

國際投資爭端中菸品包裝規範與商標使用爭議之探討—以

Philip Morris v. Uruguay 案為中心

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摘要

科學證據顯示吸菸對人類健康有嚴重的危害，世界衛生組織透過菸草控制框架公約的簽訂，促使各國採取有效的菸草控制措施，防止菸草危害的進一步擴散。在諸多控制菸草需求的非價格措施中，嚴格限制菸品包裝與品牌行銷被認為係對降低青少年或初次吸菸者接觸菸品的有效手段。尤其在各國立法禁止菸商從事菸品廣告與贊助活動之情況下，菸商須仰賴菸品包裝和品牌設計吸引消費者購買菸品。因此，各國採取菸品素面包裝、圖文健康警示等規範，進而限制商標的使用，乃係更進一步限制菸商藉由菸品包裝從事行銷之作法。為此，跨國菸草公司基於商業利益之考量，積極採取法律途徑挑戰各國採取的菸品包裝與品牌規範等菸草控制措施，除透過國內途徑進行遊說或司法訴訟外，更藉由國際貿易與投資協定之爭端解決機制，透過世界貿易組織或國際投資仲裁機構挑戰各國政府所採取之菸草控制措施。

其中，知名跨國菸草公司菲利普莫里斯國際菸草公司，分別於 2010 年 2 月與 2011 年 6 月向國際投資爭端解決中心與常設仲裁法院提出投資人與地主國爭端解決之申請，控訴澳洲政府採取之菸品「素面包裝」措施，與烏拉圭政府採取的「單一呈現要求」與擴大「圖文健康警示」面積至 80% 等措施損害其投資的利益，主張其具有商業價值之商標，因前開規定限制在所販售的商品上使用，而有損其無形資產的投資利益，故請求仲裁庭命令地主國停止採行此等措施，並賠償因此所致之投資損害。兩案業經仲裁庭審理分別於 2015 年 12 月 (Philip Morris v. Australia) 與 2016 年 7 月 (Philip Morris v. Uruguay) 作出仲裁判斷，前者作出欠缺管轄權駁回原告控訴之判斷；而後者作出原告控訴無理由敗訴之判斷。

本文試圖從公共健康的觀點探討國際菸草投資爭端案件之意義與影響。首先，本文將扼要說明跨國菸草公司企圖透過投資人與地主國爭端解決機制，挑戰並影響各國採取有效的菸草控制政策之背景。其次，針對國際投資爭端中有關菸草控制措施之近期案例的背景事實、系爭措施、主要爭點及仲裁判斷之理由等進

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行分析，另針對投資保障實體義務之法律要件與認定標準，從地主國規制權的角度探討仲裁庭所持見解，例如：間接徵收、公平與公正待遇、傘狀條款等合致性爭議，此外，本文將著重探討系爭菸品包裝規範所涉及投資商標權使用之爭議問題，並基於仲裁案件之探討，評析此等仲裁判斷所彰顯的重要意涵及可能影響。最後則為本文之結論。

Abstract

Scientific evidence shows that smoking has serious harm to human health. The World Health Organization (WHO), through the conclusion of the Framework Convention on Tobacco Control, has prompted countries to adopt effective tobacco control measures to prevent the further spread of tobacco epidemics. Among the many non-price measures controlling the demand of tobacco, strict restrictions on cigarette packaging and brand marketing are considered to be effective means of preventing the youth and first-time smokers from smoking. In particular, with current trend of prohibiting tobacco advertising and sponsorship by state legislators, the tobacco industry is dependent on cigarette packaging and brand design to attract consumers to buy cigarettes. Therefore, the adoption of plain packaging or pictorial health warning measures with the effect of restricting the use of trademarks, will further limit the tobacco industry to engage in marketing activities through cigarette packaging. To this end, transnational tobacco companies actively take legal challenges against countries implemented tobacco packaging measures through various forums such as domestic lobbying, judicial proceedings or investor-state, even WTO dispute settlement proceedings.

Among them, the Philip Morris v. Uruguay and Philip Morris v. Australia are two of the high-profile cases in recent time. The multinational tobacco company, Philip Morris International, challenge the Uruguay's Single Presentation Requirement and 80% Pictorial Health Warning measures to the International Center for Settlement of Investment Dispute in February 2010, and Australia's Plain Packaging measure to the Permanent Court of Arbitration in June 2011. Philip Morris claimed its commercial value of the trademark had been expropriated, requesting for compensation and even injunctive relief. Arbitral tribunals rendered the awards in December 2015 (Philip Morris v. Australia) and in July 2016 (Philip Morris v. Uruguay). Both tribunals made an award against Philip Morris with different causes, as the lack of jurisdiction with the former and lack of the merit with the latter.

This paper attempts to explore the meaning and impact of international investment disputes associated with tobacco control from the perspective of public

health. First, this article will outline the transnational tobacco companies' attempts to challenge and influence the implementation of effective tobacco control policies through investor-state dispute settlement mechanism. Secondly, according to the recent cases of tobacco control measures in international investment disputes, the author analyzes the background facts, the measures, the main points of the dispute and the reasons for the arbitration judgment, and the legal requirements and identification of the obligations of the investment guarantee entity Standards, from the perspective of the sovereign rights of the landlord to explore the views of the arbitral tribunal, such as: indirect collection, fair and just treatment, umbrella clauses and other co-dispute, in addition, this article will focus on cigarette packaging rules involved in the use of trademark as part of the investment. Finally, based on the examination of arbitration cases, this paper will discuss the important implications and possible impacts of these arbitration award. Finally, the conclusion of this article.

