

Attachment
Singapore, Tobacco and Distribution Services

Singapore has been called the “the world’s most hostile environment” for tobacco corporations.ⁱ It currently imposes some of the world’s strictest tobacco control regulations. These controls were enacted through the Tobacco Control of Advertisements and Sale Act.ⁱⁱ The Tobacco Act and its subsequent amendments seek to curb adult smoking rates while limiting adoption by youth. While tobacco products are not prohibited outright, Singapore’s control measures strictly limit advertisements, require mandatory health warnings, and cap the amount of tar and nicotine per cigarette.ⁱⁱⁱ Importantly, Singapore imposes strict bans on Internet sales of tobacco, both domestic and international.

Tobacco and E-Commerce

While tobacco products are generally thought of as a traded good, the global tobacco trade implicates a variety of services. In this instance, the rise of e-commerce has the potential to undermine tobacco controls. In many countries, customers now have the opportunity to purchase large volumes of cigarettes at heavy discounts through online retailers operating in foreign countries.^{iv} According to public health experts, these online sales often bypass or violate legislation intended to ensure that online tobacco sales are treated equally.^v Bans on Internet sales, including Singapore’s, attempt to prevent both legal and illegal sales over the Internet.^{vi}

E-Commerce services generally fall under the heading of distribution services. While it is unclear under existing interpretations if selling goods over the Internet is a distribution service on its own, prohibitions on Internet sales would certainly affect trade in distribution services.^{vii} By affecting trade in services, a domestic regulation will be considered covered by the trade in services commitments that a country has made.^{viii} The General Agreement on Trade in Services (GATS) encourages countries to make substantive commitments to liberalize services trade. Each country selects sectors in which it will make commitments to follow market access and national treatment rules and then lists these sectors, along with any limitations on those commitments, in its schedule. In this case, Singapore has not yet made distribution sector commitments under GATS.

Singapore, E-Commerce Bans and the TPPA

Unlike GATS, the TPPA applies trade rules to *all* service sectors by default. This means that the TPPA will commit Singapore to market access obligations with regard to domestic regulations affecting trade in distribution services. Singapore may take a reservation in its TPPA annex to allow tobacco control measures limit distribution services. But if Singapore accepts default coverage, its Internet sales restrictions are clearly implicated. Unless careful steps are taken, the restrictions may be open to challenge.^{ix} Because the TPPA services rules are expected to be very similar to the GATS, we can look to existing GATS decisions for guidance on a possible challenge. In a previous GATS case, the Appellate Body found U.S. laws banning Internet gambling services to violate GATS because a ban results in a “zero quota.”^x A quota is a *quantitative* measure that violates the market access rules.

It is difficult to pre-determine whether or not Singapore’s Internet sales restrictions are quantitative measures. In the *U.S.-Gambling* case, the Appellate Body rejected the U.S. argument that a ban on Internet gambling is a qualitative, not quantitative, measure and thus not covered by the prohibition on quotas. The Appellate body also rejected the U.S. attempt to invoke the public morals exception to justify its gambling restrictions.^{xi} The analytical method for reviewing a public health exception will be the same as applied to a public moral exception. The ambiguity of the ruling is cause for concern that similar tobacco control measures (a partial ban on services) would not survive if a country has made a sector commitment.^{xii}

To prevent this scenario under TPPA rules, Singapore could take a number of actions. First, it could list the Tobacco (Control of Advertisements and Sale) Act and all other tobacco control measures in its Annex for nonconforming measures. This allows countries to exclude specific measures from coverage by the market access rules. Alternatively, Singapore could ensure its future ability to limit tobacco-related services by excluding those services (as opposed to the specific measures) from the relevant sectoral commitments. However, it is difficult to predict every service sector that a tobacco control measure might affect. To better ensure future regulatory flexibility, Singapore can take a comprehensive reservation across all sectors for tobacco control measures.

Finally, it is important to reiterate that even a comprehensive schedule reservation for tobacco controls will not exempt Singapore from all of the obligations of the trade in services chapter. A reservation only allows Singapore to avoid the market access and national treatment rules. Singapore would still be bound by disciplines on domestic regulation. These disciplines, which may include a necessity test or similar obligations, creates additional hurdles for public health regulations focused on tobacco. Accordingly, the most effective solution is to simply carve out tobacco from all chapters of the TPPA.

Endnotes

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- ⁱ RJ Reynolds. Singapore market update. 1993. R.J. Reynolds. Bates No. 513055689/5700. Available at <http://legacy.library.ucsf.edu/tid/tao23d00>.
- ⁱⁱ For more information, visit the Singapore Health Science Authority website, Health Products Regulation, Tobacco (Control of Advertisements and Sale) Act, available at http://www.hsa.gov.sg/publish/hsaportal/en/health_products_regulation/legislation.html#Smoking.
- ⁱⁱⁱ Id.
- ^{iv} *Policy Brief on: Internet Cigarettes*, SUBSTANCE ABUSE POLICY RESEARCH PROGRAM (Oct. 2007), http://www.saprp.org/knowledgeassets/pdf/InternetCigSales_PolicyBriefReport.pdf
- ^v *THE PACT ACT: Preventing Illegal Internet Sales of Cigarettes & Smokeless Tobacco*, CAMPAIGN FOR TOBACCO-FREE KIDS (Mar. 31, 2011), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0361.pdf>.
- ^{vi} Other countries that have limited internet sales include, but are not limited to: Canada; Mexico; Ireland; Norway; Spain; the Philippines; Vietnam; Turkey; and South Africa. For more information on restrictions on country-specific Internet tobacco controls, please visit <http://www.tobaccocontrolaws.org/>.
- ^{vii} Such bans may also affect trade in other service sectors including advertising, financial services, and delivery services, among others.
- ^{viii} GATS Article I:1 applies the terms of the agreement to “measures by members affecting trade in services.” Subsequent panel interpretations have taken an expansive view of the scope of this article. Measures need not directly a service to fall within GATS coverage. Supply of a service includes the production, distribution, marketing, sale and delivery of a service. *WTO Analytical Index: General Agreement on Trade in Services*, available at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gats_e.htm (last visited April 29, 2012).
- ^{ix} Because existing tobacco control affect a number of service sectors, many of these
- ^x Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 238, WT/DS285/AB/R (Apr. 7, 2005)[hereinafter Appellate Body Report].
- ^{xi} Appellate Body Report ¶ 373.
- ^{xii} Note from the Secretariat, *Revised Chairperson’s text on a protocol on illicit trade in tobacco products, and general debate*, WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL, FCTC/COP/INB-IT/3/INF.DOC./4 (May 7, 2009).