct. 14, 2003).

34. See The World Bank Group, *Services - Trade Services in the World Economy* (describing the enormous impact of service trade on the world economy), at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/TRADE/0,,contentMDK:20106726~menuPK:207651~pagePK:148956~piPK:216618~theSitePK:239071,00.html> (last visited Oct. 13, 2003); see also *infra* notes 35-37 and accompanying text (detailing estimates of importance of services in the global economy).

international economy in the last fifteen years, accounting for about sixty to seventy percent of production and employment in developed countries and generating over \$1.3 trillion in 1999.³⁵ Remarkably, economists assume that the economic importance of services will only continue to grow because the dual impacts of the growing feasibility of trade in services, due to improvements in technology, and a growing trend towards liberalization will serve as an impetus for increased service trade.³⁶ As a result, policy makers cannot overstate the importance of the GATS agreement.³⁷

B. THE PROCESS AND FRAMEWORK OF THE GATS AGREEMENT

GATS remains a work in progress because its framers developed it as a dynamic agreement that requires signatories to adopt certain general principles and then negotiate specific commitments for the gradual liberalization of their service economies.³⁸ It has three major elements: the framework for general obligations for services trade, annexes on specific sectors, and the schedules of WTO members'

35. See The World Bank Group, *supra* note 34 (noting these statistics, which the World Bank believes might be undervalued even at these levels, and mentioning that the fastest growing sectors are in telecommunications, health, and finance services); see also ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 12, at 13 (providing the Organization for Economic Co-operation and Development (OECD) estimates regarding this economic activity). The OECD asserts that trade in services account for seventy percent of production and employment in its member area. *Id.*

36. See The World Bank Group, *supra* note 34 (advancing World Bank economists' major explanations for the recent increases in service trade).

37. See *supra* notes 35-36 and accompanying text (highlighting the financial data that demonstrates the importance of services and emphasizing that this importance will continue to grow).

38. See GATS, *supra* note 11, art. XIX, (detailing the framework for the gradual negotiations of specific commitments geared toward generating progressive liberalization), available at http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm (last visited Oct. 13, 2003); see also ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 12, at 10 (discussing the flexible liberalization approach of the GATS agreement); J. Steven Jarreau, *Interpreting the General Agreement on Trade in Services and the WTO Instruments Relevant to the International Trade in Financial Services: The Lawyer's Perspective*, 25 N.C. J. INT'L L. & COM. REG. 1, 31-35 (1999) (discussing the framework of the GATS agreement and noting that the framework's general principles and rules apply to all trade in services).

commitments.³⁹ Having adopted the agreements' principles, the signatory governments are currently abiding by the Uruguay Round's agenda that calls for further negotiations.⁴⁰

Negotiations commenced on January 1, 2000, to facilitate specific commitments to liberalize Members' service sectors in the request-offer proceedings when Members can request access to others' economies and offer access to their own.⁴¹ Leaders envisioned this voluntary process of progressive liberalization as a means to ensure that countries, particularly developing countries, could exercise substantial control over the rate of liberalization.⁴² Members took the concrete step of setting deadlines for proposals at the Doha, Qatar meeting to ensure the continued progress of the negotiations.⁴³ As a result, GATS negotiators remain on course to make steady, albeit slow, progress toward the ultimate aims of GATS beyond the general principles previously adopted.⁴⁴

39. See ORG. FOR ECON. CO-COOPERATION AND DEV., *supra* note 12, at 10 (providing analysis of the GATS framework).

40. See *id.* at 13 (describing the current process of securing Member commitments).

41. See *id.* at 10 (noting that GATS permits Members to select the sectors, supply modes and regulatory conditions in which to make its commitments); see also World Trade Organization, *The New Negotiations* (supplying an overview of the specific commitment process, including the most recent offer submissions to the WTO), available at http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm (last visited Oct. 12, 2003).

42. See GATS, *supra* note 11, part IV (outlining the process of progressive liberalization of Members' service economies); see also ORG. FOR ECON. CO-COOPERATION AND DEV., *supra* note 12, at 10 (noting that the "progressive, voluntary nature of liberalization" renders the GATS the most "development-friendly" agreement of the Uruguay Round Agreements).

43. See World Trade Organization, *Doha 4th Ministerial Declaration*, WT/MIN(01)/DEC/1 (Nov. 20, 2001) (committing members to completing the request and offer phase by March 31, 2003), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (last visited Oct. 12, 2003).

44. See *Trading Futures*, *supra* note 9 (noting that the GATS negotiations are continuing and making slow but positive progress); see also World Trade Organization, *Africa Urges End to Cotton Subsidies*; Supachai Warns "Time Running Out" on Cancun Preparations, Opening Remarks of TNC Chairman (June 10, 2003) (noting that the negotiators have made progress in crucial areas and also stressing the need for further progress before the Cancun Conference), at http://www.wto.org/english/news_e/news03_e/tnc_open_remarks_10june03_e.htm

C. THE GATS AGREEMENT: BASIC SCOPE

Article I defines GATS' scope as governing "measures by Members affecting trade in services."⁴⁵ The definition of "services," in Article I:3, however, is less clear, sparking some controversy.⁴⁶ Article I:3 provides that "services" means any service except those supplied "in the exercise of government authority."⁴⁷ In order to apply the government authority exception, the government must supply the service "neither on a commercial basis, nor in competition

(last visited Oct. 13, 2003); Supachai Panitchpakdi, *The Real Losers are the Poor*, INT'L HERALD TRIB., Sept. 18, 2003, (blaming the inability of the WTO to achieve its objectives in Cancun on the lack of political will and the Members' failure to disclose true negotiation positions in the early stages of negotiations, but remaining hopeful that the WTO will achieve its aims after Members' recommitment to success), *available at* [http://www.iht.com/ihtsearch.php?id=110287&owner=\(IHT\)&date=20030919132938](http://www.iht.com/ihtsearch.php?id=110287&owner=(IHT)&date=20030919132938) (last visited Oct. 13, 2003); Jenny Davey & Russell Hotten, *WTO Negotiations End in Failure*, TIMES (London), Sept. 15, 2003, at 19, (reporting on the collapse of the most recent WTO Ministerial Conference in Cancun, Mexico and likening this failure to the 1999 disastrous Seattle, Washington trade talks and noting that the WTO publicly stated that this event was only a "setback" because the member's had reconfirmed the Doha declarations and the General Council will meet again before December 15, 2003); World Trade Organization, *Day 5: Conference Ends Without Consensus* (summarizing the final day of the conference and highlighting Chairperson Luis Ernesto Derbez's optimism that the WTO will ultimately achieve its goals), *at* http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm (last visited Oct. 12, 2003); John Audley, *The Cancun Circus: A Worn Out Act by Rich Nations*, INT'L HERALD TRIB., Sept. 18, 2003 (analyzing the results of the Cancun conference and highlighting the major factors, including U.S. special domestic interests, that contributed to the failure of the talks), *available at* [http://www.iht.com/ihtsearch.php?id=110274&owner=\(IHT\)&date=20030919132938](http://www.iht.com/ihtsearch.php?id=110274&owner=(IHT)&date=20030919132938) (last visited Oct. 13, 2003).

45. See GATS, *supra* note 11, arts. I:1 & I:2 (describing four modes that define trade in services). Specifically, these modes define trade in services as the supply of a service:

- (a) from the territory of one Member into the territory of any other member;
- (b) in the territory of one Member to the service consumer of any other Member;
- (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
- (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member. *Id.*

46. See KRAJEWSKI, *supra* note 12 at 4, 16, 18 (describing the ambiguities that plague observers' efforts to interpret the scope of the GATS agreement).

47. GATS, *supra* note 11, art. I:3 (defining services).

with one or more service suppliers,” a crucial provision which the GATS framers did not clarify.⁴⁸ Thus, this seemingly narrow approach does not appear to make any concessions for hybrid or mixed private and public entities that provide essential social services, which are common mediums governments use to subsidize their costs for caring for citizens.⁴⁹ Commentators assert that the extent of the confusion about these basic principles that define the essence of GATS is so widespread that WTO Members do not even agree on the definitions of these elements.⁵⁰

Thus, as the WTO struggles with the negotiations pertaining to specific members’ commitments and schedules for liberalizing their service sectors, these discussions might be premature, as more fundamental issues remain unresolved.⁵¹ Varied understandings of the scope of the GATS could serve to complicate further negotiations as the specific offers and requests will likely prompt debate about these more basic elements of the agreement.⁵²

D. NATIONAL POSTAL SERVICES DEBATE: ADDITIONAL EVIDENCE OF A POOR FOUNDATION FOR NEGOTIATIONS

Regardless of whether a Member has included postal services in its commitment schedules, a finding that the national postal service is not a protected “exercise of governmental authority”⁵³ will trigger

48. *See id.* (stating that services supplied in the exercise of governmental authority are neither supplied on a commercial basis, nor in competition with other service suppliers).

49. *See supra* note 47 and accompanying text (providing the strict language of the GATS exception); *see also* discussion *infra* Part II.A.1 (analyzing USPS and demonstrating the difficulties associated with interpreting the GATS provision and applying it to national postal services).

50. *See* KRAJEWSKI, *supra* note 12, at 6 (examining the WTO Secretariat and WTO Members’ conditional and uncertain language in discussing what these provisions require and illustrating the general uncertainty that exists regarding interpretation of the provision).

51. *See* discussion *infra* Part I.D (describing some of the difficulties in reaching agreements because the member governments continue to argue about basic definitional and other fundamental issues).

52. *See id.* (exploring the difficulties associated with interpreting the GATS agreement).

53. GATS, *supra* note 11, art. I.3.

general GATS obligations, including those under Article VIII concerning “Monopolies and Exclusive Service Suppliers.”⁵⁴ This provision obligates Members to monitor monopoly service providers to ensure that their activities comply with other GATS principles under Article II⁵⁵ and the Member’s specific commitments.⁵⁶ Observers expect to see the application of these provisions to postal systems because these systems are losing their government service characteristics as they venture into the competitive markets with the benefits of a statutory monopoly, or receive such substantial

54. *See id.* art. I:3 (providing that GATS governs services outside of government authority); *see also id.* art. VIII (outlining GATS guidelines for monopolies and exclusive service providers).

55. *See id.* art. II (detailing Most Favored Nation language and commitments). Article II contains the commitments to Most Favored Nation Treatment. *Id.*; *see also id.* art. II:1 (stating that “[w]ith respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member, treatment no less favourable than that it accords to like services and service suppliers of any other country”); Alessandra Perrazzelli & Paolo R. Vergano, *Terminal Dues Under the UPU Convention and the GATS: An Overview of the Rules and of Their Compatibility*, 23 *FORDHAM INT’L L.J.* 736, 737-51 (2000) (explaining most favored nation treatment and discussing Universal Post Union (“UPU”) terminal dues and potential difficulties in maintaining the system under the GATS’ most favored nation provisions). Commentators have noted that in instances where Article II guarantees are applied to postal services, the global arrangement that postal operators have developed under the auspices of the UPU may prove to be a violation of the GATS Most Favored Nation Treatment. *Id.* Despite the GATS apparent sensitivity to the plight of developing countries, the GATS language may render the UPU terminal dues system, which are a set of agreements negotiated between governments to recoup the costs of delivering international mail, unworkable. *Id.* Under the UPU Conventions, developing countries receive preferential treatment in deference to the varied cost structures of many delivery areas and expertise, and such treatment could violate the GATS Most Favored Nation Treatment principles. *Id.* GATS might also similarly jeopardize postal operators’ significant discretion in preventing commercial re-mailers from abusing the preferential treatment provisions. *Id.*; *see also* Scott Sinclair, Remarks Prepared for: Universal Postal Union Seminar, “The GATS Implications for Postal Services,” [hereinafter Sinclair GATS Remarks] (cautioning that GATS could limit national postal systems from continuing certain aspects of the UPU system) *available at* http://www.upu.int/relations_with_wto/seminar_scott_sinclair.pdf (last visited Oct. 15, 2003).

56. *See* GATS, *supra* note 11, art. VIII:1 (requiring Members to “ensure that any monopoly supplier provider of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member’s obligations under Article II and specific commitments”).

subsidies with which a private service provider would be unable to compete.⁵⁷ Despite the apparent relevance of these provisions to national postal systems, the GATS text does not provide guidance about how to determine what are acceptable postal activities, nor does it clarify what possible abuses could fall under these Article VIII regulations.⁵⁸

In order to facilitate negotiations and comparison of Members' schedules, the GATS Service Sectoral Classification List, which guides the negotiations, assigns postal and courier services to the communications sector.⁵⁹ For clarification purposes, negotiators have

57. See Mary S. Elcano & Anthony Alverno, *Reform in the Universal Postal Union and the World Trade Organization*, in FUTURE DIRECTIONS IN POSTAL REFORM 293, 303 (Michael A. Crew & Paul R. Kleindorfer eds., 2001) ("Many public postal operators have legal or *de facto* monopolies over certain types of reserved services, such as the carriage of letters. Thus, to the extent these operators are also participants in competitive markets, they could face allegations of abuse of monopoly position.") The GATS agreement is explicit in covering both natural and statutory monopolies. See GATS, *supra* note 11, art. VIII:5 (noting that the Article provisions will apply to cases of exclusive service suppliers who "formally or in effect" create a monopoly).

58. See Sinclair GATS Remarks, *supra* note 55 (highlighting the uncertainties due to language ambiguities and the lack of definitions of crucial terms surrounding compliance with GATS Article VIII provisions about monopolies).

59. See WTO Secretariat, *Services Sectoral Classification List*, MTN.GNS/W/120 (July 10, 1991) [hereinafter *SSCL*] (outlining the key sectors and their representative services), available at http://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc (last visited Oct. 15, 2003); see also World Trade Organization, *GATS: Specific Commitments* (explaining that the sector and sub-sector commitments are listed in member schedules according to the Sectoral Classification List in order to facilitate comparison and negotiations), at http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto06/wto6_27.htm (last visited Oct. 13, 2003). However, the WTO Secretariat believes that this designation is outdated. See World Trade Organization Secretariat, *Postal and Courier Services: Background Note by the Secretariat*, S/C/W/39 (June 12, 1998) (explaining that this listing is based on in the outdated assumption that postal and telecom services are offered by a single state monopoly), available at http://www.wto.org/english/tratop_e/serv_e/w39.doc (last visited Oct. 15, 2003). Reform of these listings may become a reality as observers have positively reacted to the European Union Commission's proposed new system of classification. See also Hilke Smit, *GATS and the Postal Sector: The Next Round of Negotiations*, in FUTURE DIRECTIONS IN POSTAL REFORM 309, 315 (Michael A. Crew & Paul R. Kleindorfer eds., 2001) (analyzing the weaknesses in the current classification of the services scheme).

cross-referenced the GATS Service Sectoral Classification List to the United Nations Central Product Classification (“UNCPCL”).⁶⁰ While the UNCPCL assists in providing some indication as to what comprises “postal services,”⁶¹ the problem of determining the extent of GATS regulation of postal services remains acute when considered in light of the “government authority” exemption of GATS, and the wide range of communication services national postal systems now offer.⁶² Due to the difficulties in defining the scope of GATS over postal services, some commentators have proposed an individualized analysis of each Member’s postal system to determine the extent of the system’s service as a vehicle to exercise government authority even before attempting to gauge possible violations or abuse of monopoly positions.⁶³

E. MAJOR INTERNATIONAL POSTAL DISPUTES

As a result of the vagueness in the GATS agreement, observers have suggested examining major cases involving postal monopolies and similar provisions in international law in order to identify more conclusively the possible difficulties for USPS compliance with

60. See *SSCL*, *supra* note 59 (cross-referencing SSCL sectors and sub-sectors to the corresponding United Nations Central Product Classification (CPC)).

61. See United Nations Statistics Division, *Central Product Classification Version 1.1*, Series M. No. 77, ST/ESA/STAT/SER/M/77/Ver.1.1. (2002) UNCPCL (Series M. No. 77, 1991) (clarifying that generally postal services related to letters, consisting of pick-up, transport and delivery services, parcels, counter-services and other postal services, including mailbox rental among others, are considered “postal services”), available at <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=16&Lg=1> (last visited Oct. 13, 2003).

62. See Sinclair GATS Remarks, *supra* note 55 (commenting on the challenges of understanding the potential impact of GATS on national postal services in light of the vague agreement and varied postal system structures); see also Daniel J. Foucheaux, Jr., *USPS, Report on Non-postal Initiatives* (revealing several USPS business activities that are not part of USPS’ Congressionally authorized postal monopoly), available at <http://www.nonprofitmailers.org/news/nonpostal.pdf> (last visited Oct. 15, 2003). For example, the report notes that USPS has developed a number of non-postal services including electronic bill paying services and phone cards in addition to its parcel services that are not included in the statutory monopoly. *Id.* at 4-13.

63. See Sinclair GATS Remarks, *supra* note 55 (describing the possible need for scrutiny of the activities of each government in terms of the provision of postal services).

GATS.⁶⁴ This urgent need for USPS reform⁶⁵ to meet international standards is evident in the signals of the European Union's dissatisfaction with the current USPS monopoly because it suggests that the European Union might be eager to exploit any legal vulnerability USPS might encounter under the GATS agreement.⁶⁶ Both the *Deutsche Post* case and the *Canada Post* case are informative in formulating USPS reforms.⁶⁷

1. *The Deutsche Post Case*

a. Lessons from the *Deutsche Post* Case

Prior to the March 2001 European Commission ("E.C.") decision regarding the *Deutsche Post* monopoly and USPS' claims, USPS and *Deutsche Post*'s operations seemed extremely similar.⁶⁸ In addition to the operational similarities, the relevant regulation at issue in the *Deutsche Post* case, Article 82 of the E.C. Treaty, resembles the GATS monopoly regulations because Article 82 is relatively broad

64. See *id.* (highlighting the ongoing *UPS v. Canada Post* NAFTA case as a possible tool to identify needed reforms); see also Canadian Union of Postal Workers, *The GATS and Public Postal Services* (mentioning the NAFTA arbitration as an example for Canadian officials to monitor to ensure *Canada Post*'s compliance with GATS), available at http://www.cupw.ca/pages/document_eng.php?Doc_ID=281 (last visited Oct. 15, 2003).

65. See COMMISSION REPORT, *supra* note 18, at 159 (emphasizing the need for postal reform in order to ensure the continued operations of USPS).

66. See King, *supra* note 23 (citing the European Union's request for USPS to give up its monopoly over first class mail delivery and liberalize other economic sectors). By virtue of the fact that the United States is a GATS signatory, the E.U. has additional legal avenues to attack USPS' operations, as evidenced in its right to monitor USPS at all times to ensure that the United States is meeting its obligations under basic GATS principles and complying with the agreement. See GATS, *supra* note 11, pmb. & art. VIII (setting forth the basic principles of GATS and requiring monopolies to abide by the general framework of the agreement).

67. See discussion *infra* Part II (explaining how the *Deutsche Post* case and the *Canada Post* arbitration highlight some important issues to consider in evaluating USPS' compliance with GATS).

68. See David E.M. Sappington & J. Gregory Sidak, *Competition Law for State-Owned Enterprises*, AM. ENTER. INST. FOR PUB. POL'Y RESEARCH 1-4 (noting the similar mail monopoly rights of the two national postal systems and their similar competitors outside of their respective letter monopolies), available at http://www.aei.org/docLib/20021215_pssida0212.pdf (last visited Oct. 15, 2003).

and vague with scant case law regarding the subject.⁶⁹ Thus, analysis of Deutsche Post's activities could prove useful in determining how an international body would define postal monopoly abuses.⁷⁰ The experience of Deutsche Post and the Commission's solutions to its abusive monopoly tactics might provide guidelines for USPS' potential GATS issues.⁷¹

69. See John Temple Lang & Robert O'Donoghue, *Defining Legitimate Competition: How to Clarify Pricing Abuses Under Article 82 E.C.*, 26 FORDHAM INT'L L.J. 83, 83-84 (2002) (noting that "very little effort" has been made to illuminate the meaning of Article 82 of the E.C. Treaty and designating prohibited behaviors); see also discussion *supra* Part I (explaining that there are some questions as to the meaning of the plain language of GATS and questions as to its applications to monopolies).

70. See Sappington & Sidak, *supra* note 68, at 4-6, 11-12, (suggesting that the issues and solutions in the Deutsche Post case could provide a valuable precedent for the NAFTA arbitration involving Canada Post and UPS); see also SCOTT SINCLAIR, *THE GATS AND CANADIAN POSTAL SERVICES* 27-29 (2001) (suggesting that Canada Post's NAFTA arbitration experience provides lessons for understanding how GATS might be applied to postal operations), available at <http://www.policyalternatives.ca/publications/gatsandpostalservices.pdf> (last visited Oct. 15, 2003).

71. See Case COMP/35.141- Deutsche Post AG, 2001 O.J. (L 125) 27, para. 3 [hereinafter Deutsche Post Decision] (indicating that UPS could bring a claim against Deutsche Post under Article 3 of Regulation No. 17 in July 1994), available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_125/l_12520010505en00270044.pdf (last visited Oct. 24, 2003). The European Commission had jurisdiction over this case because the Federal Republic of Germany is a member of the E.U., and under E.U. laws, private companies, such as UPS, operating in the E.U. territory can bring legal action against another entity operating in E.U. territory. *Id.* paras. 3, 25 & 30; see also Press Release, European Commission, Antitrust Proceedings in Postal Sector Result in Deutsche Post Separating Competitive Parcel Services from Letter Monopoly (Mar. 20, 2001) (summarizing briefly UPS' standing as an active operator in the parcel business in Germany), available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=&doc=IP/01/419|0|RAPID&lg=EN (last visited Oct. 13, 2003). As the case was decided according to E.U. competition law, this example does not exactly mirror USPS' situation, but many of the principles of the competition law in the E.U. and various other international agreements are similar. See discussion *infra* Parts II.B.1, II.B.2 (noting that USPS' activities are similar to Deutsche Post's prior manner of operations, found illegal by the E.C.).

b. Background about Deutsche Post's Activities

Like USPS, Deutsche Post enjoyed a statutory monopoly over letter services, but also endured the burden of fulfilling a public service obligation.⁷² Deutsche Post's public service obligation required it to provide services to the entire country, including relatively unprofitable areas, and to ensure that it could handle peak demand while providing a quality service.⁷³ As a result of these obligations to the German people, Deutsche Post maintained a substantial infrastructure including sorting equipment, mail trucks, and a large workforce.⁷⁴ Among many activities that negatively impacted fair competition in the German market, Deutsche Post officials determined that the postal operator could utilize its legally necessary infrastructure for delivery services other than their statutorily required obligations.⁷⁵

72. See Deutsche Post Decision, *supra* note 71, paras. 2, 8 (describing Deutsche Post's monopoly and obligations under German law to provide certain public services); see also U.S. GEN. ACCOUNTING OFFICE, U.S. POSTAL SERVICE: KEY POSTAL TRANSFORMATION ISSUES, 4-5 (May 29, 2003) [hereinafter TRANSFORMATION ISSUES] (noting that USPS' universal service obligation is not expressly defined, but that USPS has interpreted it to include uniform postal rates for all communities, six day postal delivery and universal access to post offices among other services), at www.gao.gov/new.items/d03812t.pdf (last visited Nov. 7, 2003).

73. See Deutsche Post Decision, *supra* note 71, paras. 2, 8 (outlining Deutsche Post's monopoly and its obligations under German law to provide certain public services).

74. See *id.*, paras. 8, 11-16 (describing Deutsche Post's infrastructure and briefly commenting on the advantages of maintaining this massive network in competition against private parcel delivery services); see also Lang & O'Donoghue, *supra* note 69, at 152-56 (detailing Deutsche Post's responsibility to maintain their infrastructure and the possibility that Deutsche Post could use its infrastructure for other activities besides the letter monopoly tasks).

75. See Sappington & Sidak, *supra* note 68, at 12, 15-16 (noting that Deutsche Post was using its trucks, personnel, and sorting centers required for its letter monopoly obligations to provide other delivery services).

c. UPS' Allegations

UPS successfully argued⁷⁶ that Deutsche Post used its monopoly profits to maintain a parcel delivery service that charged below cost prices.⁷⁷ This form of cross-subsidization is illegal under E.U. competition law⁷⁸ because it distorts competition in a manner that policymakers have found harmful for consumers in the long-run.⁷⁹ UPS also successfully asserted that Deutsche Post's fidelity rebate scheme violated E.U. competition principles.⁸⁰

d. The European Commission's Decision

The European Commission's analysis of Deutsche Post's activities provided important clarifications of European competition law.⁸¹ The Commission considered Deutsche Post's operations in light of E.C. Treaty Article 82 restrictions that prohibit entities in a "dominant"

76. See Deutsche Post Decision, *supra* note 71, paras. 3, 4 (briefly stating the relevant areas of UPS' claims against Deutsche Post and revealing that UPS' operations were predominately in the business-to-business sector).

77. See *id.* art. 1:2 (finding that Deutsche Post's costs of supplying its mail order parcel service exceeded its prices); see also Sappington & Sidak, *supra* note 68, at 16 (concluding that Deutsche Post's parcel services were not sustainable at their former cost levels without the influx of cash and resources from the monopoly services).

78. See CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, art. 82, Nov. 10, 1997, art. 82, O.J. (C 325) 33 (2002) [hereinafter E.C. Treaty] (prohibiting firms with dominant market positions from abusing their economic power), available at http://europa.eu.int/eurlex/en/treaties/dat/EC_consol.pdf (last visited Oct. 15, 2003).

79. See Sappington & Sidak, *supra* note 68, at 12-16 (detailing the European Commission's determination of the harmful effects in the markets adjacent to Deutsche Post's mail monopoly, highlighting that the major disagreement was the definition of cross-subsidization, and discussion of the European Commission's understanding of what constituted cross-subsidization to Deutsche Post's activities).

80. See Deutsche Post Decision, *supra* note 71, paras. 33-34 (finding that Deutsche Post's fidelity rebate scheme violated Article 82 of the E.C. Treaty).

81. See Lang & O'Donoghue, *supra* note 69, at 84-85 (arguing that case law and European legislation has inadequately articulated the contours of Article 82 of the E.C. Treaty); see also Sappington & Sidak, *supra* note 68, at 7-9 (arguing that the Deutsche Post decision does not represent an entirely new development in European competition law because it merely extends themes in the 1991 AKZO decision, which also dealt with a multi-product firm).

economic position from behaving in an unfair manner.⁸² In applying these provisions to postal operations for the first time, the Commission indicated that government postal operations must adhere to E.U. competition laws in offering an expansive interpretation of the treaty, finding that “undertaking” includes “enterprise[s] which offer services for remuneration.”⁸³

The E.C. substantially explored the structure of Deutsche Post’s operations and the impact of its statutory obligations in calculating what were permissible and impermissible postal operations in light of monopoly regulations that prohibit abuse of monopoly power.⁸⁴ E.C. case law provided the precedent that a fair interpretation of Article 82 included prohibitions against multi-product firms, like Deutsche Post, engaging in cross-subsidization.⁸⁵ Noting that cross-subsidization, a type of predatory pricing, “occurs where the earnings from a given service do not suffice to cover the incremental costs of providing that service and where there is another service or bundle of services the earnings from which exceed the stand alone costs,”⁸⁶ the Commission endeavored to calculate whether Deutsche Post had covered the incremental costs of the parcel service, while

82. See Deutsche Post Decision, *supra* note 71, para. 25 (noting the basis for the applicability of Article 82 and the E.C.’s analysis); see also E.C. Treaty, *supra* note 78, art. 82 (broadly describing the breadth of the prohibition on dominant undertakings’ that are incompatible with the common market prohibited actions).

83. See Deutsche Post Decision, *supra* note 71, para. 25 (demonstrating the broad approach the Commission adopted with respect to the scope of Article 82 of the E.C. Treaty by allowing this type of “undertaking” to qualify).

84. See *infra* notes 85-91 and accompanying text (describing the Commission’s analysis).

85. See Deutsche Post Decision, *supra* note 71, paras. 5-41 (exploring Deutsche Post’s operations and applying relevant economic theories in order to gauge the legality of Deutsche Post’s operations); see also Sappington & Sidak, *supra* note 68, at 8-9 (explaining how this decision extended the AKZO Chemie BV v. Commission test to account for unique postal system attributes).

86. See Deutsche Post Decision, *supra* note 71, para. 6 (defining cross-subsidization and establishing the standards that the E.C. applied in reviewing Deutsche Post’s operations); see also Lang & O’Donoghue, *supra* note 69, at 150-51 (outlining basic principles of cross-subsidization analysis).

differentiating these costs from common fixed costs which are not solely accrued from this parcel service.⁸⁷

In order to conduct this analysis, the Commission scrutinized every aspect of Deutsche Post's mail-order parcel service and determined the extent of the operation's reliance on the statutorily required mail facilities.⁸⁸ As the Commission recognized that Deutsche Post's public service obligation requires the maintenance of a certain reserve capacity regardless of the demand, the Commission did not attribute the common fixed costs of maintaining the network to the parcel service costs, but it still required Deutsche Post to show that the parcel service revenue covered the costs of actually providing the service or utilizing the network.⁸⁹ Thus, the Commission stressed the differences between a firm's "costs of supply network capacity and its costs of supply network usage."⁹⁰ Ultimately, the Commission demonstrated concern for consumers and the overall state of fair competition in the market in striking the balance of allowing Deutsche Post's mail order parcel service to realize the benefits of the larger network, but refusing to condone Deutsche Post's attempt to capitalize on its market dominance and network in its fidelity rebate scheme and instances of predatory pricing.⁹¹

87. See Deutsche Post Decision, *supra* note 71, paras. 11-24 (presenting the Commission's relevant considerations and calculations).

88. See *id.*, paras. 30-32 (examining the processes involved with the collection of the parcels, sorting, long-distance transport, regional and local transport, and delivery).

89. See *id.*, paras. 8-10 (outlining the considerations for calculating the costs associated with the parcel service while properly accounting for the costs arising from Deutsche Post's statutory requirements).

90. See *id.*, paras. 11-17 (finding that Deutsche Post's mail order parcel services could use Deutsche Post's mail delivery resources without accounting these fixed costs to the mail order parcel operations); see also Sappington & Sidak, *supra* note 68, at 8-9 (highlighting some of the crucial bases for the Commission's decision and explaining how this case contributed to the competition law in the E.U. by extending the AKZO Chemie BV v. Commission test to encompass a postal monopoly's unique situation when the law requires it to maintain a network regardless of volume).

91. See Deutsche Post Decision, *supra* note 71, paras. 33-41 (examining Deutsche Post's fidelity rebate system, allegations of predatory pricing, and exploring the effects of Deutsche Post's behavior on the markets).

2. *The Canada Post Arbitration*

a. Lessons from the Canada Post Arbitration

Although arbitration under NAFTA regulations in *United Parcel Services, Inc. v. the Government of Canada* continues, the parties' briefs and other legal analysis are useful in determining which postal processes could be considered illegal under GATS.⁹² Like the GATS articles, the NAFTA agreement prohibits abusive monopoly practices and also expressly places the burden of monopoly regulation on the national governments.⁹³

b. Background about Canada Post's Activities

Like other national postal carriers, Canada Post enjoys a special relationship with the national government.⁹⁴ Canada Post's circumstances are unique because it is not a department of the

92. See Government of Canada, Department of Foreign Affairs and International Trade, Dispute Settlement, *NAFTA - Chapter 11 Investment* (stating that UPS first filed suit in April 2000 and the arbitration proceedings are still in progress), available at <http://www.dfait-maeci.gc.ca/tna-nac/parcel-en.asp> (last visited Oct. 17, 2003); see also discussion *supra* Part I.E.2 and *infra* Part II.B (summarizing Canada Post's operational practices that triggered the UPS arbitration proceedings against the postal monopoly and highlighting that as these same issues are evident in USPS' operations USPS will likely be vulnerable to allegations that it abuses its monopoly resources under the GATS agreement).

93. Compare GATS, *supra* note 11, art. VIII (mandating that national governments must regulate monopolies) with North American Free Trade Agreement, Dec. 17, 1992, Can. - Mex. - U.S., 32 I.L.M. 289 (entered into force Jan. 1, 1993) [hereinafter NAFTA], arts. 1502, 1503 (requiring that national governments monitor monopolies and prevent abuses of market dominance), available at http://www.nafta-sec-alena.org/DefaultSite/legal/indexP_e.aspx?articleid=165english/index.htm (last visited Oct. 17, 2003); see also Scott Sinclair, *The GATS and Postal Services: Implications for Developing Countries*, 3:2 CAN. CENTRE FOR POL'Y ALTERNATIVES BRIEFING PAPER SERIES: TRADE AND INVESTMENT 4 (Oct. 2002) (arguing that the NAFTA and GATS monopoly language is substantively similar), available at <http://www.policyalternatives.ca/publications/brief3-2.pdf> (last visited Oct. 13, 2003).

94. See *United Parcel Service of America, Inc. v. Government of Canada*, Statement of Defense, para. 24, (Feb. 7, 2003), ICSID (W. Bank) [hereinafter Statement of Defense] (noting that Canada Post is a Crown Corporation, which is an entity of the Canadian government), available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/IntegratedStatement.pdf> (last visited Oct. 13, 2003).

government, but a Crown Corporation, meaning that it has some independence from the government and pursues commercial success.⁹⁵ However, despite the appearance of autonomy, the organizational structure ultimately reveals that the Canadian government is the only shareholder, and it defines Canada Post's mandate and public policy goals.⁹⁶

The Crown Corporation status includes a statutory monopoly over certain aspects of Canada Post's services.⁹⁷ The Canadian Parliament awarded Canada Post this monopoly to assist it in meeting its Universal Service obligation, which requires Canada Post to provide affordable national postal and parcel services throughout Canada.⁹⁸ Given that Canada's geographical size is the second largest in the world, Canada Post's task of providing service is very demanding.⁹⁹ As a result, unlike monopoly rights awarded to other national postal services, Canada Post's mandate is more expansive as it expressly authorizes Canada Post to engage in operations that Canada Post finds "necessary or incidental" to achieving its very difficult primary goal of providing universal service.¹⁰⁰ Thus, in addition to its traditional letter and parcel delivery services, Canada Post uses its post offices and equipment to provide a retail return service and

95. *See id.* paras. 22-23 (describing the concept of a Crown Corporation and detailing its close relationship with the Canadian government while appearing to be solely a commercial enterprise).

96. *See id.* (revealing the enormous power the Canadian government can exercise over the operations of a national postal carrier).

97. *See id.* paras. 19-32 (summarizing the development of Canada Post and noting that Canada Post enjoys monopoly rights in a manner similar to other national postal services).

98. *See id.* paras. 25-33 (highlighting the Universal Service Obligation and noting the challenges of meeting this obligation in a country as geographically expansive such as Canada); *see also* SINCLAIR *supra* note 70, at 14-16 (analyzing Canada Post's legal obligations).

99. *See* Statement of Defense *supra* note 94, para. 29 (noting that Canada is a geographically large country with a modest population and a cold climate that complicates the process of mail delivery); *see also* SINCLAIR, *supra* note 70 (noting that the size of Canada makes universal mail service very costly as Canada's many rural areas are expensive to service).

100. *See* SINCLAIR, *supra* note 70 (arguing that this expansive language was purposeful and necessary for Canada Post to operate efficiently and meet its primary obligations).

online bill payment service, which, according to the Government of Canada, generate necessary revenue to maintain Canada Post's immense mail network.¹⁰¹

c. UPS' Allegations

UPS alleges that Canada Post's operations violate NAFTA's provisions on monopolies and the more restrictive provisions on state enterprises.¹⁰² As WTO negotiators left the important term "abuse" in the GATS agreement undefined, the examination of evidence relating to UPS' specific grievances, which were framed according to NAFTA language similar to GATS, can assist in predicting how the WTO might define "abuse" in legal challenges to USPS under GATS.¹⁰³

UPS' specific claims under Chapter 15 of NAFTA concerning Canada Post's method of operations clarify some issues that arguably could constitute "abuse" under GATS.¹⁰⁴ While NAFTA permits signatory countries to maintain government monopolies,¹⁰⁵ it

101. See Statement of Defense, *supra* note 94, para. 33 (stating that Canada Post's competitive operations are necessary to maintain its enormous postal network); see also Canada Post, *Products and Services* (providing detailed information about Canada Post's services), available at <http://www.canadapost.ca/personal/prodserv/default-e.asp> (last visited Oct. 17, 2003).

102. See *United Parcel Service of America, Inc. v. Government of Canada*, Statement of Claim, paras. 11-44, (Apr. 19, 2000), ICSID (W. Bank) [hereinafter Statement of Claim] (summarizing the claims of UPS under NAFTA regulations against the government of Canada), available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/state-claim.pdf> (last visited Oct. 24, 2003).

103. See Sinclair, *supra* note 93, at 4 (arguing that UPS' allegations about Canada Post suggest possible appropriate challenges to national postal services under GATS); see also SINCLAIR, *supra* note 70 (noting that UPS' same strategies would probably be successful in a challenge to postal services under GATS).

104. See Statement of Claim, *supra* note 102, paras. 21-39 (summarizing the claims of UPS under NAFTA Chapter 15).

105. See NAFTA, *supra* note 93, art. 1505 (defining terms for NAFTA competition regulations). NAFTA defines a monopoly as "an entity, including a consortium or government agency, that in any relevant market in the territory of a Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant." *Id.*

expressly requires parties to ensure that their monopolies and state enterprises comply with the broad principles of free trade.¹⁰⁶ NAFTA sets forth these principles elsewhere in the agreement, including in Chapter Eleven on investment and Chapter Fourteen on financial services, and lists a variety of prohibited actions under Article 1503(2).¹⁰⁷ Under these provisions, UPS alleged that, with the full knowledge of the Canadian government,¹⁰⁸ Canada Post subsidized its e-commerce operations development costs with its revenues from the letter monopoly, and that Canada Post engaged in predatory pricing with respect to its Xpresspost and Priority courier services.¹⁰⁹

UPS' claims regarding Canada Post's predatory pricing practices suggest that Canada Post, like Deutsche Post, charges significantly lower prices for some of its parcel services because Canada Post's mail monopoly infrastructure minimizes costs for the operations.¹¹⁰ For example, UPS compared the costs to the consumer of sending a parcel overnight with UPS and Canada Post's Xpresspost, finding

106. *See id.*, art. 1503(2)-(3) (setting forth the requirements for state enterprises to behave according to the agreement's broader goals for free trade and investment, and also listing a range of prohibited activities in general terms).

107. *See id.* (listing the general free trade principles that apply to government controlled firms). The effort to ensure that governments cannot avoid the NAFTA restrictions by designating government-controlled firms to engage in anti-competitive behavior adds substantial force to the agreement because it encompasses explicit and implicit delegations of governmental authority, which covers the range of relationships that national postal services have developed with their governments. *See* Statement of Claim, *supra* note 102, para. 23 (stressing that NAFTA's language defines state enterprises broadly, thus widening the scope of NAFTA).

108. *See* Statement of Claim, *supra* note 102, para. 39 (arguing that the Canadian government was aware of the unfair business practices of Canada Post, and has not intervened or prevented the continuance of these practices, but has instead supported Canada Post's behavior).

109. *See id.* para. 32 (summarizing two of UPS' key claims against Canada Post under NAFTA Articles 1502(3)(d) and 1105).

110. *See id.* paras. 150(i) - (iii) (outlining the possible reasons for Canada Post's ability to charge less than UPS for essentially the same service, concluding that cross-subsidization is the only viable reason). UPS also noted that in 1996 the Canada Post Mandate Review found that Canada Post is an "unfair competitor in ways," and that its failure to properly allocate costs results in cross-subsidization, which UPS alleges is an unfair practice. *Id.* paras. 154-65 (presenting the findings of the Canada Post Mandate Review and reiterating that Canada Post's ability to use its infrastructure constitutes an unfair cross-subsidization practice).

that it costs customers \$8.27 more to ship with UPS.¹¹¹ UPS alleges that Canada Post can charge this lower price because Xpresspost's prices do not reflect the real costs to the service provider since Canada Post engages in cross-subsidization by carrying the parcels over its extensive network developed for the monopoly services.¹¹²

UPS' Statement of Claim details how this cross-subsidization pervades Canada Post's operations by examining how Canada Post's Xpresspost services utilize Canada Post's monopoly infrastructure.¹¹³ Customers can leave Xpresspost packages at any Canada Post office or place them in any Canada Post mailbox, which qualifies as a monopoly benefit since use of the offices and mailboxes is exclusive to Canada Post's operations.¹¹⁴ Because Canadian law solely authorizes Canada Post employees to open the mailboxes, a Canada Post employee picks up the Xpresspost package, takes it to a Canada Post sorting center, and ensures that Xpresspost packages are sorted with the monopoly letter products for air and ground transportation.¹¹⁵ According to UPS, the use of the monopoly service network for its non-monopoly products represents Canada Post's

111. *See id.* para. 149 (comparing costs of shipping a letter overnight from Calgary to Winnipeg with UPS and Xpresspost).

112. *See id.* paras. 150 (iii), 154-59 (noting that Xpresspost uses a variety of Canada Post facilities and services that Canada Post created for its monopoly operations).

113. *See* notes 111-13 and accompanying text (demonstrating that Canada Post's competitive services show significant reliance on its monopoly infrastructure).

114. *See* Statement of Claim, *supra* note 102, paras. 172-79 (stating that Canada Post's retail locations handle monopoly and non-monopoly products, but the costs of maintaining these retail locations are charged against the general operating costs of the letter monopoly); *see also* "Mail Receptacle Regulations, Interpretation," C.R.C. [SOR/83-743], §§ 3-4 (providing national regulations about postal mailboxes that limit their use to Canada Post's operations and grant Canada Post the discretion to place the mailboxes in whichever locations Canada Post finds beneficial to their operations), *available at* <http://www.canlii.org/ca/regu/sor83-743/> (last visited Oct. 14, 2003). Canada Post can capitalize on this benefit because the Canadian government has granted it great latitude in placing the mailboxes wherever Canada Post sees fit. *Id.*; *see also* Statement of Claim, *supra* note 102, paras. 150, 160, 161 (noting that Xpresspost customers can use the mailboxes, and Canada Post has broad discretion in determining where it can locate the mailboxes that are exclusive to its use).

115. *See* Statement of Claim, *supra* note 102, paras. 150 (iii) & 160 (detailing how an Xpresspost package travels through the Canada Post mail system in order to document the extensive reliance of this service on the monopoly network).

attempt to integrate the monopoly and competitive services to deflect the high fixed costs in a manner that is contrary to general principles of free trade under NAFTA.¹¹⁶

II. ANALYSIS

A. U.S. OBLIGATIONS RELATING TO POSTAL SERVICES UNDER GATS

Although the United States has not made any specific commitments in the sector of postal services provided under the USPS monopoly, GATS general principles will likely cover certain USPS activities, and U.S. specific commitments will likely trigger application of the Article VIII restrictions.¹¹⁷ The specific commitment that will prove most troublesome for the USPS is the March 31, 2003 U.S. offer in the area of “express delivery services.”¹¹⁸ In offering liberalization in the sector of “express delivery services,” U.S. negotiators went beyond the WTO classification list in order to differentiate these services from the “postal services” category, which typically refers to services

116. See *id.* paras. 154-55 (describing the intentional attempt to present a misleading representation of costs to the monopoly and competitive services). UPS stressed that Canada Post uses its mail trucks to pick up packages and charges these costs to Canada Post’s general mail operations. *Id.* para. 67.

117. See GATS, *supra* note 11, art. VIII (requiring monopolies to abide by the GATS general principles of Article II, which details the Most Favored Nation obligations, and also requiring governments to ensure that the monopolies abide by the Member’s specific commitments within the monopoly sector, as well as in other economic sectors that the monopoly may enter); see also *infra* note 124 and accompanying text (explaining that some of USPS’ services will qualify as “express delivery services,” which subjects USPS to the GATS obligations in this sector); discussion *infra* Parts II.A.1, II.A.2 (explaining that the U.S. offer will require the USPS to comply with Article VIII obligations because the USPS cannot use the government authority exception, and some of the USPS’ operations would be subject to the U.S. initial offer).

118. See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, THE UNITED STATES- INITIAL OFFER 45-46 [hereinafter INITIAL OFFER] (containing the U.S. offer in the sector of “express delivery services”), available at http://www.ustr.gov/sectors/services/2003-03-31-consolidated_offer.pdf (last visited Sept. 22, 2003); see also discussion *supra* Part II.A (discussing the implications of the U.S. offer for USPS).

performed by postal administrations.¹¹⁹ The Office of the United States Trade Representative, the executive branch agency responsible for negotiating American GATS commitments,¹²⁰ defined “express delivery services” as the time sensitive delivery systems that use advanced technologies to manage the delivery networks and logistical problems and that provide such convenient services, such as tracking a package and the ability of a sender to confirm delivery.¹²¹ This offer is relevant to USPS operations because it offers such services outside its statutory monopoly in its Express Mail, Priority Mail, Global Express Mail Guaranteed, and Global Express services.¹²²

There are conflicting signals from the Office of the United States Trade Representative about whether the U.S. government believes that this provision would also cover national postal systems’ “express delivery services.”¹²³ Analysis of the GATS language,

119. See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, EXPRESS DELIVERY SERVICES 2 [hereinafter EXPRESS DELIVERY SERVICES] (explaining the U.S. proposal to liberalize “express delivery services” and defining which services the United States proposed to liberalize), <http://www.ustr.gov/sectors/services/express.pdf> (last visited Oct. 13, 2003); see also SSCL, *supra* note 59 (organizing the list of services according to the UNCP); see also *supra* notes 42-44 and accompanying text (providing background regarding the importance of the classification lists for organizing the negotiations).

120. See Office of the United States Trade Representative, *USTR’s Role* (outlining the Office of the United States Trade Representative’s duties and highlighting its role in advising the U.S. President, coordinating all U.S. trade policy and negotiating all matters pertaining to the WTO), at <http://www.ustr.gov/about-ustr/ustrrole.shtml> (last visited Aug. 15, 2003).

121. See INITIAL OFFER, *supra* note 118, at 45-46 (describing the U.S. offer in the sector of “express delivery services”); see also EXPRESS DELIVERY SERVICES, *supra* note 119, at 2 (providing a more detailed description of the services U.S. negotiators intended to include in their offer).

122. See U.S. Postal Service, *Domestic Mailing* (describing expedited domestic delivery services that permit the customer to ship parcels quickly with the benefit of some tracking and delivery confirmation services), at <http://www.usps.com/send/waystosendmail/senditwithintheus/domesticmailbillscar dsandletters.htm> (last visited Oct. 24, 2003); see also U.S. Postal Service, *Send Mail* (describing USPS’ international mail services that allow the customer to track the package and confirm delivery), at <http://www.usps.com/global/sendmail.htm> (last visited Oct. 24, 2003).

123. Compare Bernard Ascher, Remarks at “The Classification Debate” Universal Postal Union Council of Administration Project Team on WTO

however, indicates that this GATS offer would apply to some USPS operations, thus jeopardizing the USPS in a critical period of reformation by calling into question the legality of its operations.¹²⁴

1. The GATS “Government Authority” Exception Does Not Protect USPS Delivery Services

The U.S. government has indicated that the U.S. offers in the area of “express delivery services” would not apply to services supplied in the exercise of government authority, an exception allowed by the GATS agreement.¹²⁵ This provision, however, will arguably not protect USPS operations because the GATS language is very narrow in determining what constitutes a valid exercise of government

Relations 1 (Oct. 23, 2002) (stating that these provisions would apply to both private operators and any public postal administration that offers express services), at http://www.upu.int/relations_with_wto/seminar_bernard_ascher_en.pdf (last visited Oct. 24, 2003), with INITIAL OFFER, *supra* note 118, at 45-46 (stressing that express delivery service obligations would not apply to “services supplied in the exercise of government authority” and suggesting that governments would “retain the right to regulate to meet domestic policy objectives,” which appears to provide a loophole for national postal systems to provide express services for domestic policy objectives, thus avoiding these regulations). See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, FREE TRADE IN SERVICES 2 (Mar. 31, 2003) (noting that the proposal will not effect USPS’ monopoly services, but also stating that it would in “no way privatize any aspect of postal activity,” suggesting that USPS would not have to undertake the massive reforms that will be necessary to avoid violating the GATS agreement under the current U.S. offer), at <http://www.ustr.gov/sectors/services/2003-03-31-services-trade-facts.pdf> (last visited Oct. 24, 2003); see also discussion *infra* Parts II.A.1, II.A.2 (detailing why USPS would violate the GATS under the current circumstances).

124. See UNITED STATES POSTAL SERVICE, 2002 THE NEED FOR TRANSFORMATION 2-8 [hereinafter TRANSFORMATION PLAN] (noting USPS’ need for reform as evidence of substantial financial problems stemming from declining first class mail volume and other market changes), available at http://www.usps.com/strategicdirection/_pdf/TheNeedForTransformation.pdf (last visited Sept. 22, 2003); see also COMMISSION REPORT, *supra* note 18, at viii (summarizing the need for USPS to reform its operations as USPS’ poor financial state is jeopardizing both universal service and USPS’ continued existence); discussion *infra* Parts II.A, II.B (describing USPS’ difficulties in complying with the GATS agreement as a result of the U.S. offer regarding “express delivery services”).

125. See GATS, *supra* note 11, art. I:3 (defining the “exercise of government authority”); see also EXPRESS DELIVERY SERVICES, *supra* note 119, at 2 (stating that the “express delivery services” would not pertain to those provided in the exercise of government authority).

authority for purposes of the exception.¹²⁶ Even in the event that the USPS chooses to rely on its relationship with the U.S. government and government assigned obligations to claim this exemption, the USPS must still meet the requirement that it supplies the service “neither on a commercial basis, nor in competition with one or more service suppliers” in order to qualify for the GATS exception.¹²⁷ As a result, this language will not exempt the USPS’ from compliance with the GATS provisions and U.S. specific commitments regarding “express delivery services.”¹²⁸ First, the USPS fails the requirement that its services not compete with the private sector, as its express service activities are clearly in competition with major private parcel handlers, including UPS and Federal Express (“FedEx”).¹²⁹ Second, in light of the USPS’ current “businesslike” operating strategy and its goal of enhancing this focus on operating like a business, the “commercial basis” clause may also preclude the USPS from using the government exemption because its operations reflect a

126. See GATS, *supra* note 11, art. I:3 (defining a service supplied “in the exercise of government authority”); see also Perrazzelli & Vergano, *supra* 55, at 741-43 (noting the UPU’s assessment that GATS will apply to postal services and arguing that debate about GATS’ application to UPU terminal dues will be more difficult to resolve); Pub. Citizen, *Save Our Services - Background*, (warning that many government services could be at risk of GATS restrictions because they involve some “public/private mix or fee structure”), at <http://www.citizen.org/trade/wto/gats/articles.cfm?ID=9233> (last visited Oct. 24, 2003).

127. GATS, *supra* note 11, art. I:3 (emphasis added).

128. See *supra* note 124 and accompanying text (describing the USPS’ conflicts with GATS); *infra* note 134 and accompanying text (reasoning that GATS would likely cover USPS’ activities).

129. See CHANGING RESTRICTIONS, *supra* note 19, at 34-40 (noting that USPS’ Express mail and priority mail products main private competitors include FedEx, UPS, Airborne Express, Roadway Package System (“RPS”) and DHL); see also TRANSFORMATION PLAN, *supra* note 124, at 17 (acknowledging that UPS and FedEx are USPS’ competitors); Geddes, *supra* note 19, at 1 (stating that “government postal firms usually offer overnight mail and package shipping services in direct competition with private delivery companies”); Mike Eskew, Chairman and CEO of UPS, Testimony Before The President’s Commission on the United States Postal Service 4 (Feb. 20, 2003) [hereinafter Eskew Testimony] (noting that UPS, FedEx and other private carriers compete with USPS), at <http://www.treasury.gov/offices/domestic-finance/usps/witness-testimony.html#testimony0202003> (last visited Oct. 24, 2003). Mr. Eskew also observed that “UPS is the only Fortune 100 company that has the U.S. government as its primary competitor in its core line of business.” *Id.*

commercial concentration.¹³⁰ USPS is ultimately attempting to conform its activities to the model of a “self-sustaining commercial enterprise,” which openly implies application of commercial principles.¹³¹

Some observers have suggested that even this basic analysis of the USPS’ strategies and market position may be unnecessary to prove that USPS cannot qualify for the government authority exception.¹³² For instance, academics and the E.C. decision in the *Deutsche Post* case suggest that the WTO might consider the commercial basis exclusion applicable to the USPS’ service merely because it charges its customers fees for its services.¹³³ As a result, New Zealand government authorities have stressed that as postal services charge a fee, “there would appear to be few examples of postal services

130. See GATS, *supra* note 11, art. I:3 (limiting that the “government authority” exception to services that are not supplied on a “commercial basis”); see also TRANSFORMATION PLAN, *supra* note 124, at i, viii, x (summarizing USPS’ gradual transition into a more businesslike entity and advocating for further reorganization in order to more closely resemble a commercial entity that can compete in the changing markets).

131. See COMMISSION REPORT, *supra* note 18, at 32 (noting that the Commission recommends that USPS “embrace proven business strategies” and become a “self-sustaining commercial enterprise”); see also TRANSFORMATION ISSUES, *supra* note 72, at 2 (emphasizing that Congress intended for USPS to operate like a private, competitive business); TRANSFORMATION PLAN, *supra* note 124, at 65-69 (summarizing USPS’ analysis that a “commercial government enterprise model” would be most appropriate for USPS to fulfill its universal service obligation while addressing its growing financial problems); Eskew Testimony, *supra* note 129, at 2 (describing USPS’ mission to provide a public service and operate like a business).

132. See *infra* notes 133-134 and accompanying text (explaining the theory that the USPS practice of charging for its services may be sufficient to preclude application of the government authority exception to USPS).

133. See text accompanying note 83 (noting that the E.C. used similar reasoning in finding that the weak standard of “enterprise[s] which offer services for remuneration” sufficed to define an “undertaking” under European competition law); see also SINCLAIR, *supra* note 70 (highlighting “commercial basis” is left undefined in GATS and, as a result, the WTO could choose to apply the usual standards for commercial activity of charging and accepting fees for a service to postal operators’ activities).

supplied 'neither on a commercial basis nor in competition with one or more service suppliers.'"¹³⁴

2. The Office of the United States Trade Representative's Offer Regarding "Express Delivery Services" Will Trigger the Application of Article VIII Provisions to USPS Operations and Potentially Produce Costly Results Under the WTO Sanctions Regime

As a result of the U.S. offer and USPS' inability to benefit from a government authority exception, another WTO Member could object to the method of USPS' provision of "express delivery services" because USPS, a monopoly, operates in a market outside its monopoly that is arguably subject to a U.S. specific commitment.¹³⁵ Specifically, the broadly defined "express delivery services" refers to time sensitive delivery systems that use advanced technologies to manage delivery networks, solve logistical problems, and provide such services as package tracking and delivery confirmation.¹³⁶ These express services are effected via USPS' Express Mail, Priority Mail, Global Express Mail Guaranteed, and Global Express services.¹³⁷ Because USPS provides these committed services outside its

134. See Delegation of New Zealand, *Communication from New Zealand: Negotiating Proposal for Courier/Postal Services*, S/CSS/W/115 (Nov. 6, 2001) (communicating the opinions of the New Zealand government on GATS' powers to regulate postal services), available at <http://www.esf.be/docs/GATS%20Negotiating%20proposals/New%20Zealand%20Postal-Courier%20Services.doc> (last visited Oct. 24, 2003); see also Sinclair GATS Remarks, *supra* note 55 (highlighting remarks from various governments that dramatize the substantial lack of common understanding about essential elements of the GATS and demonstrating Members' differences in opinion regarding fundamental GATS issues such as its scope).

135. See *infra* discussion *supra* Part II.A (arguing that USPS operates in a competitive environment that is subject to a U.S. specific commitment).

136. See INITIAL OFFER, *supra* note 118, at 45-46 (detailing the U.S. offer of "express delivery services"); see also EXPRESS DELIVERY SERVICES, *supra* note 119, at 2 (describing the services U.S. negotiators intended to include in their offer in greater detail).

137. See U.S. Postal Service, *Domestic Mailing*, *supra* note 122 (listing and describing expedited domestic delivery services that offer customers the ability to ship parcels quickly with the benefit of some tracking and delivery confirmation services); see also U.S. Postal Service, *Send Mail*, *supra* note 122 (describing USPS' international mail services with tracking and delivery confirmation features).

monopoly, the GATS agreement mandates that the United States must abide by Article VIII:2 objectives.¹³⁸ These principles require the United States to monitor USPS and other monopolies to ensure that, when a monopoly enters other markets and competes outside its monopoly sector in services that are subject to a specific commitment, the monopoly does not abuse its monopoly power.¹³⁹

U.S. negotiators should not overlook the significance of an Article VIII violation.¹⁴⁰ Potential GATS Article VIII violations are enforceable under the Article XXIII Dispute Settlement and Enforcement provisions, which authorize a complaining member to resort to the WTO's Dispute Settlement Understanding ("DSU") procedures.¹⁴¹ Under the DSU provisions, the WTO can authorize sanctions and compensation for losses due to a Member's violations.¹⁴² As prior U.S. experience with WTO enforcement actions indicates, the dispute proceedings can spark trade wars and result in substantial sanctions under WTO authority.¹⁴³ Thus, given

138. See GATS, *supra* note 11, art. VIII:2 (requiring that Members monitor monopolies for compliance with GATS general principles and ensure that they do not abuse their dominant market position when they enter into markets that Members include in their schedule of commitments).

139. See *id.* (outlining each Member's obligations to monitor its monopolies when they compete outside their monopoly sector for adherence to GATS Article II and to the Member's specific commitments).

140. See *infra* notes 141-144 and accompanying text (explaining the financial and diplomatic significance of violating a WTO provision).

141. See Dispute Settlement Understanding, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2 (detailing the provisions that will govern WTO violation proceedings), at http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (last visited Aug. Oct. 16, 2003).

142. See *id.* art. 22 (providing for compensation for Members' non-compliance).

143. See Brian Eriksen Noer, *ETI Under Threat*, ASSET FIN. INT'L., Dec. 2, 2002 (describing the chain of events that generated WTO backed sanctions against the E.U. and the United States and stating that the E.U. launched a claim against the United States as a reaction to the U.S. banana suit), available at 2002 WL 25701813; see also Heather Stewart, *Trading Blows: The E.U. at Bay*, THE GUARDIAN, Jan. 17, 2002, at 26 (discussing various trade disputes between international trading partners including the U.S. "banana war" with the E.U.), available at 2002 WL 9514574. The United States brought a claim on behalf of General Foods against the E.U. over the European quotas for Caribbean bananas, charging that this behavior constituted banned preferential treatment of Caribbean bananas that hurt American companies' Latin American banana interests. *Id.*

the significant risk of financially and politically expensive trade sanctions,¹⁴⁴ the Office of the United States Trade Representative should recognize the severity of the situation and appreciate that the WTO will have the requisite authority under the GATS provisions and the U.S. offer to penalize the United States if the USPS abuses its monopoly position.¹⁴⁵

B. CHALLENGES TO DEUTSCHE POST AND CANADA POST'S
OPERATIONS INDICATE THAT USPS' OPERATIONS ARE ALSO
FRAUGHT WITH PROBLEMS CONCERNING ABUSE OF ITS
MONOPOLY STATUS

As the GATS agreement leaves Article VIII abusive monopoly practices undefined, examination of similar cases against national postal systems can highlight which aspects of USPS' operations would require reform under the GATS agreement and the U.S. "express delivery service" commitment.¹⁴⁶ Government reports, the President's Commission on the United States Postal Service's hearings and analysis of USPS, and other observers' criticisms demonstrate that USPS' operations exhibit some of the same

144. See Noer, *supra* note 143 (discussing the U.S. charges against the E.U. in connection to its banana import quotas). Finding the E.U. policy in violation of WTO principles, the WTO authorized \$190 million in sanctions against E.U. Members. *Id.* These sanctions sparked E.U. fury and a claim against the United States that the "FSC Repeal and Extraterritorial Income Act of 2000" was a WTO violation. *Id.*; see also Stewart, *supra* note 143 (stating that the WTO approved \$190 million in sanctions against the E.U.). Although the E.U. relinquished its position in order to avoid the costly sanctions, the European claim resulted in the WTO awarding the E.U. over \$4 billion in damages, demonstrating the enormous financial consequences of failing to abide by WTO regulations. *Id.*

145. See *supra* notes 140-144 and accompanying text (explaining that the risk to the United States of repercussions relating to illegal USPS operations is real, that the WTO has authority to enforce the GATS agreement, and that the WTO has previously undertaken economic sanctions); see also discussion *infra* Part II.B (arguing that the WTO would likely find that USPS' abuses its monopoly position because it demonstrates many of the questionable practices at issue in the Canada Post and Deutsche Post cases).

146. See discussion *supra* Part I.D (explaining that some provisions of the GATS agreement are unclear and that commentators have suggested applying the lessons from other postal disputes to determine how the WTO might find a national postal system's practices abusive).

questionable practices that triggered the Deutsche Post suit and the Canada Post arbitration.¹⁴⁷

1. Illegal Cross-Subsidization Pervades USPS' Operations

Both the Deutsche Post and the Canada Post cases addressed the problem of cross-subsidization as evidence of abuse of a monopoly position.¹⁴⁸ In examining the postal system's infrastructure, the European Commission found that Deutsche Post engaged in cross-subsidization, a form of predatory pricing, after considering which costs were attributable to the universal service obligation, and calculating whether the incremental costs of providing the competitive services exceeded the revenue.¹⁴⁹ UPS' analysis of Canada Post's activities also centered on Canada Post's use of its infrastructure for both its monopoly and competitive products.¹⁵⁰ Although the E.C.'s financial analysis is arguably a more precise determination of the cost realities in postal operations, it appears that in this case evaluation of USPS' actual activities and infrastructure use is a better indicator of possible cross-subsidization because the President's Commission on the United States Postal Service found USPS' cost allocation statistics to be unreliable.¹⁵¹

147. See discussion *infra* Parts II.B.1, II.B.2 (highlighting some of USPS' practices that mirror or are analogous to the postal practices at issue in the Deutsche Post case and the Canada Post arbitration and suggesting that these practices render USPS vulnerable to legal challenges under GATS).

148. See Deutsche Post Decision, *supra* note 71, paras. 6-7, 35-36 (defining and discussing cross-subsidization as it applied to Deutsche Post's operations); see also Statement of Claim, *supra* note 102, paras. 154-55 (discussing cross-subsidization issues pertaining to Canada Post's operations).

149. See Deutsche Post Decision, *supra* note 71, para. 36 (performing the economic analysis and determining that Deutsche Post's revenue was below incremental costs of providing this service); see also Lang & O'Donoghue, *supra* note 69, at 150-55 (outlining major factors to consider when evaluating cross-subsidization issues and describing the E.C.'s reasoning in deciding the Deutsch Post case).

150. See Statement of Claim, *supra* note 102, paras. 154-55 (analyzing Canada Post's operations for evidence of illegal cross-subsidization).

151. See COMMISSION REPORT, *supra* note 18, at 67 (noting that testimony on the topic of cost allocation at USPS was contradictory and stressing that USPS' internal system for cost allocation contained historic preferences or biases resulting in USPS assigning more than forty percent of costs to the category of general institutional costs, while UPS employees testified that their system allocates one

Examining how USPS provides competitive, expedited services demonstrates that under the reasoning of the two major postal cases—Deutsche Post and Canada Post—USPS is cross-subsidizing its competitive products.¹⁵² USPS uses its enormous infrastructure to move its competitive products, while allocating these costs to the monopoly products that generate seventy-five percent of USPS' operating revenue.¹⁵³ The postal monopoly originally developed this infrastructure, including USPS post offices, vehicles, and sorting facilities, for its monopoly service, but competitors charge that it is essential for USPS' competitive services.¹⁵⁴ For instance, if a customer chooses to use USPS' Express Mail service, which provides overnight delivery to most domestic locations, the customer could bring the package to any Post Office, where a USPS employee would accept it, hand it to any USPS letter carrier, or drop it into an Express Mail collection box normally located outside Post Offices or other government owned property.¹⁵⁵ USPS letter carriers would later deliver the Express Mail package, because USPS' expedited delivery services use the letter carrier employees.¹⁵⁶ Thus, the complete

hundred percent of their costs appropriately); *see also* James Holsen, Vice President, Industrial Engineering, UPS, Testimony Before The President's Commission on the United States Postal Service 3, 21 (May 28, 2003) (providing an overview of UPS' activity based costs and describing the need for such detailed analysis in the competitive market), at <http://www.treasury.gov/offices/domestic-finance/usps/pdf/Holsen.pdf> (last visited Oct. 24, 2003).

152. *See* COMMISSION REPORT, *supra* note 18, at 67 (expressing the Commission's concern with USPS' possible cross-subsidization); *see also infra* text accompanying notes 153-163 (assessing USPS' cross-subsidization).

153. *See* COMMISSION REPORT, *supra* note 18, at 67 (noting that USPS has an advantage in having its monopoly that regularly generates seventy-five percent of its operating revenues); *see also* TRANSFORMATION PLAN, *supra* note 124, at 4 (highlighting that as of 2002 USPS' First Class Mail service, a monopoly product, provided sixty-nine percent of institutional costs, which include post offices and delivery points); Eskew Testimony, *supra* note 129, at 6 (stressing that USPS uses its monopoly infrastructure for its competitive products).

154. *See* Eskew Testimony, *supra* note 129, at 6 (describing some of the assets USPS can use for its competitive services while attributing these costs to its regular monopoly services).

155. *See* U.S. Postal Service, *Express Mail*, at 1 (detailing the various methods a customer may use Express Mail services), at <http://pe.usps.gov/cpim/ftp/manuals/qsg/q500.pdf> (last visited Oct. 24, 2003).

156. *See id.* (noting that USPS' workforce, which as one undivided group is responsible for delivering all competitive and non-competitive products, is second

integration of the infrastructure for the monopoly and competitive services produces cost distortions that result in costs incurred in providing the competitive services inaccurately reported as costs related to the monopoly offering.¹⁵⁷

The U.S. government has acknowledged that USPS engages in cross-subsidization to support USPS' non-postal monopoly ventures.¹⁵⁸ For instance, the U.S. GATS offer contains the language, "The United States will consider undertaking commitments to establish or maintain appropriate measures, substantive and/or procedural to address certain cross-subsidization of express delivery services, such as may arise from monopoly first-class letter carriage if other Members are prepared to do so as well."¹⁵⁹ This statement appears to recognize problems with USPS without explicitly placing blame on USPS, but it provides no information about which "express delivery services" might be cross-subsidized or how the government believes the USPS cross-subsidizes its services.¹⁶⁰ The extent of this likely cross-subsidization is even difficult for the U.S. government to gauge as evidenced in the President's Commission on the United States Postal Service expressing concerns that USPS' inaccurate accounting system has rendered it extremely challenging to conduct any sort of verification of USPS cost allocations.¹⁶¹ In addition to these criticisms, the U.S. General Accounting Office ("GAO"), which is responsible for studying U.S. government expenditures, flatly refused to believe USPS' assertion that it appropriately

only to Wal-Mart as the largest workforce in the United States today); *see also* COMMISSION REPORT, *supra* note 18, at 34, 110 (stating that USPS employs approximately 854,000 people to provide its monopoly and competitive services, making it the second largest employer in the United States).

157. *See* COMMISSION REPORT, *supra* note 18, at 67 (highlighting problems in USPS cost accounting measures).

158. *See infra* notes 159-163 and accompanying text (discussing various government reports regarding USPS cross-subsidization).

159. INITIAL OFFER, *supra* note 118, at 45.

160. *See id.* (offering to address "certain cross subsidization issues" without specifying the issues or services engaging in cross-subsidization).

161. *See* COMMISSION REPORT, *supra* note 18, at 67 (noting the Commission's worries about USPS' possible cross-subsidization and costs accounting methods); *see also supra* note 152 and accompanying text (discussing the Commission's concerns).

allocated costs in the context of USPS' e-commerce activities.¹⁶² The GAO argued that the USPS has failed in this task and that their cost allocation procedures were generally inadequate.¹⁶³

2. USPS' Other Special Benefits from its Status as a Government Entity Demonstrate Additional Evidence of Illegal Abuse of USPS' Monopoly Position

Like Canada Post, USPS' competitive products also benefit from special privileges that the government provides USPS to assist in fulfilling its public service goals.¹⁶⁴ These privileges are unavailable to USPS' competitors, thus giving USPS an advantage over its competitors.¹⁶⁵ Many of these same types of special advantages are at

162. See U.S. GEN. ACCOUNTING OFFICE, U.S. POSTAL SERVICE: UPDATE ON E-COMMERCE ACTIVITIES AND PRIVACY PROTECTIONS 3 (Dec. 2001) [hereinafter GAO USPS UPDATE] (stating that the GAO did not believe USPS' assertion regarding its costs allocation), at <http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename=d0279.pdf&directory=/diskb/wais/data/gao> (last visited Oct. 24, 2003); see also U.S. Gen. Accounting Office, *What Is GAO?* (outlining the GAO's basic responsibilities, which include working as the investigatory arm of Congress in monitoring and evaluating U.S. government programs and scrutinizing government expenditures), at <http://www.gao.gov/about.html> (last visited Nov. 7, 2003).

163. See GAO USPS UPDATE, *supra* note 162, at 3 (noting the General Accounting Office's disapproval of the USPS' financial arrangements, including its method of allocating costs to particular operations). The GAO reported that USPS does not have clearly established policies for addressing revenues and costs associated with its products and services, and that this has resulted in inconsistent financial reporting. *Id.*

164. See CHANGING RESTRICTIONS, *supra* note 19, at 17 (outlining USPS' public service objectives, including uniform rates for certain services, ensuring public access to services, and providing some services for free or at reduced cost); see also MAILBOX ACCESS, *supra* note 19, at 34 (asserting that the Private Express Statutes, which guarantee USPS' monopoly, have been crucial to maintaining universal service); TRANSFORMATION ISSUES, *supra* note 72, at 31 (stating that USPS interprets the meaning of its "universal service requirement" for itself); discussion *infra* Parts I.E.2.b and I.E.2.c (summarizing some of the advantages that Canada Post enjoys as a result of its relationship with the Canadian government that UPS claims are illegal under NAFTA); *supra* notes 165-182 and accompanying text (listing benefits USPS' receives from its status as a government entity and arguing that, as these benefits are unavailable to private competitors, USPS has unfair advantages).

165. See CHANGING RESTRICTIONS, *supra* note 19, at 17 (outlining USPS' public service objectives); see also MAILBOX ACCESS, *supra* note 19, at 34 (asserting that the Private Express Statutes, which guarantee USPS' monopoly, have been crucial

issue in the Canada Post case because they distort the competitive market.¹⁶⁶

USPS' special government relationship generates immediate financial advantages for all of its operations.¹⁶⁷ For instance, as USPS, like Canada Post, is a government entity, it does not pay taxes to the government like its competitors.¹⁶⁸ USPS' tax exemption includes property taxes to state and local governments, gross receipts taxes, income taxes, and sales taxes.¹⁶⁹

USPS' unique government entity status also allows it to borrow from the federal Treasury at preferential rates that are below the appropriate market rates, a privilege that it shares with none of its competitors.¹⁷⁰ Without this privilege and the financial backing of the

to maintaining universal service); TRANSFORMATION ISSUES, *supra* note 72, at 31 (stating that USPS interprets the meaning of its "universal service requirement" for itself).

166. See Statement of Claim, *supra* note 102, paras. 65-139 (outlining the benefits that Canada Post receives as a result of its relationship with the Canadian government, including preferential customs treatment, reduced fees, and exemption from the payment of some taxes).

167. See *infra* notes 168-180 and accompanying text (mentioning a variety of direct financial and other benefits that USPS enjoys as a government entity that its private competitors cannot share).

168. See COMMISSION REPORT, *supra* note 18, at 67 (stating that USPS does not pay taxes like its competitors). UPS has argued that Canada Post's lower tax rate, which covers its competitive products, is an unfair abuse of its monopoly position. See Statement of Claim, *supra* note 102, paras. 81-82 (describing how Canada Post's privileged monopoly position shelters it from taxes that UPS and other private companies must pay).

169. See Eskew Testimony, *supra* note 129, at 7 (listing the taxes that USPS' competitors must pay and noting that USPS' immunity to these taxes has a negative impact on the competitive market).

170. See COMMISSION REPORT, *supra* note 18, at 67 (noting that USPS can borrow from the Treasury at favorable rates unlike its competitors); see also Geddes, *supra* note 19 (stating that Congress intended that this power to borrow from the Treasury would give USPS more independence and thereby help it become more efficient); Eskew Testimony, *supra* note 129, at 7 (observing advantages of USPS' status as a government entity). UPS has also objected to Canada Post's ability to borrow at preferential rates because UPS claims this is a form of illegal government subsidy for Canada Post's operations in that this right assists it in providing its competitive and non-competitive services. See Statement of Claim, *supra* note 102, paras. 200-214 (dissecting Canada Post's financial state, suggesting that without the government's guarantee Canada Post would be unable to continue its operations or invest in its new competitive services).

U.S. government, it is questionable whether USPS could secure private financing because USPS' financial situation is progressively deteriorating.¹⁷¹ Among other problems, it has growing debt, declining net income, and is facing increasing competition.¹⁷² As of May 16, 2003, USPS' financial liabilities exceeded \$92 billion, including over \$7 billion already owed to the Treasury.¹⁷³ In the event that USPS could no longer service its debt obligations, USPS' government entity status would likely force the government and the taxpayers to assume the debt, a security that USPS' competitors do not share.¹⁷⁴

USPS' status as a government entity makes it eligible for special funding from Congress in emergency or special situations.¹⁷⁵ For instance, after the anthrax mailings that followed the September 11th attacks, USPS' Postmaster General John Potter asked Congress for \$5 billion to assist in the anthrax decontamination efforts, install new safety equipment, and to help compensate USPS for the decrease in postal revenues.¹⁷⁶ The anthrax attacks, however, did not merely highlight USPS' vulnerabilities and need for security improvements

171. See COMMISSION REPORT, *supra* note 18, at 4 (analyzing USPS financial obligations and concluding that the government must reform USPS).

172. See TRANSFORMATION ISSUES, *supra* note 72, at 1 (noting that in April 2001 the GAO put USPS on its High Risk List, signaling that USPS' financial future was perilous and it needed massive reform).

173. See COMMISSION REPORT, *supra* note 18, at 4 (outlining USPS financial obligations and arguing that these enormous debts indicate that USPS must make major reforms to its operational structure). Congress has instituted a \$15 billion cap in USPS' borrowing from the U.S. Treasury. *Id.* at 68.

174. See *id.* at v, 3, 6, 8, 18, 38, 76, 137, 160 (repeatedly emphasizing the possibility that USPS inefficiencies and growing debt would force U.S. taxpayers to assume USPS' obligations).

175. See *infra* note 176 and accompanying text (stating that USPS has the luxury of asking Congress for additional funds during difficult financial times).

176. See *America's Ordeal: U.S. Postal Service Seeks \$5b Aid*, NEWSDAY, Nov. 9, 2001, at A56 (reporting that USPS requested \$5 billion to assist in its recovery from the September 11th attacks and the anthrax mailings and noting that, while lawmakers said that they were committed to helping USPS through the difficulties associated with the attacks, they were concerned the bailout compensated USPS for its prior debts); see also TRANSFORMATION PLAN, *supra* note 124, at 4 (citing the September 11th attacks and the anthrax mailings as substantial factors in the fall of first class mail volumes that has greatly impacted USPS' poor financial situation).

in its infrastructure, it also demonstrated the need for other delivery services to take steps to ensure that their companies were not putting the public at risk by transporting dangerous materials.¹⁷⁷ Despite similar needs to invest in security measures, USPS' competitors cannot rely on Congress to appropriate funds for these improvements.¹⁷⁸

USPS' government entity status also exempts it from a variety of fees and regulations that hamper its competitors.¹⁷⁹ Unlike FedEx, UPS, and its other competitors, vehicle registration regulations do not apply to USPS.¹⁸⁰ As a result, USPS does not have to pay the costs associated with obtaining the license plates and registration stickers for USPS' fleet of 215,530 vehicles that the government requires of USPS' competitors.¹⁸¹

In addition to the vehicle registration exemption, USPS is also immune to most parking restrictions.¹⁸² Private parcel delivery

177. See Edward L. Hudgins, *Bail the Mail?*, CATO INST., (Nov. 14, 2001) (stating that other major parcel carriers will also upgrade their security and invest in more equipment to protect against bioterrorism and explosive devices), at <http://www.cato.org/dailys/11-14-01.html> (last visited Nov. 5, 2003).

178. See *id.* (emphasizing that USPS' competitors must pay for these same measures themselves and pass the costs of these improvements to the customers in higher prices).

179. See *infra* notes 180 and accompanying text (describing the myriad of fees and other regulations that do not apply to USPS).

180. See FEDEX CORPORATION, COMMENTS FROM ORGANIZATIONS: FEDEX CORPORATION 2 (highlighting that USPS' government entity status excuses USPS from vehicle registration and other costly regulations that private companies must pay), at http://www.treasury.gov/offices/domestic-finance/usps/comments/organizations/comments_FederalExpress.doc (last visited Nov. 6, 2003).

181. See *20/20 Profile: Give me a Break!; U.S. Postal Service Monopoly is Losing Taxpayer's Money* (ABC 20/20 television broadcast, July 19, 2002) [hereinafter *Give me a Break*] (containing Reporter John Stossel's analysis that USPS is wasting taxpayer's money and has too many exemptions from local and state regulations, including license plate requirements and parking restrictions), available at 2002 WL 10835149; see also U.S. Postal Service, *Postal Facts* (listing information about the Postal Service including the number of USPS vehicles), at <http://www.usps.com/communications/organization/postalfacts.htm> (last visited Oct. 8, 2003); Eskew Testimony, *supra* note 129, at 7 (describing USPS' unfair advantages as a government entity).

182. See *Give me a Break*, *supra* note 181 (describing the regulations USPS avoids as a result of its government status, including parking tickets); Eskew

services must factor in the costs of parking tickets as a routine business expense.¹⁸³ As delivery truck drivers often experience great difficulties in finding legal parking spots in urban areas appropriate for their large trucks, the major delivery companies rapidly accumulate parking fines.¹⁸⁴ For instance, the four largest package delivery companies, UPS, FedEx, Airborne Express, and DHL, paid nearly \$7.3 million to just New York City from June 2001 to July 2002.¹⁸⁵

Unlike any of its competitors, USPS can exercise the government's power of eminent domain to facilitate its operations.¹⁸⁶ This power allows USPS to take land by either physical seizure, "entering physical possession of the property without a court order," or it can initiate condemnation proceedings under its authority as a U.S. government entity.¹⁸⁷ As both USPS' and its competitors' operations require many trucks and constant activity that produce noise and pollution, this right can squash neighborhood opposition or other political difficulties in locating delivery and sorting facilities

Testimony, *supra* note 129, at 7 (noting USPS' immunity to regulations that affect its competitors).

183. See Annemarie Mannion, *Businesses' Fleets Deliver Client Loyalty*, CHI. TRIB., Aug. 4, 2003, at 23, (explaining that delivery services must account for the cost of tickets in operational budgets), available at 2003 WL 61472947.

184. See Ryan Teague Beckwith, *Trafficking in Parking Tickets: Delivery Companies Say It's Difficult to Find a Legal Spot*, NEWSDAY, Sept. 9, 2002, at A37 (reporting that drivers must park twenty foot trucks in urban areas where there are very few loading areas, one of the very few areas where parking their trucks is legal, and government cars often illegally take these coveted parking spots), available at 2002 WL 2761859.

185. See *id.* (discussing the difficulties of delivering packages in New York City and the substantial parking fines the companies accumulate). UPS reports that their drivers receive about 6,000 tickets a year in the City of Philadelphia alone. *Id.*; see also Joseph R. Daughen, *Sources: Restaurateurs' Tickets Dismissed*, PHILADELPHIA DAILY NEWS, at 6 (mentioning that UPS receives about 6,000 tickets for parking violations a year and routinely tries to challenge their responsibility to pay the tickets), available at 2003 WL 3182640.

186. See *Benderson Development Co., Inc. v. U.S. Postal Service*, 998 F.2d 959, 962 (Fed. Cir. 1993) (finding that USPS has the power of eminent domain in the name of the U.S.).

187. *U.S. v. Dow*, 357 U.S. 17, 21 (1958) (outlining the U.S. government's eminent domain powers, which allows the government to take property for government use provided that the government provides the former owner just compensation for the loss of the property).

that trouble USPS' competitors.¹⁸⁸ Thus, USPS can easily obtain land for its facilities, post offices, and exclusive blue post boxes in a manner that its competitors cannot.¹⁸⁹ In choosing these land parcels for its operations, USPS has the additional luxury of ignoring zoning restrictions, another hurdle its competitors face, because as a government entity it is exempt from these regulations.¹⁹⁰

USPS can also use its own police force, the Postal Inspection Service, to investigate crimes impeding its operations and safeguard its customers' mail and parcels.¹⁹¹ As USPS is a government entity,

188. See David Beal, *Parking Problems*, ST. PAUL PIONEER PRESS, Aug. 10, 2003, at 1C (detailing typical community opposition to truck terminals, which bring noise, pollution, and constant activity to a neighborhood), available at 2003 WL 2619896. Zoning restrictions typically place heavy limitations on where trucking and delivery companies can locate these facilities. *Id.* However, as USPS is not subject to these restrictions, USPS can ignore these local regulations, forcing communities to resort to lobbying their members of Congress to assert political pressure on USPS. *Id.*

189. See Eskew Testimony, *supra* note 129, at 7 (stating that USPS has the power of taking land by condemnation or eminent domain); see also Rick Geddes, *Why We Need Serious Postal Reform and What it Should Entail*, AM. ENTERPRISE INST. (describing the various advantages given the post office including the power of eminent domain to take property for its use), at http://www.aei.org/publications/filter.,pubID.16582/pub_detail.asp (last visited Aug. 15, 2003). USPS can use this power to install green drop boxes that hold delivery items for its carriers to deliver later. See Beckwith, *supra* note 184, at A37 (noting that USPS employees drop delivery items in the green drop boxes for delivery later by carriers, reducing the need for USPS to use trucks). As USPS' competitors must abide by normal land use restrictions and do not have the power of eminent domain, they do not have the luxury of relying of these drop boxes that provide a much needed reduction in the need for vehicles in urban areas where it is difficult to park delivery trucks. *Id.*

190. See Eskew Testimony, *supra* note 129, at 7 (stating that USPS has immunity from local zoning regulations that its competitors must adhere to); see also USPS, *Competitors Square Off at Conference*, CATO POL'Y REP. (CATO Inst., Washington, DC), Mar./Apr. 1999 (detailing the concerns of Frederick W. Smith, founder and CEO of Federal Express and a CATO board member, about USPS' unfair exemptions from regulations, including zoning, customs and tax laws, that restrain its competitors), at http://www.cato.org/pubs/policy_report/v21n2/postalend.html (last visited Aug. 15, 2003).

191. See COMMISSION REPORT, *supra* note 18, at 99-100 (describing the responsibilities of the Postal Inspection Service); see also U.S. Postal Inspection Service, *Who We Are* (outlining the duties of the U.S. Postal Inspection Service and stressing that it "provides assurance to American businesses for the safe

this armed force has the added authority, which is unavailable to USPS private competitors, to make arrests and execute search warrants.¹⁹² As a result, the Postal Inspection Service protects USPS' competitive and non-competitive operations in a manner that the private sector cannot replicate.¹⁹³

3. Assistance to USPS that is Not Restricted to its Monopoly Services Amounts to Helping its Competitive Products Because USPS' Entire Integrated Organization Benefits

Although USPS offers important government services which necessitates its status as a government entity and encourages the U.S. government to provide assistance, any government support of USPS in its current form is illegal under the GATS agreement because, due to complete integration of USPS' competitive and monopoly operations, this support directly or indirectly assists its competitive products.¹⁹⁴ Formulation of appropriate benefits for USPS that only further its social policy goals is practically impossible because USPS' operational strategy blurs any distinctions between its different service offerings.¹⁹⁵ As a result, the provision of tax immunities and extra assistance, designed to assist USPS in its goal

exchange of funds and securities through the U.S. Mail; to postal customers of the "sanctity of the seal" in transmitting correspondence and messages; and to postal employees of a safe work environment"), at <http://www.usps.com/postalinspectors/missmore.htm> (last visited Oct. 8, 2003); TRANSFORMATION PLAN, *supra* note 124, at 47- 49 (summarizing the multi-tiered responsibilities of the U.S. Postal Inspection Service in protecting the public and USPS employees and revealing USPS' proposed security strategy that places heavy reliance on the U.S. Postal Inspection Service's ability to deter and investigate postal related crimes).

192. See COMMISSION REPORT, *supra* note 18, at 99-100 (noting the significance of the Postal Inspection Service's status as a government entity as it can perform the usual police activities).

193. See *id.* at 99 (stressing that the public, including criminals, respect the Postal Inspection Services skill and resources); see also *supra* note 191 (quoting the U.S. Postal Service's goal of providing "assurances," which is a particularly powerful concept when the provider is a branch of the U.S. government).

194. See discussion *supra* Parts II.B.1, II.B.2 (explaining how USPS' competitive offerings benefit from USPS' monopoly operations).

195. See *id.* (describing how USPS uses its infrastructure and other assets, which as a result of USPS' government status benefits, obtains at a lower cost than a private competitor, for both its competitive and non-competitive services).

of maintaining inexpensive universal service across the United States, defray costs for competitive services, thus constituting abuse of USPS' monopoly status because its competitors do not enjoy this same advantage.¹⁹⁶ Regardless of intent, any government assistance to USPS will render its operations vulnerable to charges that it is abusing its monopoly status.¹⁹⁷

III. RECOMMENDATIONS

A. REVISE THE U.S. OFFER

The Office of the United States Trade Representative must revise the proposed U.S. offer of "express delivery services" in order to permit USPS to continue to legally offer its "express delivery services."¹⁹⁸ The United States can still support its powerful multinational corporations' attempts to gain equal access to foreign markets under the GATS framework with a narrower definition.¹⁹⁹ While the current definition meets the needs of this powerful lobby, the Bush Administration should consider the public interest in maintaining USPS' operations and proceeding with gradual USPS reform by insulating USPS from GATS regulations and refusing to artificially accelerate USPS reform in order to satisfy corporate interests.²⁰⁰

196. See *supra* notes 192-194 and accompanying text (explaining how the integration of services and USPS' benefits endanger USPS' legal status under GATS).

197. See discussion *supra* Part II (highlighting USPS' vulnerabilities as a result of its special government benefits).

198. See *id.* (explaining that USPS' current state of operations would be illegal under the GATS agreement if the United States extends its "express delivery services" offer); see also INITIAL OFFER, *supra* note 118, at 1 (indicating that the U.S. government reserved the right to modify or withdraw its offer at any time before the conclusion of negotiations).

199. See SINCLAIR, *supra* note 70, at 4-5 (arguing that the multinational courier industry has gained the U.S. government as an ally and is actively lobbying for access to foreign markets).

200. See discussion *supra* Part II (discussing the potential impact of the Bush Administration's "express delivery services" offer on USPS); see also COMMISSION REPORT, *supra* note 18, at ix-xi (summarizing the Commission's analysis that USPS needs to reform, but that it should be an evolutionary gradual

U.S. negotiators should narrow the meaning of “express delivery services” by focusing on some of the additional special services and guarantees that USPS’ major competitors offer in conjunction with their “express delivery services.”²⁰¹ For instance, USPS often faces criticisms for failing to explicitly guarantee delivery by a certain time.²⁰² The ability to guarantee delivery date and time is one of greatest strengths of its competitors.²⁰³ For example, FedEx offers a Priority Overnight Service that guarantees delivery by ten-thirty a.m. to most areas the following day.²⁰⁴ UPS provides Next Day Air and Next Day Air Savers that guarantee delivery by ten-thirty a.m. or three p.m. respectively.²⁰⁵

USPS’ current operational structure cannot guarantee delivery times with such accuracy or offer the broad range of services that its competitors can provide.²⁰⁶ As a result, USPS is only able to promise

process without abrupt changes that could jeopardize USPS’ ability to provide its core services and meet its universal service obligation).

201. See *infra* notes 201-208 and accompanying text (explaining that a narrower definition would protect some of USPS’ activities from GATS restrictions, while also promoting free trade, and suggesting U.S. negotiators should adopt narrower language that helps differentiate USPS’ services from its private sector competitors).

202. See Rick Merrit, *Priority Mail Sham*, POSTAL WATCH BRIEFING, April 18, 2003, at 2-3 (arguing that USPS misrepresents its delivery guarantees, specifically the time necessary for delivery, and highlighting that only seventy-three percent of priority mail reached its destination within the two days as advertised), at http://www.postalwatch.org/priority_mail/2003_04_bp_priority_mail.pdf (last visited Oct. 16, 2003).

203. See *id.* at 3 (emphasizing that private carriers offer a wide range of delivery-timing options when they will deliver a package for each service with no variation resulting from delivery location with the exception of the least expensive, ground delivery service); see also *infra* notes 204-206 and accompanying text (noting that USPS’ competitors provide guarantees about delivery day and time).

204. See Federal Express, *Service Info* (listing FedEx Express’ various services), at <http://www.fedex.com/us/services/express/us/> (last visited Oct. 16, 2003).

205. See United Postal Service, *Zones and On-Demand Rates for Shipping within the U.S. and to Puerto Rico* (describing UPS’ delivery services), at http://www.ups.com/content/us/en/shipping/cost/zones/on_demand.html#demand (last visited Oct. 16, 2003).

206. See U.S. Postal Service, *Express Mail* (suggesting that USPS cannot guarantee delivery by a certain time and noting that the package will arrive the next day or two days after the customer mails it with Express Mail), at <http://www.usps.com/shipping/expressmail.htm> (last visited Oct. 16, 2003).

less precise morning or afternoon delivery on its Express Mail service.²⁰⁷ Thus, the language in the U.S. proposal, language which provides that “express delivery services” may include “delivery within a certain time” should focus more prominently in defining “express delivery services.”²⁰⁸ U.S. officials should specify time frames for delivery in the definition and make a guarantee of these precise time frames a requirement for services to qualify as an express delivery service. This narrower definition of “express delivery services” will include many of the products of USPS’ competitors, but exclude most of USPS’ services.²⁰⁹

U.S. negotiators could also narrow the definition by proposing restrictive requirements for tracking capabilities available to the consumer.²¹⁰ USPS currently offers tracking services,²¹¹ but critics charge that private delivery services provide more frequent tracking information.²¹² Specifying the frequency of tracking packages and providing additional tracking criteria could help differentiate USPS’ services from its competitors who excel in this area.²¹³

207. *See id.* (implying that USPS cannot guarantee delivery by a certain time and stating that USPS will guarantee that USPS will deliver the packages by twelve noon or three p.m. “to many destinations” rather than all destinations).

208. *See INITIAL OFFER, supra* note 118, at 45-46 (providing the language used in the U.S. “express delivery service” offer); *see also supra* note 208 and accompanying text (explaining the utility of narrowing the meaning of “express delivery services” in this manner).

209. *See supra* text accompanying notes 201-209 (outlining how U.S. negotiators could narrow the definition of “express delivery services” and the potential effect of this narrower definition).

210. *See infra* notes 211-213 and accompanying text (explaining how negotiators can focus on tracking requirements to differentiate USPS’ service from its competitors by focusing on tracking requirements).

211. *See* U.S. Postal Service, *Track and Confirm FAQs* (stating that USPS offers tracking services), at <http://www.usps.com/shipping/trackandconfirmfaqs.htm> (last visited Oct. 17, 2003).

212. *See Merrit, supra* note 202, at 2 (noting that “waypoint tracking” capabilities are standard features of private carriers’ services, which allows customers to monitor the location of their packages).

213. *See* discussion *supra* Parts II, III.A (explaining that USPS is vulnerable to challenges under the broad GATS offer and suggesting possible ways to narrow the definition of “express delivery service”).

B. WITHDRAW “EXPRESS SERVICE DELIVERY” OFFER

Alternatively, under the terms of the Office of the United States Trade Representative’s offer, the U.S. government can withdraw the U.S. offer regarding “express delivery services.”²¹⁴ This would be desirable because if U.S. negotiators withdraw the express service delivery offer, it will become more difficult for competitors to claim that the United States ignores its GATS obligations.²¹⁵ As a result of GATS’ focus on voluntary liberalization, the agreement does not compel the United State to make this particular offer or any offers in this sector, nor does it require the U.S. government to eliminate or weaken monopolies.²¹⁶ Thus, GATS would permit USPS to remain a monopoly and the governing GATS restriction would only regulate Article II principles, which in the case of USPS would be entirely harmless, non-limiting regulations.²¹⁷ In addition, USPS’ competitive services would not violate Most Favored Nation regulations, thereby triggering WTO action, because while USPS’ competitive products would continue to benefit from cross-subsidization and USPS’ status as a government entity, USPS’ special privileges would generate equal disadvantages to all other competitors.²¹⁸ In the absence of the broad “express delivery service” commitment, USPS could continue its operations in providing delivery services at low cost to the American public.²¹⁹

214. See INITIAL OFFER, *supra* 118, at 1 (providing the legal authority for the United States to withdraw the offer before the WTO concludes the negotiations).

215. See discussion *supra* Parts II.A, Part II.B (explaining that the U.S. offer will trigger the application of certain GATS provisions to USPS’ operations, and suggesting that USPS’ operations would not violate GATS if the United States withdrew the offer).

216. See discussion *supra* Part I.B (explaining that the GATS framers designed the agreement as a gradual process of voluntary liberalization in order to protect developing countries and assist all Members with the process of opening their markets).

217. See *id.* (arguing that USPS would not violate the most favored nation regulation under these circumstances).

218. See GATS, *supra* note 11, art. II:1 (requiring that GATS members treat each member’s services and service suppliers equally).

219. See discussion *supra* Parts II.A, II.B (explaining that USPS’ operations would not violate the GATS agreement if the United States withdrew its offer).

C. SEPARATE USPS' COMPETITIVE AND NON-COMPETITIVE OPERATIONS

If U.S. negotiators are unwilling to revise or withdraw the "express delivery service" offer, U.S. officials should seek to avoid WTO sanctions by applying the European Commission's solution in the Deutsche Post case to separate USPS competitive and non-competitive services.²²⁰ Such a separation would protect the public interest by ensuring that any benefits the U.S. government provided USPS to assist in its crucial universal service obligation would also not subsidize competitive services.²²¹ Without the separation, such governmental assistance puts USPS' entire operation at legal risk because the WTO will arguably consider this support to constitute abuse of a monopoly position.²²² Thus, this scheme would allow the U.S. government maximum flexibility to sustain USPS' important social and cultural functions in whatever manner it sees fit, while avoiding any potential WTO challenges.²²³

In order to preserve the competitive delivery service aspect of USPS' operations, the U.S. government should require the USPS to completely sever its monopoly and competitive operations to avoid any sharing of equipment or special benefits upon which the competitive service currently relies.²²⁴ Under this scenario, USPS' competitive services would lose their government entity status, which provided a myriad of benefits unavailable to its competitors, and operate under the same rules and regulations that its competitors

220. See Deutsche Post Decision, *supra* note 71, art. 2 (requiring Deutsche Post to separate the mail monopoly from its competitive parcel service).

221. See *infra* notes 222-225 and accompanying text (explaining that the separation of the competitive and non-competitive services would require complete isolation of the services to ensure that the government can only assist USPS' non-competitive services).

222. See discussion *supra* Parts II.B.1, II.B.2 (describing how USPS' operations allow the competitive services to indirectly benefit from the subsidies for the monopoly products, which is illegal under GATS).

223. See *supra* notes 220-222 and accompanying text (explaining why the separation of the services is desirable).

224. See discussion *supra* Parts II.B.1, II.B.2 (outlining various aspects of USPS' operations that give its competitive services an unfair advantage over its competitors).

must follow.²²⁵ As the President's Commission on the United States Postal Service recently completed its review of USPS, concluding that USPS should focus on its core products, splitting the monopoly may prove to be the most efficient manner to address USPS' need for internal reforms and compliance with U.S. obligations under the GATS treaty.²²⁶ However, due to the substantial integration of its infrastructure for competitive and non-competitive services, and the USPS' significant reliance on its status as a government entity, such a drastic step might not be appropriate for the USPS in its current financially precarious state.²²⁷

CONCLUSION

The Office of the United States Trade Representative's GATS offer of "express delivery services" will arguably trigger the application of GATS provisions to the USPS' activities because the USPS is a monopoly that also offers competitive products that would be subject to the U.S. offer.²²⁸ As the USPS cannot claim the GATS "government authority exception,"²²⁹ it remains vulnerable to WTO Members' claims that it is abusing its monopoly by supplementing its competitive services with the U.S. government's provision of special governmental financial benefits and government entity status.²³⁰ Because the United States could potentially face trade

225. See *supra* notes 220-222 and accompanying text (explaining why the severing of USPS' operations is desirable and mentioning what sorts of changes such a separation will require).

226. See COMMISSION REPORT, *supra* note 18, at ix-xix (summarizing the Commission's analysis of USPS and its dire need for reform).

227. See Hudgins, *supra* note 177 (describing Deutsche Post's gradual move towards privatization over several stock offerings). This severance solution might have been easier to apply to Deutsche Post because the German government was moving toward privatization of the mail system. *Id.*

228. See discussion *supra* Part II (explaining that GATS will apply to USPS).

229. See discussion *supra* Part II.A.1. (arguing that the GATS "government authority exception" cannot apply to the USPS because it does not meet the stringent criteria of supplying the service "neither on a commercial basis, nor in competition with one or more service suppliers").

230. See discussion *supra* Part II.B.3 (explaining that it is difficult to provide assistance to USPS' non-competitive services because the integration in its operations results in possibly unintended benefits to the competitive products, an illegal advantage under the GATS agreement).

sanctions they should, therefore, revise or withdraw its offer or separate USPS' operations.²³¹

231. See discussion *supra* Part III (recommending that the U.S. government revise or withdraw the U.S. offer, or alternatively, separate USPS' operations in order to avoid trade sanctions).