

PCA Case No. 2012-12

**IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE AGREEMENT
BETWEEN THE GOVERNMENT OF HONG KONG AND THE GOVERNMENT OF
AUSTRALIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS,
SIGNED ON 15 SEPTEMBER 1993 (THE “TREATY”)**

-and-

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

-between-

PHILIP MORRIS ASIA LIMITED

(“Claimant”)

-and-

THE COMMONWEALTH OF AUSTRALIA

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

PROCEDURAL ORDER NO. 11
Regarding the Parties’ Requests for the Production of Documents

23 September 2014

Arbitral Tribunal

Professor Karl-Heinz Böckstiegel (President)

Professor Gabrielle Kaufmann-Kohler

Professor Donald M. McRae

Registry

Permanent Court of Arbitration

WHEREAS, pursuant to Procedural Order No. 9, on 28 July 2014, each Party submitted to the other Party a reasoned application for the production of documents (“Request to Produce”), limited to material relevant to the First and Second Objections as set forth by the Respondent in its Statement of Defence;

WHEREAS, in the following weeks, the Parties consulted with each other with a view to amending certain aspects of the process for document production and informed the Tribunal about their positions on 15 August 2014, 20 August 2014 and 22 August 2014; and whereas the Tribunal adopted a modified timetable for the proceedings on 26 August 2014 in the form of Procedural Order No. 10;

WHEREAS, pursuant to Procedural Order No. 10, on 8 September 2014, the Parties submitted to the Tribunal in the form of two separate Redfern Schedules all Requests to Produce that they maintained despite the other Party’s objections;

WHEREAS, on 19 September 2014, the Claimant expressed concerns about what it perceived as the overly broad character of the Respondent’s Requests to Produce; and whereas the Claimant presented a proposal to limit the scope of the Parties’ Requests to Produce and requested “that Respondent agree to this proposal by September 23, 2014” or, in the absence of such agreement, “that the Tribunal issue an order adopting the proposal Claimant has suggested”;

WHEREAS, on 22 September 2014, the Respondent replied to the Claimant’s proposal, noting that “[t]he Respondent does not agree to the Claimant’s proposal for the production of documents relating to control” and requesting “that the Tribunal [...] decline to make an order reflecting this proposal”; and whereas the Respondent expressed, however, its agreement to limit the scope of e-mails that the parties were required to review, subject to certain qualifications;

WHEREAS, Paragraph 2 of Procedural Order No. 10 provides that “[b]y 29 September 2014 the Tribunal shall decide on such applications” for the production of documents;

NOW, THEREFORE, THE TRIBUNAL DECIDES:

1. Introduction

- 1.1 The Tribunal recalls Article 27(3) of the UNCITRAL Rules, which authorizes the Tribunal to order the production of documents. The Tribunal further recalls that the timetable adopted in the present arbitration in consultation with the Parties provided for the submission of Redfern Schedules and the Tribunal’s decision thereon.
- 1.2 The Tribunal has carefully considered the submissions of the Parties regarding document production, including their extensive comments in the Redfern Schedules on each other’s Requests to Produce. The Tribunal has also taken note of the Parties’ letters of 19 and 22 September 2014, which relate to the appropriate scope of document production at the present stage of the proceedings.
- 1.3 According to Section 2 of Procedural Order No. 6, the IBA Rules on the Taking of Evidence in International Arbitration of 2010 (“IBA Rules”) may be used as a guideline in this case. In reaching a decision on the Parties’ Requests to Produce, the Tribunal has taken the provisions of the IBA Rules, and the relevant practice of their application in international arbitration, into account, while bearing the specific characteristics of the present proceedings in mind.
- 1.4 The Tribunal recognizes that, on the one hand, ordering the production of documents can be helpful for a Party to present its case and for the Tribunal’s task of establishing the facts of the

case. On the other hand, the Tribunal is mindful that the process of disclosure may be time-consuming, burdensome, and disproportionate to the actual probative value of the requested documents. Finally, the Tribunal has considered the extent to which requests relate to facts for which the requesting Party bears the burden of proof.

2. Scope of Document Requests at the Stage of Preliminary Objections

- 2.1 The Tribunal recalls its invitation in Procedural Order No. 10 that “the Parties [...] limit the requests that they will submit in their Redfern Schedules to those documents that are absolutely necessary for the limited purpose of dealing with the preliminary objections to be addressed at the Hearing on Preliminary Objections in February 2015”.
- 2.2 The Tribunal appreciates both Parties’ constructive efforts in limiting the scope of their Requests to Produce at the present stage of the proceedings. As evidenced by the Redfern Schedules, the Parties’ consultations in this regard have permitted to resolve a significant number of points that had initially been contentious.
- 2.3 In considering the remaining Requests to Produce, which remain contentious between the Parties, the Tribunal has adopted a relatively restrictive approach, focusing on the issues that it considers relevant for its future decision on jurisdiction and admissibility. However, the Tribunal’s approach in the present Procedural Order is without prejudice to any decision that the Tribunal may be called to take in respect of future document requests, should the case proceed to the merits.

3. Qualifications and Limitations of Document Production

- 3.1 The term “documents” in the present Order shall be understood as defined in the “Definitions” section of the IBA Rules.
- 3.2 All documents produced pursuant to this Order may be utilized by the other Party only in direct connection with the present arbitration procedure, and the present Order is without prejudice to the Tribunal’s Procedural Order No. 5 regarding confidentiality arrangements in the present arbitration.
- 3.3 The Tribunal recalls the Parties’ agreement, recorded in Procedural Order No. 10, that any objections to production that a Party wishes to raise on grounds of legal impediment or privilege or special political or institutional sensitivity should be dealt with in a separate phase. Accordingly, the present Order does not address such objections.
- 3.4 For the avoidance of doubt, a decision by the Tribunal rejecting a Party’s request to compel production of particular documents or categories of documents at the present stage of the arbitration does not preclude a Party from seeking disclosure of the same documents or categories of documents at a potential merits stage.

4. Documents to Be Produced

- 4.1 The Redfern Schedules submitted by the Parties on 8 September 2014, as amended by the Tribunal, are attached to this Procedural Order as Annexes 1 and 2. The Tribunal’s order in respect of each Request to Produce is contained in the last column of each Annex.

- 4.2 To the extent that the Tribunal orders the production of documents, such documents shall be produced to the requesting Party (but not to the Tribunal) **by 20 October 2014**. The further procedure for document production shall be as set out in Procedural Order No. 10.

Dated: 23 September 2014

A handwritten signature in blue ink, appearing to read "Böckstiegel", is enclosed in a thin black rectangular border.

On behalf of the Tribunal

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