

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”)**

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**Final Award  
Regarding Costs**

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**ARBITRAL TRIBUNAL**

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

**REGISTRY**

Dr. Dirk Pulkowski  
Permanent Court of Arbitration

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## LIST OF DEFINED TERMS

<b>Australia</b>	The Commonwealth of Australia
<b>Abuse Objection</b>	Respondent’s third preliminary objection to the Tribunal’s jurisdiction
<b>Admission Objection</b>	Respondent’s first preliminary objection to the Tribunal’s jurisdiction
<b>AGD</b>	Attorney-General’s Department
<b>AGS</b>	Australian Government Solicitor
<b>BIT</b>	Bilateral Investment Treaty (also referred to as the “Treaty”)
<b>Claimant</b>	Philip Morris Asia Limited, a limited liability company incorporated in accordance with the laws of Hong Kong
<b>FIRB</b>	Australia’s Foreign Investment Review Board
<b>OIL</b>	Office of International Law
<b>Parties</b>	The Claimant, PM Asia, and the Respondent, Australia
<b>Plain Packaging Measures</b>	The measures enacted by the Tobacco Plain Packaging Act 2011 and the Tobacco Plain Packaging Regulations 2011
<b>PM Asia</b>	Philip Morris Asia Limited, a limited liability company incorporated in accordance with the laws of Hong Kong
<b>Respondent</b>	The Commonwealth of Australia
<b>Timing Objection</b>	Respondent’s second preliminary objection to the Tribunal’s jurisdiction
<b>TPP Act</b>	Tobacco Plain Packaging Act 2011 (Act No. 148 of 2011)
<b>TPP Regulations</b>	Tobacco Plain Packaging Regulations 2011 (Selective Legislative Instrument 2011 No. 263)
<b>Treaty</b>	The Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of

Investments as signed on 15 September 1993  
(also referred to as the “BIT”)

**1976 Rules**

The United Nations Commission on  
International Trade Law Arbitration Rules  
1976

**2010 Rules**

The United Nations Commission on  
International Trade Law Arbitration Rules, as  
revised in 2010

## I. INTRODUCTION

### A. THE CLAIMANT

1. The claimant in the present arbitration is Philip Morris Asia Limited (“**PM Asia**” or the “**Claimant**”), a limited liability company incorporated under the laws of Hong Kong pursuant to the Hong Kong Companies Ordinance on 8 November 1994,<sup>1</sup> with its registered address at Level 28, Three Pacific Place, 1 Queen’s Road East, Hong Kong.
2. The Claimant is represented in these proceedings by Dr. Stanimir A. Alexandrov, Mr. James Mendenhall, Ms. Marinn Carlson, and Mr. David Roney of Sidley Austin LLP; Mr. Joe Smouha Q.C. and Mr. Salim Moollan Q.C. of Essex Court Chambers; and Mr. Christopher Young of Ninian Stephen Chambers.

### B. THE RESPONDENT

3. The respondent in this arbitration is the Commonwealth of Australia (“**Australia**” or the “**Respondent**”), a sovereign State.
4. The Respondent is represented by Mr. Simon Daley P.S.M., Ms. Catherine Kelso, Mr. Jonathon Hutton, and Ms. Jancis Cunliffe of the Australian Government Solicitor; Mr. Justin T. Gleeson S.C., Solicitor-General of Australia (until 6 November 2016), Mr. Bill Campbell Q.C. of the Attorney-General’s Department; Mr. James Hutton of Eleven Wentworth Chambers; Mr. Samuel Wordsworth Q.C. of Essex Court Chambers; and Professor Chester Brown of 7 Selborne Chambers.

### C. BACKGROUND

5. The present Award is the second and final award in a dispute between PM Asia and Australia (together the “**Parties**”) in respect of the Respondent’s enactment and enforcement of the *Tobacco Plain Packaging Act 2011* (the “**TPP Act**”) and the implementing regulations known as the *Tobacco Plain Packaging Regulations 2011* (the “**TPP Regulations**”) (collectively the “**Plain Packaging Measures**”).
6. By Notice of Arbitration dated 21 November 2011 the Claimant had commenced arbitration in relation to this dispute pursuant to the Agreement between the Government of Hong Kong and

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<sup>1</sup> Claimant’s Notice of Claim, para. 21.



the Government of Australia for the Promotion and Protection of Investments dated 15 September 1993 (the “**Treaty**” or “**BIT**”). On 17 December 2015, the Tribunal issued an **Award on Jurisdiction and Admissibility**, in which it addressed the following objections to the jurisdiction of the Tribunal and to admissibility of claims: (i) the Claimant’s investment was not legally admitted in Australia (“**Admission Objection**”); (ii) the dispute had arisen before the Claimant obtained the protection of the Treaty (“**Timing Objection**”); (iii) in any event, the commencement of the arbitration shortly after the Claimant’s restructuring constituted an abuse of rights (“**Abuse Objection**”). 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.<sup>2</sup>

7. The dispositive part of the Award on Jurisdiction and Admissibility reads as follows:

For the reasons set out above in this Award, the Tribunal unanimously decides, declares, and awards as follows:

- I. The claims raised in this arbitration are inadmissible;
- II. Therefore, the Tribunal is precluded from exercising jurisdiction over this dispute;
- III. Costs are reserved for a final award limited to costs.

8. It is with the question of the costs of arbitration that the Tribunal will deal in the present Final Award.

## **II. PROCEDURAL HISTORY**

9. The Award on Jurisdiction and Admissibility recounts in detail the procedural history of the arbitration from its commencement up until the date of the issuance of that Award. The Tribunal has also issued seventeen procedural orders, each of which sets out the procedural events that are relevant to the particular decision. All of these documents have been published, in accordance with the Tribunal’s Procedural Order No. 5, on the website of the Permanent Court of Arbitration. The Tribunal therefore recalls only key developments since December 2015, when the Partial Award was issued.

10. On 28 January 2016 and 29 January 2016, in accordance with Procedural Order No. 5, the Claimant and the Respondent submitted their proposed redactions to the Award.

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<sup>2</sup> Award on Jurisdiction and Admissibility, para. 588.

11. On 12 February 2016, the Respondent submitted objections to several of the Claimant's proposed redactions. On 29 February 2016, the Claimant replied to the Respondent's objections and, on 7 March 2016, the Respondent submitted comments on the Claimant's reply.
12. On 12 March 2016, the Tribunal invited the Parties to submit further comments. The Respondent submitted its additional comments and the Claimant submitted its response to the Respondent's additional comments on 18 March 2016 and 25 March 2016 respectively. On 31 March 2016, the Respondent objected to certain additional redactions proposed by the Claimant.
13. On 2 May 2016, the Tribunal issued Procedural Order No. 17, in which it determined which of the redactions proposed by the Parties would be permitted in order to protect confidential information.
14. By letter dated 6 June 2016, the Tribunal invited the Parties to file submissions on costs by 1 July 2016 and comments on the opposing Party's submission on costs by 16 July 2016, unless otherwise agreed to by the Parties.
15. On 23 June 2016, the Respondent wrote to the Tribunal to inform it of an agreement between the Parties to postpone deadlines for the filing of the submissions on costs and comments on the opposing Party's submission on costs to 2 September 2016 and 16 September 2016 respectively.
16. By letter dated 23 June 2016, the Tribunal confirmed that the timetable agreed between the Parties was acceptable to the Tribunal.
17. On 2 September 2016, the Claimant submitted the **Claimant's First Submission on Costs** dated 2 September 2016. On the same date, the Respondent submitted **Australia's Submission on Costs** dated 2 September 2016.
18. On 16 September 2016, the Claimant submitted the **Claimant's Second Submission on Costs** dated 16 September 2016. On the same date, the Respondent submitted **Australia's Reply Submission on Costs** dated 16 September 2016.

### III. INTRODUCTION TO THE TRIBUNAL'S EXAMINATION

19. The Tribunal has given consideration to all the extensive factual and legal arguments presented by the Parties in their submissions. The fact that a specific argument is not expressly referred to in the Award does not mean that it has not been considered; the Tribunal discusses only those submissions of the Parties which it considers most relevant for its decisions. The Tribunal's

reasons, without repeating all the arguments advanced by the Parties, address what the Tribunal considers to be the determinative factors in deciding on the Requests of the Parties.

20. The Parties have extensively referred to decisions of other tribunals. There is no dispute that in any event the decisions of other tribunals are not binding on this Tribunal. The many references by the Parties to certain arbitral decisions in their pleadings do not contradict this conclusion.
21. However, this does not preclude the Tribunal from considering arbitral decisions and the arguments of the Parties based upon them, to the extent that it may find that they shed useful light on the issues that arise for the decision in the present case. Such an examination is conducted by the Tribunal, in so far as considered relevant for the present case, later in this Decision, after the Tribunal has considered the Parties' contentions and arguments regarding the various issues raised.
22. The Tribunal will first deal with the allocation of costs claimed by the Parties. Once the respective principles, their application in the present case, and the question whether any costs have to be reimbursed by a Party to the other are determined, the Tribunal will turn in a separate section to the question whether the amount of such costs is to be considered reasonable.

#### **IV. ALLOCATION OF COSTS OF ARBITRATION**

23. The Parties are in agreement that the costs of the arbitration are to be allocated in accordance with Article 42(1) of the 2010 United Nations Commission on International Trade Law Rules on Arbitration (2010) ("**2010 Rules**"). However, the Parties disagree as to the interpretation of this provision and its application to the present proceedings. The Respondent is of the view that the Claimant has been unsuccessful in this arbitration, and that there is no reason to depart from the "loser pays" approach, in particular in the light of the Tribunal's finding on abuse of rights. Accordingly, the Respondent submits that the Claimant should pay the costs of arbitration and the costs incurred by the Respondent. The Claimant, on the other hand, submits that the loser pays approach is "readily reversible". According to the Claimant, each Party prevailed on two and lost on two of the major issues in the preliminary objections phase of the arbitration. Each Party should therefore pay its own legal fees and one-half of the arbitration costs.

##### **A. THE CLAIMANT'S REQUEST**

24. The Claimant refers to Article 42(1) of the 2010 Rules, which provides:

The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it

determines that apportionment is reasonable, taking into account the circumstances of the case.

25. The Claimant emphasizes the words “in principle”. In this regard, the Claimant refers to scholarly commentary on the UNCITRAL Rules that provides that the presumption in favour of the loser pays approach is “readily reversible” and that “the determination of whether apportionment is reasonable is subject to the arbitral tribunal’s own judgement.”<sup>3</sup> The Claimant further notes that some tribunals operating under the UNCITRAL Rules have rejected the loser pays approach. In particular, the tribunal in *EnCana v. Ecuador* stated that the loser pays presumption is “not an inflexible rule” and ordered the prevailing party to pay the unsuccessful claimant’s arbitration costs.<sup>4</sup> The Claimant notes that the Tribunal “is not bound to adopt and apply the ‘loser pays’ approach” and, instead, should apportion costs based on the circumstances of the case.<sup>5</sup> The Claimant considers that relevant circumstances include the following considerations.
26. First, the Claimant contends that each of the Parties “prevailed on two, and lost on two, of the key issues before the Tribunal” and that “in broad terms, Claimant prevailed in arguing that the Tribunal had jurisdiction over the dispute, while Respondent prevailed in its admissibility objection.” The Claimant concludes that in such circumstances it is not “correct or appropriate to label one party the ‘winner’ and one party the ‘loser’.”<sup>6</sup> The Claimant further argues that, in cases where each party prevails on certain issues, “tribunals should award costs in line with the proportion of issues upon which each party succeeded.” The Claimant submits that it is an approach routinely adopted by UNCITRAL tribunals and refers to *Occidental v. Ecuador*, *Les Laboratoires Servier v. Poland* and *Rurelec v. Bolivia*.<sup>7</sup> Similar to these cases, the Parties in the

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<sup>3</sup> Claimant’s First Submission on Costs dated 2 September 2016, para. 6, referring to David Caron and Lee Caplan, *THE UNCITRAL ARBITRATION RULES: A COMMENTARY* (2013), Oxford University Press at 866 (**Exhibit CLA-292**).

<sup>4</sup> Claimant’s First Submission on Costs dated 2 September 2016, para. 6, referring to *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN 3481, UNCITRAL, Award, February 3, 2006, para. 201 (**Exhibit CLA-026**); *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits, May 24, 2007, para. 188 (**Exhibit CLA-287**); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, March 14, 2003, paras 648-649 (**Exhibit CLA-288**); *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, September 3, 2001, paras 317-319 (**Exhibit CLA-059**).

<sup>5</sup> Claimant’s First Submission on Costs dated 2 September 2016, para. 8.

<sup>6</sup> Claimant’s First Submission on Costs dated 2 September 2016, para. 9; Claimant’s Second Submission on Costs dated 16 September 2016, paras 4-5.

<sup>7</sup> Claimant’s First Submission on Costs dated 2 September 2016, para. 9, referring to *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, UNCITRAL, Final Award, July 1, 2004, para. 216 (**Exhibit CLA-049**); *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, UNCITRAL, Award (Redacted), February 14, 2012, paras 669-672 (**Exhibit CLA-254**); *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, UNCITRAL, Award, January 31, 2014, para. 620 (**Exhibit CLA-255**).

present arbitration had “‘mixed success’ with respect to the four major issues in dispute.”<sup>8</sup> The Claimant notes that it would be “unreasonable and unjust for Claimant to be ordered to pay the costs of adducing evidence on issues unsuccessfully raised by Respondent.”<sup>9</sup>

27. Second, the Claimant submits that the apportionment of costs is inappropriate where counsel for the parties have acted professionally and efficiently. In this regard, the Claimant relies on *Romak v. Uzbekistan*, where the tribunal observed “a general trend” towards an equal apportionment of arbitration costs “irrespective of the outcome of the dispute.” The tribunal in that case held:

neither of the Parties has presented its case in a way justifying the shifting of arbitral costs against it. To the contrary, counsel for both Parties worked ably, diligently and efficiently in defense of their clients’ respective interests. . . . Each of the Parties shall therefore be liable to pay half of the arbitration costs. Each Party shall also bear its own costs for legal representation and other costs incurred in connection with presenting its case.<sup>10</sup>

28. The Claimant also refers to *Merrill & Ring v. Canada* and *HICEE B.V. v. Slovak Republic*, where the respective tribunals emphasized “professional competence” and “cooperation” of the parties and ruled that each party was to bear its own costs.<sup>11</sup>
29. The Claimant submits that, in the present arbitration, counsel for the Claimant “worked ably, diligently and efficiently” and demonstrated “professional competence.”<sup>12</sup> Although Australia raised “complex, novel and difficult questions of fact and law,” the Claimant confined its submissions to a reasonable length and limited its use of witnesses and experts, which “allowed for a relatively short jurisdictional hearing.”<sup>13</sup>
30. In response to the Respondent’s arguments, the Claimant submits that the cases cited by the Respondent “support Claimant’s position that Respondent should not be awarded its claimed costs and fees, given that it was not fully successful in raising objections.”<sup>14</sup>

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<sup>8</sup> Claimant’s First Submission on Costs dated 2 September 2016, para. 10.

<sup>9</sup> Claimant’s First Submission on Costs dated 2 September 2016, paras 10-11.

<sup>10</sup> Claimant’s First Submission on Costs dated 2 September 2016, para. 12, referring to *Romak S.A. v. Republic of Uzbekistan*, UNCITRAL, Award, November 26, 2009, para. 252 (**Exhibit RLA-319**).

<sup>11</sup> Claimant’s First Submission on Costs dated 2 September 2016, para. 13, referring to *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL, Award, March 31, 2010, paras 270-271 (**Exhibit CLA-291**); *HICEE B.V. v. Slovak Republic*, UNCITRAL, Partial Award on Jurisdiction, May 23, 2011, para. 151 (**Exhibit RLA-080**).

<sup>12</sup> Claimant’s First Submission on Costs dated 2 September 2016, para. 14, referring to *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL, Award, March 31, 2010, paras 270-271 (**Exhibit CLA-291**); *HICEE B.V. v. Slovak Republic*, UNCITRAL, Partial Award on Jurisdiction, May 23, 2011, para. 151 (**Exhibit RLA-080**).

<sup>13</sup> Claimant’s First Submission on Costs dated 2 September 2016, para. 14.

<sup>14</sup> Claimant’s Second Submission on Costs dated 16 September 2016, paras 4-5.

31. The Claimant explains that notably in *Detroit International Bridge Company v. Canada* the tribunal “rejected Canada’s request to collect all of its costs and fees” and described it as a “partially unsuccessful” party. In addition, the tribunal in this case noted that it had “nearly total discretion to allocate the costs of arbitration pursuant to Article 42(1).”<sup>15</sup>
32. The Claimant submits that other cases that are relied upon by the Respondent are “clearly distinguishable”. Thus, in *Achmea v. Slovak Republic II*, the claimant “did not succeed in establishing jurisdiction” and the tribunal awarded only a portion of the total fees claimed. In the present arbitration, according to the Claimant, it “*did* succeed in establishing the Tribunal’s jurisdiction” and the Respondent prevailed on its admissibility objection.<sup>16</sup> As for *ICS v. Argentina* and *Gallo v. Canada*, the respondents in these cases, unlike the Respondent in this arbitration, were entirely successful and therefore, according to the Claimant, these cases are “clearly irrelevant”.<sup>17</sup> The Claimant also notes that *Philip Morris Brands Sarl et al. v. Uruguay* does not support the Respondent’s position since the tribunal “did not award the respondent its full costs and fees.”<sup>18</sup>
33. The Claimant further argues that the Respondent cites abuse of rights cases that support the Claimant’s, rather than the Respondent’s, position. In particular, the Claimant submits that all of the awards cited by the Respondent either did not award full costs and fees to the respondent<sup>19</sup> or awarded costs and fees to the respondent in order to sanction claimants for fraud or unprofessional conduct, which, according to the Claimant, was not present in this case.<sup>20</sup>
34. In support of the latter point the Claimant submits that, in three of the cases that the Respondent “attempts to portray as abuse of right cases,” the tribunals did not find an abuse of right; instead

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<sup>15</sup> Claimant’s Second Submission on Costs dated 16 September 2016, paras 7-8, referring to *Detroit International Bridge Company v. Canada*, PCA Case No. 2012-25, Award on Costs, August 17, 2015, paras 48, 50-51 (**Exhibit RLA-374**).

<sup>16</sup> Claimant’s Second Submission on Costs dated 16 September 2016, para. 10, referring to *Achmea B.V. v. Slovak Republic II*, Award on Jurisdiction and Admissibility, paras 288-289 (**Exhibit RLA-236**) (emphasis by the Claimant).

<sup>17</sup> Claimant’s Second Submission on Costs dated 16 September 2016, para. 11, referring to *ICS Inspection and Control Services Limited v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, February 10, 2012, paras 59-63, 326-27 (**Exhibit RLA-375**); *Vito G. Gallo v. Canada*, PCA Case No. 2008-02, Award, September 15, 2011, paras 146, 328-330) (**Exhibit CLA-196**).

<sup>18</sup> Claimant’s Second Submission on Costs dated 16 September 2016, para. 12, referring to *Philip Morris Brands Sarl v. Uruguay*, Award at para. 588 (Exhibit RLA-380).

<sup>19</sup> Claimant’s Second Submission on Costs dated 16 September 2016, paras 14-17, referring to *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28, Award, June 2, 2016, paras 125-127; *Renée Rose Levy and Gremcitel v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, January 9, 2015, paras 201-202.

<sup>20</sup> Claimant’s Second Submission on Costs dated 16 September 2016, para. 19.

those cases involved fraud, bad faith, or unprofessional conduct.<sup>21</sup> In addition, the Claimant notes that in *Cementownia v. Turkey* and *Europe Cement v. Turkey* the tribunals found abuse “because the investors used forged and fraudulent documents as evidence of their purported ownership of the relevant investments”; the tribunal thus used cost allocation to sanction the claimants for their unprofessional conduct.<sup>22</sup> According to the Claimant, it “complied with all procedural orders and conducted this arbitration in a professional manner” and “the Tribunal recognized that both Parties in this arbitration acted professionally.”<sup>23</sup>

35. The Claimant also notes that in its first Submission on Costs the Respondent ignores *Alapi v. Turkey*, one of the cases on which the Respondent relied to make its Abuse Objection. In this case the tribunal “ordered that each Party bears its own legal expenses and that the costs of arbitration be divided equally between the Parties.”<sup>24</sup>
36. The Claimant submits that the Respondent’s failed jurisdictional objections and its burdensome document requests caused both Parties to incur “substantial fees and expenses.” According to the Claimant, the Respondent’s failed jurisdictional objections were not “as closely ‘intertwined’ with its Abuse Objection”<sup>25</sup> as the Respondent suggests. In particular, the Claimant notes that “Respondent’s Admission Objection under domestic law was clearly distinct from its Abuse Objection under international law” and required the Claimant’s counsel to address not only Australian law but also “the policies and practices of the Australian Treasurer and Foreign Investment Review Board.”<sup>26</sup>
37. The Claimant also asserts that the Admission Objection was “late, spurious and constantly shifting.” The Respondent introduced this objection in its Statement of Defence, “almost two

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<sup>21</sup> Claimant’s Second Submission on Costs dated 16 September 2016, para. 19, referring to *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, paras 321-322 (**Exhibit CLA-088**); *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, July 14, 2010, paras 153-54 (**Exhibit RLA-311**); *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, December 10, 2010, paras 7.3.6-7.3.7 (**Exhibit RLA-376**).

<sup>22</sup> Claimant’s Second Submission on Costs dated 16 September 2016, para. 19, referring to *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, August 13, 2009 (“*Europe Cement v. Turkey*, Award”), para. 175 (**Exhibit CLA-158**); *Cementownia “Nowa Huta” S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, September 17, 2009, para. 159 (**Exhibit CLA-145**).

<sup>23</sup> Claimant’s Second Submission on Costs dated 16 September 2016, para. 19.

<sup>24</sup> Claimant’s Second Submission on Costs dated 16 September 2016, para. 18, referring to *Alapli Elektrik B.V. v Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, July 10, 2014, para. 26 (**Exhibit RLA-239**).

<sup>25</sup> Claimant’s Second Submission on Costs dated 16 September 2016, para. 22.

<sup>26</sup> Claimant’s Second Submission on Costs dated 16 September 2016, para. 23.

years after Claimant submitted its Notice of Arbitration.” According to the Claimant, the Respondent “could not seriously have expected the Tribunal to find that Claimant’s investment had not been admitted.” Moreover, the Claimant notes that while in its Statement of Defence and Reply the Respondent made references to the Australian Criminal Code and “evaded the question of whether it alleged criminal wrongdoing,” at the hearing the Respondent informed the tribunal that it “did not allege any criminal wrongdoing.”<sup>27</sup>

38. The Claimant notes that the Respondent’s Timing objection was similarly not as intertwined with its Abuse Objection as the Respondent contends. It related to a “distinct body of international jurisprudence on jurisdiction *ratione temporis*, which included a number of ICJ and PCIJ judgements.” Furthermore, the Respondent “submitted over 30 pages of additional argumentation devoted solely to its Timing Objection.”<sup>28</sup>
39. The Claimant also argues that “it was Respondent’s burdensome document requests that resulted in substantial costs and fees for both Parties.” The Respondent, according to the Claimant, was “seek[ing] virtually the entirety of Claimant’s business records for a 13 year period,” which was “vastly overbroad and burdensome” since the relevant question was “whether Claimant controlled the Australian subsidiaries immediately before Respondent alleged that the dispute arose—not a decade earlier in 2001.”<sup>29</sup>
40. In relation to its own production requests directed to the Respondent, the Claimant notes that these requests were “a result of the Admission Objection” and were directly caused by the Respondent’s decision to raise that Objection. The Claimant further submits that “the extent of the Parties’ document review relating to [the files of Australia’s Foreign Investment Review Board (“**FIRB**”)] is simply further evidence that Respondent’s Admission Objection was not ‘closely intertwined’ with its Abuse Objection.”<sup>30</sup>
41. The Claimant concludes that “the most reasonable method of apportioning costs and fees is to do so equally between the Parties” and requests the Tribunal to order each party to pay its own legal fees and one-half of the arbitration costs.<sup>31</sup>

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<sup>27</sup> Claimant’s Second Submission on Costs dated 16 September 2016, para. 24.

<sup>28</sup> Claimant’s Second Submission on Costs dated 16 September 2016, para. 25.

<sup>29</sup> Claimant’s Second Submission on Costs dated 16 September 2016, paras 27-28.

<sup>30</sup> Claimant’s Second Submission on Costs dated 16 September 2016, para. 29.

<sup>31</sup> Claimant’s First Submission on Costs dated 2 September 2016, paras 16-17, *see also* Claimant’s Second Submission on Costs dated 16 September 2016, para. 35.



## B. THE RESPONDENT'S REQUEST

42. The Respondent submits that Article 42(1) of the 2010 Rules establishes a general rule that it is for the unsuccessful party to bear the costs of arbitration and the costs incurred by the successful party. The Respondent argues that, in this arbitration, there is no reason to depart from this general rule.<sup>32</sup>
43. The Respondent provides that the loser pays principle has been applied by many tribunals. The Respondent in particular points to *ST-AD v. Bulgaria*, where the tribunal confirmed that the UNCITRAL Rules establish “a presumption in favour of the losing party paying the costs of the arbitration.”<sup>33</sup> In addition, the Respondent asserts that both PM Asia’s and Australia’s submissions, exchanged prior to the Award on Jurisdiction and Admissibility, were consistent with that approach, as each Party had requested the Tribunal to award costs in its favour in the event that it prevailed in the arbitration.<sup>34</sup>
44. The Respondent submits that PM Asia should be considered the “unsuccessful” party for the purposes of Article 42(1). In support, the Respondent relies on awards in which arbitral tribunals, applying the loser pays principle, held that a claimant failing to establish jurisdiction is the “unsuccessful” party.<sup>35</sup> The Respondent notes that these cases also demonstrate that the key question is “which *party* is unsuccessful, not which arguments are unsuccessful”<sup>36</sup> and that “it is this *overall* result that the Tribunal must take as a starting point.”<sup>37</sup>
45. The Respondent notes that certain factors in the present case reinforce the application of the loser pays principle.<sup>38</sup> First, the Respondent points out that the Tribunal found that the initiation of the arbitration constituted an abuse of rights.<sup>39</sup> The Respondent submits that “[t]ribunals commonly enter costs awards against claimants that pursue abusive claims” and that such approach is “appropriate for obvious reasons of fairness.”<sup>40</sup> Second, the Respondent notes that Australia’s arguments that were dismissed by the Tribunal—the Admission Objection and the Timing

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<sup>32</sup> Australia’s Submission on Costs dated 2 September 2016, para. 4.

<sup>33</sup> Australia’s Submission on Costs dated 2 September 2016, para. 12.

<sup>34</sup> Australia’s Submission on Costs dated 2 September 2016, para. 12.

<sup>35</sup> Australia’s Submission on Costs dated 2 September 2016, para. 13.

<sup>36</sup> Australia’s Submission on Costs dated 2 September 2016, para. 13.

<sup>37</sup> Australia’s Submission on Costs dated 2 September 2016, para. 14 (emphasis by the Respondent).

<sup>38</sup> Australia’s Submission on Costs dated 2 September 2016, para. 16.

<sup>39</sup> Australia’s Submission on Costs dated 2 September 2016, para. 17.

<sup>40</sup> Australia’s Submission on Costs dated 2 September 2016, para. 18-21.

Objection—were serious and substantial and were “closely intertwined with the abuse of right objection.”<sup>41</sup> In particular, the Respondent notes that the factual and evidentiary analysis that Australia undertook “to demonstrate the driving motivation of the restructure” was used in both of these arguments as well as in its abuse of rights argument.<sup>42</sup>

46. The Respondent asserts that the cases relied upon by the Claimant were decided under the United Nations Commission on International Trade Law Rules on Arbitration 1976 (“**1976 Rules**”), while the relevant rule in the present case is Article 42(1) of the 2010 Rules. The Respondent notes that a significant difference between these sets of Rules is that the 2010 Rules make “the apportionment of the costs of legal representation and assistance subject to the same allocation principles as all other costs.”<sup>43</sup>
47. The Respondent criticizes the Claimant’s “mixed success” approach. According to the Respondent, “[t]he fact that a party may have succeeded on certain discrete issues does not prevent that party from being the ‘unsuccessful party’ within the meaning of that term in the first sentence of Article 42(1).” The Respondent asserts that “it is both legally correct and appropriate to regard PM Asia as the ‘unsuccessful party’” in the light of the Tribunal’s finding that it is precluded from exercising jurisdiction.<sup>44</sup>
48. The Respondent disagrees that the loser pays principle in Article 42(1) is readily reversible.<sup>45</sup> Rather, “there must be real and substantial reasons to depart from the principle.”<sup>46</sup> This approach, according to the Respondent, “gives full effect to the plain meaning of Article 42(1) and is consistent with the *travaux préparatoires* for the 1976 Rules, which first included the ‘loser pays’ principle.”<sup>47</sup>

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<sup>41</sup> Australia’s Submission on Costs dated 2 September 2016, paras 22-25.

<sup>42</sup> Australia’s Submission on Costs dated 2 September 2016, para. 25

<sup>43</sup> Australia’s Submission on Costs dated 16 September 2016, para. 6.

<sup>44</sup> Australia’s Submission on Costs dated 16 September 2016, para. 11.

<sup>45</sup> Australia’s Submission on Costs dated 16 September 2016, para. 13.

<sup>46</sup> Australia’s Submission on Costs dated 16 September 2016, para. 12.

<sup>47</sup> Australia’s Submission on Costs dated 16 September 2016, paras 12-19, referring to D Caron and L Caplan, *The UNCITRAL Arbitration Rules: A Commentary (With an Integrated and Comparative Discussion of the 2010 and 1976 UNCITRAL Arbitration Rules)* (Oxford University Press, 2<sup>nd</sup> ed, 2013), p. 866 (**Exhibit RLA-372**); Report of the United Nations Commission on International Trade Law on the work of its eight session (Geneva, 1-7 April 1975) (A/10017) at A/31/17, Annex II, para. 222; as quoted in Binder *UNCITRAL Commentary*, para. 42-006 (**Exhibit RLA-383**).

49. The Respondent also argues that “tribunals have been reluctant to depart from the ‘loser pays’ approach”<sup>48</sup> even where the applicable rules of procedure did not require the application of that principle. The Respondent refers, in this regard, to the awards in *Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland* and *Philip Morris Brands SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Uruguay*.<sup>49</sup>
50. The Respondent emphasizes that in any event, “the reasons advanced by PM Asia do not provide a compelling basis such as to displace the ‘loser pays’ principle.” First, “mixed success” is not a significant factor in this case; rather the factor that should carry “far greater weight” is the Tribunals’ finding on abuse of rights.
51. Second, the Respondent argues that acting in a professional and efficient manner is “not in itself a reason to overturn the ‘loser pays’ principle.”<sup>50</sup> The Respondent refers to *International Thunderbird Gaming Corporation v. The United Mexican States*, where the tribunal noted that it “does not find [professional and efficient conduct] a decisive factor for awarding costs in deviation of the general principle.”<sup>51</sup> The Respondent also submits that, in any case, PM Asia’s approach to bifurcation “cannot be described as efficient” and has put the Tribunal and Australia to “more effort and expense than was necessary.”<sup>52</sup>
52. The Respondent argues that, even if the Tribunal were to take the above-mentioned factors into account, “other factors would lead the Tribunal to award Australia its claimed costs.”<sup>53</sup> In particular, the Tribunal’s abuse of right finding, according to the Respondent, “means that the arbitration should never have been commenced.” Furthermore, the Respondent submits that PM Asia “failed to acknowledge that many of the facts relating to Australia’s jurisdictional objections were intertwined,” while “the control argument—which PM Asia raised and on which Australia ultimately prevailed—was the only freestanding jurisdictional point.”<sup>54</sup>

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<sup>48</sup> Australia’s Submission on Costs dated 16 September 2016, para. 43.

<sup>49</sup> Australia’s Submission on Costs dated 16 September 2016, paras 44-45.

<sup>50</sup> Australia’s Submission on Costs dated 16 September 2016, para. 28.

<sup>51</sup> Australia’s Submission on Costs dated 16 September 2016, para. 43, referring to *International Thunderbird Gaming Corporation v. The United Mexican States* (NAFTA Award, 26 January 2006), para. 218 (**Exhibit RLA-062**).

<sup>52</sup> Australia’s Submission on Costs dated 16 September 2016, para. 30.

<sup>53</sup> Australia’s Submission on Costs dated 16 September 2016, para. 33.

<sup>54</sup> Australia’s Submission on Costs dated 16 September 2016, paras 34-40.

53. The Respondent further submits that PM Asia “does not refer to a single case involving a finding of abuse of right.”<sup>55</sup> According to the Respondent, a “substantial body of cases”, including recent awards in *Green Energy, LLC and Transglobal Green Panama S.A. v. Panama* and *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, “establish that the abusive nature of a proceeding is a factor that carries very significant weight in the allocation of costs.”<sup>56</sup>
54. The Respondent alleges that the Claimant instead “seeks to rely on irrelevant cases.” First, according to the Respondent, PM Asia’s submission referred to four cases “as examples of tribunals reversing or ‘rejecting’ the ‘loser pays’ principle,” however each of them was decided under the 1976 Rules, each went to the merits phase and each turned on “circumstances that are quite different from those in the present case.”<sup>57</sup> Similarly, *Eastern Sugar v. Czech Republic*, cited by PM Asia in support of its position that “the mixed success of the parties should guide the Tribunal’s decision on apportionment of costs,” concerned only the apportionment of costs for legal representation. However, this case was determined under the 1976 Rules, which did not extend the loser pays principle to this category of costs.<sup>58</sup>
55. Second, the Respondent argues that the Claimant cites irrelevant cases to support its statement that “tribunals ‘routinely’ apportion costs based on wins and losses on discrete arguments.”<sup>59</sup> None of the cases cited by the Claimant in that respect “involved a finding of abuse of right; none are examples of a claim being dismissed in its entirety at the jurisdictional phase; and all but *Guaracachi* were determined under the 1976 Rules.” The Respondent further emphasizes that *Occidental* and *Les Laboratoires* “contain only cursory analysis in relation to costs.” The Tribunal should instead rely on such cases “that have rigorously and carefully examined Article 42(1),” which, according to the Respondent, support Australia’s position.<sup>60</sup>

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<sup>55</sup> Australia’s Submission on Costs dated 16 September 2016, para. 42.

<sup>56</sup> Australia’s Submission on Costs dated 16 September 2016, paras 42-43, referring to *Green Energy, LLC and Transglobal Green Panama S.A. v. Panama* (ICSID Case No. ARB/13/28, Award, 2 June 2016) (**Exhibit RLA-377**); and *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru* (ICSID Case No. ARB/11/17, Award, 9 January 2015) (**Exhibit CLA-284**).

<sup>57</sup> Australia’s Submission on Costs dated 16 September 2016, para. 48.

<sup>58</sup> Australia’s Submission on Costs dated 16 September 2016, para. 49.

<sup>59</sup> Australia’s Submission on Costs dated 16 September 2016, paras 50-51, referring to *Occidental Exploration and Production Company v. Republic of Ecuador* (LCIA Case No. UN3467, Final Award, 1 July 2004) (**Exhibit CLA-049**), *Les Laboratoires Servie, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland* (UNCITRAL, Award (Redacted), 14 February 2012) (**Exhibit CLA-254**), *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia* (PCA Case No. 2011-17, Award, 13 January 2014) (**Exhibit CLA-255**), *Hesham T. M. Al Warraq v. Republic of Indonesia* (UNCITRAL, Final Award, 15 December 2014) (**Exhibit CLA-289**).

<sup>60</sup> Australia’s Submission on Costs dated 16 September 2016, para. 51.

56. Finally, the Respondent refers to *Romak* and *Merrill & Ring*, cited by the Claimant in support of the proposition that professional and efficient conduct of the parties provides a basis upon which to apportion costs evenly. The Respondent submits that these cases did not contain substantive discussion of the loser pays principle and did not involve the key factors present in the current arbitration. Moreover, in both cases, the professional and efficient conduct of the parties was “just one of a number of factors that featured in the tribunals’ analyses.”<sup>61</sup>

### C. THE TRIBUNAL’S ANALYSIS

57. As the Parties agree, Article 42(1) of the 2010 Rules is applicable. Article 42(1) provides:

The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

58. The Tribunal notes that this provision of the 2010 Rules differs from the respective provision in the original 1976 Rules (not applicable in the present case) in so far as the 2010 Rules make the apportionment of the costs of legal representation and assistance subject to the same allocation principles as all other costs. For the present procedure, therefore, the disputed issue of the costs of legal representation has indeed to be decided on the basis of the above cited Article 42(1).
59. In the view of the Tribunal, this wording establishes a clear relationship between its two sentences: The first sentence, by the words “in principle”, establishes a presumption that the unsuccessful party shall bear the costs. However, the wording of the second sentence of Article 42(1) makes it equally clear, by using the word “may”, that the Tribunal has discretion to depart from this result if it finds that the circumstances of the case at hand make another result more “reasonable”.
60. Regarding the first sentence, the Parties dispute who is to be considered the “unsuccessful party”. The Tribunal does not agree with the Claimant that, if each of the Parties “prevailed on two, and lost on two, of the key issues before the Tribunal,” it is not “correct or appropriate to label one party the ‘winner’ and one party the ‘loser’.” While these considerations may be taken into account as “circumstances” under the second sentence of the provision, the Tribunal understands the “unsuccessful party” to be the one whose requests for final relief sought in the arbitration have been dismissed. In the present case, since the Tribunal has declared the Claimant’s claims inadmissible, this is the Claimant. The Tribunal considers that the particular grounds on which the Claimant’s claim failed reinforce this conclusion. The Tribunal has found that the

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<sup>61</sup> Australia’s Submission on Costs dated 16 September 2016, paras 52-53.

commencement of the arbitration constituted an abuse of right. While a finding of abuse of right does not imply any bad faith on the part of a claimant (as explained in the Tribunal's Partial Award), 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.

61. Regarding the Tribunal's discretion in the application of the second sentence, it is a long tradition in the relevant jurisprudence in international investment law to consider, as relevant "circumstances", whether the unsuccessful party has prevailed regarding major disputed issues and whether the efforts expended on these issues have made up a considerable part of the work of the parties and of the Tribunal during the procedure.<sup>62</sup>
62. The Tribunal sees no reason to depart from this approach in the present case.
63. The Tribunal notes the Claimant's contention that each of the Parties "prevailed on two, and lost on two, of the key issues before the Tribunal" and that "in broad terms, Claimant prevailed in arguing that the Tribunal had jurisdiction over the dispute, while Respondent prevailed in its admissibility objection." Indeed, the Claimant prevailed on the Admission Objection and the Timing Objection. The Respondent prevailed on the procedural issue of bifurcation and on the Abuse Objection. Moreover, the Claimant argued unsuccessfully that it had already exercised "control" within the meaning of the Treaty before the restructuring had occurred.
64. For its consideration of which apportionment is reasonable according to the second sentence of Article 42(1), the Tribunal notes at the outset that all four of the issues identified above, as well as the additional question of the Claimant's exercise of control before the restructuring, were heavily disputed points, which were discussed in detail in the written submissions of the Parties and further explored at the hearing on bifurcation and the hearing on jurisdiction and admissibility. Ample documentary and expert evidence was adduced in respect of each of the Objections.
65. The Tribunal sees no reason to question the professional efficiency of the Parties' counsel at any stage of the proceedings. While many questions of procedure and substance were hard-fought in the present arbitration—perhaps more than in many other investment cases—counsel engaged

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<sup>62</sup> *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, UNCITRAL, Final Award, July 1, 2004, para. 216 (**Exhibit CLA-049**); *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, UNCITRAL, Award (Redacted), February 14, 2012, paras 669-672 (**Exhibit CLA-254**); *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, UNCITRAL, Award, January 31, 2014, para. 620 (**Exhibit CLA-255**); see also *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award 26 January 2006, para. 220

with the factual record and the legal aspects of the case in a thorough and overall effective manner. The significant efforts made by counsel for both sides, including a number of procedural motions, were, in the Tribunal's view, commensurate with the exceptional economic and political significance of the case. This also applies to the Parties' extensive document requests. The Tribunal further notes the helpful cooperation of counsel for both sides in respect of a number of logistical questions that arose in the course of the proceedings. Hence, the Tribunal concludes that the procedural conduct of the Parties should not sway the allocation of costs in either direction; it does not constitute a circumstance in the present proceedings that leads the Tribunal to consider that "apportionment is reasonable" within the sense of the second sentence of Article 42(1).

66. In this context, the Tribunal also notes that the Parties' dispute regarding the desirability of bifurcation of the proceedings led to a separate hearing and thereby to additional work and costs. The Tribunal recalls that the Respondent had requested an opportunity to address the Tribunal on this issue in the context of a hearing, while the Claimant had regarded a written procedure as sufficient. While it is rather unusual in investment arbitration to hold in-person hearings on procedural questions, such an approach may be helpful in some cases. The Tribunal was persuaded in the present proceedings that a hearing on bifurcation would be appropriate, and the Respondent ultimately prevailed with its request to order the bifurcation of (most of) its preliminary objections. Hence, the Tribunal does not consider that any adverse cost consequences should arise for the Respondent.
67. Having determined that the conduct of the Parties or their counsel in the context of the proceedings should not affect the allocation of costs, the Tribunal must consider whether the fact that the Claimant prevailed on the Admission Objection and on the Timing Objection warrants a departure from the principle that the Claimant, as the overall unsuccessful Party, should bear the costs in their entirety.
68. In this regard, a distinction must be drawn between the two Objections. The evidence as well as some of the legal arguments relevant to the Timing Objection were closely related to the Parties' submissions in respect of the Abuse Objection (on which the Respondent prevailed). Accordingly, the Tribunal is not persuaded that the Parties were required to expend significant resources in presenting their arguments on the Timing Objection in addition to what was in any event required to address the Abuse Objection. The Tribunal would add that, in the present circumstances, the Tribunal does not regard the Claimant's success in respect of the Timing Objection as more significant than the Respondent's success in respect of the Abuse Objection, as the Claimant seems to suggest. In the event of a finding of abuse of rights, there is no room for diminishing the

significance of such finding on the ground that it affects the admissibility of a claim rather than the Tribunal's jurisdiction.

69. The matter lies differently in respect of the Admission Objection. That objection was based on a distinct body of evidence and raised distinct legal questions under both international law and Australian law, which did not arise in the analysis of any of the other Objections. In particular, the Tribunal recalls that it was presented with a substantial body of expert evidence regarding complex—and in many respects unprecedented—questions of Australian administrative law. Discussion of these questions accounted for a substantial proportion of the time spent at the hearing on jurisdiction and admissibility, and the Tribunal expended considerable effort in analysing the substance of the Objection in appropriate depth. While the Tribunal regards Australia's Admission Objection as serious (rather than, as the Claimant suggest, spurious), the fact remains that the Respondent has not prevailed with its view. Had the Respondent not raised the Admission Objection, the Tribunal could have reached its conclusion that the claim is inadmissible more expeditiously and at more limited costs to the Parties. This conclusion must weigh in the Claimant's favour when it comes to the allocation of costs. The Tribunal accordingly takes the view that "apportionment is reasonable" in respect of some of the costs incurred, pursuant to the second sentence of Article 42(1).
70. Exercising its discretion pursuant to the second sentence of Article 42(1), taking into account all of the above aspects, the Tribunal considers it reasonable that the Claimant should bear █% of the costs of the Respondent. Since, as mentioned above, the new version of the 2010 Rules makes the costs of legal representation and assistance subject to the same allocation principles as all other costs, this decision applies to the costs mentioned in Article 40(2) under subsections (a) to (f). Therefore, the Claimants shall bear █% of the Respondent's costs mentioned in Article 40(2), subsections (a) to (f), in so far as these are found to be reasonable by the Tribunal.
71. In the next section of this Award, the Tribunal will deal with the quantum of the costs claimed by the Respondent.

## **V. AMOUNTS OF COSTS CLAIMED**

72. The Claimant does not claim any of the costs incurred in this arbitration. The Respondent claims a total of ██████████ in costs. The Parties differ in respect of the reasonableness of the amounts claimed by the Respondent. The Claimant submits that the Respondent's cost claim is



excessive, whereas the Respondent contends that its claim “is reasonable in light of the circumstances of the case.”<sup>63</sup>

#### **A. THE CLAIMANT’S POSITION**

73. The Claimant does not request an order from the Tribunal that the Respondent pay any of its costs. Accordingly, it refrains from providing any figures detailing the costs that it has incurred in connection with the present arbitration.
74. Commenting on the Respondent’s costs claim, the Claimant submits that the Respondent’s costs claim is unreasonable for a “legal team that consisted primarily of public servants.”<sup>64</sup> By way of comparison, the Claimant states that Canada and the United States, which have created specific Government divisions to represent the State in investment proceedings, “have never claimed [REDACTED] [REDACTED] as much in costs and fees as Respondent claims in this arbitration.”<sup>65</sup> In particular, Canada has never claimed more than US\$4.5 million in costs and fees and the United States has never claimed more than US\$3 million.<sup>66</sup>
75. The Claimant emphasizes that, even excluding the fees of four outside counsel, the Respondent’s government lawyers claim over [REDACTED] in fees, even though Australia itself pays them “very modest government salaries.”<sup>67</sup>

#### **B. THE RESPONDENT’S REQUEST**

76. The Respondent refers to Article 40(2) of the 2010 Rules, applicable in the present arbitration, which reads as follows:

The term “costs” includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
- (b) The reasonable travel and other expenses incurred by the arbitrators;
- (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

<sup>63</sup> Australia’s Submission on Costs dated 2 September 2016, para. 28.

<sup>64</sup> Claimant’s Second Submission on Costs dated 16 September 2016, para. 33.

<sup>65</sup> Claimant’s Second Submission on Costs dated 16 September 2016, para. 32.

<sup>66</sup> Claimant’s Second Submission on Costs dated 16 September 2016, para. 32.

<sup>67</sup> Claimant’s Second Submission on Costs dated 16 September 2016, para. 33.

(f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.

The Respondent notes that it “seeks reimbursement for its claimed costs falling into each of the above-listed categories.”<sup>68</sup>

77. First, the Respondent seeks reimbursement of the amount of [REDACTED], which it has deposited towards the fees and expenses of the Tribunal and the fees and expenses of the Secretary-General of the Permanent Court of Arbitration.<sup>69</sup>
78. Second, the Respondent submits that the expenses of its expert witness, Mr. Gyles Q.C., and its fact witnesses, Mr. Wilson and Mr. Swan, amounted to [REDACTED].<sup>70</sup>
79. Third, the Respondent claims [REDACTED] in legal and other costs incurred by Australia. The legal expenses of Australia consist of (i) the legal fees for services rendered by Australia’s counsel team, (ii) the legal fees for services rendered by the Australian Government Solicitor (“AGS”), and (iii) the costs of certain legal services provided by the Office of International Law (“OIL”).<sup>71</sup>
80. In relation to the first category, the Respondent explains that Australia’s legal team was led by Australia’s Solicitor-General (Mr. Stephen Gageler S.C. between July 2011 and August 2012, followed by Mr. Justin Gleeson S.C. since November 2012); the costs for the services of the Solicitor-General are recoverable at a rate of AU\$5,000 per day, as is provided for in general guidance notes issued by the Solicitor-General’s department.<sup>72</sup> Australia also retained four external counsel specializing in international law (Mr. Samuel Wordsworth Q.C. and Professor Chester Brown) and domestic law and evidentiary issues (Mr. Tony Payne S.C. and Mr. James Hutton). Counsel were briefed at “Commonwealth rates”, which, according to the Respondent, are lower than their usual commercial rates.<sup>73</sup>
81. The Respondent submits that AGS does not receive any government funding and was retained by Australia “to appear as solicitor on the record in this arbitration and provide a range of legal

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<sup>68</sup> Australia’s Submission on Costs dated 2 September 2016, paras 56-57.

<sup>69</sup> Australia’s Submission on Costs dated 2 September 2016, para. 58.

<sup>70</sup> Australia’s Submission on Costs dated 2 September 2016, para. 59.

<sup>71</sup> Australia’s Submission on Costs dated 2 September 2016, para. 62.

<sup>72</sup> Attorney-General’s Department – Office of Legal Services Coordination, “Guidance Note 11 – Briefing the Solicitor-General” (July 2015), para. 32 (**Exhibit R-1411**).

<sup>73</sup> Australia’s Submission on Costs dated 2 September 2016, paras 64-67.

services.”<sup>74</sup> In this regard, the Chief Solicitor in charge of the present file, Mr. Simon Daley P.S.M., explains in a witness statement that up until 1 July 2015 AGS was a statutory corporation “operating on a commercial and competitive basis to provide a full range of legal and related services.” Since 1 July 2015 AGS ceased to be a statutory corporation and was consolidated into the Attorney-General’s Department, but “continues to operate on a commercial and competitive basis in the marketplace.”<sup>75</sup>

82. According to the Respondent, AGS “was responsible for the day-to-day conduct of the arbitration.” In particular, AGS focused on developing Australia’s evidence and arguments for the preliminary objection phase and was also required to “investigate and develop a range of merits-related subject matter for inclusion in Australia’s Amended Statement of Defence.”<sup>76</sup> AGS was involved in document production tasks; in particular, a separate team was retained to address PM Asia’s requests relating to the FIRB files.<sup>77</sup>
83. The Respondent explains that AGS charges on a fee-for-service basis, and AGS lawyers bill in 6-minute units and “provide detailed bills describing the work carried out and the time and cost of the work.”<sup>78</sup> According to the Respondent, the fees of AGS are reasonable. From October 2014 to May 2015, the rates for the AGS core team were capped at 6 hours per day. In addition, junior lawyers and paralegals were used throughout the arbitration to reduce costs.<sup>79</sup> Further, it was AGS’s practice “to review time records before rendering invoices on the Department of Health and to write down or write off any charges that AGS did not consider should be passed on.”<sup>80</sup> The invoices were reviewed once again for the purposes of preparing the costs claim, and a range of costs was excluded to “ensure that only work directly incurred in relation to the arbitration has been included.”<sup>81</sup>
84. The Respondent submits that Australia retained a team of international lawyers from OIL within the Office of International Law in the Attorney-General’s Department (“AGD”) and that “OIL’s core function is to provide legal advice and other services to the Australian Government on

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<sup>74</sup> Australia’s Submission on Costs dated 2 September 2016, para. 68.

<sup>75</sup> Daley Statement (**Exhibit RWS-018**), paras 3-4.

<sup>76</sup> Australia’s Submission on Costs dated 2 September 2016, paras 70-71.

<sup>77</sup> Australia’s Submission on Costs dated 2 September 2016, paras 72-73.

<sup>78</sup> Australia’s Submission on Costs dated 2 September 2016, para. 74.

<sup>79</sup> Australia’s Submission on Costs dated 2 September 2016, para. 76.

<sup>80</sup> Australia’s Submission on Costs dated 2 September 2016, para. 77.

<sup>81</sup> Australia’s Submission on Costs dated 2 September 2016, para. 78.

matters of international law.”<sup>82</sup> According to the Respondent, OIL “established a taskforce comprising of two teams of full-time lawyers.” The first team provided advice on international law issues, while the second team was responsible “for coordinating the litigation across a large number of Australian Government departments that provided information, documents and evidence in the arbitration.” This taskforce was active from June 2011.<sup>83</sup> The Respondent only seeks to recover the costs of the OIL team that provided international law services.<sup>84</sup>

85. The Respondent notes that OIL’s costs were billed on a salary basis, even though it would have been open to OIL to charge on an hourly basis. In the Respondent’s view, it is the established practice in investment arbitration “to estimate the time spent working on the arbitration and then multiply the cost of each individual’s salary and benefits for a given year by that estimate.”<sup>85</sup>
86. The Respondent claims [REDACTED] for expenses incurred by Australia for twelve expert witnesses, who submitted eleven reports in response to sixteen reports submitted by expert witnesses for PM Asia.<sup>86</sup>
87. The Respondent claims [REDACTED] in travel costs, which include travel costs incurred by Australia for counsel, other lawyers and expert witnesses to travel for the purposes of arbitration. The Respondent notes that these travel costs are reasonable as, first, a minimum number of representatives attended each hearing, and, second, all international travel expenses incurred were consistent with the Australian Government’s Best Fare of the Day policy. Domestic travels were similarly booked in line with the Australian Government’s domestic travel policy which requires use of the “lowest practical fare”.<sup>87</sup>
88. The Respondent claims [REDACTED] for other arbitration expenses “incurred to assist Australian lawyers as part of Australia’s defence in the arbitration.” These expenses include the creation and maintenance of a Ringtail document management system, “conference room hire during oral hearing phases, delivery and courier fees, photocopying and printing, library loans

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<sup>82</sup> Australia’s Submission on Costs dated 2 September 2016, para. 81.

<sup>83</sup> Australia’s Submission on Costs dated 2 September 2016, paras 81-84.

<sup>84</sup> Australia’s Submission on Costs dated 2 September 2016, para. 87.

<sup>85</sup> Australia’s Submission on Costs dated 2 September 2016, paras 85-86.

<sup>86</sup> Australia’s Submission on Costs dated 2 September 2016, paras 89-92.

<sup>87</sup> Australia’s Submission on Costs dated 2 September 2016, paras 92-99.

and other research expenses, corporate records and other database searches and reports and translation services.”<sup>88</sup>

89. The Respondent requests the Tribunal to award interest on the total sum of Australia’s legal and other costs “calculated from the date of the final award on costs until the date of payment in full.” The Respondent asks that the interest be calculated at the rate of 1.50% (corresponding to the Australian cash rate as set by the Reserve Bank of Australia as applicable at the date of Australia’s Submission on Costs).<sup>89</sup>
90. The Respondent submits that Australia’s cost claim “is reasonable in light of the circumstances of the case.” Australia has undertaken a “principled and cautious approach”, having notably deducted (i) fees paid to consulting experts who did not prepare reports for filing in this arbitration and of legal advisors who played a minor role in the proceedings; (ii) costs incurred by AGD “which were not attributable to OIL’s core role of providing advice and assistance on international law”; and (iii) costs of counsel, the Australian Government Solicitor and OIL incurred prior to the service of the Notice of Arbitration.<sup>90</sup>
91. The Respondent further submits that PM Asia’s strong opposition to bifurcation required Australia “to prepare an extensive memorial and substantial supporting evidence to defend PM Asia’s claim on its merits.”<sup>91</sup>
92. In addition, the Respondent argues that Australia had to undertake a “significant amount of work” to respond to the PM Asia’s claims as well as its defence to Australia’s jurisdictional objections, noting that these claims and defences were “particularly broad and complex and shifted over time.”<sup>92</sup>
93. Finally, the Respondent emphasizes that Philip Morris sought to challenge a public health measure that is of a critical importance to Australia, and it was therefore necessary for the Respondent to “mount a robust and comprehensive response to all aspects of the claim.”<sup>93</sup> The Respondent also notes that Australia’s cost claim represents less than ████████ of the total amount of damages claimed by Philip Morris, while in *Philip Morris Brands SARL, Philip Morris*

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<sup>88</sup> Australia’s Submission on Costs dated 2 September 2016, paras 100-104.

<sup>89</sup> Australia’s Submission on Costs dated 2 September 2016, paras 107-108.

<sup>90</sup> Australia’s Submission on Costs dated 2 September 2016, paras 29-37.

<sup>91</sup> Australia’s Submission on Costs dated 2 September 2016, paras 39-42.

<sup>92</sup> Australia’s Submission on Costs dated 2 September 2016, paras 43-49.

<sup>93</sup> Australia’s Submission on Costs dated 2 September 2016, paras 50-54.

*Products S.S. and Abal Hermanos S.A. v. Uruguay*, the Government of Uruguay claimed costs in an amount of approximately 46% of the damages claimed by Philip Morris.<sup>94</sup>

### C. THE TRIBUNAL'S ANALYSIS

94. The Parties agree that Article 40(2) of the 2010 Rules, is applicable in the present case, which reads as follows:

The term "costs" includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
- (b) The reasonable travel and other expenses incurred by the arbitrators;
- (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.

95. The Tribunal fixes the costs of the arbitration referred to under subsections (a), (b), (c) and (f) in the present case as follows:

<b><i>Arbitrator fees (EUR)</i></b>	
Professor Karl-Heinz Böckstiegel <i>Fees:</i>	██████████
Professor Gabrielle Kaufmann-Kohler <i>Fees:</i>	██████████
Professor Donald McRae <i>Fees (exclusive of VAT):</i> <i>VAT:</i>	██████████ ██████████
<b><i>Registry fees of the PCA (EUR)</i></b>	██████████
<b><i>Expenses (EUR)</i></b>	
Arbitrator expenses:	██████████
General expenses (court reporting, audio-visual technology, catering, courier and other expenses):	██████████
<b>TOTAL COSTS (EUR)</b>	██████████

<sup>94</sup> Australia's Submission on Costs dated 2 September 2016, para. 53.

<b>TOTAL DEPOSIT (EUR)</b>	<div style="background-color: black; width: 100px; height: 20px; display: inline-block;"></div> * *reflecting equal contributions from the Parties
<b>REMAINING DEPOSIT (EUR)</b>	<div style="background-color: black; width: 100px; height: 20px; display: inline-block;"></div>

96. The Parties disagree how subsection (e) should be applied in the present case, given that: “[t]he legal and other costs incurred by the parties in relation to the arbitration” form part of the costs of arbitration, which the Tribunal may allocate between the Parties, only “to the extent that the arbitral tribunal determines that the amount of such costs is reasonable.” In light of its decision on cost allocation reached above, the Tribunal has only to consider the Respondent’s costs. As summarized above, the Claimant considers that a number of the costs claimed by the Respondent are not “reasonable” as required by this subsection.
97. For its examination regarding the question whether and to what extent the costs claimed by the Respondent can be considered “reasonable”, the Tribunal may take into account the jurisprudence in comparable cases, particularly in cases in which governments claimed their costs, as well as, more importantly, the specifics of the case at hand.
98. The table of comparison provided by the Claimant to the costs claimed by other governments only relates to NAFTA cases. While, indeed, these amounts are considerably smaller than those claimed by the present Respondent, they do not show the volume of work and the numbers of hours spent in those cases. Without further research, for which the Parties have not supplied sufficient information, the Tribunal is confident in its presumption that the present case has been one in which the volume of work and time involved in the presentation of the Parties’ cases considerably exceeded what is usual in NAFTA and other investment arbitrations.
99. In this regard, the Tribunal notes that both Parties presented voluminous Memorials, not only on bifurcation and jurisdiction, but also, in accordance with Procedural Order No. 7, full first Memorials on the merits, analysing in detail whether the Plain Packaging Measures were consistent with the substantive provisions of the Treaty. These Memorials were accompanied by a substantial body of evidence, including several expert opinions on questions of public health. While the Claimant’s claims were in the end rejected as inadmissible, it is evident that the Parties’ costs reflect the considerable work already performed in respect of the merits. The Tribunal also recalls that the present proceedings were, at various junctures, more complex than is the norm in investor-State arbitration. For instance, the Parties submitted several detailed briefs on key

procedural questions (such as the place of arbitration and confidentiality) after the first procedural hearing and presented their views on bifurcation in the context of an in-person hearing.

100. As the Claimant mentions, in NAFTA cases, Canada and the United States rely on their own legal teams to represent them. However, while this may be considered appropriate because the NAFTA system is a repetitively used system of dispute resolution for these States, the present dispute proceeds under the Treaty between Australia and Hong Kong, under which Australia had never been a respondent and for which it had no pre-existing in-house expertise through a pre-constituted legal team familiar with the dispute settlement method and the issues involved. The Tribunal, therefore, considers it justified that the Respondent hired outside counsel to help its own legal team in this procedure. The fees and costs claimed for these outside counsel do not go beyond what is usual in other investment cases and are thus deemed reasonable by this Tribunal.
101. The costs and fees claimed by the Respondent for its own legal team have been explained in detail in paragraphs 62 to 88 and the Annexure to Australia's Submission on Costs dated 2 September 2016. The Tribunal does not accept the Claimant's criticism with respect to the fact that these fees exceed what it describes as "modest government salaries".<sup>95</sup> It is normal and justified practice in investment and other arbitrations that not only the salaries are claimed, but also considerably higher amounts in view of high overhead costs. The rates for the various members of its own legal team as explained by the Respondent appear reasonable to the Tribunal. Taking into account the complexity of issues of domestic and international law relevant in this procedure, particularly for a government team usually not engaged in such disputes, the Tribunal does not consider that any of these costs claimed by the Respondent were unreasonable and should not have been incurred. 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.
102. The same is true for the costs claimed by the Respondent for witnesses and experts<sup>96</sup> as well as travel and other expenses claimed and explained in Australia's Submission on Costs dated 2 September 2016. In this context, the Tribunal recalls that the Parties, under the procedure

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<sup>95</sup> Australia's Submission on Costs dated 16 September 2016, para. 33.

<sup>96</sup> This does not, however, include the witness expenses of Mr. Gyles QC, Mr. Wilson and Mr. Swan in an amount of [REDACTED], which were incurred solely in relation to the Respondent's Admission Objection and shall not be subject to reimbursement.



adopted, filed full submissions on the merits, together with all their evidence, including expert reports and witness statements.

103. In conclusion therefore, the Tribunal finds that the amounts claimed by the Respondent for its legal representation in a total of [REDACTED] are reasonable.
104. The arbitration costs have to be added to this amount in application of subsections (a), (b), (c) and (f) of Article 40(2) of the 2010 UNCITRAL Rules which were found above to be [REDACTED].

## VI. CONCLUSION

105. Applying the Tribunal's conclusion at the end of Section IV above that the Claimant must bear [REDACTED] % of the Respondent's cost claim insofar as found reasonable, this leads to the conclusion that the Claimant has to reimburse the Respondent:
- [REDACTED] % of the Respondent's share of the arbitration costs according to subsections (a), (b), (c) and (f), which the Respondent paid into the deposit of the PCA: [REDACTED];
  - [REDACTED] % of the Respondent's costs according to subsections (d) and (e): [REDACTED].

## VII. INTEREST

106. The Respondent has claimed interest from the date of the Final Award on the costs it is awarded to be reimbursed.<sup>97</sup> In principle, this claim has not been objected to by the Claimant. Indeed, the jurisprudence relied on by the Respondent in this context affirms that such a claim can be raised, and the Tribunal sees no reason to depart from this approach.
107. Moreover, the Tribunal accepts Respondent's suggestion that the interest shall be calculated on a simple basis using the Australian cash rate as set by the Reserve Bank of Australia, at the rate of 1.50%, to accrue from the date of this Final Award.

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<sup>97</sup> Australia's Submission on Costs dated 2 September 2016, paras 107-108.


**VIII. DECISION**


108. For the reasons set out above in this Award, the Tribunal decides, declares, and awards as follows:

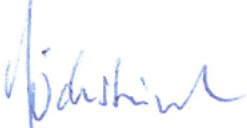
- I. The Claimant shall pay to the Respondent the amount of [REDACTED] in application of subsections (a), (b), (c) and (f) of Article 40(2) of the 2010 UNCITRAL Rules.
- II. The Claimant shall pay to the Respondent the amount of [REDACTED] in application of subsections (d) and (e) of Article 40(2) of the 2010 UNCITRAL Rules.
- III. As from the date of this Award, the Claimant shall pay to the Respondent interest on the above amounts calculated on a simple basis using the Australian cash rate as set by the Reserve Bank of Australia, at the rate of 1.50%.
- IV. All other remaining claims are dismissed.
- V. The Registry is requested to return to the Parties in equal shares any remaining amounts on deposit.

Place of Arbitration: Singapore.

Date of Award: 8 March 2017

  
\_\_\_\_\_  
Professor Gabrielle Kaufmann-Kohler  
Co-arbitrator

  
\_\_\_\_\_  
Professor Donald McRae  
Co-arbitrator

  
\_\_\_\_\_  
Professor Karl-Heinz Böckstiegel  
Presiding Arbitrator