

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”)

PROCEDURAL ORDER NO. 15
Regarding the Forthcoming Hearing on Preliminary Objections

4 February 2015

Arbitral Tribunal

Professor Karl-Heinz Böckstiegel (President)

Professor Gabrielle Kaufmann-Kohler

Professor Donald M. McRae

Registry

Permanent Court of Arbitration

WHEREAS pursuant to Article 10 of the Treaty, the Claimant served upon the Respondent a Notification of Claim dated 22 June 2011; and whereas pursuant to Article 10 of the Treaty and Article 3 of the UNCITRAL Rules, the Claimant served upon the Respondent a Notice of Arbitration dated 21 November 2011;

WHEREAS pursuant to Article 4 of the UNCITRAL Rules, the Respondent served upon the Claimant a Response to the Notice of Arbitration dated 21 December 2011;

WHEREAS on 3 August 2012, after consultation with the Parties at a first procedural meeting, the Tribunal issued Procedural Order No. 2, which set out a timetable for the Parties to file their submissions relating to the bifurcation of the proceedings;

WHEREAS on 14 April 2014, following a hearing on the question of bifurcation, the Tribunal issued Procedural Order No. 8, deciding that two preliminary objections should be considered in an initial phase of the proceedings and establishing a timetable for that phase;

WHEREAS on 16 May 2014, after consultation with the Parties, the Tribunal issued Procedural Order No. 9, in which it confirmed that the hearing on preliminary objections (the “Hearing”) would commence on 16 February 2015;

WHEREAS on 16 January 2015, a draft of the present Order was communicated to the Parties; and whereas the Parties submitted their comments on 26, 27 and 29 January 2015;

TAKING ACCOUNT OF THE PARTIES’ VIEWS, THE TRIBUNAL NOW DECIDES AND ORDERS:

1 Duration, Date and Location of the Hearing

1.1 The Hearing shall be held from 16 February 2015 at 10 a.m. to 19 February 2015 at 1 p.m. The Hearing shall commence on the first day at 10 a.m. and thereafter at a time decided by the Tribunal in consultation with the Parties.

1.2 The afternoon of 19 February 2015 shall remain reserved, only in the event that the Tribunal, after consultation with the Parties, deems it necessary to extend the Hearing.

1.3 The Hearing shall be held at:

Maxwell Chambers
32 Maxwell Road
#03-01
Singapore 069115

2 Documentation at the Hearing

2.1 The Parties shall endeavor to produce an agreed Timeline of Relevant Facts, to be filed with the Tribunal by 9 February 2015. In the event that the Parties are unable to agree on a Timeline, each Party is requested to produce its own Timeline by the same date.

2.2 To facilitate references to the exhibits that the Parties rely on in their oral presentations, and in view of the considerable number of exhibits submitted by the Parties, the Parties are requested to make available at the Hearing Hearing Binders containing those exhibits, witness statements, expert reports, and legal authorities (or parts thereof) that they intend to rely on in their oral

presentations at the Hearing, together with a separate consolidated Table of Contents of each Party's Hearing Binders. Each Party shall provide one Hearing Binder for each Tribunal member, one Hearing Binder for the PCA, and two Hearing Binders for the opposing Party. The Hearing Binders shall be produced in A4 or US letter format.

- 2.3 The Parties shall use separate document bundles for the examination of witnesses or experts, which are to be handed to the witness or expert at the beginning of his or her examination. One copy shall be provided to each Member of the Tribunal, one copy to the PCA, and two copies to the opposing Party. Bundles for direct examination need only be provided if new developments have occurred after the witness' or expert's last written statement that the Party presenting the witness wishes to introduce on the basis of documents.
- 2.4 In addition, by 9 February 2015, each Party shall deliver to the Hearing venue one complete hard copy version, in A5 format, of all its written submissions, including exhibits, witness statements, expert reports, and legal authorities, for use in the Hearing room.

3 Agenda of the Hearing

- 3.1 The Tribunal may address questions to the Parties at any time.
- 3.2 The following agenda is established for the Hearing (the "**Agenda**"):
 1. Introduction by the Chairman of the Tribunal.
 2. Opening Statements of not more than 1.5 hours each for:
 - a. The Respondent; and
 - b. The Claimant.
 3. Examination of the Respondent's witnesses and experts. Each witness shall be examined in the following manner and sequence:
 - a. Affirmation of witness as to the truth of his or her evidence;
 - b. Short introduction by Respondent (this may include short direct examination on new developments after the last written statement of the witness);
 - c. Cross-examination by the Claimant;
 - d. Re-direct examination by the Respondent, but only on issues raised in cross-examination;
 - e. Re-cross examination by the Claimant, but only on issues raised in re-direct examination;
 - f. Re-re-direct examination by the Respondent, but only on issues raised in the re-cross examination;
 - g. Remaining questions by Members of the Tribunal.
 4. Examination of the Claimant's witnesses and experts. Each witness shall be examined in the same manner and sequence as detailed in Section 3 of this Agenda.
 5. Any witness or expert may only be recalled for rebuttal examination by a Party or the Members of the Tribunal if such intention is announced in time to assure the availability of the witness and expert during the time of the Hearing.
 6. A single round of closing arguments of not more than 1.5 hour each for:

- a. The Respondent; and
 - b. The Claimant.
7. Remaining questions by the members of the Tribunal, if any.
 8. Discussion of post-hearing submissions and other procedural issues.

4 Allocation of Time

- 4.1 The principle of equal time as between the Parties shall be observed in the conduct of the Hearing.
- 4.2 In view of the examination of witnesses and experts, and taking into account the time available during the period provided for the Hearing in the timetable, the Tribunal establishes equal maximum time periods that the Parties shall have available for their presentations, and for the examination and cross-examination of all witnesses and experts. Taking into account the Calculation of Hearing Time attached to this Order, the total maximum time available to the Parties (excluding their introductory and final statements) for examination of witnesses and experts shall be as follows:

6 hours for the Respondent
6 hours for the Claimant
- 4.3 It is left to each Party to determine how much of its total allotted time it wishes to spend on the items in Sections 3 to 5 of the Agenda, so long as the total time allotted to it is maintained. The Parties may request short additional time if necessary for the examination of witnesses and experts; the Tribunal will exercise a small degree of flexibility in this regard, maintaining the general principle of equal sharing of time allotted to both Parties.
- 4.4 Time spent on direct or re-direct examination shall be counted toward the time account of the Party presenting the witness or expert, whereas time spent on cross-examination shall be counted toward the opposing Party's time account. Time spent on expert conferencing (*see* Section 6.2) shall be counted in half toward both Parties' time accounts. Time spent on housekeeping matters shall not be counted toward either Party's time account.
- 4.5 After the notification of the names of witnesses and experts that each Party wishes to cross-examine during the Hearing (*see* Sections 5.1 and 6.1 below), the Parties are requested to consult with each other with a view to establishing a detailed scheduling proposal indicating the order of appearance of witnesses and experts, the date and approximate time at which each witness or expert will be presented, and the timing of breaks. The Parties are requested to submit such proposal to the Tribunal by 9 February 2015.
- 4.6 In their discussion of a detailed scheduling proposal pursuant to Section 4.5, the Parties are requested to ensure that opening statements take place in the morning of Monday, 16 February 2015; that the examination of witnesses and experts begin in the afternoon of Monday, 16 February 2015; that sufficient time be reserved for the preparation of the Parties' closing statements in the afternoon of Wednesday, 18 February 2015; and that the Parties' closing statements be presented in the morning of Thursday, 19 February 2015 (with a break of 30 minutes between the Parties' presentations);

5 Examination of Witnesses

- 5.1 Witness statements shall stand in *lieu* of direct examination during the Hearing. Accordingly, witnesses shall appear for testimony at the Hearing only if they are called by the opposing Party or the Tribunal for cross-examination. By 26 January 2015 (as indicated in Section 10 of Procedural Order No. 9), each Party shall notify in writing to the other Party, with a copy to the Tribunal, the names of the witnesses whom it wishes to cross-examine at the Hearing. By 2 February 2015 (as indicated in Section 11 of Procedural Order No. 9), each Party may amend its notification in light of the other Party's notification. If a Party does not call a witness of the other side for cross-examination, this shall not be taken as accepting that witness' testimony.
- 5.2 In the event that a witness is called for cross-examination, the Party that has submitted a witness statement shall be responsible for summoning the witness to the Hearing.
- 5.3 Unless the Parties agree otherwise, prior to his or her examination, a fact witness shall not be present in the Hearing room; discuss the oral arguments or the testimony of any other witness who has already testified prior to giving his or her testimony; read any transcript of oral arguments or oral testimony; or listen to or watch any audio or video recording of the oral arguments or oral testimony. None of the restrictions mentioned in the previous sentence shall apply to witnesses who are representatives of a Party; nor do they apply to witnesses who have submitted a statement in this arbitration, but have not been called for cross-examination.
- 5.4 The Tribunal shall, at all times, have complete control over the procedure for hearing a witness. The Tribunal may in its discretion refuse to hear a witness if it considers that the facts with respect to which the witness will testify are either proven by other evidence or are irrelevant; limit or refuse the right of a Party to examine a witness when it appears that a question has been addressed by other evidence or is irrelevant; or direct that a witness be recalled for further examination at any time.

6 Examination of Experts

- 6.1 The provisions of Sub-sections 5.1, 5.2 and 5.4 shall apply *mutatis mutandis* to expert evidence.
- 6.2 In addition to, and following, cross-examination of experts by the Parties, the Tribunal may require experts with corresponding areas of specialization to give evidence concurrently and to discuss any areas of disagreement between them in the presence of the Tribunal (expert conferencing).

7 Presentation of New Documents

- 7.1 Documents that do not form part of the record in this arbitration may not be presented at the Hearing unless agreed by the Parties or authorized by the Tribunal.
- 7.2 However, the Parties may use demonstrative exhibits or Powerpoint presentations at the Hearing, provided that it shall be indicated on each page from which submission or exhibit in the file that page originates.
- 7.3 Demonstrative exhibits and Powerpoint presentations used during opening and closing statements shall be provided in hard copy at the beginning of the respective statement.

Demonstrative exhibits and Powerpoint presentations that are to be used on the first day shall be provided in hard copy at the beginning of the hearing. All other demonstrative exhibits and Powerpoint presentations shall be provided in hard copy no later than the lunch break on the day before their use at the Hearing.

8 Records of Hearings

- 8.1 The Hearing shall be recorded and transcribed.
- 8.2 Live Note transcription software, or comparable software, shall be used to make the Hearing transcripts instantaneously available to the Parties and the Members of the Tribunal in the Hearing room. Further, rough transcripts should be provided by e-mail in the evening of each Hearing day.
- 8.3 The Tribunal shall establish, as necessary, procedures and schedules for the correction of transcripts. In the event of disagreement between the Parties on corrections to transcripts, the Tribunal shall determine whether or not any such corrections are to be adopted.

9 Logistical Issues regarding the Hearing

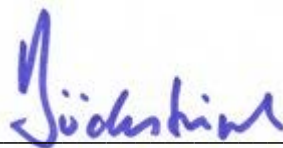
- 9.1 The PCA shall make appropriate arrangements with a court reporter for the live transcription of the Hearing, including real-time feed.
- 9.2 Each Party shall inform the PCA whether visual aids and other equipment will be required at the Hearing.
- 9.3 The PCA shall arrange the catering of lunches and sufficient supplies of refreshments every Hearing day. The Parties are invited to advise the PCA of any dietary requirements.
- 9.4 Each Party is requested to provide the PCA with a list of Hearing attendees by 9 February 2015.

10 Other Matters

The Tribunal may change any of the rulings in this Order, after consultation with the Parties, if considered appropriate under the circumstances.

Date: 4 February 2015

For the Arbitral Tribunal:



Professor Karl-Heinz Böckstiegel
(President of the Tribunal)

Annex to Procedural Order No. 15

Calculation of Hearing Time

| | Hours |
|---|--------------|
| Time available: 3 days of 8 hours | 24.0 |
| Time needed | |
| Lunch breaks: 3 x 30 minutes | 1.5 |
| Six coffee breaks | 1.5 |
| Procedural discussion (estimated total) | 1.0 |
| Introduction by Chairman | 0.5 |
| Additional questions by Members of Tribunal | 1.5 |
| | ---- |
| Total time for other purposes | 6.0 |
| That leaves for the Parties a total of | 18.0 |
| Total time available for each side | 9.0 |
| Total time for Opening Statements and Closing Statements for each Party | 3.0 |
| Total time available for each Party for witness and expert examination | 6.0 |