



HARRISON INSTITUTE FOR PUBLIC LAW
GEORGETOWN LAW

CROSS-BORDER SERVICES



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Introduction

Without trade in services, trade in goods cannot occur. Every sale of a good results from the provision of multiple services such as advertising, transport and distribution. Service sectors once considered strictly as domestic may now be provisioned from almost anywhere in the world. The General Agreement on Trade in Services (GATS) created a system of international trade rules to promote trade through the “progressive liberalization” of domestic regulations on services.ⁱ In essence, a country agrees to restraints on its sovereign ability to regulate services. These trade rules have been echoed and expanded in subsequent regional and bilateral free trade agreements (FTAs). The Trans-Pacific Partnership Agreement (TPPA) will include a cross-border trade in services chapter, which will expand the reach of trade rules.

Tobacco and services

From production through consumption, tobacco trade involves a variety of service sectors. These include, among others, advertising, packaging, wholesaling, and retailing services. Each of the TPPA countries has implemented tobacco control regulations that affect trade in these service sectors.ⁱⁱ Depending on the scope of sector commitments a country has made under GATS or FTAs, a number of existing tobacco control regulations are potentially at risk of conflict with market access rules, depending on how those rules are interpreted with respect to bans on advertising or other services. Unless a country specifically *excludes* a service sector (or services related to a product within that sector), it will be bound to follow the market access and national treatment rules for all regulations affecting that sector. This is a significant expansion of commitments (compared to GATS) because most of the TPPA countries have not previously made GATS commitments that cover tobacco-related services.

Expanded coverage of tobacco measures

- **GATS and cross-border services** – The TPPA services chapter sets limits on government regulation of cross-border supply of services. Cross-border supply is one of the four “modes of supply” covered under the WTO’s General Agreement on Trade in Services (GATS).ⁱⁱⁱ It covers services that flow from the territory of one country into the territory of another (e.g., advertising services transmitted into another country via telecommunications). Under GATS, each country identifies a “positive list” of service sectors to which it will commit to the market access and national treatment obligations, as well as limits on those commitments that reserve the right to regulate.^{iv} It enters these commitments in its GATS schedule with regard to each of the four modes of service. A country is only bound if it enters a liberalization commitment in its schedule.

- **TPPA and expanded coverage** – Unlike GATS, the TPPA is a “negative-list” agreement. That is, a service sector is included in the agreement unless specifically excluded. This automatically expands the commitments of most TPPA countries, notably commitments to remove market access barriers. Under GATS, a country makes commitments to follow market access and other rules in limited service sectors. With comprehensive commitments as the default, the TPPA forces countries to choose among three options:
 - First, a country may accept the comprehensive commitments without reservation. This option shrinks the policy space for future regulation of tobacco-related services.
 - Second, a country may attempt to use a sector-by-sector approach and take reservations only on those sectors it determines are necessary to regulate tobacco. This option is risky because it is difficult to predict when a regulation would adversely “affect” trade in a sector, which is the trigger for a trade dispute. This is especially difficult to predict in most countries, which have yet to determine their full scope of regulations under the Framework Convention on Tobacco Control (FCTC).
 - Third, a country could take a reservation across all sectors. This option is preferable to the previous ones because it anticipates the flexibility needed to adopt future regulations under the FCTC.

A problem with any of these options is that reservations are limited by the likely scope of the TPPA annex for services and investment. A country can reserve tobacco control measures from coverage by rules on market access and national treatment, but the annex does not apply to other rules, most notably the disciplines on domestic regulation and the most important investor protections – expropriation and fair and equitable treatment.

- **Sectors that could be affected by tobacco regulations** – Relevant service sectors include advertising services, packaging services, specialty design services, wholesale distribution services, and many others.^v This list demonstrates a basic problem: it is difficult to predict every service sector that could be affected by current or future tobacco regulations. Historically, tobacco companies have been innovative in finding new avenues to market and advertise products.^{vi} For example, a tobacco company might circumvent a television advertising restriction by sponsoring a local sports team and placing its logos on the team uniforms and the stadium.

Limits on regulation of tobacco

- **Market Access Rules** – GATS Article XVI, Market Access, prohibits certain types of quantitative regulations including quotas, limits on the number of suppliers, limits on the value of transactions, and limits on the participation of foreign capital, among others.^{vii} The WTO Appellate Body has ruled that an absolute ban on a service is inconsistent with the prohibition of quotas (i.e., a ban is a “zero quota”).^{viii} Commentators are divided on whether a ban on tobacco-related services violates the prohibition on zero quotas. Some argue that any ban that allows zero services of a certain type or product is *quantitative*; it amounts to a zero quota. Others argue that a ban on service related to a product like tobacco are *qualitative* because of the product distinction. Hence, they are not covered by market access rules.^{ix} If a country wants to limit tobacco-related services, it can avoid the risk of a trade conflict by taking careful reservations on its commitments.
- **Disciplines on Domestic Regulation** – Disciplines on regulation can have a significant impact on the ability to regulate tobacco. Recent free trade agreements have limited the scope of

exceptions that a country can take when implementing a regulation affecting trade in services. For example, the U.S.–Korea Free Trade Agreement (FTA) allows either party to limit its sector commitments under market access rules.^x However, the FTA does not allow either party to deviate from the domestic regulation disciplines. In the most recent U.S. FTA, these disciplines require regulations to be “based on objective and transparent criteria, such as competence and the ability to supply the service.”^{xi} The ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) agreement adds an additional requirement that a regulation must be “not more burdensome than necessary to ensure the quality of the service.”^{xii} This type of “necessity test” makes it more difficult to implement public health regulations. Tobacco regulations are generally unconcerned with ensuring the quality of the service; they are public health regulations intended to stop the spread of tobacco use. In spite of this limit on regulations, New Zealand and Australia are pushing for similar language in the proposed GATS Disciplines on Domestic Regulation.^{xiii}

Example – Advertising and distribution services

In the words of a U.S. communication to the WTO, “advertising services, which touch upon virtually all industries and affect virtually every possible good and service available today, are a significant economic force, both locally and globally.”^{xiv} Most of the regulations contested by Philip Morris International concern some type of advertising restriction.^{xv}

Chart 1: GATS Advertising Commitments

Country	Scope of Commitment
Australia	Limited (types of advertising)
Brunei	None
Chile	None
Malaysia	Limited
New Zealand	Comprehensive
Peru	Limited
Singapore	Limited
United States	Nearly comprehensive
Vietnam	Tobacco ads explicitly excluded

The nine TPPA nations have made varying levels of commitments on advertising services under GATS (Chart 1). In this area, the effects of the TPPA will be felt most strongly by those nations that have “none” or only limited services commitments in the past. The United States has made nearly comprehensive GATS commitments on advertising. As a result, the TPPA’s expansion of U.S. commitments will be marginal. However, other nations have made no GATS commitments on advertising, or they have limited their commitments, and they would lose significant regulatory space under the TPPA. For example, Brunei Darussalam has no GATS advertising commitments, and Vietnam has specifically excluded cigarette and cigar advertising from its commitments.^{xvi} Others have applied their commitments only to certain types of advertising services. The TPPA would automatically expand the advertising services commitments of these nations to cover all advertising services without restrictions on tobacco. These countries would have to set extensive sector-by-sector reservations or take a comprehensive reservation. As discussed above, both of these approaches fail to reserve the policy space to regulate tobacco under disciplines on domestic regulation or key investor protections.

Within other FTAs, some nations have attempted to reserve domestic policy space for tobacco regulation. However, in many cases, these reservations are insufficient to ensure effective implementation of tobacco regulation. For example, in Annex II of the U.S.-Australia FTA, Australia “reserves the right to adopt or maintain any measure with respect to wholesale and retail trade services of tobacco.”^{xvii} It is expected that Australia will assert a similar reservation in the TPPA agreement. However, this reservation is effective solely for *distribution services* that involve tobacco. Advertising services are a subsector of *business services*. Thus, the Australian reservation could not be invoked to justify a regulation that limits advertising services related to tobacco. It can only be asserted for distribution services such as wholesalers who sell tobacco products cross-border. A limit on advertising services performed in the United States and delivered to Australia (e.g., creative design) would not be protected by the Australian reservation.

GATS Distribution Commitments

Country	Scope of Commitment
Australia	Tobacco excluded
Brunei	None
Chile	None
Malaysia	None
New Zealand	Tobacco explicitly excluded
Peru	Limited
Singapore	None
United States	Comprehensive
Vietnam	Tobacco explicitly excluded

Like advertising, distribution services affect nearly every sector of the economy.^{xviii} This sector covers wholesaling, e-commerce, and retail outlets, among other services. Distribution services are essential to move tobacco from cigarette producers into the hands and lungs of citizens. Many of the existing regulations on tobacco, including licensing requirements and restricted points-of-sale, are restrictions on distribution services. Of the nine TPPA countries, three countries exclude coverage for tobacco-related distribution services in some form.^{xix} Four of the remaining countries make no commitments on distribution services whatsoever.^{xx} The TPPA would automatically expand the services coverage of these eight nations unless tobacco is carved out or extensive reservations are taken. As noted, Australia is expected to claim a reservation similar to that in the U.S.-Australia FTA. It is unclear whether or not other nations intend to do so as well.

Solution

A country can place a reservation in the annex to allow future tobacco regulation, but the scope of that reservation is limited. A country may only reserve the right to deviate from certain rules, including market access rules. It cannot take a comprehensive reservation to deviate from *all* rules, including necessity tests or other disciplines on domestic regulation. So to protect limits on tobacco-related services from all TPPA rules, negotiators should exclude those measures from the chapter on cross-border trade in services.

The most elegant to do this is to exclude tobacco from the entire TPPA. By excluding tobacco products and services from the whole agreement, the parties eliminate potential confusion over the permitted scope of domestic regulation. Domestic policy space would remain constrained only by existing GATS commitments and pre-existing trade agreements.

Endnotes

- ⁱ WTO, *The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines*, http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (last visited Apr. 29, 2012).
- ⁱⁱ The schedule of GATS commitments for each TPPA negotiating country can be accessed through the WTO GATS Database, available at <http://tsdb.wto.org/>. For an overview of tobacco control laws, see Campaign for Tobacco Free Kids, Legislation, available at <http://www.tobaccocontrolaws.org/legislation/>.
- ⁱⁱⁱ The other three modes of supply covered under GATS are: (1) Consumption abroad; (2) Commercial presence; and (3) Presence of natural persons.
- ^{iv} World Trade Organization, *Guide to Reading the GATS Schedules of Specific Commitments and the List of Article II (MFN) Exemptions*, available at http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm.
- ^v See JANE KELSEY, INTERNATIONAL TRADE AND INVESTMENT LAW ISSUES RELATING TO NEW ZEALAND'S PROPOSED TOBACCO CONTROL POLICIES TO ACHIEVE AN EFFECTIVELY SMOKEFREE NEW ZEALAND BY 2025, § 3.5, Trade in Services, 2012 (forthcoming).
- ^{vi} Examples of tobacco marketing campaigns from across the world have been compiled by the Campaign for Tobacco Free Kids (CTFK). Tobacco marketing campaigns range from promotional kiosks on busy streets to sponsorship of sports and entertainment events. CTFK database available at http://www.tobaccofreekids.org/ad_gallery.
- ^{vii} GATS Article XVI:2
- ^{viii} See Appellate Body Report, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, (WT/DS285/AB/R) (April 20, 2005) ¶¶ 238-239 ("[a prohibition on one, several or all means of delivery crossborder] is a 'limitation on the number of service suppliers in the form of numerical quotas' within the meaning of Article VI:2(a) because it totally prevents the use by service suppliers of one, several or all means of delivery that are included in mode 1.").
- ^{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 U.S. – South Korea FTA, Chapter 12, Cross-Border Trade in Services.
- ^{xi} U.S. – South Korea FTA, Chapter 12, Cross-Border Trade in Services, art. 12.7.2.
- ^{xii} AANZFTA Agreement, Chapter 8, Trade in Services.
- ^{xiii} Working Party on Domestic Regulation, Room Document from New Zealand, The Necessity Test in the Disciplines on Domestic Regulation, RD/SERV/39 (9 February 2011); Working Party on Domestic Regulation, Communication from Australia; Chile; Hong Kong, China; New Zealand and the Separate Customs Territory of Taiwan, Kinmen and Matsu, Article VI:4 Disciplines – Proposal for Draft Text, JOB(06)/193 (19 June 2006); see generally, Robert Stumberg, *GATS Negotiations on Domestic Regulation* (June 15, 2010).
- ^{xiv} Communication from the United States on Advertising and Related Services, Council for Trade in Services (Jul. 10, 2001), http://www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm (follow "Advertising and related services" hyperlink and select "Preview (HTML)").
- ^{xv} See, e.g., Rebecca Thurlow, *Australia Cigarette Packaging Curbs Prompt Suit*, Wall Street Journal (November 21, 2011), <http://online.wsj.com/article/SB10001424052970204443404577051361355154868.html>
- ^{xvi} WTO, Services Database, Member / Sector Matrix Report, 01. Business Services, available at <http://tsdb.wto.org/default.aspx> (viewed February 21, 2012).
- ^{xvii} U.S. - Australia FTA, Annex II.
- ^{xviii} The UN CPCprov exploratory note describes distribution services as "trade services consisting in selling merchandise to retailers, to industrial, commercial, institutional or other professional business users, or to other wholesalers, or acting as agent or broker (wholesaling services) or selling merchandise for personal or household consumption including services incidental to the sale of the goods (retailing services). The principal services rendered by wholesalers and retailers may be characterized as reselling merchandise, accompanied by a variety of

related, subordinated services, such as: maintaining inventories of goods; physically assembling, sorting and grading goods in large lots; breaking bulk and redistribution in smaller lots; delivery services; refrigeration services; sales promotion services rendered by wholesalers; and services associated with retailers' business, e.g. processing subordinated to selling, warehousing and garage services.” CPCprov Ch.6, *Trade Services; Hotel and Restaurant Services*, available at <http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=9&Lg=1&Co=6>

^{xix} Australia, New Zealand, Vietnam.

^{xx} Brunei, Chile, Malaysia, and Singapore.