

從WTO「澳洲—菸品素面包裝案」論必要性與合理性

作為合法政策空間之衡量標準

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摘要

關於菸草貿易的爭端可溯及 1990 年代《關稅暨貿易總協定》(General Agreement on Trade and Tariff, GATT) 的「泰國—菸品案 (Thailand-Restrictions on Importation of and Internal Tax on Cigarettes)」, 世界貿易組織 (World Trade Organization, WTO) 成立後, 菸草控制措施雖亦不乏成為爭端解決之控訴對象, 例如: 「多明尼加共和國—菸品進口與銷售案 (Dominican Republic-Measures Affecting the Importation and Internal Sale of Cigarettes)」、「美國—丁香菸品案 (United States-Measures Affecting the Production and Sale of Clove Cigarettes)」等; 然而, 前開案件均不若「澳洲—菸品素面包裝案 (Australia-Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging)」受到各界廣泛的關注與討論, 蓋此案之核心爭議著實涉及貿易利益與健康價值間之根本衝突, WTO 爭端解決小組如何衡量與決定, 攸關貿易規範如何調和公共健康價值, 以及確保政府採行合法政策空間之重要關鍵問題。本案甫經 WTO 於 2018 年 6 月 28 日公布爭端解決小組裁決報告, 作出有利於澳洲之裁決, 駁回古巴、多明尼加共和國、宏都拉斯及印尼等國所提出的控訴, 肯認菸品素面包裝措施之 WTO 合法性。

對於貿易與其他社會價值之衝突, WTO 貿易規範多以「規則與例外」的方式處理, 如 GATT 第 20 條一般例外條款即是本此意旨所為的規範。然而, 於「澳洲—菸品素面包裝案」中, 因系爭措施涉及菸品包裝之技術性規章及商標使用之限制與保護, 經控訴違反之 WTO 相關協定主要係《技術性貿易障礙協定》(Agreement on Technical Barriers to Trade, 以下簡稱 TBT 協定) 及《與貿易有關之智慧財產權協定》(Agreement of Trade-Related Intellectual Property Rights, 以下簡稱 TRIPS 協定) 下之相關義務, 而此等協定欠缺如 GATT 第 20 條之例外條款作為調和貿易與健康衝突之內在機制。因此, 爭端解決小組如何在解釋與適用各該協定規範之同時, 得以兼顧調和與健康價值並給予政府合法的政策空間, 則為

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本案最值得關注的課題。

由於本案涉及系爭措施是否違反 TBT 協定第 2.2 條造成不必要貿易限制，以及是否違反 TRIPS 協定第 20 條對商標之使用造成不合理的妨礙等義務要求，其中，必要性與合理性兩項原則，除了作為 WTO 協定義務是否違反之法律要件外，更扮演得以積極調和健康價值之折衝功能。因此，本文旨在探討此兩項原則於本案例中，如何透過爭端解決小組之解釋與適用作為政府採取合法政策之衡量標準，以及兩項標準間是否因本案小組之見解，存有內在不一致而有增加原協定所無的權利或義務之情形。

關鍵詞：菸品素面包裝、不必要貿易限制、不合理妨礙、技術性貿易障礙、商標使用、WTO、FCTC

Abstract

The dispute over tobacco trade can be traced back to the case of *Thailand-Restrictions on Importation and Internal Tax on Cigarettes* in 1990 under the era of General Agreement on Trade and Tariff (GATT). Since the establishment of World Trade Organization (WTO) in 1995, tobacco control measures have frequently become the object of complaints brought under the WTO dispute resolution, for example: *Dominican Republic—Import and Sale of Cigarettes*, *United States—Clove Cigarettes*, etc.; however, these cases are not as attentive and contentious as that of *Australia—Tobacco Plain Packaging* widely debated all over the world. The controversy derived from the involvement of fundamental conflicts between free trade and public health, the ultimate issue this Panel would have to decide how to reconcile these two values at stake so that the state could preserve legitimate policy space to regulate for public interests. The report was published by the WTO on June 28, 2018, and the Panel's ruling was made in favor of Australia, rejecting all of the complaints' claims filed by Cuba, Dominican Republic, Honduras and Indonesia, and affirming Australia's compatibility of WTO rules regarding its tobacco plain packaging (TPP) measures.

For the conflict between trade and other social values, WTO trade norms are mostly dealt with such issue through the “rules and exceptions” approach. For example, the general exception clause of Article 20 of GATT is stipulated for this particular purpose. However, in *Australia—Tobacco Plain Packaging* case, given the TPP measure specifically involved with the technical regulations of tobacco packaging and the restrictive use of trademark, in which the claims were brought under the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement of Trade-Related Intellectual Property Rights (TRIPS Agreement), these two Agreements lack the

exception clause similar to Article 20 of the GATT as an intrinsic mechanism for reconciling trade and health conflicts. Therefore, it will fully rely on the Panel's function to reconcile the potential conflicts through interpretative methods while applying to the substantive rules under TBT and TRIPS Agreements challenged by the complaints.

How the line could be drawn by the Panel depends on the interpretation and application of the necessity test under Article 2.2 of TBT Agreement and the rationality test under Article 20 of TRIPS Agreement respectively, which requires the TPP measures shall not be adopted to cause more trade restrictiveness than necessary to achieve policy goals, and unjustifiably encumber the use of trademark. These two tests serve not only positive trade obligations for Member to fulfill but also a set of balancing standards to accommodate other societal values. Therefore, this paper aims to explore these two legal tests to see if a clearer line could be drawn and any differences between the two tests from the Panel's report. This paper finds that the Panel's report does not provide clear standard for the rationality test despite its ruling in favor of tobacco control. A case-by-case review may still be required as this ruling does not provide sufficient guidance for the state's public interest regulations in the future.

Keywords: Tobacco Plain Packaging, unnecessary obstacles to trade, unjustifiable encumbrance, technical barriers to trade, trademark use, WTO, FCTC