

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 15 SEPTEMBER 1993 (THE “TREATY”)**

- and-

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

-between-

PHILIP MORRIS ASIA LIMITED

(“Claimant”)

-and-

THE COMMONWEALTH OF AUSTRALIA

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

**PROCEDURAL ORDER NO. 6
Regarding Outstanding Procedural Matters**

Date: 30 November 2012

Arbitral Tribunal

Professor Karl-Heinz Böckstiegel (President)

Professor Gabrielle Kaufmann-Kohler

Professor Donald M. McRae

Registry

Permanent Court of Arbitration

I. INTRODUCTION

In the Procedural Order No. 6, the Tribunal determines certain outstanding procedural matters concerning the conduct of the present arbitration.

For the most part, the Tribunal has placed on record the agreed results of the discussion at the First Procedural Meeting, held on 30 July 2012 in Singapore. In relation to some points, a decision by the Tribunal was called for.

II. PROCEDURAL HISTORY

According to the Notice of Arbitration, the dispute arises from the enactment and enforcement by the Respondent of the *Tobacco Plain Packaging Act 2011* and the effect it has on investments in Australia owned or controlled by the Claimant. The Tribunal refers to its previous Procedural Orders for a description of the background of the present dispute.

Following the constitution of the Tribunal, on 22 May 2012, the Tribunal provided the Parties with a draft of a procedural order setting out the basic framework for the present proceedings. Taking comments received from the Parties into account, the Tribunal issued Procedural Order No. 1 on 7 June 2012.

By letter dated 7 June 2012, the Tribunal provided the Parties with a draft Annotated Agenda for a First Procedural Meeting with the Parties. The Parties were invited to submit comments on the Agenda by 25 June 2012.

By letter dated 25 June 2012, the Claimant informed the Tribunal that “[d]iscussions between the Parties are ongoing, and each of the Parties anticipates being in a position to inform the Tribunal on 27 June 2012 of the areas in relation to which they have reached agreement and those areas of difference that may require resolution by the Tribunal”.

On 27 June 2012, the Parties wrote separately to the Tribunal, identifying areas of agreement and disagreement between them. In annexures to their correspondence, the Parties also proposed certain specific amendments to the draft Annotated Agenda.

On 30 July 2012, the Tribunal held a First Procedural Meeting in Singapore. Present at the Meeting were:

The Tribunal:
Professor Karl-Heinz Böckstiegel
Professor Gabrielle Kaufmann-Kohler
Professor Donald M. McRae

For the Claimant:

Mr. Joe Smouha QC
Mr. David Williams QC
Mr. Simon Foote
Mr. Peter O'Donahoo
Mr. Ricardo E. Ugarte
Mr. Marc Firestone
Mr. John Fraser

For the Respondent:

Mr. Stephen Gageler SC
Mr. Anthony Payne SC
Dr. Chester Brown
Mr. Mark Jennings
Mr. Simon Daley
Mr. Nathan Smyth
Mr. Will Story
Ms. Rosemary Morris-Castico

For the PCA:

Mr. Dirk Pulkowski

At the First Procedural Meeting, the Parties were provided an opportunity to present their views on each item of the Annotated Agenda.

On 3 August 2012, the Tribunal issued Procedural Order No. 2 inviting the Parties to make further written submissions on the issues of the place of arbitration, bifurcation, and confidentiality and setting out a timetable for such submissions.

On 26 October 2012, the Tribunal issued Procedural Order No. 3 regarding the place of arbitration and Procedural Order No. 4 regarding the procedure until a decision on bifurcation.

On 30 November 2012, the Tribunal issued Procedural Order No. 5 regarding confidentiality.

III. THE TRIBUNAL'S ORDER

In light of the Parties' written comments and the discussion at the First Procedural Meeting, the Tribunal now decides and directs as follows:

1. *Communications and Submissions*

1.1 The Parties and their representatives shall not engage in any oral or written communications with any member of the Tribunal *ex parte* in connection with the subject matter of the arbitration.

1.2 The Parties' written submissions shall be made as follows:

- 1.2.1 On the due date, the submitting Party shall send an electronic copy of its submission, without any accompanying evidence or legal authorities, by e-mail to each member of the Tribunal and the opposing Party, with a copy to the Registry.
- 1.2.2 No later than the following business day, the submitting Party shall dispatch by courier copies **in A4** format of the same document sent electronically, together with hard copies **in A5** format of all accompanying documentary exhibits, witness statements, and expert reports to each member of the Tribunal and the opposing Party, with a copy to the Registry.
- 1.2.3 Along with every hard copy submission, a full electronic copy shall be provided on USB flash drive, if possible in searchable Adobe Portable Document Format (“PDF”) or Microsoft Word format.
- 1.3 Written submissions shall be preceded by a table of contents.
- 1.4 Any documents shall be submitted unbound in ring binders separated from briefs and preceded by a list of such documents consecutively numbered, with consecutive numbering in later submissions (C-1, C-2 etc. for the Claimant; R-1, R-2 etc. for the Respondent). Witness statements and expert reports, and their exhibits, shall be included in the same consecutive numbering system.
- 1.5 Correspondence between the Parties and the Tribunal shall normally be sent by e-mail, with a copy to the Registry. Briefs and other submissions exceeding ten (10) pages as well as exhibits must also be sent by courier.
- 1.6 All written communications shall be deemed to have been validly made when they have been sent to:
 - i. Claimant: to the address of its solicitors set forth in Section 1 of Procedural Order No.1;
 - ii. Respondent: to the address of its solicitors set forth in Section 1 of Procedural Order No. 1;
 - iii. Tribunal: to the addresses set forth in Section 3 of Procedural Order No. 1; and
 - iv. Registry: to the address set forth in Section 7 of Procedural Order No. 1.
- 1.7 All communications from the Tribunal to the Parties will be made by e-mail.
- 1.8 The Parties shall send copies of correspondence between them to the Tribunal or to the Registry only if it pertains to a matter in which the Tribunal is required to take some action, or be apprised of some relevant event.

- 1.9 Any change of name, description, address, telephone number, facsimile number, or e-mail address shall immediately be notified by the Party or member of the Tribunal to all other addressees referred to in Section 1.6. Failing such notification, communications sent in accordance with this Section shall be valid.

2. *Evidence*

Except in so far as they conflict with Procedural Orders made by the Tribunal, the Parties and the Tribunal may use, as a guideline, the IBA Rules on the Taking of Evidence in International Arbitration (2010), subject to changes considered appropriate in this case by the Tribunal.

3. *Documentary Evidence*

- 3.1 In principle, all documents considered relevant by the Parties shall be submitted with their Statement of Claim and Statement of Defence, as established in the timetable set out in Procedural Order No. 4. This shall include texts and translations into English of all substantive law provisions, cases and authorities (or relevant parts thereof). Later Memorials, such as the Reply and the Rejoinder, shall be strictly limited to the rebuttal of the immediately preceding memorial of the other Party.
- 3.2 The Tribunal will make provision for the production of documents in the possession, custody or control of the opposing Party or a third party at an appropriate stage of the proceedings, in consultation with the Parties. The first sentence of Section 3.1 shall not apply to documents obtained in the course of such document production.
- 3.3 New factual allegations or evidence shall not be permitted after the respective due dates for the Rebuttal Memorials indicated in a timetable established at a later stage of the proceedings after the Tribunal's decision on bifurcation, unless agreed between the Parties or expressly authorized by the Tribunal.
- 3.4 All documents are produced to the Tribunal on the basis that each document:
- (a) is what it purports to be;
 - (b) was signed by any purported signatory shown on its face;
 - (c) was sent by the purported author and/or received by any purported addressee shown on its face; and
 - (d) if a copy, is a true copy of the original.

- 3.5 If there are any documents in respect of which authenticity is disputed or challenged, the originals of such documents shall be produced and included in a separate bundle, and the Tribunal will rule on their authenticity and/or admissibility at the hearing.

4. *Witness Evidence*

- 4.1 Written witness statements of all witnesses shall be submitted together with the Memorials, as established in the timetable set out in Procedural Order No. 4.

- 4.2 In order to make the most efficient use of time at hearings, written witness statements shall generally be used in lieu of direct oral examination, although exceptions may be admitted by the Tribunal. Details regarding the examination of witnesses at hearings shall be set out in a further procedural order by the Tribunal.

5. *Expert Evidence*

Should the Parties wish to present expert testimony, the same procedure shall apply as for witnesses.

6. *Hearings*

- 6.1 As a general rule, hearings in the present arbitration shall be held in Singapore.
- 6.2 No new documents may be presented at a hearing, unless agreed by the Parties or with leave of the Tribunal. However, demonstrative exhibits may be shown using documents submitted earlier in accordance with the Timetable. Such demonstrative exhibits are to be given to the other Party twenty-four (24) hours in advance of their introduction at a hearing, absent good cause being shown.
- 6.3 Taking into account the time available during the period provided for hearings, the Tribunal intends to allot equal maximum time periods for the Claimant and for the Respondent. Changes to that principle may be applied for at the latest at the pre-hearing conference.
- 6.4 A real-time transcript of hearings shall be produced and made available to the Parties, the Tribunal, and the Registry. A transcript shall be produced of procedural meetings of the Tribunal and made available to the Parties, the Tribunal, and the Registry. The Registry shall make the necessary arrangements in this regard.

- 6.5 Should the Parties present a witness or expert not testifying in English and thus requiring interpretation, an interpreter shall be provided, unless agreed otherwise. Should more than one witness or expert need interpretation, to avoid time-consuming successive interpretation, simultaneous interpretation shall be provided. At a Party's request and no later than two months before the date of the hearing at which the witness or expert is to be presented, the Registry shall make the necessary arrangements in this regard.
- 6.6 Further details regarding hearings will be set after consultation with the Parties in a further procedural order by the Tribunal in time before any hearings.

7. *Extensions of Deadlines and Other Procedural Decisions*

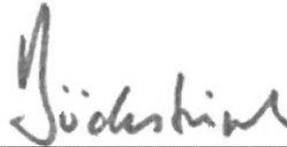
- 7.1 Short extensions may be agreed between the Parties as long as they do not affect later dates fixed for the present proceedings by the Tribunal, and the Tribunal is informed before the original due date.
- 7.2 Extensions of deadlines shall only be granted by the Tribunal on exceptional grounds, and provided that a request is submitted immediately after an event that prevents a Party from complying with the deadline has occurred.
- 7.3 The Tribunal has indicated to the Parties, and the Parties have taken note thereof, that in view of travels and other commitments of the arbitrators, it might sometimes take a certain period for the Tribunal to respond to submissions of the Parties and decide on them.

8. *Languages and Translations*

- 8.1 All written submissions, witness statements, expert reports and administrative or procedural correspondence shall be submitted in English, provided that witness statements or expert reports may be submitted in the principal language of the witness or expert, but shall be accompanied by an English translation. In the case of exhibits and authorities, the originals of which are in another language, translations into English may consist of only relevant portions of the exhibit or authority in question. Any documents produced by the Parties which are not in English shall be submitted to the other Party together with an unofficial translation into English, unless the Parties agree otherwise.
- 8.2 The Parties are not required to produce certified translations; rather, confirmation from counsel that the document is a translation will suffice. Each Party retains its right to: (i) challenge the accuracy of the English translation submitted by the other Party and submit a new translation that clearly identifies the differences; and, (ii) submit additional

translated parts of any document not submitted or translated in its entirety. Should a Party challenge the accuracy of the translation submitted by the other Party, the challenging Party may request that the Tribunal order that a certified translation be prepared. Should the wording of the certified translation substantially match that of the uncertified one, its cost shall be borne by the challenging Party.

Dated, 30 November 2012



On behalf of the Tribunal

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