

跨太平洋夥伴協定下之菸草控制爭議與規範初探

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摘要

隨著貿易自由化與雙邊或區域自由貿易協定的發展趨勢，菸草貿易儼然成為全球菸草盛行與菸害擴散的主要原因。然而，菸草貿易與投資所衍生公共健康的問題，長期以來並未在雙邊或區域自由貿易安排上受到應有的重視。過去，菸品被視為像其他農產品受貿易規範之拘束，菸草相關產品亦適用關稅減讓，使得大型跨國菸草公司得藉由貿易與投資協定拓展海外菸草市場，並享有保障其海外直接投資的權利，進而影響各國採行菸草控制政策的意願與成效。此等情勢直到跨太平洋夥伴協定（TPP 協定）談判時才有所轉變。於 TPP 協定談判中，首次將菸草控制與貿易的議題搬上談判桌，成員國間針對美國與馬來西亞之菸草提案展開熱烈的討論，最終談判結果正式納入協定第 29.5 條之菸草例外條款。

本文旨在探討 TPP 協定下之菸草控制議題及最終形成共識的菸草例外條款。本文著重於探討 TPP 協定談判過程中由美國和馬來西亞所提出的兩種菸草控制的規範模式，分別為「例外模式」與「除外模式」，分析兩國所提菸草提案的具體內容，及兩種模式間的差異。此外，亦將探討談判過程中各界曾提及之其他可能的替代方案。鑑於前開菸草提案極具爭議性，受到各界的關注，本文將歸納成員國、民間團體及菸草產業贊成或反對前開提案模式的論點。最後，針對 TPP 協定第 29.5 條菸草例外條款，進行分析與檢討。本文初步認為最終共識之條文，固然使各國採取菸草控制政策時，免於受到跨國大型菸草公司利用投資人與地主國爭端解決機制之挑戰或威脅，而具有指標性的成果。然而，離達成維護公共健康之菸草控制目標，仍有所差距，最終妥協的條款可謂係前開兩模式的折衷方案。

Abstract

With the proliferation of free trade agreements, tobacco trade becomes the major cause for the spread of tobacco epidemics worldwide. However, public health concerns over the threat of free trade and investment rules on tobacco control have not been formally addressed in the field of bilateral or regional free trade arrangements. Trade in tobacco products has long been controversial to strike a balance between free trade and public health when shaping the bilateral or regional trade policy. In the past, tobacco has been treated as the same as other agricultural products subjecting to trade rules or tariff concessions in trade agreements. This has allowed multinational tobacco companies expanding foreign markets through trade

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and investment agreements, and having the right to protect their own foreign direct investments. States may be unwilling to adopt more effective tobacco control measures, or for those who have adopted, the effectiveness of which may be weakened by those trade and investment rules.

It was not until the negotiation of Trans-Pacific Partnership Agreement (TPP) that trade and investment issues over tobacco control were, for the first time, officially put on table by the U.S. and debated different options among 12 Asia-Pacific countries. Two tobacco proposals submitted by the U.S and Malaysia had been hotly discussed, and an exception provision on tobacco control measures was finally concluded in article 29.5 of the TPP Agreement in the end of negotiation.

This paper aims to discuss Tobacco control issues and rules under the TPP Agreement with particular focus on two different approaches proposed by the U.S. and Malaysia, namely the “exception approach” and “carve-out approach”. This paper will examine the difference of the two approaches, and identify the underlining policy arguments for and against these two approaches. This paper will also discuss possible alternative options and analyze the implication and potential issues surrounding Article 29.5 of the finalized TPP Agreement. This paper finds that Article 29.5 may be beneficial for TPP Parties to avoid its tobacco control measures from being legally challenged by multinational tobacco companies through ISDS mechanism. However, it seems insufficient to achieve full protection of public health as several potential issues over the interpretation and application of Article 29.5.