

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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## **PROCEDURAL ORDER NO. 17**

**Regarding Redaction of Confidential Information in the Award on Jurisdiction and Admissibility**

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**2 May 2016**

**Arbitral Tribunal**

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

**Registry**

Permanent Court of Arbitration

**WHEREAS** on 17 December 2015, the Tribunal issued an Award on Jurisdiction and Admissibility (“Award”);

**WHEREAS** Procedural Order No. 5 sets out the grounds and the procedure for any redactions that a Party may request to be made to awards, or portions of awards, from the Tribunal;

**WHEREAS** on 23 December 2015 the Parties jointly requested an extension of the time period for proposing redactions to the Award by three weeks; and whereas on 26 December 2015, the requested extension was granted;

**WHEREAS** on 28 January 2016 and 29 January 2016, the Claimant and the Respondent submitted their proposed redactions to the Award;

**WHEREAS** on 11 February 2016, the Respondent withdrew certain redactions that it had proposed;

**WHEREAS** on 12 February 2016, the Respondent submitted objections to several of the Claimant’s proposed redactions on the ground that “they go beyond what is permitted” by the relevant sections of Procedural Order No. 5; and whereas the Respondent also noted that, “in light of the strong public interest in the Award”, any redactions “should be limited to the minimum” necessary to protect confidential information;

**WHEREAS** the Claimant did not raise any objections to the Respondent’s proposed redactions;

**WHEREAS** on 19 February 2016, the Respondent informed the Tribunal about a clerical error contained in its correspondence of 29 January 2016;

**WHEREAS** on 29 February 2016, the Claimant replied to the Respondent’s objections, limiting the scope of a number of proposed redactions and providing further justification for its remaining redactions; and whereas the Claimant notably argued that the privilege logs submitted in the document production phase of the proceedings should be considered confidential in their entirety;

**WHEREAS** on 7 March 2016, the Respondent submitted comments on the Claimant’s reply, noting that certain information from the Claimant’s proposed redactions was available in the public domain and in the unredacted parts of the Award and objecting to the Claimant’s assertion that the Parties agreed to the confidential status of all materials derived from the privilege logs; and whereas the Respondent sought the Tribunal’s permission to make further short submissions;

**WHEREAS** on 12 March 2016, having considered the matter raised by the Respondent, the Tribunal invited the Parties to submit further comments;

**WHEREAS** on 18 March 2016, the Respondent submitted its additional comments;

**WHEREAS** on 25 March 2016, the Claimant submitted its response to the Respondent’s additional comments, *inter alia* proposing additional redactions;

**WHEREAS** on 31 March 2016, the Respondent objected to the additional redactions proposed by the Claimant;

**WHEREAS** paragraph 53, Section D(2), of Procedural Order No. 5 provides that the Tribunal shall “make an order in relation to the proposed redaction” once it is in receipt of the Parties’ comments;

**NOW, THEREFORE, THE TRIBUNAL DECIDES:**

1. The present Order concerns the interpretation and application of the Tribunals' Procedural Order No. 5 in respect of information designated as confidential. The principles set out in Procedural Order No. 5 were mostly consensual between the Parties. This notably applies to the definition of "confidential information" adopted by the Tribunal in Procedural Order No. 5, which combines the approaches proposed by each Party in its submissions to the Tribunal at the time.
2. Paragraph 53, Section B, of Procedural Order No. 5 defines confidential information as "any information not in the public domain that is designated as such by a Party" on the following grounds:
  - a. business confidentiality, including information relating to past, present or contemplated future business activities of the Claimant; the financial affairs of the Claimant or any of its affiliates; the past, present, or contemplated future management or operational policies, procedures, or practices of the Claimant or any of its affiliates; the manufacturing, supply, or distribution process and techniques of the Claimant or any of its affiliates; the value of the Claimant or any of its affiliates or any of their respective assets; the granting of licenses or the provision of goods or services to or by the Claimant or any of its affiliates; and any other information that is proprietary or competitively sensitive and the public disclosure of which may cause competitive injury;
  - b. government confidentiality, including information the disclosure of which is, for reasons of political or institutional sensitivity, not in the public interest;
  - c. information in relation to which a Party owes an obligation of confidence to a third party.
3. The Tribunal also recalls paragraph 53, Section D, of Procedural Order No. 5, which sets out the procedure for identifying and opposing any redactions to the Tribunal's awards, decisions and orders that a Party considers necessary:

**D. PUBLICATION OF THE TRIBUNAL'S AWARDS, DECISION AND ORDERS**

1. The Registry shall publish the Tribunal's awards, decisions, and orders on its website, subject to prior redaction pursuant to Section D(2). In addition, neither Party shall be precluded from publishing any of the Tribunal's awards, decisions, and orders, subject to the same prior redaction.
2. Each Party shall identify within 21 days after receipt of any award, decision, or order from the Tribunal all redactions that the Party proposes to be made. To the extent that the other Party disagrees with any of the proposed redactions, the following procedure shall apply:
  - a. The Party opposing the redaction may, within 14 days after being notified of the other Party's proposal, submit a reasoned application to the Tribunal for an order that the publication of the document be permitted without the redaction.
  - b. Within 14 days after the making of any such application, the Party seeking the redaction may respond to the application.
  - c. The Tribunal will thereafter make an order in relation to the proposed redaction. Pending any such order, the disputed portion may not be published.

The Tribunal will remain constituted for the purpose of making any order under this Section in relation to its final award or other final decision.

3. Following the publication of the Tribunal's awards, decisions, and orders by the Registry, such documents shall no longer be considered Confidential Materials. In particular, such documents may then be disclosed to third parties without following the procedures set out in Sections C(1) to C(5).

4. After the Award was issued on 17 December 2015, each Party was provided an opportunity to propose redactions to the Award, to submit a reasoned application to the Tribunal opposing such redactions proposed by the other Party, and to provide a response to such application in accordance with paragraph 53, Section D. In addition, the Parties made additional comments in respect of specific aspects of the disputed redactions.
5. The Tribunal has reviewed and considered the Parties' general observations regarding the scope of confidentiality in these proceedings as well as the Parties' detailed schedules listing objections and comments in respect of the specific redactions that are being proposed. In the present Procedural Order, the Tribunal will refrain from repeating these arguments, which are well-known to the Parties, as a detailed restatement may compromise the very confidentiality that Procedural Order No. 5 seeks to protect.
6. While the Tribunal welcomes that the Parties were able to reach agreement in respect of a number of proposed redactions, the Tribunal considers that, in determining the admissibility of redactions to the Award, specific considerations must apply, which were less relevant in earlier phases of the present proceedings. As both Parties have recognized, and as is obvious from the frequent public commentary both during the proceedings and after the announcement by the Parties of the results of the proceedings, the issues discussed and decided in the Tribunal's Award are of particular interest and importance to States, investors, non-governmental organizations and other public and private entities involved in international investment and the legal regime applicable to it. To avoid misunderstanding and to make the Tribunal's reasoning and decisions on the facts and the law of this case comprehensible, no redactions can be permitted that would deprive the Award's analysis of essential elements of its factual or legal justification.
7. The Tribunal considers that the additional redactions requested by the Claimant in its letter of 25 March 2016 are inadmissible as they were submitted after the 21-day time limit established in paragraph 53, Section D(2), of Procedural Order No. 5 had passed.
8. The Tribunal was grateful for the Parties' detailed schedules, listing the Parties' objections and comments in respect of each specific redaction. The Tribunal's decision in respect of each proposed redaction is contained in a redacted version of the Award that is annexed to the present Order.
9. In accordance with paragraph 53, Section D(1), of Procedural Order No. 5, the Registry is requested to publish the redacted version of the Award on its Case Repository three business days after the issuance of the present Order.

**Dated: 2 May 2016**



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**On behalf of the Tribunal**

**Karl-Heinz Böckstiegel  
President of the Tribunal**