

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. 5
Regarding Confidentiality**

Date: 30 November 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 Parties seek direction from the Tribunal in relation to the confidentiality regime applicable to the present arbitration. In this respect, each Party has proposed a draft Protocol, which it requests the Tribunal to adopt.

II. PROCEDURAL HISTORY

2. In advance of the First Procedural Meeting, the Tribunal had invited the Parties to consult with each other in relation to the standard of confidentiality that should apply to the present proceedings.
3. By their respective letters dated 27 June 2012 responding to the Tribunal's invitation, the Respondent informed the Tribunal that it was committed to transparency and did not agree with the Claimant's proposal that the hearings be held *in camera*, and the Claimant informed the Tribunal that the Parties disagreed on the standard of confidentiality applicable to the proceedings but that discussions on the matter were ongoing.
4. By letter dated 24 July 2012, the Claimant informed the Tribunal that the Parties "continue[d] to be engaged in constructive discussions concerning the issue of confidentiality" but that agreement had not been reached and requested, in accordance with Article 28(3) of the UNCITRAL Rules, that the First Procedural Meeting be held *in camera* and that "all documents created or held by or on behalf of the Tribunal concerning this proceeding, including any transcript of and any other records concerning the Procedural Meeting, be kept confidential."
5. By letter dated 25 July 2012, the Respondent reiterated its commitment to transparency but agreed, as a consequence of Article 28(3) of the UNCITRAL Rules and the Claimant's request, that the First Procedural Meeting be held *in camera* and further agreed that all documents held by the Tribunal be kept confidential except for those already in the public domain.
6. By letter dated 26 July 2012, the Tribunal took note of the Parties' agreement that the First Procedural Meeting be held *in camera* and that documents not already in the public domain be kept confidential.
7. 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

8. At the First Procedural Meeting, the Parties reiterated their views and presented brief oral arguments on the issue of confidentiality. The Tribunal requested that the Parties consult with each other in the weeks following the Meeting with a view to presenting a joint proposal for an order or an agreement on confidentiality to the Tribunal.
9. On 3 August 2012, the Tribunal issued Procedural Order No. 2, which *inter alia* invited the Parties to inform the Tribunal of their views on the issue of confidentiality, including any agreement that has been reached between them.
10. By letter dated 31 August 2012, the Claimant informed the Tribunal on behalf of both Parties of an agreed extension for the Parties to submit their views on the issue of confidentiality.
11. By letter dated 12 September 2012, the Claimant set out its position on confidentiality, informing the Tribunal that, while the Parties had continued discussion on the standard of confidentiality applicable to the proceedings, the Parties had not yet reached agreement, and requested that “the Tribunal make directions to enable the determination of the issue”. By letter of the same date, the Respondent set out its position on confidentiality, informed the Tribunal that it considered that there was only one fundamental difference between the Parties on the issue of confidentiality in that the Respondent considered that each Party should be allowed to publish its own written submissions with accompanying exhibits, redacted as appropriate. The

Respondent requested that the Tribunal grant the Parties another extension before reverting back with the outcome of further consultations.

12. By letter dated 17 September 2012, the Tribunal invited the Parties to continue their efforts to reach agreement on the applicable standard of confidentiality and set out a timetable whereby the Parties were invited to submit any agreed resolution, or if no resolution was reached, to submit their respective proposals for a Tribunal procedural order on confidentiality and provide comments on the proposal of the other Party.
13. Since no resolution was reached, on 28 September 2012, each Party submitted its proposal for a Tribunal Procedural Order on confidentiality and, on 5 October 2012, comments on the proposal of the other Party, in accordance with the Tribunal's timetable.

III. SUMMARY OF THE PARTIES' ARGUMENTS

A. *The Claimant's Position*

1. General Observations

14. In the Claimant's view, the proceeding as a whole should be presumptively confidential, as provided for under Articles 28(3) and 34 of the UNCITRAL Rules, Articles 3.13 and 9.4 of the IBA Rules, and general principles.¹ The Claimant notes the Tribunal's comment at the First Procedural Meeting that the "UNCITRAL Rules start from...[a] presumption of confidentiality."² However, the Claimant consents that the Tribunal's awards, decisions, orders and directions be published, subject to the redaction of commercially sensitive information, and that the Parties may make neutral public statements concerning the nature of the issues in dispute in the arbitration and its procedural status.³ In this regard, the Claimant recognizes that, although it has a right to refuse the publication of awards under the applicable rules of procedure, investment proceedings generate a particular interest in transparency.⁴
15. The Claimant contends that its proposed Protocol is modelled on the approach adopted in *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania* (hereinafter "*Biwater*"), where the tribunal discussed in detail the need to strike a balance between protecting the procedural integrity of the proceedings and transparency. In that case, the tribunal decided that it would act

¹ Claimant's Submission dated 28 September 2012, ¶¶ 6, 10-14.

² *Ibid.*, ¶ 10.

³ *Ibid.*, ¶¶ 2, 6.

⁴ *Ibid.*, ¶ 15.

as “gate-keeper” to ensure that this balance was maintained, with the parties granted leave to apply to vary the confidentiality regime on a case-by-case basis.⁵

16. The Claimant contends that its proposed Protocol is consistent with Article 17(1) of the UNCITRAL Rules, which requires proceedings to be conducted efficiently. In the Claimant’s view, any further disclosure beyond what is contemplated in its proposed Protocol is of little or no benefit.⁶ The proposed Protocol pays regard to minimizing satellite disputes concerning the redaction of sensitive information, preserves the procedural integrity of the proceedings, and responds to the Respondent’s legitimate interest in reporting on the procedure and progress of the arbitration to the public.⁷ The Claimant notes that the Parties can apply to the Tribunal for permission to disclose any document outside of the proposed confidentiality regime.⁸
17. The Claimant contends that its proposed Protocol provides a manageable scope of documents for review and redaction, since it encompasses solely the Tribunal’s awards and orders and highlights that “extensive commercially sensitive information will be integral to PM Asia’s case.”⁹ The Claimant argues that another benefit of its proposed Protocol is that it does not require a finding as to confidentiality on a document by document basis, with all produced documents deemed confidential unless the Parties agree or the Tribunal orders otherwise.¹⁰

2. Response to the Respondent’s Proposed Protocol

18. The Claimant further submits that the conceded derogations from its starting position of confidentiality are more than sufficient to address Australia’s stated interest in keeping its public informed while balancing other competing interests in this proceeding.¹¹ The Claimant disputes the Respondent’s characterization of the Parties’ respective positions as essentially a minor point of disagreement, since “the scope of the dispute involves the lion’s share of the documents generated by this arbitration and the process proposed by Australia for managing confidentiality is fraught with unnecessary cost and inefficiency.”¹²
19. The Claimant takes issue with the Respondent’s proposal to include double square brackets to designate confidential information within each document, deeming it “highly impractical” and

⁵ *Ibid.*, ¶¶ 6, 16-17, 20, 22, citing *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, Procedural Order No. 2, 29 September 2006.

⁶ Claimant’s Submission dated 5 October 2012, ¶ 4.

⁷ Claimant’s Submission dated 28 September 2012, ¶¶ 7, 18, 24; Claimant’s Submission dated 5 October 2012, ¶ 5.

⁸ Claimant’s Submission dated 28 September 2012, ¶ 6.

⁹ *Ibid.*, ¶¶ 19-32.

¹⁰ *Ibid.*, ¶¶ 22, 45.

¹¹ *Ibid.*, ¶ 2.

¹² *Ibid.*, ¶ 9.

arguing that it would be unworkable since there will be a large amount of material and the evidence will be highly complex.¹³ By way of example, the Claimant contends that the highly commercially sensitive information it will adduce includes past and future financial figures, past and future marketing and business plans and operational, management and intellectual property arrangements.¹⁴ The Claimant further argues that identifying and redacting the documents would be “expensive, unwieldy and seriously disruptive to the proper functioning and orderly and efficient disposal of the proceeding”.¹⁵

20. The Claimant stresses that publishing the Tribunal’s order and awards, which summarise the Parties’ submissions and evidence, will meet the Respondent’s interest in keeping its public informed since the genuine public interest would be in the outcome and progress of the proceeding. The Claimant argues that the Respondent has not proven why it must publish all produced documents to satisfy that interest.¹⁶
21. The Claimant also finds fault with the Respondent’s proposal that documents relating to a hearing be publicly disclosed in advance of the hearing, arguing that it will engender disputes as to which documents relate to the hearing and require time-intensive redactions in the immediate lead up to each hearing.¹⁷
22. The Claimant further takes issue with the general definition of “confidential information” in the Respondent’s proposed Protocol, which the Claimant contrasts with its own definition of “Sensitive Information” that identifies six specific categories of information.¹⁸ The Claimant proposes that the Respondent equally put forward categories of what it deems as governmentally sensitive information.¹⁹ The Claimant stresses that, unlike the Respondent’s suggestions, the definitions in its proposed Protocol are not over-inclusive. As defined in Clause 1(a) of the Claimant’s proposed Protocol, the definition of “Confidential Materials” excludes documents that are in the public domain, other than those in the public domain because of breach of the Protocol.²⁰ Moreover, the Claimant points out that Clause 4 provides that a Party is not required to keep confidential its documents that were created other than for the dominant objective of being produced or filed in the arbitration.²¹

¹³ *Ibid.*, ¶¶ 28-29.

¹⁴ *Ibid.*, ¶ 30.

¹⁵ *Ibid.*, ¶ 31.

¹⁶ *Ibid.*, ¶¶ 25-26; Claimant’s Submission dated 5 October 2012, ¶ 2.

¹⁷ Claimant’s Submission dated 28 September 2012, ¶ 34.

¹⁸ Claimant’s Submission dated 28 September 2012, ¶ 33, Attachment B, ¶ 2.

¹⁹ *Ibid.*

²⁰ Claimant’s Submission dated 5 October 2012, ¶ 11.

²¹ *Ibid.*

23. The Claimant argues that the proceedings are subject to significant public interest and that the degree of disclosure under the Respondent's proposed Protocol may fuel a trial by media and academia, place unnecessary pressure on the witnesses and experts, and increase antagonism between the Parties.²² The Claimant contends that allowing the Respondent to publish only its own documents would not cure the issue, since many of the Respondent's submissions will respond to claims made by the Claimant; thus selected parts of its case will be released.²³
24. The Claimant alleges that the purposes for which the Respondent may have enacted its *Freedom of Information Act* 1982 (hereinafter "**FOI Act**") are irrelevant to the question of the appropriate confidentiality regime, which should be guided by Article 17(1) of the UNCITRAL Rules.²⁴ Nevertheless, the Claimant argues that its proposed Protocol takes account of the Respondent's concerns relating to the FOI Act.²⁵ The Claimant notes that its Protocol provides that, where a legal duty to disclose exists, such disclosure would be permitted provided that no exemption or exception applies (such as the exemptions under the FOI Act), and that a Party proposing to disclose documents would be under an obligation to provide the other Party with at least 10 days' notice.²⁶
25. The Claimant further disputes the relevance of the (non-mandatory) Framework Convention on Tobacco Control (hereinafter "**FCTC**") Guidelines, on which the Respondent relies, since these Guidelines are intended to control the development of tobacco control policies by FCTC States Parties and not the appropriate practice and procedure of an investment tribunal.²⁷
26. The Claimant also takes issue with the Respondent's comparison of the present arbitration to the litigation of a related dispute in Australia's High Court. That litigation proceeded by way of a demurral on a statement of "questions reserved", and incorporated agreed facts, so that the remit of the Court was confined to legal questions. Moreover, the Claimant notes that the integrity of the High Court's processes was protected by the Australian law of contempt, allowing the Court to address instances of illicit disclosure of information.²⁸
27. Turning to the specifics of the Respondent's proposed Protocol, the Claimant finds fault with Clause 3, which defines the "Authorised Person" permitted to view Protected Documents. In the Respondent's view, affiliates should only be companies immediately upstream or downstream of the Claimant, thereby preventing certain senior executives from the Philip

²² Claimant's Submission dated 28 September 2012, ¶¶ 35-39.

²³ *Ibid.*, ¶ 40.

²⁴ Claimant's Submission dated 5 October 2012, ¶ 8.

²⁵ Claimant's Submission dated 28 September 2012, ¶¶ 47-48.

²⁶ Claimant's Submission dated 28 September 2012, ¶ 48; Claimant's Submission dated 5 October 2012, ¶ 8.

²⁷ Claimant's Submission dated 5 October 2012, ¶¶ 9-10.

²⁸ *Ibid.*, ¶ 6.

Morris group from having access to the documents without giving undertakings. According to the Claimant, no reciprocal restriction is proposed for the Respondent's government personnel.²⁹ The Claimant further notes that such a restriction also appears in another part of the Respondent's Protocol, which requires advance notification to the Respondent of all personnel of the wider Philip Morris Group with whom the Protected Documents will be shared. The Claimant contrasts this regime with its proposed Protocol which provides for the disclosure of documents to personnel or affiliates of a Party and any third parties retained for the purposes of the proceedings.³⁰ The Claimant further disputes that any disclosure to the Government of Hong Kong is necessary, as provided for in Respondent's proposed Protocol at sub-Clause 3(j), noting that it would give rise to issues of maintaining confidentiality since Hong Kong is not a party in these proceedings.³¹

28. The Claimant objects to the Respondent's proposal that hearings be held *in camera* subject to "any order of the Tribunal", arguing that Article 28(3) of the UNCITRAL Rules provides for *in camera* hearings subject to the agreement of the Parties and does not extend discretion to tribunals to change the confidential nature of the hearing.³² The Claimant notes that, while the destruction of documents after the arbitration is appropriate, the Respondent's proposal that it be done within 30 days of the final award does not take into consideration any applications for setting aside the award or appeals.³³ Responding to Australia's concerns about preserving confidentiality indefinitely, the Claimant asserts that a release of documents after the conclusion of the arbitration would be a time-consuming process with minimal gains for the public interest.³⁴
29. The Claimant notes that the "other pending investor-State arbitration" involving the Philip Morris company to which the Respondent refers by way of comparison, is the claim brought by Philip Morris Brands Sàrl, Philip Morris Products SA and Abel Hermanos SA against Uruguay.³⁵ The Claimant contends that the arbitration against Uruguay is "a different case with different circumstances, involving different claimants against a different State under a different investment treaty, and is not a proceeding subject to the UNICTRAL Rules."³⁶ The Claimant

²⁹ Attachment B, Claimant's Submission dated 28 September 2012, ¶ 3.

³⁰ *Ibid.*, ¶ 4.

³¹ *Ibid.*, ¶ 5.

³² *Ibid.*, ¶ 6.

³³ *Ibid.*, ¶ 7.

³⁴ Claimant's Submission dated 5 October 2012, ¶ 12.

³⁵ *Ibid.*, ¶ 7.

³⁶ *Ibid.*

submits that the Respondent has not shown why the orders made in that proceeding are appropriate to the present arbitration.³⁷

30. The Claimant also disputes the Respondent's characterization of the present arbitration as concerning a State's right to regulate to achieve public health objectives, arguing that the Parties are in dispute as to whether the Respondent has complied with its Treaty obligations to protect the Claimant's investments in Australia in enacting plain-packaging legislation.³⁸

B. The Respondent's Position

1. General Observations

31. The Respondent stresses that it is committed to transparency in investor-State arbitration in general and in the present proceedings, which concern a State's right to adopt a regulatory measure of general application designed to achieve public welfare objectives, in particular. The dispute goes beyond a commercial dispute between two parties that should be insulated from public scrutiny.³⁹ According to the Respondent, the legitimacy of the arbitral process will be enhanced by greater transparency, as confirmed by the tribunal in *Aguas Argentinas*.⁴⁰
32. The Respondent notes that it is a State party to the FCTC and points to the Guidelines for Implementation, which provide that States should ensure that interactions with the tobacco industry are conducted transparently.⁴¹ The Respondent also stresses that the confidentiality regime in the present proceedings must recognise the Respondent's duty to disclose certain documents under the FOI Act.⁴² Accordingly, the Respondent requests that its commitment to open and transparent government, including its enactment of freedom of information laws, be taken into account when determining the confidentiality regime applicable to these proceedings.⁴³
33. The Respondent argues that its proposed confidentiality regime provides a balanced framework that takes into account the legitimate need to protect confidential and sensitive information as

³⁷ *Ibid.*

³⁸ *Ibid.*, ¶ 3.

³⁹ Annexure B, Respondent's Submission dated 28 September 2012, ¶ 5; Annexure F, Respondent's Submission dated 28 September 2012, ¶ 4; Respondent's Submission dated 28 September 2012, ¶ 5.

⁴⁰ Respondent's Submission dated 5 October 2012, ¶ 12, citing *Aguas Argentinas SA, Suez, Sociedad General de Aguas de Barcelona SA v. Argentina* (hereinafter "*Aguas Argentinas*") (ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005), ¶ 22. See also Annexure B, Respondent's Submission dated 28 September 2012, ¶ 9.

⁴¹ Respondent's Submission dated 28 September 2012, ¶ 6; Respondent's Submission dated 5 October 2012, ¶ 12.

⁴² Annexure F, Respondent's Submission dated 28 September 2012, ¶ 8.

⁴³ Respondent's Submission dated 28 September 2012, ¶ 7.

well as the public interest in an appropriately transparent procedure.⁴⁴ The Respondent considers that any regime in the present case should allow each Party to publish its own submissions (including witness statements and annexures when these are its own documents) with appropriate redactions for confidential information.⁴⁵ The Respondent disagrees that such publication would impact on the integrity of the arbitral process; however, to avoid any of the concerns raised by the Claimant, the Respondent proposes that publication take place at the beginning of the oral hearing.⁴⁶

34. The Respondent observes that its proposed confidentiality regime is modelled on the confidentiality regime of another investor-State arbitration involving Philip Morris. In fact, compared to that regime, the Respondent considers its proposal to be more restrictive since in the other dispute publication of both parties' documents is permitted (subject to redaction).⁴⁷

2. Response to the Claimant's proposed Protocol

35. The Respondent submits that the Claimant's approach does not adequately address the strong public interest in these arbitrations and disagrees with the Claimant's starting point that the proceedings should be confidential.⁴⁸ In support of its position, the Respondent relies on a commentary to the UNCITRAL Rules to argue that the provisions relied on by the Claimant alone do not give rise to a general duty of confidentiality.⁴⁹ Similarly, the Respondent notes, the *Biwater* tribunal observed that there is no general duty of confidentiality or prohibition of disclosure of documents prepared for the arbitration, besides the specific provisions of Articles 25(4) and 32(5) of the [1976] UNCITRAL Rules.⁵⁰
36. The Respondent further argues that a number of national courts in different jurisdictions have found against an implied duty of confidentiality in international arbitration proceedings.⁵¹ An implied duty of confidentiality was also rejected by investment tribunals, such as in the *Loewen*

⁴⁴ Respondent's Submission dated 28 September 2012, ¶ 4; Respondent's Submission dated 5 October 2012, ¶¶ 6, 21.

⁴⁵ Respondent's Submission dated 28 September 2012, ¶ 8.

⁴⁶ *Ibid.*

⁴⁷ Respondent's Submission dated 28 September 2012, ¶ 4; Respondent's Submission dated 5 October 2012, ¶ 5.

⁴⁸ Annexure F, Respondent's Submission dated 28 September 2012, ¶ 4.

⁴⁹ Respondent's Submission dated 5 October 2012, ¶¶ 2, 6, 9 citing David Caron, Lee Caplan and Matti Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (2006), p. 34.

⁵⁰ Respondent's Submission dated 5 October 2012, ¶ 9, citing *Biwater*, *supra* note 5, ¶ 132.

⁵¹ Respondent's Submission dated 5 October 2012, ¶ 10, citing *United States v. Panhandle Eastern Corporation*, 118 FRD 346, 349-350 (DC Delaware, 1988), *Esso Australia Resources Ltd v. Plowman* (1995) 183 CLR 10 and *Bulgarian Foreign Trade Bank Ltd v. A I Trade Finance Inc* (Judgment of the Supreme Court of Sweden, 27 October 2000).

case.⁵² The Respondent cites the *Biwater* tribunal's observation that "there is now a marked tendency towards transparency in treaty arbitration."⁵³ Moreover, the Respondent recalls the present Tribunal's observations during the First Procedural Meeting that in certain proceedings, such as those under the North American Free Trade Agreement ("NAFTA") and the Dominican Republic-Central America Free Trade Agreement, there is "absolutely full transparency" and that the standard of confidentiality has changed as compared with former times.⁵⁴

37. The Respondent submits there is a wide recognition of the need for greater transparency in investment treaty arbitration, pointing to the current project of the UNCITRAL Working Group II (Arbitration and Conciliation) to prepare a "legal standard" for transparency in treaty-based investor-State arbitration.⁵⁵ At the same time, the Respondent disputes the Claimant's reliance on the IBA Rules in asserting a general principle of confidentiality, noting that the Parties agreed that these Rules should serve merely as a guide and that the Respondent had previously objected to the application of Article 3(13) of the IBA Rules to the case.⁵⁶
38. The Respondent notes that the Parties were able to reach agreement on a number of points: that the Tribunal's awards and orders should be made publicly available subject to redaction; that the Parties may disclose material associated with the case where required to do so to fulfil a legal duty; and that (the Respondent's preference for an open hearing with published transcripts notwithstanding) Article 28(3) of the UNCITRAL Rules applies and transcripts shall be kept confidential absent agreement between the Parties.⁵⁷
39. The Respondent alleges that the only unresolved difference between the Parties relates to the confidentiality standard applicable to the Parties' written submissions.⁵⁸ While the Respondent suggests that each Party should have the right to publish its own submissions (with appropriate redactions) at the beginning of the relevant oral hearing, the Claimant is willing to consent to publication only with respect to documents that are not created for the dominant purpose of being produced or filed in the present proceedings.⁵⁹ The Respondent asserts that the

⁵² Respondent's Submission dated 5 October 2012, ¶ 11, citing *Loewen Group Inc and Raymond L Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3, Decision on Jurisdiction, 5 January 2001), ¶ 26.

⁵³ Respondent's Submission dated 5 October 2012, ¶ 11, citing *Biwater*, *supra* note 5, ¶ 114.

⁵⁴ Respondent's Submission dated 5 October 2012, ¶ 11; Transcript (First Procedural Meeting), 30 July 2012, p. 91:13-15 and p. 92:12-15.

⁵⁵ Respondent's Submission dated 5 October 2012, ¶¶ 11-12.

⁵⁶ Annexure B, Respondent's Submission dated 28 September 2012, ¶ 10; Respondent's Submission dated 5 October 2012, ¶ 8.

⁵⁷ Annexure B, Respondent's Submission dated 28 September 2012, ¶¶ 2-3; Respondent's Submission dated 5 October 2012, ¶ 3.

⁵⁸ Annexure B, Respondent's Submission dated 28 September 2012, ¶ 4.

⁵⁹ Respondent's Submission dated 5 October 2012, ¶ 4.

Claimant's submission misunderstands the Respondent's proposed Protocol.⁶⁰ The Respondent stresses that it merely wishes to be able to publish its own documents, and that Paragraph 5(b) of its proposed Protocol should not be understood to include a right to disclose documents submitted by the other Party or by third parties.⁶¹

40. The Respondent concedes that some of its documents may make reference to documents submitted by the Claimant.⁶² However, the Respondent takes issue with the Claimant's argument that it will be burdensome to redact confidential information due to the highly complex nature of the evidence, noting that the Claimant has argued elsewhere in its submissions that it has a developed specific categorisation of sensitive and confidential information.⁶³ According to the Respondent, its proposal to identify confidential information in square brackets has been accepted in another investment arbitration involving the Philip Morris companies, and exorbitant redactions can be avoided by application to the Tribunal.⁶⁴
41. The Respondent also disputes the Claimant's argument that its proposed Protocol will lead to a greater risk of inadvertent disclosure, deeming it speculative.⁶⁵
42. Moreover, the Respondent takes issue with the Claimant's fears of "trial by media", noting that the publication of a Party's own documents will only take place at the beginning of the oral hearing, thus limiting any commentary.⁶⁶ The Respondent contends that similar concerns for the integrity of the arbitral process did not apply in the other pending investor State arbitration involving the Philip Morris companies where a broader confidentiality regime was agreed.⁶⁷ In fact, the Respondent argues, the Claimant has not explained why it will not agree in the present arbitration to a regime similar to that which the Philip Morris group has adhered to in the other case, as one would not expect PM Asia's interests in confidentiality to be substantially different from those of its affiliate companies.⁶⁸
43. More generally, the Respondent argues that, in investor-State proceedings, including in the NAFTA context, documents are routinely published a short time after they are filed.⁶⁹ It also

⁶⁰ *Ibid.*, ¶ 7

⁶¹ Respondent's Submission dated 5 October 2012, ¶¶ 7, 19.

⁶² *Ibid.*, ¶ 19.

⁶³ *Ibid.*

⁶⁴ Annexure F, Respondent's Submission dated 28 September 2012, ¶ 7; Respondent's Submission dated 5 October 2012, ¶ 19.

⁶⁵ Respondent's Submission dated 5 October 2012, ¶ 19.

⁶⁶ Annexure B, Respondent's Submission dated 28 September 2012, ¶ 7; Respondent's Submission dated 5 October 2012, ¶ 19.

⁶⁷ Respondent's Submission dated 5 October 2012, ¶ 19.

⁶⁸ *Ibid.*, ¶ 5.

⁶⁹ *Ibid.*, ¶ 19.

submits that, in proceedings before other international courts and tribunals, such as the International Court of Justice and the International Tribunal for the Law of the Sea, written submissions are made publicly available. Similarly, in proceedings at the World Trade Organization, parties maintain the right to publish their own submissions.⁷⁰ The Respondent asserts that there is no perceived threat to the integrity of the proceedings before any of these adjudicatory bodies, and the Tribunal, consisting of experienced arbitrators, cannot be perceived to be influenced by public debate.⁷¹

44. The Respondent disputes the Claimant's reliance on the confidentiality regime applied in the *Biwater* arbitration since the facts and concerns of that case are materially different from those in the present proceedings. Notably, in that case, the respondent State routinely disclosed documents relating to the arbitration to a third party for publication within a short period after the documents had been issued and refused to treat the claimant's memorial as confidential.⁷² The Respondent also notes that any similarities between the *Biwater* confidentiality regime and the regime proposed by the Claimant is a result of the Parties' consultation, namely the publication of the Tribunal's awards and orders, the confidentiality of the transcripts and correspondence between the Parties, and the ability to discuss in general terms the progress of the proceedings.⁷³ The Respondent disputes that the right to publicly discuss the case in general terms is a concession from the Claimant, arguing that the UNCITRAL Rules do not preclude the making of such statements, and that in any event the Claimant has also made various public statements about the arbitration.⁷⁴
45. The Respondent contends that the Claimant's position on the publication of documents is at odds with what the tribunal decided in *Biwater*, since the *Biwater* tribunal did not impose any restriction on the publication by a party of its own documents.⁷⁵ Furthermore, the Respondent observes that the *Biwater* tribunal limited itself to restricting the publication of submissions before the end of the proceedings, while the Claimant proposes that the Parties' submissions should never be published.⁷⁶

⁷⁰ Annexure B, Respondent's Submission dated 28 September 2012, ¶ 7; Respondent's Submission dated 5 October 2012, ¶ 19.

⁷¹ Annexure F, Respondent's Submission dated 28 September 2012, ¶ 6; Respondent's Submission dated 5 October 2012, ¶ 19.

⁷² Respondent's Submission dated 5 October 2012, ¶ 14.

⁷³ *Ibid.*, ¶ 16.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, ¶ 17.

⁷⁶ *Ibid.*

46. Finally, the Respondent addresses the Claimant's specific concerns with regard to the Respondent's proposed Protocol.⁷⁷ Following on from its earlier argument that the "regime proposed by [the Claimant] appears to...treat as confidential documents and parts of documents that are not in fact confidential",⁷⁸ the Respondent clarifies that it does not consider it helpful to attempt to provide an exhaustive definition of what is meant by confidential documents and argues that any question is capable of being resolved as it arises.⁷⁹ The Respondent also finds the Claimant's proposed redaction categories of confidential information "overly prescriptive" and possibly leading to "satellite litigation".⁸⁰
47. In response to what the Claimant perceives to be a "one-sided" restriction applied only to its affiliates, the Respondent contends that the Commonwealth of Australia as a whole is the Respondent to the present arbitration and its Government naturally comprises various departments and agencies.⁸¹ Finally, regarding the Claimant's objection to the disclosure of documents to the Government of Hong Kong, the Respondent argues that an inability to share documents with Hong Kong would deprive it of the possibility of properly implementing Article 1(e) of the Treaty.⁸² The Respondent stresses that it merely seeks to disclose information pertinent to the question of "control", rather than all of the Claimant's confidential information, [REDACTED]
[REDACTED]
[REDACTED].⁸³

IV. THE TRIBUNAL'S CONSIDERATIONS

48. The Parties' extensive submissions, and particularly their respective proposals for a procedural order on confidentiality, 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 regarding confidentiality.
49. The Tribunal's starting point is that the Parties have agreed to submit this procedure to the UNCITRAL Rules. These Rules contain only two provisions dealing with particular aspects of confidentiality, namely hearings and the award (Articles 28(3) and 34(5)). The Tribunal

⁷⁷ *Ibid.*, ¶ 20.

⁷⁸ Annexure F, Respondent's Submission dated 28 September 2012, ¶ 8.

⁷⁹ Respondent's Submission dated 5 October 2012, ¶ 20.

⁸⁰ Annexure B, Respondent's Submission dated 28 September 2012, ¶ 14.

⁸¹ Respondent's Submission dated 5 October 2012, ¶ 20.

⁸² *Ibid.*

⁸³ *Ibid.*

considers that, with respect to the other aspects of the confidentiality of these proceedings, either the Parties can agree or otherwise the Tribunal can use its authority pursuant to Article 17(1) of the UNCITRAL Rules to rule on these aspects. The Tribunal would also note that both Parties have applied to the Tribunal for a ruling on these other aspects of confidentiality, thus confirming the Tribunal's role and competence in this respect.

50. On the basis of the above considerations, the Tribunal has examined the respective proposals of the Parties and identified any areas of agreement and disagreement between the Parties. The Tribunal observes that the Parties are in agreement in respect of many important points of principle, although not necessarily in respect of the specific criteria, rules and procedures to implement them. In so far as agreement in principle could be found, the Tribunal has specified the procedural details to implement the Parties' agreement in such a manner as it finds most appropriate for the efficient conduct of this complex arbitration.
51. Regarding the few issues on which the Parties could not agree, the Tribunal has taken particular account of the following considerations. The Tribunal is aware that, while confidentiality is a traditional and an essential feature of commercial arbitration in many jurisdictions, in investment arbitration the practice is much more diversified. This practice recognizes that investment disputes involve a public interest component which suggests that information about the dispute be made available not only to parties and the tribunal but also to civil society at large. This recognition has led to a growing practice – under the various rules chosen for investment arbitration – to provide for greater transparency. Evidence for such a move toward transparency is found in investment treaties, modern procedural rules and rulings of arbitral tribunals. Such considerations also apply in the present dispute. In this regard, the Tribunal has taken into account the extensive arguments raised by the Parties in favour or against the confidentiality and transparency of certain aspects of the present procedure. At the same time, the Tribunal is mindful that the arbitral process must remain manageable, that the Parties' due process rights must be safeguarded, and that confidential and sensitive information must be protected. This order seeks to strike a fair balance between transparency and these sometimes conflicting imperatives.
52. In accordance with its duty of efficiency stated in Article 17(1) of the UNCITRAL Rules, the Tribunal further considers that its rulings in this regard should be as simple as possible in order to avoid a continuous series of disputes as to what is considered confidential. Such disputes could often not be decided without long arguments and communications between the Parties and the Tribunal, making the proceedings excessively cumbersome, causing delay and possibly even disrupting the agreed timetable.

V. DECISIONS

53. Taking account of the Parties' views and on the basis of the considerations set out above, the Tribunal now decides and orders as follows:

A. CONFIDENTIAL MATERIALS

1. **Confidential Materials are all documents produced, filed or exchanged in the present arbitration, including:**

- a. all correspondence between or among the Parties, the Tribunal and/or any third parties in relation to the arbitration;
- b. all documents filed in the arbitration, including all pleadings, memorials, submissions, witness statements, annexures, and other evidence, and all documents produced (whether by a Party or a third party);
- c. all awards, decisions and orders and directions of the Tribunal that have not been subject to redaction pursuant to Section D below;
- d. all minutes, records (including recordings), and transcripts of hearings, meetings and conferences; and,
- e. information contained in or derived from any such documents.

2. Documents and information shall not be considered Confidential Materials to the extent that they are in the public domain other than as a result of a breach of this Procedural Order.

3. Neither Party shall disclose or publish any Confidential Materials unless provided for in the UNCITRAL Rules, authorized under the present Order, or agreed between the Parties.

B. CONFIDENTIAL INFORMATION

1. Confidential Information shall be any information not in the public domain that is designated as such by a Party on one of 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.**
2. **A Party may designate documents containing Confidential Information by marking them with the phrase “Contains Confidential Information”. Any Confidential Information within the document shall be identified clearly, such as by placing it in square brackets (“[...]”) or highlighting it by other appropriate means. If the document as a whole constitutes Confidential Information, it shall be sufficient to designate the document as such on its first page.**
3. **If a Party submits a document containing Confidential Information, the document shall be submitted in accordance with the timetable specified in the applicable Procedural Orders of the Tribunal. A redacted version of the document shall be submitted within 21 days thereafter, and shall be marked with the designation “Confidential Information Redacted”.**
4. **Inadvertent failure to designate information pursuant to this Procedural Order as Confidential Information shall not constitute a waiver of any claim for protection, so long as such claim is asserted within 10 days. The Party submitting the information shall have an opportunity to re-submit the relevant materials with the proper designations. The Party receiving the improperly designated material shall promptly destroy or return the material upon receiving the material with the proper designations.**
5. **If a Party objects in writing to the other Party’s designation of information as Confidential Information within 60 days after the submission of that information, or if a Party wishes to designate as Confidential Information a part of a document submitted by the other Party, the following procedures shall apply:**
 - a. **The Parties shall seek to reach agreement on the designation. If the Parties do not reach agreement, either Party may raise the issue in writing with the Tribunal. In the event that the Party concerned elects not to raise the issue with the Tribunal within 21 days after the submitting Party receives the written objection to the designation, or the receiving Party seeks to designate Confidential Information in the submitting Party’s document, the information in question shall no longer be entitled to confidential treatment or to be designated as Confidential Information (as the case may be).**
 - b. **The non-moving Party shall have 14 days to respond in writing to the other Party’s application to the Tribunal.**
 - c. **The Tribunal shall decide whether the information was properly designated or should be designated (as the case may be) as promptly as possible after the matter has been referred to it. While the matter is under consideration by the Tribunal, the information in question shall be entitled to confidential treatment.**
 - d. **If the Tribunal decides that the information was not properly designated, or should be designated, the submitting Party shall have the opportunity either to agree to remove the designation or make the designation (as the case may be), or to withdraw the information.**
 - e. **In the event that the submitting Party withdraws the information, it shall have 7 days from the date of the Tribunal’s decision under Subsection (c)**

above to resubmit the document without the information, and all persons in receipt of the documents shall thereupon destroy or return the documents, in whatever form, which contained the information or information derived therefrom.

- f. **If the information is withdrawn, it cannot be relied upon by the opposing Party or the Tribunal. The opposing Party may, however, comment upon the information. If it does so, the information shall be treated as if it were Confidential Information submitted by the original submitting Party, and may thereafter be used by the Parties and the Tribunal and treated as Confidential Information. The submitting Party may also resubmit the original document that contained the information.**
6. **All documents containing Confidential Information must be stored by the receiving Party in a secure manner and in such a way that these documents can be readily identified, isolated and retrieved.**
7. **Within three months after the conclusion of the arbitration, whether by final award or otherwise at an earlier time, the solicitors of record for each Party shall certify in writing to the solicitors of record for the other Party that all materials containing the other Party's Confidential Information, including originals and copies of such materials, in whatever form, have been destroyed or returned to the Party that submitted or produced the information. The Tribunal and other third parties to whom Confidential Information was disclosed shall also destroy or return such documents and information within three months of the conclusion of the Proceedings. Each Party shall also certify the third parties' compliance in writing. There is no requirement to destroy documents that were incorporated into a document by the receiving Party for the purposes of the arbitration. The Registry shall be under no obligation to destroy Confidential Information that was provided or copied to it in this arbitration.**

C. DISCLOSURE TO THIRD PARTIES

1. **Confidential Materials and Confidential Information may be disclosed to third parties if and when necessary for the purposes of the arbitration. Any third party (including any expert witness) to whom it is necessary to disclose Confidential Materials and Confidential Information shall be required, prior to such disclosure, to give written undertakings to keep Confidential Materials and Confidential Information confidential and to comply with this Procedural Order, such undertakings to be in the form set out in the Schedule to this Procedural Order.**
2. **The requirement to give such undertakings does not apply to:**
 - a. **the Tribunal and the Registry;**
 - b. **the Claimant's affiliates and their respective directors or the Respondent's departments and agencies;**
 - c. **officers and employees; and the legal representatives of the parties and of the persons and entities referred to in Subsection (b); and,**

- d. **court reporters or interpreters retained by the Registry in connection with any hearing in the present arbitration.**
3. **The solicitors of record for each Party shall retain a list of all third parties who have been given access to Confidential Materials or Confidential Information (other than those third parties who are not required to give undertakings under Section C(2)), and shall maintain a file of all undertakings given. Notwithstanding the giving of undertakings by any third party, the Party disclosing Confidential Materials or and Confidential Information to that third party must take reasonable steps to ensure the third party's compliance with this Procedural Order.**
4. **In the event that Confidential Materials or Confidential Information submitted by a Party are disclosed to third parties not referred to in Sections C(1) and C(2) above, the Parties shall cooperate to resolve the matter. In the event that they are unable to reach a resolution, the submitting Party may seek remedial measures from the Tribunal.**
5. **The Parties shall endeavour to reach agreement on the procedures for protecting Confidential Materials and Confidential Information if such information is to be used during a hearing to ensure that the information is only disclosed to third parties to whom it is necessary to disclose information.**

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).

E. CONFIDENTIALITY OF HEARINGS

All hearings, meetings and conferences shall be held *in camera*, and their transcripts shall be kept in confidence.

F. PUBLICATION OF FILINGS AND PUBLIC STATEMENTS

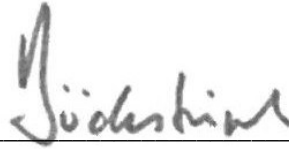
1. A Party may publish all documents that it has filed in the present arbitration, including all pleadings, memorials and submissions and all annexures (including witness statements and other evidence).
2. Prior to such publication, the Party that intends to publish shall inform the other Party accordingly so as to allow the other Party to designate parts of such documents as Confidential Information. The procedures set out in Section B(5) above shall apply *mutatis mutandis* to such designation.
3. Each Party shall be permitted to make neutral public statements concerning the nature of the issues in dispute in these proceedings and its procedural status, provided that such statements do not disclose the Confidential Information of the other Party or of any third party.
4. In making such neutral public statements, the Parties shall refrain from discussing the content of any hearing, meeting, or conference held *in camera*, including the content of witness testimony.

G. APPLICATION OF THE PRESENT ORDER

1. This Procedural Order shall not preclude a disclosure of Confidential Materials or Confidential Information as required or authorized by or under law, provided that the entity making the disclosure informs the other Party (or both Parties, as the case may be) of the proposed disclosure no less than 7 days before the proposed disclosure.
2. This Procedural Order is without prejudice to each Party's right to object to the production of materials or other information on the ground that such materials or information are protected by an applicable privilege or immunity or otherwise should be excluded from production.
3. This Procedural Order shall not affect the publication of case information on the website of the Registry, in a form and manner to be agreed between the PCA and the Parties.
4. Any Party has leave to apply to the Tribunal for a variation of this Procedural Order, giving particulars of the variation sought and the reason for it.

5. **This Procedural Order shall be incorporated into and made part of the final award rendered by the Tribunal in this arbitration. Either in the final award or by a further procedural order, the Tribunal will determine which provisions of this Procedural Order remain in effect after the conclusion of this arbitration.**

Dated, 30 November 2012



On behalf of the Tribunal

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

Schedule

PCA Case No. 2012-12

**PHILIP MORRIS ASIA LIMITED
v.
THE COMMONWEALTH OF AUSTRALIA**

CONFIDENTIALITY UNDERTAKING

I, [name], [title], hereby undertake as follows.

1. I have read a copy of Procedural Order No. 5 dated 30 November 2012 in the abovementioned arbitration
2. I have been informed that [Philip Morris Asia Limited / The Commonwealth of Australia] proposes to disclose Confidential Materials or Confidential Information (as defined in Procedural Order No. 5) to me.
3. I will abide by all of the terms of the Procedural Order in respect of any Confidential Materials and Confidential Information disclosed to me, including the obligation not to disclose any such Confidential Materials or Confidential Information other than to persons permitted by the Procedural Order to have access to such Materials and Information and will utilise any Confidential Materials or Confidential Information solely for the purpose for which it is provided to me.

Signed

Print name

Date