PHILIP MORRIS ORDERED TO PAY AUSTRALIA FOR COSTS OF DEFENDING TOBACCO PLAIN PACKAGING INVESTMENT CHALLENGE

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On 13 July 2017, the tribunal constituted to hear Philip Morris Asia Ltd's (PMA) investment treaty challenge against Australia's tobacco plain packaging laws ordered PMA to reimburse Australia for costs involved in defending the case.

The dispute, brought by PMA under the 1993 Hong Kong – Australia bilateral investment treaty, was decided in favour of Australia in 2015. In its Award on Jurisdiction and Admissibility, released in May 2016, the tribunal concluded that it was precluded from exercising jurisdiction over the dispute. It found that:

> *'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.'*

The Tribunal's Final Award Regarding Costs considers and dismisses PMA's argument that it should not pay Australia and the Tribunal's costs.

'Loser pays' rule should apply

The default rule under the relevant procedural rules is that the 'loser' pays the costs of the dispute, including the legal costs of the other party and the Tribunal's expenses. The Tribunal may decide to otherwise apportion the costs if it is 'reasonable' to do so.

PMA had argued that it was "not correct or appropriate to label one party the 'winner' and one party the 'loser'", because PMA had prevailed on two arguments and lost on two arguments.

The Tribunal disagreed, finding that the 'loser' of an investment dispute was the party that had been unsuccessful, assessed in light of the overall outcome of the case. Here, PMA's claim had been dismissed and it had been found to have abused its rights. The Tribunal emphasised that 'a respondent State that faces an abuse of right should, in principle, not be burdened with the costs of defending itself against such a claim.'

The Tribunal reduced the amount that would otherwise have been payable by PMA by a percentage that reflected the time and cost spent on one jurisdictional objection pursued by Australia that was ultimately not successful.

Australia's costs claim was reasonable

The Tribunal found that Australia had claimed a reasonable amount of costs, and rejected PMA's argument that the figure Australia was claiming was too high. The Tribunal took into account the complexity and length of the dispute, and the fact that it was Australia's first investment arbitration, which meant that Australia had had to hire external counsel and develop in-house capacity and procedures from scratch.

The Tribunal also emphasised that Australia's expenditure was appropriate given the significance of the case:

> *"In making this assessment, the Tribunal also takes into consideration the significant stakes involved in this dispute in respect of Australia's economic, legal and political framework, and in particular the relevance of the outcome in respect of Australia's policies in matters of public health."*

The Tribunal issued a redacted costs award ordering PMA to pay an undisclosed sum to Australia, and awarding interest of 1.5% (the Reserve Bank of Australia's cash rate) on the total sum.

Status of disputes

The decision brings the investment proceedings against Australia’s plain packaging laws, which were initiated in 2011, to a close. A constitutional challenge was dismissed in 2012, and a WTO panel decision is still pending.