

Attachment
Australia, Tobacco and Advertising Services

Tobacco advertising is heavily regulated within Australia.ⁱ The regulations include bans on television, radio and print advertising as well as restrictions on numerous other promotional activities. Australia has a long history as one of the global leaders in tobacco control regulations. Yet there is a risk of conflict between Australia's tobacco control regime and its trade commitments under the General Agreement on Trade in Services (GATS).ⁱⁱ

GATS Article XVI prohibitions

In the *US-Gambling* dispute, Antigua challenged a number of U.S. federal and state laws that ban Internet gambling services. The panel determined that the laws in dispute affected trade in a service sector that the U.S. had committed to liberalize (other recreation services). Next, the panel applied the requirements of GATS Article XVI (Market Access) to the U.S. measures and determined that the measures were in violation of the GATS. It found that the measures violate prohibitions on limiting the number of service suppliers (XVI:2(A)), the number of service operations, or service quantity (XVI:2(C)). Essentially, the panel found that the U.S. statutes constituted an impermissible "zero quota" on the remote supply of gambling services. The Appellate Body upheld these sections of the ruling.

Scope of Australian advertising commitmentsⁱⁱⁱ

01.F. Other Business Services

a) Advertising services (87110, 87120**, 87190) Covers services by advertising agencies in creating and placing advertising in periodicals, newspapers, radio and television for clients; outdoor advertising; media representation i.e. sale of time and space for various media; distribution and delivery of advertising material or samples. Does not include production or broadcast/screening of advertisements for radio, television or cinema.

Australia has made commitments to follow GATS rules in a number of advertising service subsectors. Its commitment extends only to those subsectors that it lists in its GATS schedule. These include "services by advertising agencies in creating and placing advertising in periodicals, newspapers, radio and television for clients; outdoor advertising; media representation i.e. sale of time and space for various media; distribution and delivery of advertising material or samples." While limited in scope, these commitments cover numerous services that involve tobacco, most notably the production and placement of advertising material. Furthermore, Australia has listed no limitations on the commitment regarding the cross-border mode of delivery. On their face, these commitments appear to obligate Australia to provide market access for tobacco-related advertising.

Measures restricting tobacco advertising

The 1992 Tobacco Advertising Prohibition (TAP) Act created a national standard for tobacco advertising and built on existing prohibitions on tobacco advertising on radio and television and in print. The TAP act creates a prohibition on most forms of tobacco advertising and establishes procedures for adjudicating complaints and issuing fines and other punishments. Additional types of tobacco advertising, including point-of-sale and certain promotional advertising, are restricted at the state level.^{iv} However, Australia does not restrict all forms of tobacco advertising. In

particular, international print media advertisements and advertisements in connection with Internet sales are not fully prohibited.

Can a ban on advertising a particular product violate GATS?

As of 2012, the *US-Gambling* decision remains the most relevant WTO case law interpreting the GATS Article XVI (Market Access). Unfortunately, neither the panel decision, nor the Appellate Body decision clarifies how to analyze a potential market access violation.

- ***Subsector analysis:*** Tobacco advertising is not a distinct subsector under the CPC code. This creates an unavoidable question when analyzing a potential GATS claim against tobacco advertising restrictions: How should the WTO analyze a restriction on a service that is related to a specific product? Australia has not limited its commitment to a specific means of cross-border transmission. Nor has Australia excluded from its commitment a specific service sector as listed in the CPC. In *Gambling*, the United States argued before the panel that because it blocked some but not *all* gambling-related services, the value of that commitment was not destroyed by a limited restriction. The panel rejected this argument, finding that when a country makes a market access commitment in a sector or subsector, “that commitment covers all services that come within that sector or sub-sector.”^v It also found that full commitments prohibited the U.S. from limiting any means of delivery of the service. Interestingly, the U.S. chose not to raise this issue on appeal. As a result, the Appellate Body declined to rule on the issue. The *Gambling* panel stated that the proper way to limit the scope of a commitment is to do so “explicitly and transparently” in the schedule.^{vi} As can be seen in the image above, nothing in the Australian schedule explicitly and transparently limits its commitment on tobacco-related advertising.
- ***Quantitative v. qualitative restrictions:*** The list of prohibited restrictions under Article XVI:2 is exhaustive. That means that regulations not of the types listed are not within the scope of prohibited measures. Therefore, if Australia’s advertising restrictions are not among the types listed, they cannot violate any market access commitments.^{vii} The Appellate Body ruling considered the difference between prohibited “quantitative” restrictions that fall under the Article XVI and “qualitative” restrictions that do not.^{viii} Unfortunately, the Appellate Body provided no real guidance on how to distinguish between the two. If tobacco advertising restrictions are *quantitative* measures, then they may violate GATS market access rules. In that case, Australia must seek refuge in the Article XIV health exception, which excuses a violation if all of the exception’s tests are satisfied. If tobacco advertising restrictions are *qualitative* measures, then they do not violate market access rules. Trade experts remain sharply divided on how the WTO might classify these types of restrictions.^{ix} The arguments for each position are as follows.
 - ***QUANTITATIVE MEASURES:*** Australia has taken a commitment on Advertising Services and that commitment encompasses services used for tobacco advertising. By making a full commitment, Australia has agreed not to limit any service falling within a covered subsector. Since it permits no suppliers to advertise tobacco products, the TAP Act amounts to a “zero quota” on the number of service suppliers, service operations or output with respect to those services that advertise tobacco products.
 - ***QUALITATIVE MEASURES:*** By restricting only advertising services related to tobacco, the TAP Act has not created a numerical or quantitative restriction. The

TAP Act limits itself to regulating the qualities of a service – specifically that it has the quality of promoting tobacco. Domestic regulations concerning the quality of a service are properly analyzed under Article VI (Domestic Regulation) and do not implicate Article XVI.

The Appellate Body ruling has major implications for domestic policymaking if these types of statutes are considered quantitative. The Appellate Body acknowledged the ambiguity but left it to future disputes to distinguish between quantitative and qualitative restrictions.

Exception to Protect Public Health

Even if the TAP Act is a violation of Australia’s market access commitments, it may still survive under the health exception of GATS Article XIV. However, to justify the TAP ACT under this exception, Australia must satisfy a two-tier analysis. First, Australia must provide a provisional justification showing that measure is necessary to protect public health.^x At this stage, Australia must show, among other arguments, that there are not reasonably available less trade-restrictive measures and that the TAP Act actually contributes to achieving the goal of reducing smoking. Second Australia must show that the measure is not arbitrary discrimination or a disguised restriction on trade.^{xi} The U.S. lost at this stage of the analysis in part because it failed to create a comprehensive ban on remote gambling services.^{xii} Here, it is important to note that neither the TAP Act, nor any other Australian law, creates a comprehensive ban on tobacco advertising. Tobacco advertising services still exist in Australia in various forms. In *Gambling*, the Appellate Body rejected the U.S. “public morals” exception due to the fact that the United States allowed numerous other types of gambling services, which permitted domestic suppliers to provide services like those that the United states prohibited over the Internet.

Conclusion

The TAP Act and other national prohibitions on tobacco advertising are at risk of conflict with Australia’s GATS obligations. The Trans-Pacific Partnership Agreement will expand the scope of Australia’s services commitments as a default. In order to ensure its ability to regulate tobacco-related services, including advertising, Australia could carefully restrict its service commitments. An even stronger safeguard would be to explicitly exclude tobacco control regulations from *all* services rules. Since the TPPA annex for reservations is not likely to cover all services rules, this can be accomplished by carving tobacco out of the TPPA altogether.

Endnotes

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- ⁱ For an overview of Australian tobacco control laws, see <http://www.tobaccocontrolaws.org/legislation/country/australia> (last visited April 27, 2012).
- ⁱⁱ Australia has limited the scope of its commitments in other sectors, most notable distribution service, so that tobacco regulations affecting trade in these sectors does not violate GATS.
- ⁱⁱⁱ WTO GATS Database, available at <http://tsdb.wto.org/>.
- ^{iv} For the purposes of a GATS analysis, we focus only on advertising restrictions at the national level.
- ^v Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.335, WT/DS285/R.(Nov. 10, 2004) [hereinafter Panel Report].
- ^{vi} Panel Report, ¶ 6.315.
- ^{vii} Though any regulations that affect trade in services must still be compliant with Article VI (Domestic Regulation).

^{viii} Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 84, WT/DS285/AB/R (Apr. 7, 2005)[hereinafter Appellate Body Report]. “It is neither necessary nor appropriate for us to draw, in the abstract, the line between quantitative and qualitative measures, and we do not do so here. Yet we are satisfied that a prohibition on the supply of services in respect of which a full market access commitment has been undertaken is a quantitative limitation on the supply of such services.”

^{ix} See e.g., Eric H. Leroux, *Eleven Years of GATS Case Law: What Have We Learned*, 10 J. Int'l Econ. L. 749 at 775 (2011) (suggesting that future disputes will consider the “purpose/rationale” of a nondiscriminatory measures before applying the market access rules); Lode Van Den Hende & Herbert Smith, *GATS Article XCI and National Regulatory Sovereignty: What Lessons to Draw From US-Gambling*, in *THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES* 466 (Kern Alexander and Mads Andenas eds., 2008)(Discussing the *US-Gambling* decision and the likely analysis of restrictions on advertising services).

^x Panel Report, ¶ 6.449.

^{xi} *Id.*

^{xii} Appellate Body Report, ¶ 373.