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The Great Battle of Intellectual Property versus State Sovereignty: Is Philip Morris v Uruguay a Good Referee? (Part II)

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In the first part of this article, we discussed the problems of balancing an investor's intellectual property rights with the sovereign right of a State. Now, we look at how *Philip Morris v Uruguay* has added to the debate.

In 2010 Philip Morris challenged two measures adopted by the government of Uruguay: (1) a "single presentation requirement" in which brands were allowed to sell products with only one packaging style therefore limiting products to one variant and (2) the "80/80 Regulation" which called for the increase in size of the graphic health warnings on cigarette packages from 50% to 80%. Uruguay defended these measures on the basis that they were adopted for the sole purpose of protecting public health, the measures were within the scope of Uruguay's sovereign powers and applied in a non-discriminatory manner to all tobacco companies. While the *root* of the FET standard was not contested, the *content* and *interpretation* of the standard was and remains today up for debate.[1)]

In an award dated 8 July 2016, all of Philip Morris' claims were rejected and the Claimants were required to pay $7 million to cover arbitration costs. The Tribunal unanimously rejected the claim of expropriation, emphasizing that this was a *valid* exercise by Uruguay of its police powers to protect public health[2)] and, by majority, rejected Philip Morris' other claims.

Is Philip Morris a Good Precedent?

As the President of Uruguay, Tabaré Vázquez, said in the midst of the Philip Morris dispute: "It is not acceptable to prioritize commercial considerations over the fundamental right to health and life…"[3)] Even though Philip Morris tried to differentiate its particular case and claim that their suit had nothing to do with questioning "Uruguay's authority to protect public health," the implications of this decision is a milestone in the battle between investor rights and public policy.

As discussed in the previous post, arbitration has been criticized as a method for large, wealthy companies to threaten small countries into conceding or settling in

order to avoid the risk of an avalanche of expense and even potential bankruptcy. *Philip Morris* shows that it is not a given that wealthy multinational corporations can bully smaller countries.[4] The original intent of developing the field of ISDS was to help developing countries attract foreign capital. Those same developing countries, instead, fear that this system will either bankrupt them or undermine their sovereignty.[5] For example, in Guatemala, the risk of a suit appeared to have weighed so heavily on the government that they decided not to challenge a controversial gold mine despite citizen protests and a recommendation of closure from the Inter-American Commission on Human Rights.[6]

The Tribunal in *Philip Morris* acknowledge that it is "common ground" that "the requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances."[7] The Tribunal further went on to acknowledge that "police powers" necessarily entail a State's ability to enact measures to protect public welfare as long as they are *bona fide* and non-discriminatory.[8] And in fact, in Born's dissent, he reiterated a multitude of times that he is in no way questioning the host State's ability to adopt legislative measures to protect health and safety.[9] Yet even though it seems to be universally agreed and recognized that a State has a right to regulate in the interests of its citizens, we continue to see arbitration proceedings brought and States failing to enact helpful regulations and measures for fear of being brought through arbitral proceedings.

So what does Philip Morris mean for State rights?

The Tribunal acknowledge the supremacy and profound leeway to be granted to the State in regulation. While this is a positive reinforcement of a State's right to regulate, this does not acknowledge the role that tribunals have increasingly been playing, for better or for worse, in balancing investor rights, intellectual property, and state sovereignty. Governments cannot perform this balancing act alone while the FET standard is still obscure. Tribunals do have a role in the balance; this role is in defining the FET standard.

The core of the problem is in the fact that FET is not fully explored and circumscribed. "The exact contours of FET protection are amorphous and can depend on the language of the relevant IIA, as well as the approach taken by the presiding arbitral tribunal"[10] with this "deliberate vagueness" being used as a catch-all claim.[11] The European Commission has stated that because FET is not clearly defined, "tribunals have had significant leeway in interpreting this in a manner that has been seen as giving too many or too few rights to investors."[12] There needs to be more consistency in the interpretations and applications of the FET claim.

Interpretations of the FET standard range across the whole spectrum. Some tribunals apply the FET standard broadly[13] while some tribunals[14] take a narrower approach. With no hierarchical system of precedent in arbitration, these competing awards leave neither guidance nor hope of consistency or stability; ironically, the same complaint

brought by a claimant arguing breach of FET.

Instead of taking this opportunity to try to better circumscribe the FET standard, the Tribunal left the door open. The Tribunal rejected reading the BIT as reflecting the minimum treatment standard of international law. Such an application would have provided a better guideline for analyzing the standard. If the Tribunal was to be dissuaded from applying the international law standard to FET cases, it should have at least attempted to delineate the proper standard rather than conclude that each case of FET depends on the particular circumstances and listing out the various ways different Tribunals have attempted to define the standard. The end result is a multitude of tribunals each trying to give a more definite meaning of breaches of the FET standard and ultimately creating a still confusedly applied standard accompanied by a random list of potentially breaching acts from particular circumstances.

While the Tribunal ultimately reached the same conclusion, this methodology does not solve the root of the problem that has been plaguing the ISDS system. The evolving nature of what is “fair” and “equitable” adds another layer of complications. Ideas of fairness and equality do indeed change every generation, even every day, but that does not mean we cannot have a circumscribable standard; it just means the created definition needs to account for flexibility.

Conclusion

The battle of rights has only just begun. State sovereignty and the right for a State to legislate and regulate in the public interest is a deeply engrained and important concept spanning many millennia. The technological revolution and the increasing emphasis on globalization has given intellectual property rights not only a new importance in and of itself, but also entangled IPRs with other fundamental aspects of human society. When the two realms clash, which should prevail?

Investment arbitration, while far from perfect, provides the most suitable forum for resolving these types of disputes. However, the vagueness of standards of review and the lack of a system of precedence has created a climate in which tribunals are seen to emphasize the rights of investors over a State’s public interest regulatory scheme. Private arbitral tribunals cannot be substituting their own judgments on policy issues in place of those of the State.

While *Philip Morris* is a significant step in equilibrating the balance, it is not sufficient. The root of the issue is the vagueness of the fair and equitable treatment standard and the consequent conflicting tribunal decisions. Rather than attempt to delineate the FET standard, the Tribunal in *Philip Morris* left the gap open. There needs to be more concrete guidelines on the FET, particularly in an intellectual property context so States are not threatened and discouraged.

Intellectual property is not an absolute right and must be put into perspective and harmonized with other rights.[15)] In the same vein, even though investment law is aimed at providing investors with certain protections, this does not operate in a vacuum and must work with other aspects of international law. An investor losing millions of dollars is not greater than or equivalent to loss of life due to lack of access

to pharmaceuticals or mass tobacco consumption or irreversible environmental damage. Each day new medical and technological discoveries are made which changes our perceptions of the status quo and the legal system needs to account for this and allow for flexibility and adaptation.[16)]

Perhaps now that the *Philip Morris* Tribunal has published its award, countries will no longer feel this chill however, just because the pressure may be eased, does not mean the problem is fully resolved. Instead of relying on various interpretations and various aspects of international law the next tribunal needs demonstrate the balance of intellectual property rights and Sovereign rights by circumscribing the limits of FET claims.

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References

↑1 *Philip Morris* ¶ 312.

↑2 Finding that the measures were a "valid exercise of the State's police powers, with the consequence of defeating the claim for expropriation" *Philip Morris*, ¶ 287.

↑3 Benedict Mander, *Uruguay Defeats Philip Morris Test Case Lawsuit*, FINANCIAL TIMES (Jul. 8, 2016)

↑4 Todd Weiler, *Philip Morris vs. Uruguay: An Analysis of Tobacco Control Measures in the Context of International Investment Law*, PHYSICIANS FOR A SMOKE FREE CANADA (Jul. 28, 2010), at 36 said that "the claim is nothing more than the cynical attempt by a wealthy multinational corporation to make an example of a small country with limited resources to defend against a well-funded international legal action…"

↑5 Claire Provost & Matt Kennard, *The Obscure Legal System that Lets Corporations Sue Countries*, THE GUARDIAN, (Jun. 10, 2015)

↑6 id.

↑7 *Philip Morris*, ¶ 422 citing *Parkerings v Lithuania*, ¶¶ 327-328; *BG Group Plc v the Republic of Argentina*, UNCITRAL, Award (Dec. 24, 2007), ¶¶ 292-310; *Plama Consortium Ltd v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008), ¶ 219; *Continental Casualty Co v Argentine Republic*, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008), ¶¶ 258-261; *EDF (Services) Ltd v Romania*, ICSID Case No. ARB/-5/13, (Oct. 8, 2009), ¶ 219; *AES*, ¶¶ 9.3.27-9.3.35; *Total S.A. v the Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, (Dec. 27, 2010), ¶¶ 123 and 164; *Sergei Paushok, CJSC Golden East Company, and CJSC Vostokneftegaz Co v the Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, (Apr. 28, 2011), ¶ 302; *Impregilo*, ¶¶ 290-291; and *El Paso*, ¶¶ 344-352 and 365-367.

↑8 *Philip Morris*, ¶ 305.

↑9 Born Dissent, for example ¶¶ 86, 89, 90, 140, 141, and 197.

↑10 PETER CHROCZIEL ET AL (EDS), *INTERNATIONAL ARBITRATION OF INTELLECTUAL PROPERTY DISPUTES: A PRACTITIONER'S GUIDE*, 153 (2017).

↑11 Valentina S. Vadi, *Towards a New Dialectics: Pharmaceutical Patents, Public Health and Foreign Direct Investments*, 5 NYU J. INTELL. PROP. & ENT. L. 113, 166 (2015). See also F.A. Mann, *British Treaties for the Promotion and Protection of Investment*, 52 BRITISH Y.B. INT'L. L. 241, 243 (1981) that FET claims are so broad they cover "all conceivable cases."

↑12 European Commission, Fact Sheet – Investment Protection and Investor-to-State Dispute Settlement in EU Agreements, 2 (Nov. 2013).

↑13 International Thunderbird Gaming Corporation v the United Mexican States, UNCITRAL, Award, (Jan. 26, 2006).

↑14 *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, (Apr. 4, 2016).

↑15 Valentina S Vadi, *'Towards a New Dialectics: Pharmaceutical Patents, Public Health and Foreign Direct Investments'* (2015) 5 NYU J Intell Prop & Ent L 113, 192–93.

↑16 Rochelle Dreyfuss and Susy Frankel, *'From Incentive to Commodity to Asset: How International Law is Reconceptualizing Intellectual Property'* (2015) 36 Michigan J Int'l L 557, 587. ("Science is not static, and neither can be its interface with the legal system. As new technologies develop and as the impact of old technologies are better understood, countries must have some freedom to adapt both IP legislation and impacted regulatory regimes").

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