



PCA PRESS RELEASE

Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia

THE HAGUE, 16 MAY 2016

Tribunal Publishes Redacted Version of Award on Jurisdiction and Admissibility

In an arbitration between Philip Morris Asia Limited and The Commonwealth of Australia, the tribunal issued an Award on Jurisdiction and Admissibility on 17 December 2015. A redacted version of that Award has now been published on the Case Repository of the Permanent Court of Arbitration (“PCA”).

The arbitration concerns the effects on the Claimant’s investments in Australia of the enactment and enforcement by Australia of the Tobacco Plain Packaging Act 2011 and the implementing regulations known as the Tobacco Plain Packaging Regulations 2011. The tribunal was constituted under the 1993 Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments. The proceedings are conducted in accordance with the 2010 arbitration rules of the United Nations Conference on International Trade Law (“UNCITRAL”).

In Procedural Order No. 8, the tribunal had ordered the bifurcation of the proceedings such that certain preliminary objections by Australia would be dealt with in a first phase:

- Australia’s objection that the claimant’s investment was not legally admitted in Australia;
- Australia’s objection 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; and
- Australia’s objection that, in any event, the commencement of the arbitration shortly after the claimant’s restructuring constituted an abuse of rights.

Following an exchange of written pleadings in respect of these preliminary objections, a hearing was held in Singapore in February 2015. In April and May 2015, the parties filed two rounds of post-hearing briefs. In its Award on Jurisdiction and Liability, the tribunal accordingly addressed only the three bifurcated objections. While the tribunal rejected Australia’s first two preliminary objections, it upheld the third objection, concluding:

“the initiation of this arbitration constitutes an abuse of rights, as the corporate restructuring by which the Claimant acquired the Australian subsidiaries occurred at a time when there was a reasonable prospect that the dispute would materialise and as it was carried out for the principal, if not sole, purpose of gaining Treaty protection. Accordingly, the claims raised in this arbitration are inadmissible and the Tribunal is precluded from exercising jurisdiction over this dispute.”

Pursuant to Procedural Order No. 5, each party had an opportunity to identify any confidential information contained in the Award that it proposed to redact before the publication of the Award.

Various exchanges between the parties occurred to narrow their differences in respect of certain redactions. In Procedural Order No. 17, the tribunal determined which of the redactions proposed by the parties would be permitted to protect confidential information.

The tribunal in this arbitration is composed of Professor Karl-Heinz Böckstiegel (president), Professor Gabrielle Kaufmann-Kohler and Professor Donald McRae. The PCA acts as registry in the arbitration.

Further information about the case, including the tribunal's procedural orders, are available on the PCA Case Repository (<http://www.pcacases.com/web/view/5>).

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