

PCA Case No. 2012-12

**IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE AGREEMENT
BETWEEN THE GOVERNMENT OF HONG KONG AND THE GOVERNMENT OF
AUSTRALIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS,
SIGNED ON 15 SEPTEMBER 1993 (THE “TREATY”)**

-and-

**THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW RULES OF
ARBITRATION AS REVISED IN 2010 (“UNCITRAL RULES”)**

-between-

PHILIP MORRIS ASIA LIMITED

(“Claimant”)

-and-

THE COMMONWEALTH OF AUSTRALIA

(“Respondent”, and together with the Claimant, the “Parties”)

PROCEDURAL ORDER NO. 16

Regarding the Further Procedure After the Hearing on Preliminary Objections

23 February 2015

Arbitral Tribunal

Professor Karl-Heinz Böckstiegel (President)
Professor Gabrielle Kaufmann-Kohler
Professor Donald M. McRae

Registry

Permanent Court of Arbitration

WHEREAS, a hearing was held from 16 to 19 February 2015, in the course of which two preliminary objections that the Tribunal had found suitable for determination in an initial phase of the proceedings were addressed (“Hearing”);

WHEREAS, at the Hearing, the Tribunal consulted the Parties in respect of the procedure to be adopted after the Hearing, notably for the exchange of post-hearing briefs and the correction of the transcript of the Hearing;

WHEREAS, on the last day of the hearing, the Parties informed the Tribunal about certain time periods on which they had agreed in this regard;

TAKING INTO ACCOUNT THE DISCUSSION, AND THE AGREEMENT REACHED, WITH THE PARTIES AT THE HEARING, THE TRIBUNAL ORDERS AS FOLLOWS:

1. Post-Hearing Briefs

1.1. **On 6 April 2015**, the Parties shall simultaneously submit **Post-Hearing Briefs** of up to 50 pages (Times New Roman, font size 12 pt, 1.5 line spacing) containing the following:

1.1.1. The relief sought by the Parties regarding the bifurcated preliminary objections;

1.1.2. Any comments that the Parties may have regarding the testimony given and issues raised at the Hearing;

1.1.3. **Separate sections** responding to the following questions of the Tribunal (which are posed without prejudice to their relevance for the final conclusions of the Tribunal), including references to the written submissions and oral pleadings that address the respective issue and to the exhibits that a Party considers relevant for the respective issue:

- a) Which Party bears the burden of proof for factual allegations relevant to the preliminary objections?
- b) What are, in summary, the Parties’ positions as to the test for control within the meaning of Article 1(e) of the Treaty, including the meaning and relevance of “substantial interest”?
- c) What, in summary, is the required content of a notification pursuant to section 26 of FATA?
- d) Under what circumstances, in summary, could such a notification be regarded as misleading?
- e) What, in summary, is the relevance in this regard of the fact that information that is not provided is within the knowledge of the recipient? In this respect, whose knowledge is relevant?
- f) What, in summary, are the Parties’ positions as to the validity or invalidity of the no-objection letter of 11 February 2011, and as to the remedies available under Australian law in this respect, taking into account Section 38 of FATA?
- g) What, in summary, are the Parties’ positions in respect of the reasons for the restructuring, taking particular account of the oral testimony at the hearing?

- 1.2. **On 4 May 2015**, the Parties shall simultaneously submit a **second round of Post-Hearing Briefs** of up to 25 pages in the same format, but only in rebuttal to the first-round Post-Hearing Brief of the other side.
- 1.3. No new documents may be submitted with the Post-Hearing Briefs. However, in exceptional circumstances and no later than two weeks before the due date of the Post-Hearing Brief, a Party may submit a reasoned request for leave to submit a new document, without at this stage attaching the document. In such a case, the other Party may submit comments on the request within three days after receiving the request.
- 1.4. The Post-Hearing Briefs shall also be submitted in the form of eBriefs, in accordance with the procedure previously set out in consultation with the Parties.

2. Corrections to the Transcript of the Hearing

- 2.1 **By 16 March 2015**, the Parties shall consult with each other in respect of any corrections to the Transcript of the Hearing that they wish to make and submit such corrections to the court reporter. The court reporter shall prepare a corrected version of the transcript on that basis at her early convenience.
- 2.2 In the event that a Party contests a particular correction that is proposed by the other Party, the court reporter shall in this respect verify the accuracy of the transcript on the basis of the audio recording.

Date: 23 February 2015

On behalf of the Arbitral Tribunal:



Karl-Heinz Böckstiegel
(President of Tribunal)