

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”)**

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**PROCEDURAL ORDER NO. 4  
Regarding the Procedure until a Decision on Bifurcation**

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**Date: 26 October 2012**

**Arbitral Tribunal**

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

**Registry**

Permanent Court of Arbitration

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## I. THE PARTIES' REQUESTS AND PROPOSALS

1. The Respondent requests that the Tribunal exercise its discretion under Articles 17 and 23(3) of the UNCITRAL Rules to order that its objections to jurisdiction be heard in a preliminary phase of the proceedings.<sup>1</sup> The Respondent proposes three possible timetables.<sup>2</sup> Under the Respondent's preferred option, the Claimant would initially lodge a limited Statement of Claim addressing only issues of jurisdiction or admissibility within 90 days of a procedural order on bifurcation by the Tribunal. Alternatively, the limited Statement of Claim could contain the Claimant's full legal case but limit any evidence to issues of jurisdiction and admissibility.<sup>3</sup> This limited Statement of Claim would be followed, within 90 days, by the Respondent's Statement of Objections to Jurisdiction and Admissibility together with the evidence upon which it wishes to rely. A hearing on jurisdiction and admissibility would be held in 2013.<sup>4</sup> The Respondent attached proposed timetables to its submissions.
2. The Claimant requests that the Tribunal refuse to order bifurcation of the proceedings. Alternatively, if the Tribunal is not inclined to refuse bifurcation at this stage, it should determine whether to order bifurcation only after the submission of full memorials by both Parties. The Claimant proposes a detailed timetable leading to an exchange of submissions on the desirability of bifurcation in late 2013.<sup>5</sup> The Claimant attached proposed timetables to its submissions.

## II. BACKGROUND OF THE DISPUTE

3. 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 Claimant alleges, *inter alia*, that "[t]he plain packaging legislation bars the use of intellectual property on tobacco products and packaging, transforming [the Claimant's wholly owned subsidiary] from a manufacturer of

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<sup>1</sup> Australia's Submission in Support of Bifurcation dated 13 August 2012 ("Respondent's Submission dated 13 August 2012"), ¶¶ 36, 43.

<sup>2</sup> Transcript, p. 61:1-19; Australia's Submission dated 13 August 2012, Annex 2.

<sup>3</sup> Transcript, pp. 62:4-63:6; Respondent's Submission dated 13 August 2012, ¶ 39, citing *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3, Procedural Order No. 1 dated 22 December 2003).

<sup>4</sup> Respondent's Submission dated 13 August 2012, ¶ 39.

<sup>5</sup> Claimant's Submission dated 20 August 2012, ¶¶ 52-54, Annexure 1.

branded products to a manufacturer of commoditized products with the consequential effect of substantially diminishing the value of [the Claimant's] investments in Australia.”<sup>6</sup>

4. The Claimant owns 100% of the shares of Philip Morris Australia (“**PM Australia**”), a holding company incorporated in Australia, which in turn owns 100% of the shares of Philip Morris Limited (“**PML**”), a trading company incorporated in Australia and engaged in the manufacture, importing, marketing and distribution for the sale of tobacco products within Australia and for export to New Zealand and the Pacific islands.<sup>7</sup> PML has “rights with respect to certain intellectual property in Australia, including registered and unregistered trademarks, copyright works, registered and unregistered designs, and overall get up of the product packaging.”<sup>8</sup>
5. The Claimant seeks declaratory and compensatory relief. In particular, the Claimant seeks an order that the Respondent “(i) take appropriate steps to suspend enforcement of plain packaging legislation and to compensate [the Claimant] for loss suffered through compliance with plain packaging legislation; or (ii) compensate [the Claimant] for loss suffered as a result of the enactment and continued application of plain packaging legislation.”<sup>9</sup> The amount in dispute is described in the Notice of Arbitration as “an amount to be quantified but of the order of billions of Australian dollars.”<sup>10</sup>

### III. PROCEDURAL HISTORY

6. In the Response to the Notice of Arbitration dated 21 December 2011, the Respondent submitted that it would “request that jurisdictional objections be heard in a preliminary phase of the proceedings” and described its objections.<sup>11</sup>
7. By letter dated 7 June 2012, the Tribunal enclosed a draft Annotated Agenda, inviting the Parties to submit comments on the Agenda by 25 June 2012, and drew attention to section 4 of the draft Agenda which invited the Parties to agree on a joint proposal for a timetable and to inform the Tribunal of the results of these discussions by 16 July 2012.
8. 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

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<sup>6</sup> Claimant's Notice of Arbitration, ¶ 1.5.

<sup>7</sup> Claimant's Notice of Arbitration, ¶¶ 4.1-4.2.

<sup>8</sup> Claimant's Notice of Arbitration, ¶ 1.3.

<sup>9</sup> Claimant's Notice of Arbitration, ¶ 1.7.

<sup>10</sup> Claimant's Notice of Arbitration, ¶ 8.3.

<sup>11</sup> Respondent's Response to the Notice of Arbitration, ¶¶ 29-36.

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”.

9. By letters dated 27 June 2012 respectively, the Respondent informed the Tribunal that it “propose[d] to continue to consult with the Claimant on the matter of a timetable, including the issue of a bifurcated procedure”, and the Claimant set out its position that procedural economy and expedition would not favour bifurcation but that “should the Tribunal not be minded to refuse bifurcation at this point, PM Asia considers that the question of whether there should be bifurcation ought to be argued and determined only following full memorials from each party” and appended a unitary timetable for the course of proceedings.
10. By letter dated 10 July 2012, the Respondent informed the Tribunal of its ongoing discussions with the Claimant and proposed that there be an exchange of brief written submissions on the issue of whether to order bifurcation and that, following such submissions, the issue of bifurcation would be ready for determination at the First Procedural Meeting or shortly thereafter.
11. By letter dated 11 July 2012, the Claimant objected to the Respondent’s proposal and submitted that, should the Tribunal not refuse bifurcation at this stage, the question of whether to bifurcate the proceedings should only be argued and determined following the delivery of full Memorials by each Party.
12. By letters dated 16 July 2012 respectively, the Parties informed the Tribunal that they had consulted on a joint proposal for a timetable but were unable to agree either on the desirability of bifurcation or on the timing and procedure for the Tribunal to determine the matter; accordingly, each Party set out its proposed timetable.
13. By letter dated 16 July 2012, the Tribunal informed the Parties that it “intend[ed] to discuss the procedure for reaching a decision on bifurcation at the First Procedural Meeting” and that no further submissions on the issue of bifurcation would be required before the Meeting.
14. 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

15. At the First Procedural Meeting, the Parties reiterated their views and presented oral arguments on the issue of bifurcation and the procedure for determining bifurcation.
16. On 3 August 2012, the Tribunal issued Procedural Order No. 2 inviting the Parties to make further written submissions on, *inter alia*, the issue of bifurcation, and setting out a timetable for such submissions.
17. On 13 August 2012, in accordance with the timetable set out in Procedural Order No. 2, the Respondent filed its submission on the issue of bifurcation.
18. By letter dated 15 August 2012, the Claimant asked the Tribunal to clarify the scope of the requested submissions on the issue of bifurcation, specifically whether it was limited to the procedure to be followed to determine whether to order bifurcation, and if the scope were so limited, that the Respondent be asked to recast its submission accordingly.
19. By letter dated 16 August 2012, the Respondent submitted that its understanding during the First Procedural Meeting was that the oral submissions of the Parties were directed to the substantive issue of whether the proceedings should be bifurcated or not, and for that reason, its submission should not be recast.
20. By letter dated 16 August 2012, the Tribunal clarified that “the Parties’ submissions on the issue of bifurcation are intended to assist the Tribunal in determining the *timing and procedure* for reaching a decision on the bifurcation of the proceedings” without prejudice to whether bifurcation is appropriate, but that the Tribunal understood that the Respondent’s position could require it to describe the content of its jurisdictional objections and therefore allowed the Respondent’s submission of 13 August 2012 as received.

21. In accordance with the timetable set out in Procedural Order No. 2, on 20 August 2012 the Claimant filed its submission on the issue of bifurcation, on 27 August 2012 the Respondent submitted its reply on the issue of bifurcation, and on 3 September 2012 the Claimant filed its reply on the Respondent's submission of 27 August 2012.

#### IV. SUMMARY OF THE PARTIES' ARGUMENTS

22. The Parties disagree on the timing and procedure for the Tribunal to determine whether the Respondent's jurisdictional objections should be addressed in a bifurcated procedure. The Respondent intends to raise three objections, which are more fully described below. For ease of reference, the Tribunal will refer to these objections as (1) the "**Temporal Objection**"; (2) the "**No Investments Objection**"; and (3) the "**Umbrella Clause Objection**".
23. The Parties also disagree on the timing and procedure for requesting documents pertaining to the negotiating history of the Treaty from the Government of Hong Kong, a non-Party to this arbitration.

##### *I. The Respondent's Position*

##### **A. General Observations**

24. The Respondent requests that its three jurisdictional objections be heard in a preliminary phase of the proceedings.<sup>12</sup> The Respondent submits that it raised its objections to jurisdiction and admissibility at the earliest possible time in the Response to the Notice of Arbitration.<sup>13</sup> While Article 23(2) of the UNCITRAL Rules sets an end point for a respondent to make jurisdictional objections no later than in the statement of defence, Article 4(2)(a) of the UNCITRAL Rules sets the starting point at which the respondent can make jurisdictional objections: in its response to the notice of arbitration.<sup>14</sup>
25. In the Respondent's view, delaying a decision on bifurcation until the exchange of full memorials (as proposed by the Claimant) would prevent any meaningful bifurcation of procedure as only minimal efficiencies could then be achieved.<sup>15</sup> The Respondent points to multiple examples of proceedings where bifurcation was ordered shortly after the first procedural meeting, compared to only one case in which the determination of bifurcation was

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<sup>12</sup> Respondent's Submission dated 13 August 2012, ¶¶ 3, 36.

<sup>13</sup> Respondent's Submission dated 13 August 2012, ¶ 2.

<sup>14</sup> Transcript, p. 45:2-15; Respondent's Submission dated 13 August 2012, ¶ 37.

<sup>15</sup> Transcript, pp. 47:15-49:6; Respondent's Submission dated 13 August 2012, ¶ 4; Australia's Reply Submission on Bifurcation dated 27 August 2012 ("Respondent's Submission dated 27 August 2012"), ¶ 7.

deferred until after the service of a statement of defence.<sup>16</sup> In this regard, the Respondent disputes the Claimant's argument that the practice of tribunals operating under the UNCITRAL Rules 1976 is irrelevant since, regardless of the version of the Rules, the key question remains whether it is likely to be procedurally efficient to bifurcate the proceedings.<sup>17</sup> The Respondent argues that Article 23(2) of the UNCITRAL Rules 2010 is materially identical to Article 21(3) of the UNCITRAL Rules 1976 and that therefore, cases conducted under the UNCITRAL Rules 1976 remain relevant for the present proceedings.<sup>18</sup> In any event, the power to order a bifurcated schedule is conferred by the general power found in Article 17 of the UNCITRAL Rules and is at the Tribunal's discretion, with fairness and efficiency as guiding factors.<sup>19</sup>

26. Contrary to what the Claimant asserts, the Respondent contends that it does not need to demonstrate that its objections are in final form or dispositive of the case but, rather, that they are "serious and substantial, and are suited to being heard in a separate phase" as well as capable of reducing the scope of issues in dispute.<sup>20</sup> The Respondent contends that each of its objections meets these conditions, as set out in detail in the following section.<sup>21</sup>
27. The Respondent also dismisses as purely speculative the Claimant's observation that further objections that might be raised in the future could raise "difficult questions" of overlap with previous preliminary objections.<sup>22</sup>

## **B. The Respondent's Jurisdictional Objections**

28. In addition to these overarching considerations, the Respondent advances specific arguments to demonstrate that each of its jurisdictional objections is suitable for bifurcation. While a summary of the three objections is included in the following section for the purpose of providing the relevant background for the present Order, the Parties remain free to describe, and respond to, these objections more fully at the appropriate time.

### **i) The Temporal Objection**

29. The Respondent's first objection is that, at the time the Claimant acquired its shares in PM Australia on 23 February 2011, the Government of Australia had already publicly committed (on 29 April 2010) to introduce plain packaging legislation by 2012, and that an investor cannot

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<sup>16</sup> Respondent's Submission dated 13 August 2012, ¶ 37.

<sup>17</sup> Respondent's Submission dated 27 August 2012, ¶ 7.

<sup>18</sup> Respondent's Submission dated 13 August 2012, ¶ 37; Respondent's Submission dated 27 August 2012, ¶ 7.

<sup>19</sup> Transcript, pp. 45:16-46:2; Respondent's Submission dated 13 August 2012, ¶ 14.

<sup>20</sup> Transcript, pp. 46:9-47:9; Respondent's Submission dated 13 August 2012, ¶ 4; Respondent's Submission dated 27 August 2012, ¶ 14.

<sup>21</sup> Respondent's Submission dated 13 August 2012, ¶¶ 5-6.

<sup>22</sup> Respondent's Submission dated 27 August 2012, ¶ 7.



buy into a dispute by making an investment at the time when a dispute is either existing or highly probable.<sup>23</sup> The Respondent contends that PML as well as the ultimate parent company, Philip Morris International, had opposed the plain packaging legislation with PML submitting its opposition during government consultations in 2009.<sup>24</sup> According to the Respondent, there was already a dispute between the Philip Morris group and the Government of Australia about the Government's decision when the Claimant acquired its shares in PM Australia.<sup>25</sup>

30. The Respondent alleges that by acquiring its shareholding in PM Australia, the Claimant positioned itself to make a claim under the Treaty and that therefore either the "dispute" between the Parties falls outside the scope of Article 10 of the Treaty, or the claim constitutes an abuse of the rights otherwise conferred by Article 10 of the Treaty.<sup>26</sup>
31. As to the argument that the dispute falls outside the scope of Article 10 of the Treaty, the Respondent contends that a "dispute" concerning an "investment" can only be submitted to investor-State arbitration under Article 10 of the Treaty if the dispute arises after the investment is made.<sup>27</sup> The Respondent argues that this interpretation is confirmed by Article 6(1) of the Treaty, which provides for compensation in case of deprivation of the value of the investment at the date immediately before the deprivation or before the impending deprivation becomes public knowledge, whichever is earlier.<sup>28</sup>
32. Regarding the abuse of right argument, the Respondent cites *Pac Rim Cayman LLC v. The Republic of El Salvador*, where the tribunal stated that "the dividing-line [for a finding of an abuse of process] occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy."<sup>29</sup>
33. The Respondent takes issue with the Claimant's argument that no dispute arose until 21 November 2011 when the plain packaging legislation passed both Houses of Parliament, pointing out that it would then be the case that there was no dispute when the Claimant served its Notification of Claim on 27 June 2011 and no dispute when the Claimant engaged with the Respondent with a view to reaching amicable settlement on 12 September 2011.<sup>30</sup> The Respondent asserts that the time the dispute arose is as early as 30 April 2010, the day after the

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<sup>23</sup> Transcript, pp. 49:12-50:16; Respondent's Submission dated 13 August 2012, ¶¶ 7-13.

<sup>24</sup> Respondent's Submission dated 13 August 2012, ¶ 7.

<sup>25</sup> Respondent's Submission dated 13 August 2012, ¶ 8.

<sup>26</sup> Respondent's Submission dated 13 August 2012, ¶¶ 9-10.

<sup>27</sup> Respondent's Submission dated 13 August 2012, ¶ 11.

<sup>28</sup> Respondent's Submission dated 13 August 2012, ¶ 11.

<sup>29</sup> Respondent's Submission dated 13 August 2012, ¶ 12, citing *Pac Rim Cayman LLC v. The Republic of El Salvador* (ICSID Case No. ARB/09/12, Decision on Jurisdiction of 1 June 2012), ¶ 2.99 ("*Pac Rim*").

<sup>30</sup> Transcript, pp. 50:17-52:6; Respondent's Submission dated 13 August 2012, ¶ 13.

Government of Australia announced its decision to introduce plain packaging legislation, and that in any event it was well before the acquisition by the Claimant of shares in PM Australia.<sup>31</sup>

34. The Respondent asserts that the Temporal Objection is suitable for bifurcation since it constitutes a “discrete and preliminary issue” which would dispose of the case if successful.<sup>32</sup> Moreover, the Respondent argues that it is in the very nature of an abuse of right argument to be dealt with as a preliminary issue, since a respondent should not be obligated to participate in arbitral proceedings that were initiated abusively.<sup>33</sup>
35. The Respondent contends that it does not matter whether the Temporal Objection is characterised as going to jurisdiction or admissibility, since, even assuming *arguendo* that Article 23(1) of the UNCITRAL Rules excludes objections going to admissibility, the Tribunal would still have the power to rule on such an objection as a preliminary matter under its general powers in Article 17(1) of the UNCITRAL Rules.<sup>34</sup> In any event, the Respondent rejects the Claimant’s argument that Article 23(1) of the UNCITRAL Rules does not apply to objections of admissibility, referring to the *travaux préparatoires* of the UNCITRAL Working Group as well as Article 34(1) of the UNCITRAL Rules.<sup>35</sup> The Respondent argues that the cases relied upon by the Claimant do not support the Claimant’s proposition: in *Methanex v. United States*, certain objections by the United States were not truly objections to admissibility even though they were so called, but were in reality applications for summary dismissal. In *Chevron v. Ecuador*, the tribunal did not seek to establish a firm rule that all issues of admissibility should be determined with the merits but intended to address only those objections to admissibility that did not overlap with jurisdictional objections.<sup>36</sup>
36. The Respondent points to *Phoenix Action Ltd. v. The Czech Republic*, *Mobil v. Venezuela*, and *Pac Rim Cayman LLC v. The Republic of El Salvador* as examples of cases where the issue of abuse of right was treated by the tribunal as going to jurisdiction rather than admissibility.<sup>37</sup> The Respondent disputes the Claimant’s contention that these decisions are irrelevant because they were rendered by ICSID tribunals under the ICSID Rules, which explicitly allow for objections on admissibility to be heard in a preliminary phase. In the Respondent’s view, the

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<sup>31</sup> Respondent’s Submission dated 27 August 2012, ¶ 7.

<sup>32</sup> Respondent’s Submission dated 13 August 2012, ¶ 14.

<sup>33</sup> Transcript, p. 52:7-25; Respondent’s Submission dated 13 August 2012, ¶ 14.

<sup>34</sup> Respondent’s Submission dated 13 August 2012, ¶ 14.

<sup>35</sup> Respondent’s Submission dated 27 August 2012, ¶¶ 10-11, citing United Nations Commission on International Trade Law, Report of Working Group II (Arbitration and Conciliation) on the work of its fiftieth session (New York, 9-13 February 2009), UN Doc A/Cn.9/669, ¶ 39.

<sup>36</sup> Respondent’s Submission dated 27 August 2012, ¶ 11.

<sup>37</sup> Transcript, p. 53:5-15; Respondent’s Submission dated 13 August 2012, ¶¶ 14, 17.

overriding consideration for these tribunals was whether it would be procedurally efficient to bifurcate the proceedings.<sup>38</sup>

37. Finally, the Respondent counters the Claimant's argument that there will be considerable overlap in the evidence relevant to its Temporal Objection and the Claimant's case on the merits regarding legitimate expectations, since the test of whether a dispute has arisen between two parties under Article 10 of the Treaty is in no way similar to the test for determining a party's legitimate expectations.<sup>39</sup> The only evidence that would overlap is the development and introduction of plain packaging in Australia, including Philip Morris' engagement in the consultation process, and not matters such as the utility of plain packaging.<sup>40</sup> The Respondent submits that the factual evidence required to rule on the Temporal Objection is limited to what the Claimant knew up until 23 February 2011 and is for the most part in the public domain; any later evidence regarding "efficacy" that might be relied on for a claim of breach of fair and equitable treatment would not be relevant.<sup>41</sup>

**ii) The No Investments Objection**

38. The Respondent's second objection is that neither the shares in PML nor PML's assets constitute investments for the purposes of the Treaty. In support of its objection, the Respondent makes reference to Articles 1(e), 1(b)(i) and 13(1) of the Treaty.<sup>42</sup> The Respondent argues that the Treaty extends protection to indirect investments only where companies incorporated in a third State qualify as investors under the Treaty, and that therefore the assets of PM Australia and PML – two Australian-incorporated companies – do not enjoy protection as investments.<sup>43</sup> The Respondent submits that, pursuant to Article 13(1) of the Treaty, the Claimant's shares in PM Australia would be eligible for protection under the Treaty (subject to their being properly admitted in accordance with Australian law and investment policies), but that the extent of the Claimant's control of PML and its assets is a matter that is contested by Australia. Accordingly, under Article 1(e) of the Treaty, the matter is to be resolved by the Contracting Parties rather than the Tribunal.<sup>44</sup> [REDACTED]

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<sup>38</sup> Respondent's Submission dated 27 August 2012, ¶ 9.

<sup>39</sup> Respondent's Submission dated 13 August 2012, ¶ 15.

<sup>40</sup> Respondent's Submission dated 13 August 2012, ¶¶ 15, 17; Respondent's Submission dated 27 August 2012, ¶ 13.

<sup>41</sup> Transcript, p. 53:16-24; Respondent's Submission dated 13 August 2012, ¶ 15; Respondent's Submission dated 27 August 2012, ¶ 13.

<sup>42</sup> Respondent's Submission dated 13 August 2012, ¶¶ 18-19.

<sup>43</sup> Transcript, pp. 56:11-57:21; Respondent's Submission dated 13 August 2012, ¶ 20.

<sup>44</sup> Transcript, pp. 58:1-59:7; Respondent's Submission dated 13 August 2012, ¶¶ 20- 21.

[REDACTED]  
[REDACTED]<sup>45</sup>

39. The Respondent argues that its No Investments Objection is suitable for bifurcation since the issue of the existence of a qualifying investment is commonly dealt with in a discrete preliminary phase.<sup>46</sup> The Respondent disputes the Claimant’s characterization of the Objection as “surprising” since the “point is apparent on the face of the BIT”.<sup>47</sup> It would be inefficient for the Claimant to present its case on the assumption that assets under its alleged control are covered by the Treaty’s protections, although the Tribunal could find that the question of control was for the Contracting Parties to decide.<sup>48</sup> While the Respondent concedes that a Tribunal ruling on the No Investments Objection would not lead to the dismissal of the entire case, it argues that a decision upholding the Objection would result in striking out of significant parts of the Claimant’s claim.<sup>49</sup> Should the Tribunal uphold the Respondent’s Objection, the proceedings would be confined to the alleged expropriation of the value of the Claimant’s shares in PM Australia.<sup>50</sup>

### iii) The Umbrella Clause Objection

40. The Respondent’s third objection is that the umbrella clause under Article 2(2) of the Treaty does not extend to obligations owed by Australia to other States under multilateral agreements and that the Tribunal is precluded from determining breaches of agreements under the auspices of the World Trade Organization (“**WTO Agreements**”) and under the Paris Convention on the Protection of Industrial Property (“**Paris Convention**”) since these treaties do not establish rights for private parties and contain their own dispute settlement procedures.<sup>51</sup>

41. The Respondent contends that the Umbrella Clause Objection is suitable for bifurcation since issues relating to umbrella clauses have often been determined as a preliminary matter, such as in the arbitrations *SGS v. Pakistan* and *SGS v. The Philippines*.<sup>52</sup> The Respondent also points out that unnecessary time and cost was expended in the absence of bifurcation in *Mox Plant (Ireland v. United Kingdom)*.<sup>53</sup>

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<sup>45</sup> Respondent’s Submission dated 13 August 2012, ¶ 21.

<sup>46</sup> Respondent’s Submission dated 13 August 2012, ¶ 22.

<sup>47</sup> Respondent’s Submission dated 27 August 2012, ¶ 7.

<sup>48</sup> Respondent’s Submission dated 13 August 2012, ¶ 23.

<sup>49</sup> Respondent’s Submission dated 13 August 2012, ¶ 24.

<sup>50</sup> Respondent’s Submission dated 13 August 2012, ¶ 25; Respondent’s Submission dated 27 August 2012, ¶ 15.

<sup>51</sup> Transcript, pp. 54:24-55:17; Respondent’s Submission dated 13 August 2012, ¶¶ 26-29.

<sup>52</sup> Transcript, p. 56:3-10; Respondent’s Submission dated 13 August 2012, ¶ 30.

<sup>53</sup> Respondent’s Submission dated 13 August 2012, ¶ 31.

42. The Respondent argues that it would be more efficient to decide upfront whether the Parties are required to address arguments relating to the WTO Agreements and the Paris Convention, as direction from the Tribunal could materially reduce the scope of the proceedings and be dispositive of several of the Claimant's claims.<sup>54</sup> Moreover, the Respondent asserts that the Umbrella Clause Objection is severable from the merits as it is a purely legal question that is confined to the interpretation of the umbrella clause in Article 2(2) of the Treaty as well as the scope of the Tribunal's jurisdiction in ruling on breaches of the multilateral agreements in question.<sup>55</sup>
43. Finally, the Respondent counters the Claimant's argument that the Claimant is not seeking any relief under WTO Agreements. The Respondent notes that it has well understood that alleged breaches of trade treaties constitute but an element of the Claimant's fair and equitable treatment claim.<sup>56</sup> However, in the Respondent's view, the Tribunal's jurisdiction does not extend to the interpretation of the multilateral agreements in question, even as a question that is incidental to claims under the Treaty.<sup>57</sup>

### **C. No Waiver Regarding Later Objections**

44. The Respondent submits that, if the Tribunal decides to hear the three jurisdictional objections identified above as a preliminary matter, prior to service of the full memorials by the Parties, it does not thereby waive its right to raise further objections at a later stage.<sup>58</sup> The Respondent notes that, pursuant to Article 23(2) of the UNCITRAL Rules, the Tribunal has the discretion to admit late objections to jurisdiction.<sup>59</sup>
45. The Respondent contends that the Claimant misunderstood the Tribunal's point raised at the First Procedural Meeting, when it asked the Respondent whether it would waive its right to request bifurcation up to the filing of the Statement of Defence.<sup>60</sup> The Respondent notes that it is not aware of any investment arbitration in which a respondent was required to waive its right to raise future jurisdictional objections as a condition precedent to bifurcation.<sup>61</sup> Rather, the common approach is to hear any later jurisdictional objections in the course of the subsequent merits phase.<sup>62</sup> The Respondent points out that, in the case *Canadian Cattlemen for Fair Trade*

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<sup>54</sup> Transcript, pp. 55:19-56:2; Respondent's Submission dated 13 August 2012, ¶ 33.

<sup>55</sup> Respondent's Submission dated 13 August 2012, ¶ 33.

<sup>56</sup> Respondent's Submission dated 27 August 2012, ¶ 16.

<sup>57</sup> Respondent's Submission dated 27 August 2012, ¶ 16.

<sup>58</sup> Respondent's Submission dated 13 August 2012, ¶ 37.

<sup>59</sup> Respondent's Submission dated 13 August 2012, ¶ 37.

<sup>60</sup> Respondent's Submission dated 27 August 2012, ¶ 5.

<sup>61</sup> Respondent's Submission dated 27 August 2012, ¶ 6.

<sup>62</sup> Respondent's Submission dated 13 August 2012, ¶ 37.

v. *United States of America*, the United States agreed that any possible further jurisdictional objections would be dealt with in a merits phase, and the Respondent signals its readiness to agree to a similar approach in the present proceedings.<sup>63</sup>

#### **D. Objection to Claimant's Request Regarding the *travaux préparatoires***

46. The Respondent notes that the Claimant seeks the production of the *travaux préparatoires* as a first procedural step. In the Respondent's view, however, a request for the production of the *travaux préparatoires* is premature.<sup>64</sup> The Respondent submits that any requests for documents, including the *travaux préparatoires*, should be made in a defined document production phase of the proceedings.<sup>65</sup>

### **2. The Claimant's Position**

#### **A. General Observations**

47. The Claimant's general position on bifurcation is that "procedural economy and expedition would not favour bifurcation since any objections to jurisdiction or admissibility would require examination of issues and evidence that are inextricably linked to the merits."<sup>66</sup> However, if the Tribunal is not inclined to refuse bifurcation at an early stage, the Claimant submits that any decision on bifurcation should be taken only after the Claimant has submitted its full Statement of Claim and the Respondent has filed its Statement of Defence. At that point, the Claimant points out, the jurisdictional issues are final and developed and the scope of evidence concerning jurisdictional matters and the merits is clear.<sup>67</sup> The Claimant notes that this accords with the UNCITRAL Rules, which allow jurisdictional objections to be made up until the delivery of the respondent's statement of defence.<sup>68</sup>
48. The Claimant contends that at the heart of any consideration of bifurcation is procedural economy and efficiency. The starting point must be Article 17(1) of the UNCITRAL Rules, which requires the Tribunal to conduct the proceedings so as to avoid unnecessary delay and to provide for a fair and efficient process.<sup>69</sup> As is illustrated by the change in language from the

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<sup>63</sup> Respondent's Submission dated 27 August 2012, ¶ 6, citing *Canadian Cattlemen for Fair Trade v. United States of America* (Procedural Order No. 1 of 20 October 2006) ¶ 3.6.

<sup>64</sup> Respondent's Submission dated 27 August 2012, ¶ 17.

<sup>65</sup> Respondent's Submission dated 27 August 2012, ¶ 17.

<sup>66</sup> Claimant's letter dated 27 June 2012, p. 3.

<sup>67</sup> Claimant's letter dated 27 June 2012, p. 3; Claimant's letter dated 12 July 2012, ¶¶ 13, 15; Claimant's Submission as to A: Procedure to be Adopted to Determine Bifurcation, and B: Seat of the Arbitration, dated 30 July 2012 ("Claimant's Submission dated 30 July 2012"), ¶¶ 2, 6-7, 17, 27; Claimant's Submission dated 20 August 2012, ¶¶ 3, 12; Claimant's Submission dated 3 September 2012, ¶ 5.

<sup>68</sup> Claimant's Submission dated 30 July 2012, ¶ 5; Transcript, p. 29:7-17.

<sup>69</sup> Transcript, p. 30:8-13.

UNCITRAL Rules 1976 to the UNCITRAL Rules 2010, it cannot be presumed that bifurcation is necessarily economical or efficient.<sup>70</sup> In this regard, the Claimant finds fault with the Respondent's examples of arbitrations conducted under the UNCITRAL Rules 1976, arguing that all these cases were conducted pursuant to a version of the Rules that still contained a presumption in favour of bifurcation.<sup>71</sup> In any event, the Claimant contends that the cases presented do not analyse whether bifurcation in fact turned out to be efficient.<sup>72</sup>

49. The Claimant alleges that the procedural efficiency of bifurcation can only be assessed after the submission of full memorials by both Parties.<sup>73</sup> The Claimant contends that the Respondent's objections are unduly "anticipatory" of the Claimant's case in that the Respondent is prepared to speculate on the case the Claimant will make, and what will be relevant therein.<sup>74</sup> Moreover, the Respondent misunderstands and underestimates the scope and relevance of the evidence to different aspects of the case.<sup>75</sup> In fact, Australia's current jurisdictional objections are in the Claimant's view very fact-intensive in nature, making it likely that the jurisdictional phase of the proceedings requested by the Respondent would take equally as long as the merits phase.<sup>76</sup>
50. That said, the Claimant accepts that it is *conceivable* that some or all of the Respondent's objections could be dealt with efficiently in a preliminary phase, should it turn out that the Respondent's final objections, as they emerge from the Statement of Defence, are amenable to a self-contained process with limited evidence.<sup>77</sup>

## **B. The Evolving Nature of the Respondent's Objections**

51. The Claimant submits that a determination of procedural efficiency can only be made when the Respondent's objections are final in number and nature.<sup>78</sup> In the Claimant's view, however, the Respondent's objections are still evolving.
52. In particular, the Claimant takes issue with the Respondent's reservation to plead further jurisdictional objections in the future, even after the proposed bifurcated proceedings. That approach would, in the Claimant's view, raise difficult questions as to whether later objections

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<sup>70</sup> Claimant's Submission dated 30 July 2012, ¶ 3; Transcript, pp. 30:16-21, 31:13-22; Claimant's Submission dated 20 August 2012, ¶ 18.

<sup>71</sup> Claimant's Submission dated 20 August 2012, ¶ 18.

<sup>72</sup> Claimant's Submission dated 20 August 2012, ¶ 19.

<sup>73</sup> Claimant's Submission dated 30 July 2012, ¶ 4; Claimant's Submission dated 20 August 2012, ¶ 3.

<sup>74</sup> Claimant's Submission dated 20 August 2012, ¶ 2; Claimant's Submission dated 3 September 2012, ¶ 7.

<sup>75</sup> Claimant's Submission dated 20 August 2012, ¶ 21.

<sup>76</sup> Claimant's Submission dated 30 July 2012, ¶¶ 25-26; Claimant's Submission dated 20 August 2012, ¶ 40.

<sup>77</sup> Claimant's Submission dated 20 August 2012, ¶ 48.

<sup>78</sup> Claimant's Submission dated 20 August 2012, ¶¶ 6, 8.

have in fact been dealt with in the Tribunal's decision, meaning that the Respondent would be precluded from raising them in a different way. Any efficiencies that may be gained from bifurcated proceedings would thus be destroyed.<sup>79</sup>

53. The Claimant also submits that the Respondent's objections are inchoate since, from the beginning of the proceedings, it has added new objections and altered the content of existing objections.<sup>80</sup> The Claimant argues that in the Response to the Notice of Arbitration, the Respondent set out two jurisdictional objections: the Temporal Objection and the Umbrella Clause Objection.<sup>81</sup> The Claimant contends that there was no mention in the Response to the Notice of Arbitration of the No Investments Objection in its current form,<sup>82</sup> and that the Respondent's qualifier that shares in PM Australia would be protected by the Treaty subject to their being "admitted" in accordance with Australian law indicates possible further objections that might be raised after the Statement of Claim.<sup>83</sup>
54. Finally, the Claimant observes that the Respondent has changed its position as to when a decision on bifurcation ought to be taken. It points out that in the Response to the Notice of Arbitration, the Respondent had suggested that "jurisdictional objections be heard in a preliminary phase of the proceedings, subsequent to service of a Statement of Claim by PM Asia", while the Respondent now presses for an earlier determination by the Tribunal.<sup>84</sup>

### **C. Replies to the Respondent's Individual Objections**

55. Turning to the Respondent's individual objections, the Claimant alleges that the Respondent's Temporal Objection goes to admissibility rather than jurisdiction. Contrary to what the Respondent asserts, the categorization of the Objection is not inconsequential, because the UNCITRAL Rules do not confer upon the Tribunal the power to hear an objection to admissibility as a preliminary issue.<sup>85</sup> The Claimant disputes the relevance of the ICSID cases *Phoenix Action Ltd. v. The Czech Republic*, *Mobil v. Venezuela*, and *Pac Rim Cayman LLC v. The Republic of El Salvador* (adduced by the Respondent), since the ICSID Rules do allow admissibility objections to be determined preliminarily. Moreover, the Claimant alleges that the categorization of jurisdiction or admissibility was not raised in *Phoenix* or *Mobil*, and that the

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<sup>79</sup> Claimant's Submission dated 20 August 2012, ¶¶ 9-10; Claimant's Submission dated 3 September 2012, ¶ 6.

<sup>80</sup> Claimant's Submission dated 30 July 2012, ¶ 16. Claimant's Submission dated 20 August 2012, ¶ 11.

<sup>81</sup> Claimant's Submission dated 30 July 2012, ¶ 12.

<sup>82</sup> Claimant's Submission dated 30 July 2012, ¶ 13; Claimant's Submission dated 20 August 2012, ¶ 13.

<sup>83</sup> Claimant's Submission dated 20 August 2012, ¶ 14.

<sup>84</sup> Claimant's Submission dated 30 July 2012, ¶ 8-11, Transcript p. 29:7-17.

<sup>85</sup> Claimant's Submission dated 30 July 2012, ¶ 18; Transcript pp. 66-18-3; Claimant's Submission dated 20 August 2012, ¶¶ 24-25.



categorization of the objection was not considered to be relevant by the *Pac Rim* tribunal.<sup>86</sup> The Claimant also takes issue with the Respondent's reliance on Article 17 of the UNCITRAL Rules as the basis for a general power under which the Tribunal can rule on objections to admissibility, submitting that the tribunals in *Methanex v. USA* and recently in *Chevron v. Ecuador* dismissed this argument in respect of the equivalent Article 15 of the UNCITRAL Rules 1976.<sup>87</sup> In any event, the Claimant contends, the general discretion in Article 17 of the UNCITRAL Rules is subsumed by the requirement of procedural efficiency.<sup>88</sup>

56. Furthermore, the Claimant contends that the evidence relevant to the Temporal Objection will substantially overlap with the evidence on the merits, since the evidence relating to the Claimant's knowledge and foresight of a potential dispute is linked to the Claimant's legitimate expectations.<sup>89</sup> Countering the Respondent's argument, the Claimant argues that the issue is not whether the same legal test applies for determining legitimate expectations in the context of fair and equitable treatment and for determining an abuse of right, but whether the evidence relating to the two issues will overlap.<sup>90</sup> While the Claimant disputes the applicability of the *Pac Rim* test (which provides that a claim can amount to an abuse of right when a dispute is probable), the Claimant alleges that reliance on that test would require an intensive factual inquiry.<sup>91</sup> As an example, the Claimant refers to the issue of the efficacy of plain packaging. Contrary to what the Respondent suggests, this issue pertains to the Temporal Objection as well as to the merits of the case, since PM Asia did not expect Australia to enact a law that had not been credibly linked to the reduction of smoking.<sup>92</sup>
57. Regarding the substance of the Respondent's Temporal Objection, the Claimant asserts that the Respondent has yet to articulate when the dispute in its view "reached a high degree of probability".<sup>93</sup> The Claimant contends that, on the date of service of the Notice of Claim, the Claimant already owned and controlled the Australian companies in question. Moreover, the

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<sup>86</sup> Claimant's Submission dated 20 August 2012, ¶ 25. The *Pac Rim* tribunal ruled that "the Respondent's jurisdictional objection based on Abuse of Process by the Claimant does not, in legal theory, operate as a bar to the existence of the Tribunal's jurisdiction; but, rather, as a bar to the exercise of that jurisdiction, necessarily assuming jurisdiction to exist. For present purposes, the Tribunal considers this to be a distinction without a difference" (*Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.10).

<sup>87</sup> Claimant's Submission dated 20 August 2012, ¶ 25.

<sup>88</sup> Claimant's Submission dated 20 August 2012, ¶ 26.

<sup>89</sup> Claimant's Submission dated 30 July 201, ¶¶ 19-24; Transcript p. 37:5-40:25; Claimant's Submission dated 20 August 2012, ¶¶ 27, 32.

<sup>90</sup> Claimant's Submission dated 20 August 2012, ¶¶ 29-30.

<sup>91</sup> Claimant's Submission dated 20 August 2012, ¶ 28.

<sup>92</sup> Claimant's Submission dated 20 August 2012, ¶ 31.

<sup>93</sup> Claimant's Submission dated 20 August 2012, ¶ 15.

Claimant argues that the Notice of Claim is merely intended to warn of a dispute that may crystallize if not settled by good faith negotiations.<sup>94</sup>

58. The Claimant characterizes the Respondent's No Investments Objection as curious since there is established jurisprudence that "ownership" and "control" cover indirectly held companies.<sup>95</sup> It would be absurd to suggest that the Contracting Parties can retrospectively exclude investors that would otherwise meet the Treaty's criteria.<sup>96</sup> In any event, the Claimant contends that the Respondent's proposed interpretation of the Treaty provisions relating to control makes it plain that a determination whether to bifurcate the proceedings should only be made after disclosure of the *travaux préparatoires*.<sup>97</sup>
59. The Claimant observes that the No Investments Objection, if successful, would only serve to reduce the scope of the Claimant's claim but would not dispose of it.<sup>98</sup> Even if the proceedings were reduced to determining the impact of the plain packaging legislation on the value of the Claimant's shares in PM Australia, the Tribunal would need to examine evidence concerning the extent and loss of the use of PML's intellectual property rights since this loss will impact on the value of PM Australia's shares.<sup>99</sup> The No Investment Objection is thus "plainly subsidiary" and cannot justify bifurcated proceedings.<sup>100</sup>
60. For similar reasons, the Claimant believes that the Umbrella Clause Objection is not fit to be addressed in a preliminary phase. In the Claimant's view, upholding the umbrella clause objection would not alter the scope of document production since the multilateral treaties in question would remain relevant for the interpretation the Treaty, including the fair and equitable treatment standard.<sup>101</sup> The Claimant clarifies in this context that it does not directly seek relief under the WTO Agreements or the Paris Convention. Rather, it argues, the Claimant reasonably expected that the Respondent would abide by its obligations under those treaties.<sup>102</sup>

#### **D. Request Regarding the *travaux préparatoires***

61. The Claimant requests the Tribunal's assistance in asking the Government of Hong Kong to provide a copy of the *travaux préparatoires* of the Treaty – a process that, in its view, is likely

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<sup>94</sup> Claimant's Submission dated 20 August 2012, ¶¶ 15-16.

<sup>95</sup> Claimant's Submission dated 30 July 2012, ¶ 15.

<sup>96</sup> Claimant's Submission dated 30 July 2012, ¶ 15.

<sup>97</sup> Claimant's Submission dated 30 July 2012, ¶ 15.

<sup>98</sup> Claimant's Submission dated 20 August 2012, ¶ 37.

<sup>99</sup> Claimant's Submission dated 20 August 2012, ¶ 37.

<sup>100</sup> Transcript, p. 67:4-13.

<sup>101</sup> Claimant's Submission dated 20 August 2012, ¶ 38.

<sup>102</sup> Transcript, pp. 67:14-68:2; Claimant's Submission dated 20 August 2012, ¶¶ 38-39.

to take some time.<sup>103</sup> The Claimant submits that it does not understand the Tribunal to have observed at the Procedural Meeting that it is too early to request the production of the *travaux*. Rather the Tribunal indicated that the *travaux préparatoires* could to some extent be relevant for at least the jurisdictional phase, and that the Tribunal would determine whether to adopt the Claimant's approach regarding the *travaux préparatoires* after having seen the Parties' written submissions.<sup>104</sup>

## V. THE TRIBUNAL'S CONSIDERATIONS

62. The Parties' extensive submissions have been very helpful. All of them have been taken into account by the Tribunal. In view of the above summaries of the Parties' contentions, the Tribunal hereafter will only focus on those arguments and considerations which it considers as determinative for its decision on the further procedure until the decision on bifurcation.
63. As is undisputed between the Parties, Art. 17(1) UNCITRAL Rules provides the Tribunal with wide discretion as to the conduct of the procedure. The second sentence of this provision directs that the Tribunal shall exercise this discretion "*so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute*".

### I. *Bifurcation*

64. Particularly regarding pleas as to jurisdiction, Article 23(3) UNCITRAL Rules provides a further qualification to the effect that the arbitral tribunal may rule on such pleas "*either as a preliminary question or in the award on the merits*".
65. These criteria obviously depend on the particularities of the case at hand. The Tribunal, therefore, feels it does not have to enter into the Parties' arguments as to the relevance of respective decisions by other tribunals under the former version of the UNCITRAL Rules or as to the comparative analysis between the respective provisions in these former and the new UNCITRAL Rules applicable to the present case. Instead, the Tribunal has to focus on what the present Parties request and how the criteria provided by the UNCITRAL Rules are best applied to the specific circumstances of the present dispute.
66. The Tribunal has taken note of the objections on jurisdiction as identified in the Respondent's submissions as well as of the Claimant's comments in this regard. Taking these into account, the Tribunal considers that it is not in a position to come to any conclusion at the present stage as to whether such objections would best be examined in a first separate phase of the procedure

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<sup>103</sup> Transcript, p. 78:3-15.

<sup>104</sup> Claimant's Submission dated 3 September 2012, ¶ 9.

or not. Some of the objections are dependent on a number of factual issues which are not yet, and cannot be fully developed by the Parties at the present stage. Only after both sides have had an opportunity to make first presentations of their factual and resulting legal arguments on the entire case will the Tribunal be sufficiently informed to be able to decide whether or not bifurcation is the most efficient way to proceed.

67. A further consideration strongly confirms this approach: in response to a question by the chairman of the Tribunal at the Procedural Meeting in Singapore, the Respondent pointed out at that meeting and also in its later submissions that it does not waive its right under Article 23(2) UNCITRAL Rules to raise objections to jurisdiction at the latest in its Statement of Defence. The Tribunal fully understands this position, because, indeed, only after having received the Claimant's Statement of Claim, can the Respondent make an informed final decision regarding the full extent of the objections to jurisdiction that it wishes to raise. However, this also has the consequence that only after receiving the Respondent's Statement of Defence will the Tribunal be aware of all the objections to jurisdiction raised in the present case. And only at that time will the Tribunal be in a position to fully examine all factors relevant for the question whether bifurcation is the most efficient method to proceed or whether all or some of the objections to jurisdiction should better be joined to the procedure on the merits.
68. In view of the above considerations, the Tribunal concludes that the decision regarding bifurcation should be postponed until after a full Statement of Claim and a full Statement of Defence on all aspects of the case are submitted.

## **2. *The Claimant's Application Regarding the Travaux Préparatoires***

69. Similar considerations as to the issues of bifurcation are relevant to the Claimant's application regarding the *travaux préparatoires*.
70. The Tribunal has taken note of the Claimant's argument that the *travaux* may be relevant at an early stage for the examination of the question of jurisdiction. However, just as the Tribunal feels it is not presently able to take an informed decision on jurisdiction or on bifurcation, so does it consider that it does not have sufficient information to decide whether the application of the Claimant should be granted or not.
71. The Tribunal appreciates the Claimant's argument that it would need the *travaux* for the elaboration of its Statement of Claim. However, whether or not that is so, cannot be decided by the Tribunal at present. It is not an unusual situation in arbitration that, at the time it submits a statement of claim (or of defence for that matter), a party is not in possession of all the documents it considers relevant to present its case. The procedure on disclosure of documents is available precisely for the purpose of requesting further evidence. The same should apply, in

the view of the Tribunal, regarding evidence which is sought by a Party not from the other Party, but from another source as suggested in the Claimant's Application.

72. In view of the above considerations, the Claimant's Application is denied. But the Claimant may, if it still considers it necessary, submit the same or a similar application, depending on the evidence it has, after receiving the Respondent's Statement of Defence and after the Tribunal's decision on bifurcation, in accordance with the timetable the Tribunal will set at that juncture.

### **3. Procedure Until the Decision on Bifurcation**

73. The Tribunal has taken note of the Parties' proposals regarding the further procedure and the respective timetables under the various scenarios they suggested.
74. In particular, the Tribunal has noted the – relatively long – periods both Parties have indicated for the submissions of the full Statement of Claim and Statement of Defence.

Further, the Tribunal considers that, after these full Statements have been filed, since two rounds of submissions have already been filed on bifurcation and the resulting timetable, only one further round of submissions on these issues will be sufficient, particularly if a hearing on them is held thereafter.

In view of the importance both Parties attribute to the issue of bifurcation, the Tribunal indeed considers that such a hearing is the preferable way to proceed to enable a further and final opportunity for an exchange between the Parties and the Tribunal, before the Tribunal decides on bifurcation and the resulting timetable for the procedure thereafter.

75. The timetable determined in the following section on decisions takes the above considerations into account.

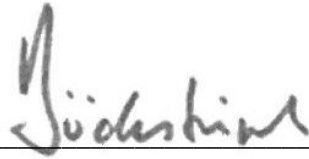
## **VI. DECISIONS**

- 1. The Tribunal takes no decision regarding bifurcation at the present time. That decision is postponed in accordance with the timetable set forth hereafter.**
- 2. The Claimant's Application regarding the *travaux préparatoires* is denied. But the Claimant may, if it still considers it necessary, submit the same or a similar application, after the Tribunal's decision on bifurcation in accordance with the timetable set then.**

**3. The following TIMETABLE is set for the further procedure:**

- 3.1 By 15 February 2013, the Claimant shall file its Statement of Claim on all aspects of the dispute together with all evidence (documents, witness statements, expert statements) it wishes to rely on.**
- 3.2 By 31 July 2013, the Respondent shall file its Statement of Defence on all aspects of the dispute together with all evidence (documents, witness statements, expert statements) it wishes to rely on. The Respondent shall also address any aspects of bifurcation not covered in the already completed two rounds on that subject and propose timetables for the two following scenarios:**
- a) bifurcation between a first phase on jurisdiction and, should jurisdiction be accepted by the Tribunal, a second phase on the merits; and**
  - b) no bifurcation.**
- 3.3 By 30 August 2013, the Claimant shall file a submission on aspects of bifurcation not covered in the already completed two rounds on that subject and propose timetables for the two scenarios outlined in Paragraph 3.2 above.**
- 3.4 Shortly thereafter, the Tribunal will consult the Parties as to the details of the hearing on bifurcation, either by a telephone conference or by e-mail communication, as considered more appropriate by the Tribunal.**
- 3.5 On 25 September 2013, a hearing on bifurcation and the resulting timetable will be held in Singapore, possibly to be extended to 26 September 2013 if considered appropriate by the Tribunal after consultation with the Parties.**

**Dated, 26 October 2012**



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**On behalf of the Tribunal**

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