After Philip Morris II: The “regulatory chill” argument failed – yet again

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Nikos Lavranos (NL-Investmentconsulting)

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The two *Philip Morris* cases involving restrictions on the presentation and sale of cigarettes through plain packaging measures has been used by anti-ISDS groups as the prime example for creating the myth that treaty arbitration causes states not to adopt certain measures for the protection of public goods, i.e., results in so-called “regulatory chill”.

This myth has been blown up to proportions equal only to ancient Greek myths. Indeed, even the TPP negotiators have become believers of this myth – so much that they have excluded tobacco from the scope of the ISDS rules within TTP.

However, as I noted in a previous blogpost, the anti-ISDS groups have been extremely silent when the first *Philip Morris* case against Australia was kicked out at the jurisdictional phase because, in the view of the arbitral tribunal, the restructuring of the *Philip Morris* subsidiary into Hong Kong entity occurred only after the dispute arose. Although the tribunal did not deal with the merits of the case, Australia succeeded and will most likely recover its legal costs. In other words, the Australian plain packaging legislation remained unaffected in force. Thus, one would have expected the anti-ISDS groups to loudly celebrate this outcome and hail the ISDS system as working properly to protect public interest. When I asked why there was only deafening silence, I was told that this had to do with fact that there was no discussion on the merits, and since Philip Morris surely would have won on the merits – as the anti-ISDS groups always maintain that the ISDS system is rigged and pro-investor biased – there was no reason for joy.

However, recently, in another ISDS arbitration also involving plain packaging measures, brought by *Philip Morris* against Uruguay, the arbitral tribunal did render a decision on the merits. In this *Philip Morris* II award, the majority tribunal again sided with the state, so the challenged legislation remains in place and the state will most likely recover its legal costs. But again there were no bursts of joy and happiness in the anti-ISDS camp.

The silence of anti-ISDS groups regarding the outcome in both *Philip Morris* disputes is remarkable and in stark contrast with the mythical proportions attributed to these cases as a perfect real life example of “regulatory chill”. This effect is enabled and facilitated by the possibility of foreign investors to bring claims against states, which presumable intend to protect public goods and which are fearful of damages they may have to pay to investors when ordered by rigged, private and secret tribunals.

But as it turned out again, the “regulatory chill” argument simply remains unconvincing and failed yet

again. The weakness of the "regulatory chill" argument has also been confirmed by the in-depth analysis of EFILA.

The truth is that both arbitral tribunals did a decent job: they considered and weighted all arguments, allowed *amicus curiae* briefs and extensively discussed relevant case law. In other words, they did what every arbitral tribunal normally does, namely, they delivered justice. Nevertheless, I believe that the minority views in both cases had more merit. In particular, the *Philip Morris II* arbitral tribunal gave practically unlimited deference to state measures, which in my view went beyond what is necessary.

But be that as it may, the bottom line is that the whole hysteria surrounding the alleged undermining of policy exemplified by the *Philip Morris* cases was clearly exaggerated, and ultimately, wrong.

Of course, one can understand that the anti-ISDS critics would not suddenly stand up in defense of the ISDS system, but they should, at the very least, explicitly acknowledge that their "regulatory chill" argument has lost one of its most prominent cases – the other one in their eyes being the *Vattenfall* case, which still awaits adjudication.

But, more importantly, as Gary Born, one of the most respected arbitrators in the world and regular contributor to this blog, recently rightly argued in an interview with GAR, the international arbitration community must defend the virtues and benefits of international arbitration more vigorously.

He drew a comparison with the Seven Kingdoms in the "Game of Thrones" series, saying that international arbitration has enjoyed "a long golden summer when everything went right" but "winter is coming". More specifically, Born is quoted as saying that outside the confines of the kingdoms, "an army of the undead" wants to tear down "everything that has so harmoniously been created" in the belief that "the state and state-selected decision makers are the only real way to properly resolve disputes."

He continued by arguing that the criticisms of investment arbitration are not just wrong but "wildly wrong" and those who attack the system "would do well to take a step back and think about what a world would look like without neutral and independent application of legal rules because that is the direction that their criticisms take us."

Accordingly, the question arises: what can we do to avoid the victory of "the armies of the undead"? For the answer, Born looked not to the "Game of Thones" but another popular US television series, "House of Cards", and Frank Underwood's rule for life: "hunt or be hunted".

Born is quoted as saying:

"I think we should stop being hunted and always defending international arbitration. "We defend it against not being transparent […] against being pro-investor […] against being inconsistent".

Instead, Gary Born called upon the arbitration community to speak more robustly about the historic role of international arbitration in safeguarding the rule of international law and the protection of fundamental civil rights. And, in doing so, it may need to describe forthrightly the historical roots of current critics of international law and international arbitration.

He finished by wishing us all "Happy hunting".