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The Deafening Silence of the Anti-ISDS Groups After the Philip Morris Decision

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On 17 December 2015, the website of the Permanent Court of Arbitration (PCA) announced that the Arbitral Tribunal in the *Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia* case has issued an Award on Jurisdiction and Admissibility of the case.

While the award has not yet been published – pending the redaction of confidential information – it has been reported that the Arbitral Tribunal declined its jurisdiction in this case because it considered Australia's objections that the Claimant's investment was not properly admitted in Australia, that the dispute had arisen before the Claimant obtained the protection of the Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments (BIT), and that, in any event, the commencement of the arbitration shortly after the Claimant's restructuring constituted an abuse of rights.

The proceedings commenced on 22 June 2011 and were conducted under the UNCITRAL Arbitration Rules of 2010 pursuant to the Hong Kong-Australia BIT. It took the Arbitral Tribunal, which consisted of highly experienced arbitrators Prof. Karl-Heinz Böckstiegel (Presiding Arbitrator), Prof. Gabrielle Kaufmann-Kohler, and Prof. Donald M. McRae, four and a half years to consider its jurisdiction and the admissibility of the case.

Ever since the case was initiated by Philip Morris back in 2011 it was taken up by the anti-ISDS groups and turned into a horror scenario of "big multinationals being able to prevent democratically elected governments of taking measures to protect the health of their citizens". This scenario has been relentlessly repeated and enlarged into a general attack against the 50 year old ISDS system as a whole. As EFILA has analysed previously, among many criticisms, it was claimed that arbitration is pro-investor, that arbitrators often have conflicts of interests, that ISDS results in "regulatory chill" and eventually undermines democracy.

It must be – sadly – admitted that this anti-ISDS campaign has been successful in alienating the general public, the media, and politicians from the virtues of investment protection and arbitration, which until recently were generally considered to be highly important – not only for strengthening trade relations, increasing FDI but also for improving the Rule of Law in the signatory states of the BITs.

The greatest visible success of this campaign has certainly been the fact that any ISDS claims regarding tobacco measures have been fully carved out in the recently signed TTP agreement.

However, what is most striking is the fact that after it became publicly known that the *Philip Morris* case has been thrown out (it should be noted that Philip Morris has also initiated ICSID proceeding against Uruguay, which is still pending), the anti-ISDS groups have been completely silent.

In light of the hysteria that was created, all what remains is deafening silence, which is quite surprising.

Why is that so, one wonders? Is it because the outcome of the case does not matter for the anti-ISDS groups anyway? If the outcome is considered "correct", this would prove – yet again – that ISDS does not cause "regulatory chill", an argument often voiced by anti-ISDS groups. One would expect that the critics of ISDS would hail this outcome as a decision, which preserved the policy space of Governments to adopt measures to protect public policy aims.

Moreover, if indeed the Arbitral Tribunal dismissed the case because the restructuring of Philip Morris into Hong Kong apparently took place after the dispute arose, this decision proves that Arbitral Tribunals are mindful of "frivolous treaty shopping" and effectively prevent such kind of Claimants to pursue their claims.

In short, anti-ISDS groups – as all as Governments – would have every reason to loudly applaud this decision and thus support ISDS, but there is only deafening silence.

But let's focus on one particular issue, which is time (and costs) associated with this award and compare the situation with the parallel cases that have been brought by several states against Australia within the context of the WTO. Indeed, the situation in the WTO is particularly relevant now since the European Commission's proposal for a so-called "investment court system (ICS)" is largely inspired by and build upon the WTO Dispute Settlement Understanding (DSU).

Right after the press release was published, some well-known academics complained that it was utterly unacceptable that the Philip Morris Arbitral Tribunal took four and a half years only to come to the conclusion that it does not have jurisdiction and that the case is inadmissible, whereas they would take only 15 minutes to figure that out and that first-year investment arbitration students would have come to that conclusion anyway (or otherwise would be failed).

It is these kinds of lengthy procedures which push up the costs for arbitration, and which the supporters of the ICS proposal argue would be avoided.

Well, let's have a look at the current status of the plain packaging cases in the WTO in order to assess if the WTO dispute settlement system is indeed working quicker. According to the WTO website, the following 5 disputes are currently pending against Australia regarding its tobacco plain packaging measures:

- DS434 Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant: Ukraine) 13 March 2012,
- DS435 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant: Honduras) 4 April 2012,
- DS441 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging

(Complainant: Dominican Republic) 18 July 2012,
- DS458 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant: Cuba) 3 May 2013,
- DS467 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant: Indonesia) 20 September 2013.

Meanwhile, it should be noted that on 2 June 2015, the dispute initiated by Ukraine has been suspended upon its request. This leaves 4 disputes pending, which – as indicated above – were initiated in 2012 and 2013, i.e., more than three and a half years ago.

Moreover, according to the WTO website, the "Chair of the panel in the dispute initiated by Honduras informed the DSB that the panel expects to issue its final report to the parties not before the first half of 2016 in accordance with the timetable adopted by the panel on 17 June 2014 on the basis of a draft timetable proposed by the parties."

Accordingly, the panel report will certainly be issued at least 4 years after the initiation of the proceedings. If that report is appealed, Article 17(5) DSU applies, which prescribes that

> "As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. […] When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days."

Thus, additional 2-3 months must be added (and probably some more) to push the total time line to at least 4 years.

Whereas it is of course not possible to predict how much time the Arbitral Tribunal would have needed to decide the merits in the *Philip Morris* case, it is obvious that the plain packaging disputes before the WTO are not considerably faster. The dispute settlement proceedings as envisaged in the ICS would – in the most optimal situation – last 27 months (presuming the Tribunal of First Instance decides the case within the envisaged 18 months and the appeal procedure is concluded within 9 months). So, the ICS procedure could be faster, but still would last around 3 years, which is not a great deal faster.

Aside from the time issue, another interesting question is: what will be the reaction of the anti-ISDS groups, media and Governments involved, if the WTO panels would decide against Australia? Or even more interestingly, if some of the panels in the various WTO plain packaging disputes would come to conflicting conclusions? Would the WTO Appellate Body "correct" such panel reports? And what would happen if the Appellate Body would find that Australia breached its WTO law obligations? Will there be a similar outcry against the WTO – failing to preserve the policy space of states – as has been the cases against ISDS in the *Philip Morris* case?

Finally, let me draw your attention to another very recent example of surprising deafening silence, namely, the decision of the US Supreme Court to – temporarily – block Obama's climate

commitments he accepted in the Paris Climate deal of last December. Since the US is one the most important CO2 polluters in the world, the decision of the US Supreme Court significantly impacts the effective implementation of the Paris Climate deal. Or to translate it into the language of the anti-ISDS groups: "this decision significantly restricts the policy space of US President Obama to protect the environment."

But again there has been no outcry from the media or the NGOs. Is it because it is the US Supreme Court, which rendered this decision – a permanent court with publicly paid judges – which makes the difference? Is it because that decision is simply more "acceptable" to the public than an award by an ad-hoc Arbitral Tribunal?

Who knows?

But what has become clear over the past years – and which was also the conclusion at the recently held EFILA Annual Conference – is that the debate on ISDS is not a legal one (and never has been); it is also not a debate on investment policy, but simply has turned into politics, where rationality, sense, and sensibility are simply absent. This eventually may explain the deafening silence after the *Philip Morris* decision.

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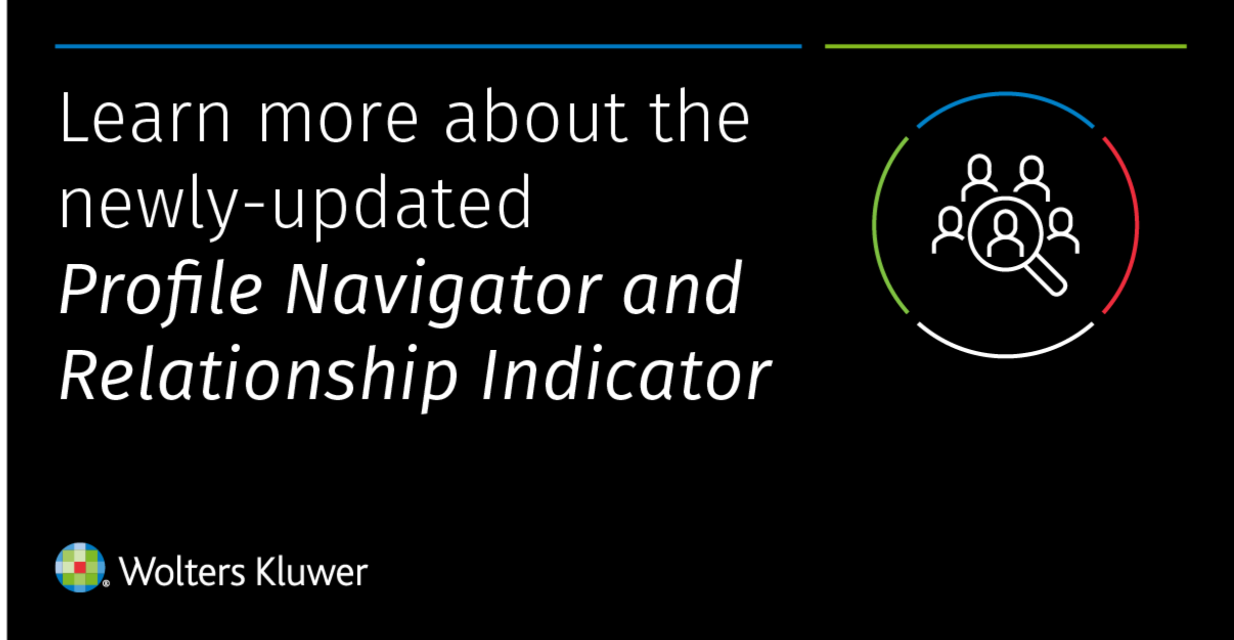

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