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 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. 8

Regarding Bifurcation of the Procedure

Date: 14 April 2014

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 present Procedural Order addresses the manner in which the Respondent's preliminary objections will be heard—in a preliminary phase of the proceedings or joined to the merits—and sets out the timetable for the arbitration.

2. The Respondent requests that the Tribunal exercise its discretion under Articles 17 and 23(3) of the UNCITRAL Rules to order that its objections be heard in a preliminary phase of the proceedings.[1]

3. The Claimant requests that the Tribunal refuse to order bifurcation of the proceedings.[2]

4. In accordance with their respective requests, the Parties have proposed indicative timetables for the subsequent procedural stages of the dispute depending on whether the Tribunal orders a bifurcated or non-bifurcated procedure.[3]

II. BACKGROUND TO THE DISPUTE

5. 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 branded products to a manufacturer of commoditized products with the consequential effect of substantially diminishing the value of [the Claimant's] investments in Australia."[4]

6. The Claimant is a company incorporated in Hong Kong. [redacted].[5] 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, which engages in the manufacture, import, marketing and

1 Australia's Submission in Support of Bifurcation dated 13 August 2012 ("Respondent's Submission dated 13 August 2012") at paras. 3, 36 and 43; Respondent's Statement of Defence, Volume A dated 23 October 2013 ("Statement of Defence, Volume A").

2 Claimant's Opposition to Bifurcation dated 26 November 2013 ("Claimant's Opposition to Bifurcation").

3 Statement of Defence, Volume A, at pp. 105 – 109; Claimant's Opposition to Bifurcation, at pp. 48 – 56.

4 Claimant's Notice of Arbitration, at para. 1.5.

5 Claimant's Notice of Arbitration, at para. 4.1; Statement of Claim, at para. 20.

distribution of tobacco products for sale within Australia and for export to New Zealand and the Pacific Islands.[6] 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."[7]

7. 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."[8] 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."[9]

III. PROCEDURAL HISTORY

8. On 15 July 2011, pursuant to Article 10 of the Treaty, the Claimant served on the Respondent a notification of claim. As the Parties were unable to settle their dispute within a three-month period running from the date of the notification of claim, the Claimant served on the Respondent a Notice of Arbitration dated 21 November 2011, submitting the dispute to international arbitration under the United Nations Commission on International Trade Law Rules as revised in 2010 ("UNCITRAL Rules").

9. On 21 December 2011, the Respondent served on the Claimant its Response to the Notice of Arbitration, in which it described its jurisdictional objections, and stated that it would "request that jurisdictional objections be heard in a preliminary phase of the proceedings".[10]

10. Following the constitution of the Tribunal, by letter dated 7 June 2012, the Tribunal invited the Parties to comment on the agenda for a first procedural meeting. The Tribunal drew attention to Section 4 of its draft agenda, which invited the Parties to consult with each other on the timetable for the present arbitration.

11. By letter dated 27 June 2012, 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

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6 Claimant's Notice of Arbitration, at paras. 4.1 – 4.2.

7 Claimant's Notice of Arbitration, at para. 1.3.

8 Claimant's Notice of Arbitration, at para. 1.7.

9 Claimant's Notice of Arbitration, at para. 8.3.

10 Australia's Response to the Notice of Arbitration, at paras. 29 – 36.

bifurcated procedure". By letter of the same date, the Claimant set out its position that procedural economy and expediency 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".

12. By letter dated 10 July 2012, the Respondent 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. 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. By letters dated 16 July 2012, the Parties informed the Tribunal that they 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, to be held in Singapore ("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 which the Parties reiterated their views and presented oral argument on the issue of bifurcation and the procedure for determining bifurcation.

15. 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.

16. 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.

17. 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. By letter dated 16 August 2012, the Respondent explained its understanding that the oral pleadings at the First

Procedural Meeting had been directed to the substantive issue of whether the proceedings should be bifurcated or not and that, therefore, its submission should not be recast.

18. 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 was appropriate, but that the Tribunal understood that the Respondent's position could require it to describe the content of its jurisdictional objections. The Tribunal therefore allowed the Respondent's submission of 13 August 2012 as received.

19. 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 to the Respondent's submission of 27 August 2012.

20. On 26 October 2012, the Tribunal issued Procedural Order No. 4, in which it postponed its decision on bifurcation until the Parties had exchanged submissions on the desirability of bifurcation, and set out a detailed timetable for the filing of the Claimant's Statement of Claim, the Respondent's Statement of Defence, and the Claimant's submissions on aspects of bifurcation not covered in previous submissions.

21. Following a change of the Claimant's counsel of record, by letter dated 3 December 2012, the Claimant requested an extension of the deadline for the filing of the Statement of Claim to 28 March 2013. By letter dated 12 December 2012, the Respondent noted that, if the Claimant's request for an extension were granted, a corresponding extension should also be granted for the filing of the Statement of Defence to 23 October 2013, and acknowledged that corresponding adjustments might also need to be made to the date for the filing of the Claimant's submissions on aspects of bifurcation not covered in previous submissions. By letter dated 14 December 2012, the Claimant similarly acknowledged that it would be necessary to identify a new date for the filing of its submissions on the aspects of bifurcation not covered in previous submissions.

22. On 31 December 2012, after consultation with the Parties, the Tribunal issued Procedural Order No. 7, in which it set out a revised timetable for the filing of the Claimant's Statement of Claim, the Respondent's Statement of Defence, and the Claimant's submissions on aspects of bifurcation not covered in previous submissions. Pursuant to this revised timetable, the Claimant submitted its Statement of Claim on 28 March 2013; the Respondent submitted its Statement of Defence on 23 October 2013; and the Claimant submitted its Opposition to Bifurcation on 26 November 2013.

23. On 20 and 21 February 2014, a hearing on bifurcation was held in Toronto ("Hearing"). Present at the Hearing were:

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

For the Claimant:
Mr. Marc Firestone
Mr. Kevin Banasik
Mr. Joe Smouha QC
Dr. Stanimir Alexandrov
Mr. James Mendenhall
Mr. Aaron Wredberg

For the Respondent:
Mr. Justin Gleeson SC (appearing via video link)
Mr. Simon Daley PSM
Mr. John Atwood
Ms. Esme Shirlow
Mr. Nathan Smyth
Mr. Lucas Robson
Mr. Tony Payne SC
Mr. Sam Wordsworth QC
Professor Chester Brown

For the PCA:
Dr. Dirk Pulkowski

24. The Agenda of the Hearing was as follows:

20 February 2014

09:00 – 11:00	Respondent's opening statement
11:00 – 11:15	Coffee break
11:15 – 13:15	Claimant's opening statement
13:15 – 14:30	Lunch break
14:30	Tribunal questions

21 February 2014

09:00 – 10:00	Respondent's closing statement
10:00 – 10:15	Coffee break
10:15 – 11:15	Claimant's closing statement
11:15	Tribunal questions

25. After the opening statements of the Parties, the Tribunal raised a number of questions adding that these were without prejudice to their final relevance for its decision on bifurcation. The Claimant, in its presentation slides for its closing statement, aptly summarized these questions as follows:

> "1. Any need for document disclosure and testimony from witnesses and experts in the first phase of a bifurcated proceeding?
>
> 2. If only some objections are dealt with in a bifurcated proceeding, how would that affect the proposed timetables? Faster or stay the same?
>
> 3. If agreed that the "no-investment" objection is not dispositive of the entire case, why should it, by itself, be a reason for bifurcation?
>
> 4. While proposing similar non-bifurcated scenarios, the Parties' calculations for bifurcated scenarios differ greatly. What explains this?
>
> 5. What does Respondent's offer to forego a Reply on Jurisdiction mean for the document disclosure process?
>
> 6. What would be the extent of the savings in terms of witnesses and experts at a bifurcated hearing on jurisdiction?
>
> 7. How do the Parties [deal with] the opposing side's characterization of the dispute under Article 10 of the BIT?
>
> 8. Does Claimant plan to contest Respondent's assertions about Australian administrative law in the context of the non-admission objection?
>
> 9. Any further clarification on the factual overlap and intertwined nature of jurisdiction and merits?"[11]

26. The Parties addressed these questions in their closing statements.

27. By e-mail correspondence dated 26 February 2014, the Respondent notified the PCA that two arbitral decisions that "have a direct bearing on the bifurcation issue" had been made public since the Hearing, and stated that it wished to draw them to the Tribunal's attention. By e-mail correspondence on that same day, the Claimant was invited to comment on the Respondent's request by 28 February 2014.

28. On 27 February 2014, the Claimant informed the PCA that it had "no objections to the submission of [the] two decisions" and proposed a schedule for the submission of the two decisions and the Parties' subsequent comments.

29. On 3 March 2014, the Tribunal directed the Parties that, if the Respondent wished to submit the two decisions in question, it might do so by 17 March 2014, provided that:

> "(i) If the Respondent wishes to submit any comments, it must do so at the time it submits the two decisions;
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> (ii) The Respondent's comments, if any, shall be limited to no more than five pages;
>
> (iii) Whether or not the Respondent submits any comments in addition to providing the two decisions, the Claimant will be permitted to comment on the decisions and, if necessary, provide additional authorities that relate to the topics addressed in those decisions; and
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> (iv) The Claimant shall also limit its comments to five pages and provide them, and any additional authorities, within two weeks after the Respondent's submission."

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[11] Claimant's Closing Statement Presentation Slides, slide 2; Bifurcation Hearing Transcript, at pp. 184 – 192.

30. On 17 March 2014, the Respondent submitted the two decisions in question, along with its comments on the decisions ("Respondent's Comments on the Additional Authorities").

31. On 27 March 2014, the Claimant submitted its comments in reply to the Respondent's Comments on the Additional Authorities ("Claimant's Reply on the Additional Authorities").

IV. THE RESPONDENT'S PRELIMINARY OBJECTIONS

32. The Respondent raises three objections to the jurisdiction of the Tribunal, which the Tribunal, for ease of reference, will refer to as the **"First Objection"** or **"Non-Admission of Investment Objection**"; the **"Second Objection"** or **"Temporal Objection"**; and the **"Third Objection"** or **"No Investments Objection"**. These objections will be described in the following sections only to the extent necessary to place the Parties' arguments on bifurcation in context. The Claimant does not accept the Respondent's objections, and the Tribunal takes no position at this stage on the merits of any of the Respondent's objections.

33. The Tribunal has taken note of the Claimant's view that one of the Respondent's objections is properly qualified as an objection to admissibility, rather than to the Tribunal's jurisdiction (and the Claimant's position is described in detail below). As a matter of convenience, the Tribunal uses the term "preliminary objections" in this Procedural Order, noting that the Parties have adopted that term in their second round of pleadings and at the Hearing.

34. The Tribunal also notes that, in the Notice of Arbitration, the Claimant had made reference to certain alleged breaches of agreements under the auspices of the World Trade Organization and of the Paris Convention on the Protection of Industrial Property ("WTO and PCPIP Arguments"). In response, the Respondent, in its Submission dated 13 August 2012, asserted as a fourth preliminary objection 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 ("Umbrella Clause Objection").[12] The Tribunal has taken note of the Respondent statement at the Hearing that, since the Claimant had not reiterated the WTO and PCPIP Arguments in subsequent rounds of pleadings, it would similarly withdraw its Umbrella Clause Objection.[13] The Tribunal also observes that this statement was not contradicted by the Claimant.

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12 First Procedural Meeting Transcript, at pp. 54:24-55:17; Respondent's Submission dated 13 August 2012 at paras. 26 – 29.

13 Bifurcation Hearing Transcript, at pp. 9:17-10:2.

A. THE NON-ADMISSION OF INVESTMENT OBJECTION (FIRST OBJECTION)

35. The Respondent's first objection is that the Claimant's purported "investment" – i.e. its acquisition of shares in PM Australia – has not been admitted by the Respondent in accordance with Article 1(e) of the Treaty, which provides that an "investment" must be "admitted by [Australia] subject to its law and investment policies applicable from time to time".[14] According to the Respondent, Article 1(e) of the Treaty preserves the customary international law position that a State has a sovereign right to determine the terms on which it admits foreign investment.[15] The Respondent therefore asserts that the issue of whether a Hong Kong investment is admitted in Australia is ultimately a matter for Australian law and investment policy.[16]

36. Turning to the admission requirements under Australia's law and investment policy, the Respondent states that, pursuant to its Foreign Acquisitions and Takeovers Act of 1975 ("**FATA**")[17] and an [redacted], the Treasurer can make an order prohibiting an investment if it was satisfied that the investment "would be contrary to [Australia's] national interest".[19] In order for this assessment to be made, foreign investors are required to submit a Statutory Notice and to provide supplementary information stating the reasons for the acquisition and whether the investment could impact Australia's national interest.[20] The Respondent also points out that, in providing the Statutory Notice and supplementary information to the Treasurer, it is a criminal offence for foreign investors to mislead the Treasurer.[21]

37. The Respondent alleges that, in the present case, the Claimant's application for admission of its investment contained "false and misleading" assertions [redacted]

14 Statement of Defence, Volume A, at para. 12; Bifurcation Hearing Transcript, at p. 12:4-12:8.

15 Statement of Defence, Volume A, at para. 13.

16 Statement of Defence, Volume A, at para. 13; Bifurcation Hearing Transcript, at p. 45:11-45:15.

17 Foreign Acquisitions and Takeovers Act 1975 (Cth) (as at 16 February 2010) (Exhibit RLA-004).

18 [redacted]

19 Statement of Defence, Volume A, at paras. 19 – 22; Bifurcation Hearing Transcript, at p. 32:5-32:10.

20 Statement of Defence, Volume A, at paras. 23 – 30; Bifurcation Hearing Transcript, at p. 12:10-12:17, pp. 31:25-32:4, and p. 34:13-34:19.

21 Statement of Defence, Volume A, at para. 32, citing s136.1 of Sch 1 of Australia's Criminal Code; Bifurcation Hearing Transcript, at pp. 35:18-36:5.

[redacted] The Respondent contends that, in reality, the true purpose of the Claimant's investment was to place itself in a position where it could bring the present claim under the Treaty once the Respondent had enacted the plain packaging legislation.[23] The Respondent further asserts that the Philip Morris group was aware that its true purpose for the investment would be directly relevant to assessing whether the investment was contrary to Australia's national interest because the bringing of its claim, if successful, "could affect Australia's capacity to carry out its announced public policy and/or affect its economy and community."[24]

38. Accordingly, the Respondent asserts that the following legal consequences arise from the fact that the Claimant's application for admission of its investment contained false or misleading information. First, its investment fails to be in accordance with Australia's law and investment policy.[25] Second, pursuant to sections 26 and 27 of the FATA, the Claimant's Statutory Notice and supplementary information are invalid, and do not have any legal effect.[26] Third, the Treasurer's decision not to prohibit the Claimant's investment under s18(2) of the FATA was "affected by jurisdictional error" and is therefore "to be regarded in law as no decision at all".[27] Consequently, the Claimant's investment does not satisfy the requirements of Article 1(e) of the Treaty.[28]

B. THE TEMPORAL OBJECTION (SECOND OBJECTION)

39. The Respondent's second objection is that the Claimant's claim falls outside the scope of Article 10 of the Treaty because it relates to a pre-existing dispute (the "Ratione Temporis Argument"); or, alternatively, that the Claimant's claim amounts to an abuse of right because

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22 Statement of Defence, Volume A, at paras. 14, 36 and 48 – 55; Bifurcation Hearing Transcript, at pp. 38:15-40:23.

23 Statement of Defence, Volume A, at paras. 15 and 49 – 53; Bifurcation Hearing Transcript, at pp. 40:24-41:5.

24 Statement of Defence, Volume A. at para. 55.

25 Statement of Defence, Volume A. at para. 56; Bifurcation Hearing Transcript. at p. 12:4-12:8 and p. 43:3-43:8.

26 Statement of Defence, Volume A, at para. 58; Bifurcation Hearing Transcript, at p. 13:5-13:10 and p. 43:10-43:24.

27 Statement of Defence, Volume A, at paras. 59 – 64; Bifurcation Hearing Transcript, at p. 13:5-13:10, pp. 43:25-44:14 and p. 46:2-46:7.

28 Statement of Defence, Volume A, at para. 68.

the Claimant cannot restructure its investment to gain Treaty protection over a pre-existing or reasonably foreseeable dispute (the "Abuse of Right Argument").[29]

1. The Ratione Temporis Argument

40. The Respondent asserts that an investor cannot buy into a dispute by making an investment at the time when a dispute is either existing or highly probable.[30] According to the Respondent, this is precisely what the Claimant has done. The Respondent contends 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.[31] The Respondent contends that PML as well as the ultimate parent company, Philip Morris International, had opposed the plain packaging legislation by stating their opposition during government consultations in 2009[32] and in various other communications to Australia's Health Minister and Minister for Trade, and public speeches from 2009 to 2011.[33] Hence, in the Respondent's view, at the time the Claimant acquired its shares in PM Australia, and before the plain packaging legislation had been enacted by the Australian Parliament, there was already a dispute between the Philip Morris group and the Government of Australia about the Government's decision to implement the plain packaging legislation.[34] As such, the Claimant's acquisition of the shareholding in PM Australia served the sole purpose of positioning itself to make a claim under the Treaty.[35]

41. The Respondent takes issue with the Claimant's argument that no dispute had arisen until 21 November 2011, when the plain packaging legislation passed both Houses of Parliament, pointing out that, on the Claimant's theory, there would have been no dispute when the

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29 Bifurcation Hearing Transcript, at p. 14:1-14:6, p. 18:7-18:14 and p. 52:12-52:16.

30 First Procedural Meeting Transcript, at pp. 49:12-50:16; Response to the Notice of Arbitration, at para. 7; Respondent's Submission dated 13 August 2012 at paras. 7 – 13; Statement of Defence, Volume A, at paras. 69 – 70.

31 Australia's Response to the Notice of Arbitration dated 21 December 2011 ("Response to the Notice of Arbitration") at para. 21; Statement of Defence, Volume A, at paras. 85 – 87; Bifurcation Hearing Transcript, at p. 14:10-14:16 and pp. 59:4-60:7.

32 Respondent's Submission dated 13 August 2012 at para. 7; Statement of Defence, Volume A, at paras. 76 – 77.

33 Statement of Defence, Volume A, at paras. 80 – 83 and 88 – 106; Bifurcation Hearing Transcript, at p. 60:8-60:18 and pp. 61:15-63:11.

34 Response to the Notice of Arbitration, at para. 27; Respondent's Submission dated 13 August 2012 at para. 8; Statement of Defence, Volume A, at para. 73; Statement of Defence, Volume A, at paras. 108 – 109, 135 – 136 and 158; Bifurcation Hearing Transcript. at p. 17:4-17:7 and p. 64:3-64:8.

35 Bifurcation Hearing Transcript, at p. 64:9-64:24.

Claimant served its Notification of Claim on 27 June 2011 and when the Claimant engaged with the Respondent with a view to reaching an amicable settlement on 12 September 2011.[36] The Respondent asserts that a dispute arose as early as 30 April 2010, the day after the Government of Australia announced its decision to introduce plain packaging legislation, and in any event well before the acquisition by the Claimant of shares in PM Australia.[37] Consequently, since the "dispute" between the Parties pre-existed the Claimant's alleged investment under the Treaty, it falls outside the scope of Article 10 of the Treaty.[38]

2. The Abuse of Right Argument

42. The Respondent asserts in the alternative that, even if the dispute falls within the scope of Article 10 of the Treaty, the Claimant's claim constitutes an abuse of the rights otherwise conferred by Article 10 of the Treaty.[39] Citing *Phoenix, Mobil, Pac Rim* and *Tidewater*, the Respondent submits that an investor cannot "restructure investments so as to gain jurisdiction under a BIT for [pre-existing or reasonably foreseeable] disputes as it would constitute an abusive manipulation of the system of investment protection".[40]

43. According to the Respondent, the present dispute, if not pre-existing the Claimant's investment, was at the very least reasonably foreseeable with a "very high degree of probability" at the time the Claimant restructured its investment.[41] The Respondent disagrees with the Claimant's argument that it already had an investment in Australia [redacted] The Respondent contends that [redacted]

36 First Procedural Meeting Transcript, at pp. 50:17 – 52:6; Respondent's Submission dated 13 August 2012 at para. 13; Bifurcation Hearing Transcript at pp. 69:7-70:5.

37 Respondent's Submission dated 27 August 2012 at para. 7.

38 Respondent's Submission dated 13 August 2012 at paras. 9 – 10; Statement of Defence, Volume A, at paras. 70, 116 and 137; Bifurcation Hearing Transcript, at p. 65:18-65:22 and p. 71:4-71:6.

39 Bifurcation Hearing Transcript, at p. 71:7-71:13.

40 Bifurcation Hearing Transcript, at p. 73:5-73:16.

41 Bifurcation Hearing Transcript, at pp. 74:22-75:6.

42 Statement of Defence, Volume A, at para. 167; Bifurcation Hearing Transcript, at p. 75:11-75:20.

43 Bifurcation Hearing Transcript, at p. 75:16-75:20.

[redacted]

C. THE NO INVESTMENTS OBJECTION (THIRD OBJECTION)

44. The Respondent's third objection is that neither the shares in PML nor PML's assets constitute investments for the purposes of the Treaty.[45] In support of its objection, the Respondent makes reference to Articles 1(e), 1(b)(i) and 13(1) of the Treaty.[46] 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,[47] and that therefore the assets of PM Australia and PML – two Australian-incorporated companies – do not enjoy protection as investments.[48] The Respondent submits that, pursuant to Article 13(1) of the Treaty, only the Claimant's shares in PM Australia would be eligible for protection under the Treaty[49] (subject to their being properly admitted in accordance with Australian law and investment policies).[50]

45. The Respondent also contends that, even if the Tribunal is of the view that the definition of "investment" under the Treaty does include investments which are owned and controlled indirectly, the Claimant cannot be said to "own" or "control" its "investment"[51] within the meaning of Article 1(e) of the Treaty[52] (with the exception of the intellectual property

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44 Statement of Defence, Volume A, at paras. 71, 168, and 171 – 174; Bifurcation Hearing Transcript, at pp. 76:13-77:1.

45 Statement of Defence, Volume A, at para. 189; Bifurcation Hearing Transcript, at p. 18:15-18:18.

46 Respondent's Submission dated 13 August 2012 at paras. 18 – 19.

47 Statement of Defence, Volume A, at paras. 203 and 206 – 207.

48 First Procedural Meeting Transcript, at pp. 56:11 – 57:21; Respondent's Submission dated 13 August 2012 at para. 20; Statement of Defence, Volume A, at paras. 209 and 213.

49 Statement of Defence, Volume A, at paras. 213 and 215; Bifurcation Hearing Transcript at p. 86:17-86:20.

50 The Tribunal notes that, at the First Procedural Meeting and in the subsequent short brief regarding the timing and procedure for a decision on bifurcation, the Respondent had also argued that, under Article 1(e) of the Treaty, the meaning of "control" under the Treaty was to be resolved by the Contracting Parties rather than the Tribunal (First Procedural Meeting Transcript at pp. 58:1-59:7; Respondent's Submission dated 13 August 2012 at paras. 20 – 21). That argument does not seem to be repeated in the Respondent's Statement of Defence.

51 According to the Respondent in its Statement of Defence, Volume A, at para. 220, the Claimant's purported "investment" consists of: [redacted] (b) rights under a licence agreement to use intellectual property rights owned by PM Products in respect of the *choice*, *Wee Willem*, and *Willem II* brand families; and (c) rights of ownership in Australia of intellectual property rights in respect of the *Peter Jackson* brand family."

52 Statement of Defence, Volume A, at para. 219.

associated with the *Peter Jackson* brand family).[53] This is because the Claimant does not have any ownership rights in respect of the intellectual property rights at issue, nor is it a party to the licence agreements.[54] The Claimant therefore cannot be said to "control" any of the relevant intellectual property rights or licences.[55] Moreover, PML does not "control" the intellectual property rights that are licensed to it [redacted] Finally, the Respondent asserts that, under the Australian Trade Marks Act, it is the registered owner—PML—that is legally required to exercise control over these trade marks and the Claimant therefore cannot purport to control those trade marks.[57]

V. THE PARTIES' ARGUMENTS REGARDING BIFURCATION

46. The Parties disagree on whether the Respondent's objections should be addressed in a bifurcated procedure. A summary of the Parties' arguments regarding bifurcation in general and of their arguments on the suitability of bifurcation specifically in relation to each preliminary objection is set out below.

A. THE RESPONDENT'S ARGUMENTS

1. General Factors in Support of Bifurcation

47. The Respondent submits that its objections should be heard in a preliminary phase of the proceedings, in advance of any consideration of the merits.[58] According to the Respondent, its objections are serious and substantial and raise discrete issues. The resolution of these preliminary issues could therefore dispose entirely of the Claimant's claims, or at the very least, confine the scope of these claims, saving time and expense for both Parties.[59] Additionally, the Respondent argues that, in light of the [redacted] bifurcation will allow "immediate savings" because there will only be limited discovery and production of documents, there will not be a

53 Bifurcation Hearing Transcript, at p. 87:1-87:5.

54 Statement of Defence, Volume A, at para. 222.

55 Statement of Defence, Volume A, at para. 227.

56 Statement of Defence, Volume A, at para. 229.

57 Statement of Defence, Volume A, at para. 250.

58 Statement of Defence, Volume A, at para. 254.

59 Statement of Defence, Volume A, at para. 255; Bifurcation Hearing Transcript, at pp. 91:25-92:11.

second round of written submissions on the merits, and there will be no need to rely on any expert reports.[60]

48. The Respondent asserts that non-bifurcated proceedings will be "demonstrably inefficient" because both Parties will proceed to develop and present arguments on the merits which may ultimately be unnecessary if the objections are upheld.[61] In this regard, the Respondent recalls the Tribunal's observation in Procedural Order No. 4 that, in order for the Tribunal to be sufficiently informed to decide the issue of bifurcation, it was necessary for both Parties to present their factual allegations and legal arguments in relation to the entire case. The Respondent asserts that those first presentations now show that a determination on the merits would require an extensive factual inquiry which includes the consideration of the Parties' numerous expert reports and witness testimonies, as well as the voluminous data regarding the impact of plain packaging in the market.[62] In contrast, if the proceedings were bifurcated, the Tribunal would not need to undertake the "very substantial factual inquiry" nor examine the "extensive expert evidence" as would be required for a determination on the merits.[63] Moreover, the substantial effort and expense of disclosure and analysis of documents and expert testimony would be avoided.[64]

49. The Respondent also submits that, even if the Respondent's objections turn out to be unsuccessful, an equivalent amount of time will be required regardless of whether a bifurcated or a non-bifurcated procedure is adopted. On the other hand, if the objections are upheld in a bifurcated procedure, this would bring the proceedings to a conclusion by early 2015 or, at the very least, significantly reduce the scope of any remaining claims.[65] A bifurcated procedure could therefore potentially save time and expense for both Parties.[66] In this regard, the Respondent refers to *Caratube International Oil Company v. Kazakhstan*, where the tribunal observed that, "[w]ith the wisdom of hindsight, the majority of the costs and expenses of each party and of the dispute, both in duration and expense, would have been avoided had Respondent opted for bifurcation",[67] and asserts that the jurisdictional objection in *Caratube*

60 Bifurcation Hearing Transcript, at p. 91:1-91:10, p. 234:8-234:19 and p. 235:11-235:14.

61 Statement of Defence, Volume A, at paras. 256 and 283.

62 Statement of Defence, Volume A, at para. 280.

63 Statement of Defence, Volume A, at para. 256; Bifurcation Hearing Transcript, at pp. 23:8-24:7.

64 Statement of Defence, Volume A, at paras. 256 and 281; Bifurcation Hearing Transcript, at pp. 23:8-24:7 and pp. 25:14-26:7.

65 Statement of Defence, Volume A, at para. 282.

66 Statement of Defence, Volume A, at para. 285.

67 Statement of Defence, Volume A, at para. 283; Bifurcation Hearing Transcript, at pp. 26:8-27:20.

ultimately concerned the question of ownership and control of the investment, which in the Respondent's view, is the same basic issue as set out in its No Investments Objection.[68] Additionally, the Respondent disputes the Claimant's assertion that studies have indicated that bifurcation is only valuable in very limited cases, and asserts that the studies relied on by the Claimant must be treated with caution.[69]

50. Finally, the Respondent contends that bifurcation would be in the public interest. According to the Respondent, the present dispute has "produced and is producing a deep and profound regulatory chill across the globe" because the longer the resolution of this dispute is delayed, the longer every other state that is considering a similar plain packaging regulatory measure (including the 177 parties to the WHO Framework Convention on Tobacco Control) will be prevented from enacting such measures.[70] The Respondent contends that the Claimant does not want bifurcation because "bifurcation might thaw that freezer…sooner and faster than it would like".[71] Hence, public policy grounds require bifurcation of the present dispute because Australia and other states "need to know the answer" to this "public health measure" as soon as possible.[72]

2. The Non-Admission of Investment Objection is Suitable for Bifurcation

51. Turning to its specific objections, the Respondent asserts that the Non-Admission of Investment Objection is suitable for bifurcation because it turns on discrete and self-contained questions of fact, Australian and international law, and goes to the foundation of the Tribunal's jurisdiction under the Treaty.[73] According to the Respondent, this objection does not raise issues of the operation or effect of plain packaging and merely concerns the Philip Morris group's intention at the time of the relevant acquisition to use PM Asia to make a claim under the Treaty, as well as the circumstances leading to the invalidity of the Claimant's admission of investment under Australian law and investment policy.[74] In this regard, limited document discovery and only

68 Bifurcation Hearing Transcript, at p. 208:20-208:25.

69 Bifurcation Hearing Transcript, at p. 204:2-204:3.

70 Bifurcation Hearing Transcript, at pp. 28:17-29:4.

71 Bifurcation Hearing Transcript, at p. 29:1-29:4.

72 Bifurcation Hearing Transcript, at p. 79:1-79:8.

73 Statement of Defence, Volume A, at paras. 257 and 268; Bifurcation Hearing Transcript, at p. 47:20-47:24.

74 Statement of Defence, Volume A, at para. 267; Bifurcation Hearing Transcript, at p. 48:1-48:12.

selected fact witnesses will be required, and none of the Parties' expert evidence relates to this objection.[75]

52. As to the legal issues that are engaged by this objection, the Respondent submits that the relevant questions of law are limited to the application of Australian law concerning the invalidity of the [redacted] decision to admit the investment under the FATA.[76] The Respondent further points out that if the Non-Admission of Investment Objection is accepted by the Tribunal, it would dispose of the entire proceedings.[77]

53. Finally, in response to the Claimant's argument that the Respondent should be precluded or estopped from raising its Non-Admission of Investment Objection because it was not raised until the Statement of Defence, the Respondent explains that, due to equitable duties of confidence that apply under Australian law to correspondence with Australia's Foreign Investment Review Board, the Attorney-General's Department of Australia (which is responsible for defending these proceedings) was not permitted to view the relevant documents until they were supplied as fact exhibits to the Claimant's Statement of Claim.[78] Accordingly, there was no delay as alleged by the Claimant.

3. The Temporal Objection is Suitable for Bifurcation

54. The Respondent asserts that the Temporal Objection is suitable for bifurcation because it constitutes a "discrete and preliminary issue" which would fully dispose of the case if upheld.[79] Moreover, it is in the very nature of an abuse of right argument that it is to be dealt with as a preliminary issue, since a respondent should not be obligated to participate in arbitral proceedings that were initiated abusively.[80] The Respondent cites *Lao Holdings BV v. Lao People's Democratic Republic*[81] ("*Lao Holdings*") and *ST-AD GmbH (Germany) v. Republic of Bulgaria*[82] ("*ST-AD v. Bulgaria*") as examples of cases where a tribunal held that bifurcation

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75 Statement of Defence, Volume A, at para. 267; Bifurcation Hearing Transcript, at p. 48:20-48:24.

76 Statement of Defence, Volume A, at para. 267; Bifurcation Hearing Transcript, at pp. 48:25-49:7

77 Statement of Defence, Volume A, at para. 257; Bifurcation Hearing Transcript at p. 47:14-47:17.

78 Bifurcation Hearing Transcript, at p. 10:11-10:25 and pp. 50:22-52:4.

79 Respondent's Submission dated 13 August 2012 at para. 14; Statement of Defence, Volume A, at para. 270; Bifurcation Hearing Transcript, at p. 52:19-52:24 and p. 79:16-79:20.

80 First Procedural Meeting Transcript, at p. 52:7-25; Respondent's Submission dated 13 August 2012 at para. 14; Bifurcation Hearing Transcript, at p. 79:9-79:15.

81 ICSID Case No. ARB(AF)/12/6.

82 PCA Case No. 2011-06, Award on Jurisdiction of 18 July 2013.

was appropriate for an objection to the Tribunal's jurisdiction *ratione temporis* on the basis that the claimant only became a protected "investor" under a BIT after the dispute had crystallized.[83]

55. The Respondent contends that it does not matter whether the Temporal Objection is characterized 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.[84] 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.[85] 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.[86]

56. The Respondent points to *Phoenix Action Ltd. v. Czech Republic*, *Mobil v. Venezuela*, and *Pac Rim Cayman LLC v. 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.[87] 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 to admissibility to be heard in a preliminary phase. In the Respondent's view, the overriding consideration for these tribunals was whether it would be procedurally efficient to bifurcate the proceedings.[88]

57. The Respondent also 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

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83 Respondent's Comments on the Additional Authorities at para. 6.

84 Respondent's Submission dated 13 August 2012 at para. 14; Statement of Defence, Volume A, at para. 263.

85 Respondent's Submission dated 27 August 2012 at paras. 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 at para. 39.

86 Respondent's Submission dated 27 August 2012 at para. 11.

87 First Procedural Meeting Transcript, at p. 53:5-15; Respondent's Submission dated 13 August 2012 at paras. 14 and 17.

88 Respondent's Submission dated 27 August 2012 at para. 9.

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.[89] In the Respondent's view, the only evidence that would overlap is the development and introduction of plain packaging in Australia, including Philip Morris' engagement in the consultation process.[90] In this regard, the Respondent submits that the Statement of Claim and the Statement of Defence support its position that the factual evidence required to rule on the Temporal Objection is limited to the Claimant's knowledge up until 23 February 2011.[91] The factual inquiry will focus on the contemporaneous statements by Philip Morris group officials and the group's intentions now disclosed in the witness statement of one of the Claimant's witnesses [redacted]. Any later evidence regarding the "reasonableness or efficacy" of plain packaging as a public health policy that might be relied on for a claim of breach of fair and equitable treatment would not be relevant.[92] Additionally, the Respondent points out that, in respect of many of the issues that the Claimant has claimed to be "overlapping", the Claimant has failed to identify any witnesses that it intends to call on those issues.[93] Hence, the Respondent asserts that the relevant factual and legal issues to be determined in relation to the Temporal Objection are discrete and can be resolved in isolation from the merits.[94]

58. Finally, the Respondent maintains its position that the Temporal Objection, if upheld by the Tribunal, would eliminate the need to proceed to the merits.[95] Even if this objection is not resolved in the Respondent's favour, aspects of this determination may serve to reduce the scope of the issues in contention in the merits phase.[96] Accordingly, the Respondent submits that, as a matter of fairness, it should not have to participate in a full hearing on the merits before the Tribunal has determined whether the claim is abusive.[97]

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89 Respondent's Submission dated 13 August 2012 at para. 15; Respondent's Submission dated 27 August 2012 at para. 13; Bifurcation Hearing Transcript, at p. 222:10-222:13.

90 Respondent's Submission dated 13 August 2012 at paras. 15 and 17; Respondent's Submission dated 27 August 2012 at para. 13.

91 Bifurcation Hearing Transcript, at pp. 217:17-218:4.

92 First Procedural Meeting Transcript, at p. 53:16-24; Respondent's Submission dated 13 August 2012 at para. 15; Respondent's Submission dated 27 August 2012 at para. 13; Statement of Defence, Volume A, at para. 258; Statement of Defence, Volume A, at para. 272.

93 Bifurcation Hearing Transcript, at pp. 85:4-86:7.

94 Respondent's Submission dated 13 August 2012 at paras. 16 – 17; Statement of Defence, Volume A, at para. 270.

95 Bifurcation Hearing Transcript, at p. 223:12-223:18.

96 Statement of Defence, Volume A, at paras. 270 and 273.

97 Statement of Defence, Volume A, at paras. 258, 270 and 274.

4. The No Investments Objection is Suitable for Bifurcation

59. The Respondent argues that its No Investments Objection is suitable for bifurcation because the issue of whether the Claimant "own[s] or control[s]" the purported investment raises a confined legal question on the interpretation of Articles 1(e), 1(b), 6.2 and 13 of the Treaty.[98] The Respondent points out that such issues relating to the existence of a qualifying investment are commonly dealt with in a discrete preliminary phase.[99] The only factual inquiry that the Tribunal will need to undertake is to identify the actual "investments" and the nature of the claimed intellectual property rights.[100]

60. The Respondent disputes the Claimant's characterization of the objection as "surprising" since the "point is apparent on the face of the BIT".[101] While the Respondent concedes that a Tribunal decision on the No Investments Objection would not lead to the dismissal of the entire case, it argues that a decision upholding the Objection would "considerably narrow the subject matter of these proceedings" and would result in striking out significant parts of the Claimant's claim.[102] In particular, the Respondent asserts that the preliminary resolution of the No Investments Objection will "significantly confine, or at the very least, clarify" the scope of the Parties' submissions, evidence and document production in relation to "(a) the alleged "deprivation" of investments under Article 6; (b) the "impairment" of investments under Article 2; and (c) the alleged damages occasioned to investments by any breach of the BIT".[103] Moreover, in the Respondent's view, should the No Investments Objection be upheld, the proceedings would be confined to the alleged expropriation of the value of the Claimant's shares in PM Australia.[104] In contrast, a non-bifurcated proceeding would be inefficient because the Claimant would have to present its case on the assumption that assets under its alleged control are covered by the Treaty's protections.[105]

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98 Statement of Defence, Volume A, at paras. 259 and 278; Bifurcation Hearing Transcript, at pp. 88:23-89:6 and p. 227:16-227:17.

99 Respondent's Submission dated 13 August 2012 at para. 22.

100 Statement of Defence, Volume A, at para. 278; Bifurcation Hearing Transcript, at pp. 88:23-89:6.

101 Respondent's Submission dated 27 August 2012 at para. 7.

102 Respondent's Submission dated 13 August 2012 at para. 24; Statement of Defence, Volume A, at paras. 259 and 277; Bifurcation Hearing Transcript, at p. 88:3-88:16.

103 Statement of Defence, Volume A, at para. 276; Bifurcation Hearing Transcript, at p. 88:3-88:16.

104 Respondent's Submission dated 13 August 2012 at para. 25; Respondent's Submission dated 27 August 2012 at para. 15.

105 Respondent's Submission dated 13 August 2012 at para. 23.

B. THE CLAIMANT'S ARGUMENTS

1. General Factors Weighing Against Bifurcation

61. The Claimant submits that the nature of the issues in dispute, their interrelationship, and the stage which this arbitration has reached, call for a non-bifurcated resolution of all the issues through a single hearing and award.[106] The Claimant asserts that, in general, experience and empirical data proves that bifurcation is inefficient and delays resolution of disputes.[107] Recent studies have found that, on average, bifurcated cases took longer to reach a final decision as compared to non-bifurcated cases,[108] and bifurcation is often used as "a mere dilatory tactic".[109]

62. The Claimant contends that at the heart of any consideration of bifurcation is procedural economy and efficiency. The Claimant refers to 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.[110] As is illustrated by the change in language from the UNCITRAL Rules 1976 to the UNCITRAL Rules 2010, the UNCITRAL Rules 2010 do not contain a presumption in favour of bifurcation.[111] According to the Claimant, in fact, the presumption in favour of bifurcation was removed in the UNCITRAL Rules 2010 precisely because bifurcation is likely to result in unnecessary costs and delays, and potential prejudice to the parties.[112] In this regard, the Claimant disagrees 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

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106 Claimant's Opposition to Bifurcation, at para. 1.

107 Claimant's Opposition to Bifurcation, at p. 9, heading II and para. 19; Bifurcation Hearing Transcript, at p. 104:4-104:9.

108 Claimant's Opposition to Bifurcation, at para. 19, citing Greenwood, Lucy, *Does Bifurcation Really Promote Efficiency?*, 28 J. Int'l Arbitration 105 (2011); Bifurcation Hearing Transcript, at pp. 106:17-107:10.

109 Claimant's Opposition to Bifurcation, at para. 20, citing Uchkunova, Inna and Temnikov, Oleg, *Bifurcation of Proceedings in ICSID Arbitration: Where Do We Stand?*, Kluwer Arbitration Blog, August 15, 2013 ("Bifurcation of Proceedings in ICSID Arbitration: Where Do We Stand").

110 First Procedural Meeting Transcript, at p. 30:8-13; Claimant's Opposition to Bifurcation, at para. 3; Bifurcation Hearing Transcript, at p. 95:8-95:13.

111 Claimant's Submission dated 30 July 2012 at para. 3; First Procedural Meeting Transcript at pp. 30:13-21, 31:13-22; Claimant's Submission dated 20 August 2012 at para. 18; Claimant's Opposition to Bifurcation, at para. 17, citing *Guarachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*; PCA Case No. 2011-17, Procedural Order No. 10, December 17, 2012 at para. 9.

112 Claimant's Opposition to Bifurcation, at para. 18; Bifurcation Hearing Transcript, at p. 104:10-104:16.

bifurcation.[113] In any event, the Claimant contends that the cases presented do not analyse whether bifurcation in fact turned out to be efficient.[114]

63. According to the Claimant, investor-State tribunals have identified several factors to be taken into account in deciding whether to bifurcate an arbitration proceeding, including: "whether the objection is substantial…[–] a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding; whether…the jurisdictional issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or costs; and whether the objection to jurisdiction, if granted, will result in a material reduction of the length and scope of the proceedings at the next phase."[115]

64. Turning to the present proceedings, the Claimant asserts that bifurcation would be inefficient at this stage of the arbitration for a number of reasons. First, the Claimant argues that this proceeding is well beyond a stage at which bifurcation would "avoid unnecessary delay and expense".[116] More than two years have passed since the Notice of Arbitration was submitted, and each Party has already submitted thousands of pages of argumentation on all aspects of the dispute.[117] The Claimant points out that in the procedural hearing in July 2012, even the Respondent itself took the position that bifurcation following a first round of written submissions would result "in minimal efficiencies" and save "no cost in the pre-hearing phases".[118] The Claimant agrees with that assessment,[119] and asserts that since the Parties' respective arguments have already been presented in chief, a non-bifurcated procedure would allow the argumentation to be completed with only one more round of briefs on the merits, a rejoinder on jurisdiction, and a single, dispositive hearing.[120] In contrast, a bifurcated procedure would involve an additional round of briefing, an additional round of document production, an additional hearing, and a separate written finding by the Tribunal to decide on the Respondent's objections.[121] Accordingly, the Claimant contends that it is unrealistic for the Respondent to

113 Claimant's Submission dated 20 August 2012 at para. 18.

114 Claimant's Submission dated 20 August 2012 at para. 19.

115 Claimant's Opposition to Bifurcation, at para. 4 and fn. 4; Bifurcation Hearing Transcript, at pp. 101:3-102:2.

116 Claimant's Opposition to Bifurcation, at p. 12, heading III.

117 Claimant's Opposition to Bifurcation, at para. 2; Bifurcation Hearing Transcript, at pp. 97:13-98:2.

118 Claimant's Opposition to Bifurcation, at paras. 6 and 23, citing First Procedural Meeting Transcript, at p. 49:1-3.

119 Claimant's Opposition to Bifurcation, at para. 23.

120 Claimant's Opposition to Bifurcation, at paras. 5 and 24 – 25; Bifurcation Hearing Transcript, at p. 98:3-98:8.

121 Claimant's Opposition to Bifurcation, at para. 26.

suggest (based on the timetables submitted in its Statement of Defence, Volume A) that a non-bifurcated proceeding will take only 15 weeks longer than a bifurcated one,[122] and asserts that a realistic schedule for a bifurcated proceeding could delay final resolution of the dispute by a year or more.[123] According to the Claimant, it is also unrealistic for the Respondent to suggest that no experts will be required at the jurisdictional phase.[124] Additionally, the Claimant points out that the substantial time and money that the Parties have devoted to developing their arguments and evidence on the merits are sunk costs for both Parties, and cannot be avoided by bifurcation.[125] In light of this, the Claimant contends that bifurcation would merely further delay the resolution of the dispute and result in significant additional costs.[126]

65. Second, the Claimant avers that bifurcation is not suitable because the Respondent's objections involve facts that are inextricably linked to the merits.[127] According to the Claimant, a bifurcated procedure would severely prejudice its ability to present its case because it would force the Tribunal to decide facts prematurely even though such facts are "deeply intertwined with the merits of the Claimant's claims".[128] Hence, since the facts relevant to the objections overlap with the merits, the tribunal should adopt a non-bifurcated proceeding in order to avoid the risk of prejudging the merits or deciding in the absence of sufficient information. Bifurcation would raise the risk of subsequent disagreement as to whether the Tribunal's conclusions on the evidence in the jurisdictional phase should be treated as *res judicata*.[129] The Claimant further relies on *Mesa Power Group LLC v. Canada*[130] for the proposition that a partial overlap is sufficient to justify a denial of bifurcation on this basis.[131]

66. Third, the Claimant contends that none of the Respondent's objections are sufficiently substantial to warrant bifurcation.[132] In this regard, the Claimant submits that the Tribunal, in considering the issue of bifurcation, must consider the risk that bifurcation will result in a

122 Claimant's Opposition to Bifurcation, at para. 5.

123 Claimant's Opposition to Bifurcation, at paras. 21 and 26.

124 Bifurcation Hearing Transcript, at pp. 267:16-269:10.

125 Bifurcation Hearing Transcript, at p. 115:12-115:16.

126 Claimant's Opposition to Bifurcation, at para. 2.

127 Claimant's letter dated 27 June 2012 at p. 3; Claimant's Opposition to Bifurcation, at para. 7.

128 Claimant's Opposition to Bifurcation, at para. 2; Bifurcation Hearing Transcript, at p. 108:16-108:22.

129 Claimant's Opposition to Bifurcation, at paras. 7 – 8, citing *Kardassopoulos v. Georgia* ICSID Case No. ARB/05/18, Decision on Jurisdiction, July 6 2007 at para. 260 and Bifurcation of Proceedings in ICSID Arbitration: Where Do We Stand; Bifurcation Hearing Transcript, at pp. 109:5-110:9.

130 PCA Case No. 2012-17.

131 Claimant's Opposition to Bifurcation, at para. 7.

132 Claimant's Opposition to Bifurcation, at para. 10.

decision that does not dispose of the claims at issue, cause delay and increase costs, and make it more difficult to manage factual and legal overlap among the jurisdictional, admissibility and merits issues.[133] The Claimant asserts that, in this case, bifurcation would trade off the predictability and certainty of a non-bifurcated proceeding on the basis of a timetable already largely agreed by the Parties and leading to a final hearing in the summer of 2015, for a "hypothetical benefit" that is entirely dependent on the chances of success of the Respondent's objections.[134]

67. Finally, in response to the Respondent's reliance on *Caratube*, the Claimant argues that the tribunal's statement in *Caratube* is inapposite because that statement was made with the benefit of hindsight, and it is impossible at this point in the present dispute to know in advance which evidence and arguments the Tribunal will find dispositive.[135] Moreover, for every case that may have been resolved more cheaply and quickly in a bifurcated proceeding, there are cases that also, in retrospect, could have been resolved more cheaply and more quickly by proceeding on a non-bifurcated track.[136] Additionally, in the Claimant's view, many of the costs and expenses noted by the *Caratube* tribunal (such as costs related to document disclosure) are costs and expenses that cannot be avoided in the present dispute.[137]

2. The Non-Admission of Investment Objection is Not Suitable for Bifurcation

68. Addressing the Respondent's specific objections, the Claimant contends that the Respondent's Non-Admission of Investment Objection does not justify bifurcation because it is not substantial. First, in the Claimant's view, the Respondent has already taken the position, in arguing abuse of right, that the Philip Morris group restructured the ownership of PML to obtain treaty protection of a dispute already existing at the time of the restructuring. It follows that the Respondent had every opportunity to review the Statutory Notice at the time it was submitted, with full knowledge of the broader context. However, the Respondent never raised concerns about the fact that the Claimant's investments would be protected by the Treaty. Accordingly, the Respondent cannot now claim surprise.[138]

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133 Claimant's Opposition to Bifurcation, at para. 11; Bifurcation Hearing Transcript, at p. 112:5-112:16.

134 Claimant's Opposition to Bifurcation, at para. 12; Bifurcation Hearing Transcript, at p. 113:5-113:12.

135 Bifurcation Hearing Transcript, at pp. 118:19-119:7.

136 Bifurcation Hearing Transcript, at p. 119:15-119:21.

137 Bifurcation Hearing Transcript, at p. 120:4-:120:8.

138 Claimant's Opposition to Bifurcation, at paras. 72 and 73; Bifurcation Hearing Transcript at p. 174:1-174:23 and pp. 176:23-177:4.

69. Second, the Claimant asserts that the Respondent has failed to allege the facts necessary to support its objection. The Claimant contends that the Respondent has avoided the question of whether the alleged misstatement in the Statutory Notice had any material bearing on the legality of the restructuring, by "artfully" omitting the following critical facts from its Statement of Defence, Volume A:

> (a) at no point does Respondent ever actually assert that the restructuring was contrary to Australia's national interest; (b) Respondent has not pointed to anything in Australia's law or investment policy that indicates that seeking to obtain BIT protection for an investment is against Australia's national interest; (c) Respondent has not asserted that the Treasury would have rejected Claimant's Statutory Notice even if the Notice had explicitly stated that one of the motivations for the restructuring was to provide another basis for claiming BIT protection; and (d) Respondent has not asserted that, even if the Statutory Notice were misleading, PM Asia's ownership of PM Australia and PML would be deemed unlawful.[139]

70. Third, the Claimant points out that, at the time of its acquisition of the investment in February 2011, no legislation had even been introduced in Parliament. Hence, plain packaging could not be described as having been adopted as national policy at that point and there was no adopted national policy that the acquisition in February 2011 would have enabled the Claimant to challenge under the Treaty.[140]

71. Fourth, the Claimant alleges that the Respondent cannot meet its burden of proof because, contrary to what the Respondent suggests, the Claimant's representations were accurate.[141] The threshold of proof for such allegations of bad faith, fraud, or criminal conduct is an "extraordinarily high one".[142] The Claimant asserts that its Statutory Notice was correct in stating that the purpose of its acquisition [redacted]. The fact that the acquisition provided a second basis [redacted] for securing the investment protections of the Treaty does not render the Statutory Notice "false or misleading". In any event, if the Respondent had concerns it could easily have sought additional information from the Claimant, but it did not.[144]

139 Claimant's Opposition to Bifurcation, at para. 74.

140 Claimant's Opposition to Bifurcation, at para. 88.

141 Claimant's Opposition to Bifurcation, at para. 78; Bifurcation Hearing Transcript, at p. 175:20-175:23.

142 Claimant's Opposition to Bifurcation, at para. 78; Bifurcation Hearing Transcript, at p. 175:13-175:19.

143 Claimant's Opposition to Bifurcation, at para. 82

144 Claimant's Opposition to Bifurcation, at para. 82.

72. Additionally, in the Claimant's view, its statement in the Statutory Notice [redacted] is accurate [redacted] Furthermore, the Respondent has not explained why the availability of treaty protection is material to its assessment of whether to approve an investment, and therefore, why the fact that the Claimant did not explicitly state in its Statutory Notice [redacted] renders the Claimant's investment illegal.[146]

73. Even if the Respondent's allegations are correct, any alleged oversight in the Statutory Notice does not rise to the level that would remove the Claimant's investment from the scope of protection in the Treaty.[147] The Claimant asserts that the Respondent's Non-Admission of Investment Objection merely relates to the transfer of ownership of PM Australia and PML from one foreign entity (Philip Morris Brands Sàrl) to another foreign entity (PM Asia), and such foreign ownership of assets is entirely legal.[148] Furthermore, there is nothing false or misleading in the information contained in the Statutory Notice.[149] The Claimant contends that, even assuming that there was a violation of Australian law, the Respondent should have raised the purported illegality of the Claimant's acquisition of its ownership over the Australian assets much earlier, in the context of reviewing the Claimant's application. Instead, the Respondent approved the Claimant's investment with full knowledge of the Claimant's identity and legal rights, and the broader regulatory context in Australia.[150] The principles of fairness therefore "require [the] tribunal to hold [the Respondent] estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law".[151] The Respondent cannot now retroactively invalidate its approval of the Claimant's investment in order to avoid its treaty obligations.[152] For these reasons, the Respondent's Non-Admission of Investment Objection is not substantial and cannot support bifurcation.

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145 Claimant's Opposition to Bifurcation, at para. 83; Bifurcation Hearing Transcript, at p. 177:5-177:22.

146 Claimant's Opposition to Bifurcation, at para. 84; Bifurcation Hearing Transcript, at p. 180:12-180:17.

147 Claimant's Opposition to Bifurcation, at para. 79.

148 Claimant's Opposition to Bifurcation, at para. 79.

149 Claimant's Opposition to Bifurcation, at para. 79.

150 Claimant's Opposition to Bifurcation, at para. 81.

151 Claimant's Opposition to Bifurcation, at para. 81, citing *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines*, ICSID Case No. ARB/03/25, Award, August 16, 2007 at para. 346.

152 Claimant's Opposition to Bifurcation, at paras. 80 – 81.

74. Furthermore, in the Claimant's view, there is a significant overlap between the evidence relevant to this objection and the evidence on the merits.[153] According to the Claimant, an analysis of what Australia's national interest was or might have been would require a detailed inquiry of facts that are at the heart of the Claimant's claims on the merits, such as: whether Australia had a strong BIT program that encouraged foreign investment and investor-State arbitration, whether plain packaging was not supported by empirical evidence, whether there was any basis to believe that plain packaging would advance the government's health objectives, whether plain packaging was against Australia's international obligations, whether plain packaging legislation had been introduced in Parliament, and whether plain packaging could result in increased rather than reduced tobacco consumption and would cause enormous damage to the industry.[154] If the Tribunal decides the facts before hearing full arguments on the merits, this would prejudice the Claimant's ability to present its case.[155] Accordingly, the Non-Admission of Investment Objection is not suitable for bifurcation.

3. The Temporal Objection is Not Suitable for Bifurcation

75. The Claimant asserts that the Respondent's Ratione Temporis Argument is not substantial and is intertwined with the merits.[156] The Claimant contends that it is based on the erroneous premise that a series of acts prior to the February 2011 corporate restructuring violated the BIT—a claim that the Claimant maintains it has never made.[157] Rather, the Claimant asserts that the present dispute arises solely out of the enactment of the Tobacco Plain Packaging Act and the Tobacco Plain Packaging Regulations 2011, which were promulgated by the Respondent after the date that the Claimant had acquired its investment.[158] The Claimant asserts that this distinction between the "wrongful act" and "conduct prior to that act which is of preparatory character" is confirmed by numerous arbitral decisions.[159] Hence, in the Claimant's view, the Respondent, by

153 Claimant's Opposition to Bifurcation, at para. 15.

154 Claimant's Opposition to Bifurcation, at para. 91; Bifurcation Hearing Transcript at pp. 262:17-263:8.

155 Claimant's Opposition to Bifurcation, at para. 91.

156 Claimant's Opposition to Bifurcation, at p. 16.

157 Claimant's Opposition to Bifurcation, at para. 33.

158 Claimant's Opposition to Bifurcation, at para. 31; Bifurcation Hearing Transcript, at p. 130:3-130:10 and p. 133:7-133:12.

159 Bifurcation Hearing Transcript, at pp. 133:19-138:4, citing *Maffezini*, *Gabcikovo* and *Mondev v. United States*.

re-characterizing the claims, has sought to usurp the Claimant's right to define the nature and scope of the dispute that it submits for resolution.[160]

76. Additionally, the Claimant asserts that, if the Tribunal were to decide that the dispute arose out of facts other than or earlier in time than the enactment of the plain packaging measures, it will inevitably require extensive argumentation from the Parties on numerous facts that overlap with the merits of the case.[161] It would also require the Tribunal to review the comprehensive sequence of events beginning with the April 2010 announcement, and the Respondent would be required to prove facts showing the existence of a dispute prior to the time the Claimant acquired ownership of the Australian assets in February 2011 – these issues necessarily lead the Tribunal to consider the merits of the claims.[162] According to the Claimant, the overlapping nature of the issues is evident in the Respondent's cross-references to the factual chronology in Volume A of its Statement of Defence to support its arguments on the merits in Volume B.[163] Resolving those factual issues during a preliminary phase of a bifurcated proceeding would prejudice the Claimant's ability to present its case on the merits.[164]

77. As to the Respondent's Abuse of Right Argument, the Claimant asserts that this objection pertains to admissibility rather than jurisdiction.[165] Contrary to what the Respondent contends, 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.[166] The Claimant disputes the relevance of the ICSID cases *Phoenix Action Ltd. v. Czech Republic*, *Mobil v. Venezuela*, and *Pac Rim Cayman LLC v. 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 categorization of the objection was not considered to be relevant by the *Pac Rim* tribunal.[167] The Claimant also takes issue with

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160 Claimant's Opposition to Bifurcation, at para. 34, citing *Urbaser S.A. and Consoircio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, December 9, 2012; Bifurcation Hearing Transcript, at p. 132:1-132:7 and p. 138:15-138:21.

161 Claimant's Opposition to Bifurcation, at para. 35; Bifurcation Hearing Transcript, at p. 147:14-147:19.

162 Claimant's Opposition to Bifurcation, at para. 36; Bifurcation Hearing Transcript, at p. 148:2-148:15.

163 Claimant's Opposition to Bifurcation, at para. 37.

164 Claimant's Opposition to Bifurcation, at para. 37; Bifurcation Hearing Transcript, at pp. 149:23-150:16.

165 Bifurcation Hearing Transcript, at p. 128:4-7 and pp. 143:17-144:3.

166 Claimant's Submission dated 30 July 2012 at para. 18; First Procedural Meeting Transcript, at p. 66:18-67:3; Claimant's Submission dated 20 August 2012 at paras. 24 – 25.

167 Claimant's Submission dated 20 August 2012 at para. 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

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.[168] In any event, the Claimant contends, the general discretion in Article 17 of the UNCITRAL Rules is subsumed by the requirement of procedural efficiency.[169]

78. Additionally, the Claimant disagrees with the Respondent's definition of an abuse of right as well as the Respondent's articulation of the threshold for finding an abuse of right.[170] According to the Claimant, the Respondent "focuses on the high degree of foreseeability of a potential dispute but ignores the main component of an abuse of rights claim, namely whether [the] Claimant engaged in an abuse by taking actions in bad faith".[171] The Claimant further asserts that it is the Respondent that bears the burden of proving the purported abuse of right, and that it has failed to meet its burden.[172] According to the Claimant, the plain packaging legislation was neither inevitable nor highly probable at the time of its acquisition of its investment, and draft legislation was not introduced in Parliament until months after the investment was made.[173] The Claimant asserts that, unlike in *Phoenix* (which is the only publicly available investor-state claim to dismiss a claim entirely based on abuse of right), this is not a case where a shell company was established for purposes of initiating an arbitration claim.[174] Rather, this is a case where an existing operating entity (PM Asia) acquired ownership of companies [redacted] that were within the same corporate family.[175] Hence, the Claimant's acquisition of its 100% ownership interest in the Australian affiliates in 2011 [redacted] merely provided a

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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, June 1, 2012 at para. 2.10).

168 Claimant's Submission dated 20 August 2012 at para. 25.

169 Claimant's Submission dated 20 August 2012 at para. 26.

170 Bifurcation Hearing Transcript, at p. 139:16-139:22.

171 Bifurcation Hearing Transcript, at pp. 139:20-140:4.

172 Claimant's Opposition to Bifurcation, at para. 39; Bifurcation Hearing Transcript, at pp. 140:4 and 147:11-147:13.

173 Claimant's Opposition to Bifurcation, at para. 40.

174 Claimant's Opposition to Bifurcation, at para. 42; Bifurcation Hearing Transcript at p. 142:15-142:18.

175 Bifurcation Hearing Transcript, at p. 142:7-142:21.

second basis for asserting investment treaty protection.[176] Accordingly, the Respondent's abuse of right objection is baseless and does not warrant bifurcation.[177]

79. Furthermore, the Claimant contends that the Respondent's Abuse of Right Argument is ill-suited for bifurcation because it necessarily overlaps with the merits. It argues that, in order to assess the Respondent's assertion that the dispute had reached a "high degree of probability" in February 2011, the Tribunal would need to consider a broad range of factors and events, including:[178]

- The level of Parliament's independence and the relevance of the Prime Minister's announcement of support for plain packaging;
- The empirical evidence (or lack thereof) on the effectiveness of plain packaging in reducing tobacco consumption or raising awareness of the health risks of smoking;
- How Australia's previous proposals to enact plain packaging restrictions were abandoned and the reasons therefor;
- Australia's prior practice of adhering to its internal regulatory processes for ensuring that the legislation proposed is evidence-based and fully examined for inconsistency with domestic and international norms prior to introduction;
- The relevance of criticism from Australia's Office of Best Practice Regulation with respect to the evidentiary foundations of the proposed legislation;
- The criticism by IP Australia and officials within other agencies and departments of the Australian government of plain packaging restrictions;
- Historical data showing the rate at which legislative initiatives embraced by the Prime Minister's office: (1) fall short of enactment into law by Parliament, or (2) are substantially revised to address concerns raised by government policy experts, business interests, trade associations, labour unions, and other key stakeholders; and
- The effect of the destabilizing leadership "coup" and the ouster of Prime Minister Rudd on the perceived likelihood of Australia's adoption of plain packaging restrictions.

80. In the Claimant's view, these issues bear directly on the merits of the Claimant's argument that Australia has acted arbitrarily in enacting plain packaging legislation and breached the Treaty.[179] Moreover, the evidence relating to the Claimant's knowledge and foresight of a potential dispute overlaps with the assessment of the Claimant's legitimate expectations as well as damages calculation.[180] Countering an argument by the Respondent, the Claimant points out that the issue is not whether the same legal test applies to a determination of legitimate expectations

176 Claimant's Opposition to Bifurcation, at para. 41.

177 Claimant's Opposition to Bifurcation, at para. 43.

178 Claimant's Opposition to Bifurcation, at para. 46; Bifurcation Hearing Transcript, at pp. 151:2-162:16.

179 Claimant's Opposition to Bifurcation, at para. 47.

180 Claimant's Submission dated 30 July 2012 at paras. 19 – 24; First Procedural Meeting Transcript, at pp. 37:5-40:25; Claimant's Submission dated 20 August 2012 at paras. 27, 32; Claimant's Opposition to Bifurcation, at para. 13; Claimant's Opposition to Bifurcation, at para. 47.

in the context of fair and equitable treatment and to a determination of an abuse of right, but whether the evidence relating to the two issues will overlap.[181] 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.[182] 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.[183]

81. Finally, the Claimant disagrees with the Respondent's reliance on *Lao Holdings* and *ST-AD v. Bulgaria* and argues that both these cases do not support and in fact undermine the Respondent's position.[184] The Claimant asserts that *Lao Holdings* is an example of how bifurcation can be inefficient. According to the Claimant, bifurcation in *Lao Holdings* "failed to dispose of the case in whole or in part", required the parties to prepare four additional written submissions and attend a separate hearing on jurisdiction, and demonstrated that objections relating to a tribunal's jurisdiction *ratione temporis* are "inherently fact-intensive and intertwined with the merits".[185] Additionally, *Lao Holdings* demonstrates that the Claimant's Temporal Objection is not substantial and does not warrant bifurcation because such an objection was rejected by the tribunal even though the facts in that case were "much more favorable to the respondent than in the present proceeding".[186]

82. The Claimant distinguishes *ST-AD v. Bulgaria* from the present proceedings on the basis that in *ST-AD v. Bulgaria*, the parties had agreed to bifurcate and the tribunal therefore had no occasion to weigh the various factors for and against bifurcation.[187] The Claimant also asserts that *ST-AD v. Bulgaria* demonstrates that the facts in the present case are not sufficiently "egregious" to warrant a finding that the Claimant had engaged in an "abuse of rights".[188]

83. For the reasons above, the Claimant submits that the factual and legal issues relating to the Temporal Objection should be examined only when the Tribunal has the benefit of the full

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181 Claimant's Submission dated 20 August 2012 at paras. 29 – 30.

182 Claimant's Submission dated 20 August 2012 at para. 28.

183 Claimant's Submission dated 20 August 2012 at para. 31.

184 Claimant's Reply on the Additional Authorities at p. 1.

185 Claimant's Reply on the Additional Authorities at p. 1-2.

186 Claimant's Reply on the Additional Authorities at p. 2-3.

187 Claimant's Reply on the Additional Authorities at p. 4.

188 Claimant's Reply on the Additional Authorities at p. 4-5.

evidentiary record, including documents obtained through document production orders and witness evidence, and the Parties' full briefing on the merits.[189]

4. The No Investments Objection is Not Suitable for Bifurcation

84. According to the Claimant, the Respondent's objection that the Treaty does not cover indirectly held investments is not substantial and, therefore, cannot be a basis for bifurcation.[190] The Claimant asserts that there is established jurisprudence that "ownership" and "control" cover indirectly held companies and the assets of those companies[191] and the Respondent has offered no reason to deviate from such a well-established principle.[192] The Claimant also asserts that tribunals have repeatedly rejected arguments "virtually identical" to those raised by the Respondent,[193] and contends that it would be absurd to suggest that the Contracting Parties can retrospectively exclude investors that would otherwise meet the Treaty's criteria.[194] Moreover, in the Claimant's view, Articles 1(b)(i) and 13(1) of the Treaty do not support the Respondent's position that the Treaty does not cover indirectly held investments. Instead, those articles are in fact fully consistent with the Claimant's position that PM Australia, PML and their assets are investments of a Hong Kong Company (PM Asia).[195]

85. Additionally, the Claimant observes that the No Investments Objection in general, even if successful, would only serve to reduce the scope of the Claimant's claim but would not dispose of it.[196] 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.[197] The Claimant points

189 Claimant's Opposition to Bifurcation, at para. 47.

190 Claimant's Opposition to Bifurcation, at para. 56.

191 Claimant's Submission dated 30 July 2012 at para. 15; Claimant's Opposition to Bifurcation, at paras. 51 – 53; Bifurcation Hearing Transcript, at pp. 163:24-167:2.

192 Claimant's Opposition to Bifurcation, at para. 53; Bifurcation Hearing Transcript, at p. 167:3-6.

193 Claimant's Opposition to Bifurcation, at para. 52 and fn. 68.

194 Claimant's Submission dated 30 July 2012 at para. 15.

195 Claimant's Opposition to Bifurcation, at para. 54.

196 Claimant's Submission dated 20 August 2012 at para. 37; Claimant's Opposition to Bifurcation, at paras. 14 and 57.

197 Claimant's Submission dated 20 August 2012 at para. 37; Claimant's Opposition to Bifurcation, at paras. 14 and 57; Bifurcation Hearing Transcript, at p. 169:1-169:12.

out that the Respondent itself concedes that its No Investments Objection will not dispose of the case.[198]

86. Turning to the Respondent's argument that PML's trademark licences are not "investments" under the Treaty, the Claimant asserts that such an argument is meritless.[199] The Claimant contends that these licences are intellectual property rights that constitute protected investments, and points out that the definition of "investment" under Article 1(e) of the Treaty includes "rights with respect to copyright, patents, trademarks, trade names, industrial designs, know-how and goodwill", "licences and other rights conferred by law or under contract", and even more broadly, "every kind of asset".[200] Accordingly, the licences in question are assets indirectly owned and controlled by the Claimant by virtue of its indirect ownership of PML, and constitute investments protected under the Treaty.[201] Additionally, the Claimant finds "absurd" the Respondent's proposition that those licences are controlled by the owners and not by PML or PM Asia, because PML and PM Asia have in fact decided how to deploy the various trademarks in the Australian market for years and that was the purpose of the licences.[202]

87. Even if the Respondent's argument that the Claimant does not own or control the trademark licences were to succeed, this would not dispose of the dispute.[203] The Claimant points out that the Respondent has conceded that PML owns the *Peter Jackson* brand and its associated trademarks, and that the Claimant therefore owns and controls the *Peter Jackson* brand by virtue of its indirect ownership and control of PML.[204] Accordingly, the Claimant would still be able to claim damages with respect to the *Peter Jackson* brand, and the Tribunal would still be called upon to address all the legal and factual issues described in the Statement of Claim.[205]

88. Finally, the Claimant asserts that the Respondent's objections relating to the Claimant's lack of ownership and control over its investments factually overlaps with the merits. In the Claimant's view, this is apparent from the similarity of the discussion of the nature of the intellectual

198 Claimant's Opposition to Bifurcation, at para. 58, citing Statement of Defence, Volume A, at para. 253; Bifurcation Hearing Transcript, at p. 169:1-169:8.

199 Bifurcation Hearing Transcript, at p. 167:7-167:10.

200 Claimant's Opposition to Bifurcation, at para. 63; Bifurcation Hearing Transcript, at p. 163:15-163:23 and pp. 167:13-168:7.

201 Claimant's Opposition to Bifurcation, at para. 63.

202 Claimant's Opposition to Bifurcation, at para. 64.

203 Claimant's Opposition to Bifurcation, at para. 66; Bifurcation Hearing Transcript, at p. 168:19-168:25.

204 Claimant's Opposition to Bifurcation, at paras. 14 and 66; Bifurcation Hearing Transcript, at p. 169:13-169:23.

205 Claimant's Opposition to Bifurcation, at para. 66; Bifurcation Hearing Transcript, at pp. 169:24-170:6.

property rights at issue in this case in both volumes of the Statement of Defence.[206] Accordingly, the Respondent's No Investments Objection cannot justify bifurcation.

VI. THE PROCEDURAL TIMETABLES PROPOSED BY THE PARTIES

89. In addition to setting out their arguments on the desirability of bifurcation, the Parties have proposed timetables for the subsequent stages of the arbitration for the Tribunal's consideration, both on the assumption that the Tribunal will order a bifurcated procedure and on the assumption that the Tribunal will order a non-bifurcated procedure.

A. THE RESPONDENT'S PROPOSED TIMETABLES

90. In the event that a bifurcated procedure is ordered, the Respondent proposes a timetable that provides for a first phase on the preliminary objections and, should the Respondent be unsuccessful in its preliminary objections, a second phase on the merits of the dispute:

a) By **[4 weeks after the hearing on bifurcation [21 March 2014]]**, the Tribunal orders bifurcation of the proceedings.

b) By **[8 weeks after the date in para. (a) [16 May 2014]]**, the Claimant files its Counter-Memorial on Preliminary Objections with any further evidence (documents, non-expert witness statements, expert statements) but only in rebuttal to the Respondent's Memorial on Preliminary Objections.

c) By **[2 weeks after the date in para. (b) [30 May 2014]]**, the Parties may submit to the Tribunal and to the other Party a reasoned application (Request to Produce) to order production of documents sought from the other Party, limited to material relevant to the preliminary objections.

d) By **[2 weeks after the date in para. (c) [13 June 2014]]**, the Parties produce those requested documents to which they have no objection and Parties may submit reasoned objections to the Tribunal in respect of documents sought by the other Party.

e) By **[3 weeks after the date in para. (d) [4 July 2014]]**, the Tribunal decides on such applications, including any invitation for the Parties to consult with each other.

f) By **[3 weeks after the date in para. (e) [25 July 2014]]**, the Parties produce documents as ordered by the Tribunal.

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[206] Claimant's Opposition to Bifurcation, at paras. 68 – 69.

g) By **[8 weeks after the date in para. (f) [19 September 2014]]**, the Respondent files its Reply on Preliminary Objections together with any further evidence (documents, non-expert witness statements, expert witness statements) upon which it wishes to rely.

h) By **[4 weeks after the date in para. (g) [17 October 2014]]**, the Claimant files its Rejoinder on Preliminary Objections together with any further evidence (documents, non-expert witness statements, expert witness statements) upon which it wishes to rely.

i) By **[1 week after the date in para. (h) [24 October 2014]]**, the Parties submit notifications of the witnesses and experts presented by themselves or by the other Party whom they wish to examine at the Hearing on Preliminary Objections and a chronological list of all exhibits with indications where the respective documents can be found in the file.

j) **[1 week after the date set in para. (i) [31 October 2014]]**, a Pre-Hearing Conference between the Parties and the Tribunal may be held if considered necessary by the Tribunal, either in person or by telephone, at a date set by the tribunal after consultation with the Parties.

k) As soon as possible thereafter, the Tribunal issues a Procedural Order regarding details of the Hearing on Preliminary Objections.

l) The Hearing on Preliminary Objections shall be held from **[17 days after the date set in para. (j) [17 November 2014]]** to **[19 November 2014]**, with **[20-21 November 2014]** in reserve. After the conclusion of the Hearing on Preliminary Objections, the Tribunal will consult with the Parties as to whether the Parties shall submit post-hearing briefs and claims for arbitration costs, and by which dates.

m) By **[16 weeks after the Hearing on Preliminary Objections [11 March 2015]]**, the Tribunal delivers its decision on the preliminary objections.

n) By **[2 weeks after the date in para. (m) [25 March 2015]]**, the Parties may submit to the Tribunal and to the other Party a reasoned application (Request to Produce) to order production of documents sought from the other Party, limited to material relevant to the merits.

o) By **[2 weeks after the date in para. (n) [8 April 2015]]**, the Parties produce those requested documents to which they have no objection and Parties may submit reasoned objections to the Tribunal in respect of documents sought by the other Party.

p) By **[3 weeks after the date in para. (o) [29 April 2015]]**, the Tribunal decides on such applications, including any invitation for the Parties to consult with each other.

q) By **[6 weeks after the date in para. (p) [10 June 2015]]**, the Parties produce documents as ordered by the Tribunal.

r) By **[4 weeks after the date in para. (q) [8 July 2015]]**, the Claimant files its Reply together with any further evidence (documents, non-expert witness statements, expert witness statements) upon which it wishes to rely, but only in rebuttal to the Respondent's Defence.

s) By **[12 weeks after the date in para. (r) [30 September 2015]]**, the Respondent files its Rejoinder together with any further evidence (documents, non-expert witness statements, expert witness statements) upon which it wishes to rely, but only in rebuttal to the Claimant's Reply.

t) Thereafter, no new evidence may be submitted, unless agreed between the Parties or with the leave of the Tribunal.

u) By **[1 week after the date in para. (s) [7 October 2015]]**, the Parties submit notifications of the witnesses and experts presented by themselves or by the other Party whom they wish to examine at the Hearing on Merits and a chronological list of all exhibits with indications where the respective documents can be found in the file.

v) **[Two weeks after the date set in para. (u) [21 October 2015]]**, a Pre-Hearing Conference between the Parties and the Tribunal may be held if considered necessary by the Tribunal, either in person or by telephone, at a date set by the Tribunal after consultation with the Parties.

w) As soon as possible thereafter, the Tribunal issues a Procedural Order regarding details of the Hearing on Merits.

x) The Hearing on Merits shall be held from **[4 weeks after the date set in para. (v) [18 November 2015]]** to **[1 December 2015]** (10 business days) or until the Tribunal determines it should conclude. After the conclusion of the Hearing, the Tribunal will consult with the Parties as to whether the Parties shall submit post-hearing briefs and claims for arbitration costs, and by which dates.

91. In response to the Claimant's concern that bifurcation would lead to significant delay, the Respondent stated that it is prepared to forego a reply submission on its preliminary objections;

without a reply, there would be no need for a rejoinder by the Claimant, either.[207] Alternatively, if commentary in writing regarding the documents produced in the document disclosure phase were desirable, the Parties could simultaneously exchange pre-hearing briefs before the hearing on preliminary objections ("Respondent's Time-saving Proposal").[208]

92. In the event that a non-bifurcated procedure is ordered, the Respondent proposes the following timetable:

a) By **[4 weeks after the hearing on bifurcation [21 March 2014]]**, the Tribunal refuses bifurcation of the proceedings.

b) By **[4 weeks after the date in para. (a) [18 April 2014]]**, the Parties may submit to the Tribunal and to the other Party a reasoned application (Request to Produce) to order production of documents sought from the other Party.

c) By **[4 weeks after the date in para. (b) [16 May 2014]],** the Parties produce those requested documents to which they have no objection and Parties may submit reasoned objections to the Tribunal in respect of documents sought by the other Party.

d) By **[6 weeks after the date in para. (c) [27 June 2014]]**, the Tribunal decides on such applications, including any invitation for the Parties to consult with each other.

e) By **[9 weeks after the date in para. (d) [29 August 2014]]**, the Parties produce documents as ordered by the Tribunal.

f) By **[16 weeks after the date in para. (e) [19 December 2014]]**, the Claimant files its Reply together with any further evidence (documents, non-expert witness statements, expert witness statements) upon which it wishes to rely, but only in rebuttal to the Respondent's Defence.

g) By **[20 weeks after the date in para. (f) [8 May 2015]],** the Respondent files its Rejoinder together with any further evidence (documents, non-expert witness statements, expert witness statements) upon which it wishes to rely, but only in rebuttal to the Claimant's Reply.

h) Thereafter, no new evidence may be submitted, unless agreed between the Parties or with the leave of the Tribunal.

i) By **[2 weeks after the date in para. (g) [22 May 2015]]**, the Parties submit notifications of the witnesses and experts presented by themselves or by the other Party whom they

[207] Bifurcation Hearing Transcript, at p. 91:11-91:24.

[208] Bifurcation Hearing Transcript, at pp. 244:1-246:5.

wish to examine at the Hearing and a chronological list of all exhibits with indications where the respective documents can be found in the file.

j) **[3 weeks after the date set in para. (i) [12 June 2015]]**, a Pre-Hearing Conference between the Parties and the Tribunal may be held if considered necessary by the Tribunal, either in person or by telephone, at a date set by the Tribunal after consultation with the Parties.

k) As soon as possible thereafter, the Tribunal issues a Procedural Order regarding details of the Hearing.

l) The Hearing shall be held from **[7 weeks after the date set in para. (j) [31 July 2015] to [20 August 2015]]** (15 business days) or until the Tribunal determines it should conclude. After the conclusion of the Hearing, the Tribunal will consult with the Parties as to whether the Parties shall submit post-hearing briefs and claims for arbitration costs, and by which dates.

93. As the Respondent notes, the time allotted in its proposed timetables for a bifurcated and a non-bifurcated proceeding is roughly equivalent. The Respondent explains that it had assumed that each procedural step would take the same amount of time, regardless of whether it is accomplished separately at a preliminary stage or in conjunction with the merits at a later stage.[209]

B. THE CLAIMANT'S PROPOSED TIMETABLES

94. In the event that a bifurcated procedure is ordered, the Claimant proposes the following timetable:

a) Within **1 week** after the Tribunal grants bifurcation of the proceedings, the Parties will confer with the goal of reaching mutual agreement on exact dates for the bifurcated schedule based on the framework below, but with reasonable adjustments for national holidays, pre-existing commitments of counsel, and the availability of members of the Tribunal.

b) On a mutually agreed date approximately **8 weeks** after the consultations described above in para. (a), the Claimant files its Counter-Memorial on Preliminary Objections with any further evidence (documents, witness statements, expert reports) but only in rebuttal to

[209] Bifurcation Hearing Transcript, at p. 239:14-239:24.

the preliminary objections that the Respondent set forth in its Statement of Defence and that the Tribunal deemed suitable for resolution in the bifurcated proceeding.

c) By **2 weeks** after the date above in para. (b), the Parties may submit to the Tribunal and to the other Party a reasoned application (Request to Produce) to order production of documents sought from the other Party, limited to material relevant to the preliminary objections that the Respondent set forth in its Statement of Defence and that the Tribunal deemed suitable for resolution in the bifurcated proceeding.

d) By **4 weeks** after the date above in para. (c), the Parties may submit reasoned objections to the Tribunal in respect of documents sought by the other Party.

e) By **2 weeks** after the date above in para. (d), the Parties may submit to the Tribunal replies to the objections to the Requests to Produce.

f) By **3 weeks** after the date above in para. (e), the Tribunal decides on such applications and the Parties produce those requested documents to which they have no objection.

g) By **4 weeks** after the date above in para. (f), the Parties produce documents as ordered by the Tribunal.

h) By **10 weeks** after the date above in para. (g), the Respondent files its Reply on Preliminary Objections together with any further evidence (documents, witness statements, expert reports) upon which it wishes to rely, provided such arguments and evidence do not exceed the scope of the preliminary objections that the Respondent set forth in its Statement of Defence and that the Tribunal deemed suitable for resolution in the bifurcated proceeding.

i) By **10 weeks** after the date above in para. (h), the Claimant files its Rejoinder on Preliminary Objections together with any further evidence (documents, witness statements, expert reports) upon which it wishes to rely, but only in rebuttal to the Respondent's Reply on Preliminary Objections.

j) By **2 weeks** after the date above in para. (i), the Parties submit notifications of the witnesses and experts presented by themselves or by the other Party whom they wish to examine at the Hearing on Preliminary Objections and a chronological list of all exhibits with indications where the respective documents can be found in the file.

k) By **3 weeks** after the date above in para. (j), a Pre-Hearing Conference between the Parties and the Tribunal may be held if considered necessary by the Tribunal, either in person or by telephone, at a date set by the Tribunal after consultation with the Parties.

l) As soon as possible thereafter, the Tribunal issues a Procedural Order regarding details of the Hearing on Preliminary Objections.

m) The Hearing on Preliminary Objections shall be held from **3 weeks** after the date above in para. (k) for 5 business days or until the Tribunal determines it should conclude. After the conclusion of the Hearing on Preliminary Objections, the Tribunal will consult with the Parties as to whether the Parties shall submit post-hearing briefs and claims for arbitration costs, and by which dates.

n) By **24 weeks** after the date above in para. (m) (including any time required for post-hearing briefs and claims for arbitration costs) the Tribunal delivers its decision on the preliminary objections.

o) By **2 weeks** after the date above in para. (n), the Parties may submit to the Tribunal and to the other Party a reasoned application (Request to Produce) to order production of documents sought from the other Party, limited to material relevant to the merits.

p) By **6 weeks** after the date above in para. (o), the Parties may submit reasoned objections to the Tribunal in respect of documents sought by the other Party.

q) By **2 weeks** after the date above in para. (p), the Parties may submit to the Tribunal replies to the objections to the Requests to Produce.

r) By **4 weeks** after the date above in para. (q), the Tribunal decides on such applications and the Parties produce those requested documents to which they have no objection.

s) By **6 weeks** after the date above in para. (r), the Parties produce documents as ordered by the Tribunal.

t) By **16 weeks** after the date above in para. (s), the Claimant files its Reply on the Merits together with any further evidence (documents, witness statements, expert reports) upon which it wishes to rely, which will address any issues covered in the Respondent's Statement of Defence, as well as any new issues relevant to the merits that are revealed through document discovery.

u) By **16 weeks** after the date above in para. (t), the Respondent files its Rejoinder on the Merits together with any further evidence (documents, witness statements, expert reports) upon which it wishes to rely, but only in rebuttal to the Claimant's Reply.

v) Thereafter, no new evidence may be submitted unless agreed between the Parties or with the leave of the Tribunal.

w) By **3 weeks** after the date above in para. (u), the Parties submit notifications of the witnesses and experts presented by themselves or by the other Party whom they wish to examine at the Hearing on Merits and a chronological list of all exhibits with indications where the respective documents can be found in the file.

x) By **2 weeks** after the date above in para. (w), a Pre-Hearing Conference between the Parties and the Tribunal may be held if considered necessary by the Tribunal, either in person or by telephone, at a date set by the Tribunal after consultation with the Parties.

y) As soon as possible thereafter, the Tribunal issues a Procedural Order regarding details of the Hearing on Merits.

z) The Hearing on Merits shall be held from **4 weeks** after the date in above para. (x) for 10 business days or until the Tribunal determines it should conclude. After the conclusion of the Hearing, the Tribunal will consult with the Parties as to whether the Parties shall submit post-hearing briefs and claims for arbitration costs, and by which dates.

95. This timetable anticipates that a bifurcated proceeding will last approximately **137 weeks** from the date the Tribunal issues a decision granting bifurcation to the start of the hearing on the merits. Based on the Respondent's estimated date for the Tribunal's decision on bifurcation of 21 March 2014, this would mean that a single, dispositive hearing would commence around **7 November 2016**.

96. In response to the Respondent's Time-saving Proposal for a bifurcated hearing, the Claimant asserts that foregoing a written submission would not improve a bifurcated timetable and would likely lead to procedural inefficiency. Neither Party would know what reliance the opposing party places on documents produced in the document disclosure phase, and additional time would be needed to respond or object to new points.[210] Additionally, the Claimant contends that replacing pleadings with a round of pre-hearing briefs would remove the responsive element of the timetable and would be unfair and likely to "lead to difficulties [and] objections".[211]

97. In the event that a non-bifurcated procedure is ordered, the Claimant proposes the following timetable:

a) Within **1 week** after the Tribunal refuses bifurcation of the proceedings, the Parties will confer with the goal of reaching mutual agreement on exact dates for the non-bifurcated schedule based on the framework below, but with reasonable adjustments for national

[210] Bifurcation Hearing Transcript, at p. 295:25-296:13.

[211] Bifurcation Hearing Transcript, at p. 296:14-297:1.

holidays, pre-existing commitments of counsel, and the availability of members of the Tribunal.

b) On a mutually agreed date approximately **2 weeks** after the consultations described in para. (a), the Parties may submit to the Tribunal and to the other Party a reasoned application (Request to Produce) to order production of documents sought from the other Party.

c) By **6 weeks** after the date above in para. (b), the Parties may submit reasoned objections to the Tribunal in respect of documents sought by the other Party.

d) By **2 weeks** after the date above in para. (c), the Parties may submit to the Tribunal replies to the objections to the Requests to Produce.

e) By **4 weeks** after the date above in para. (d), the Tribunal decides on such applications and the Parties produce those requested documents to which they have no objection.

f) By **6 weeks** after the date above in para. (e), the Parties produce documents as ordered by the Tribunal.

g) By **16 weeks** after the date above in para. (f), the Claimant files its Reply on the Merits and Counter-Memorial on Preliminary Issues together with any further evidence (documents, witness statements, expert reports) upon which it wishes to rely, which will address any issues covered in the Respondent's Statement of Defence, as well as any new issues relevant to the merits that are revealed through document discovery.

h) By **16 weeks** after the date above in para. (g), the Respondent files its Rejoinder on the Merits and Reply on Preliminary Issues together with any further evidence (documents, witness statements, expert reports) upon which it wishes to rely, but only in rebuttal to the Claimant's Reply.

i) By **8 weeks** after the date above in para. (h), the Claimant files its Rejoinder on Preliminary Objections, but only in rebuttal to the Respondent's submissions on these objections in its Rejoinder.

j) Thereafter, no new evidence may be submitted unless agreed between the Parties or with the leave of the Tribunal.

k) By **2 weeks** after the date above in para. (i), the Parties submit notifications of the witnesses and experts presented by themselves or by the other Party whom they wish to examine at the Hearing and a chronological list of all exhibits with indications where the respective documents can be found in the file.

l) By **2 weeks** after the date above in para. (k), a Pre-Hearing Conference between the Parties and the Tribunal may be held if considered necessary by the Tribunal, either in person or by telephone, at a date set by the Tribunal after consultation with the Parties.

m) As soon as possible thereafter, the Tribunal issues a Procedural Order regarding details of the Hearing.

n) The Hearing shall be held **4 weeks** after the date above in para. (l) for 10 business days or until the Tribunal determines it should conclude. After the conclusion of the Hearing, the Tribunal will consult with the Parties as to whether the Parties shall submit post-hearing briefs and claims for arbitration costs, and by which dates.

98. This timetable anticipates that a non-bifurcated proceeding will last approximately **69 weeks** from the date the Tribunal issues a decision declining bifurcation to the start of the hearing on preliminary objections and the merits. Based on the Respondent's estimated date for the Tribunal's decision on bifurcation of 21 March 2014, this would mean that a single, dispositive hearing would commence around **20 July 2015**.

VII. THE TRIBUNAL'S ANALYSIS

99. The Tribunal has considered the extensive factual and legal arguments presented by the Parties in their written and oral submissions. The Tribunal's use of one Party's terms as opposed to the other's is not a reflection of the Tribunal's legal interpretation of an issue – rather, effort has been made to use consistent terminology through this Order in order to facilitate understanding. Below, the Tribunal discusses the arguments of the Parties most relevant for its decisions. The Tribunal's reasons, without repeating all of the arguments advanced by the Parties, address what the Tribunal considers to be the determinative factors required to decide upon the issue of bifurcation. The Tribunal considers, however, that brief repetition of certain aspects of its conclusions in the context of particular issues is necessary, or at least appropriate, in order to avoid misunderstanding.

100. The Tribunal stresses that its considerations and decisions regarding bifurcation should in no way be understood to prejudice the substance of the preliminary objections or the submissions on the merits by the Parties.

A. GENERAL CONSIDERATIONS REGARDING BIFURCATION

101. As the Parties agree, the issue of bifurcation is subject to Article 23(3) of the UNCITRAL Rules of 2010 which provides that the Tribunal "may" bifurcate, while the preceding UNCITRAL

Rules of 1976 (which are not applicable to this procedure) provided that the Tribunal "should rule" for bifurcation. The parties disagree on the question of what impact this change has on the issue of bifurcation in the present proceedings. The Tribunal agrees with the Claimant that the new version can only be interpreted as giving the Tribunal a wider discretion and not providing a presumption in favour of bifurcation.

102. On the other hand, it is also clear from the word "may" and undisputed between the Parties that the Tribunal has the authority and discretion to order bifurcation on preliminary questions. Hereafter, the Tribunal will therefore consider whether it should use this option in the present case.

103. The Tribunal has taken note of the Parties' references to decisions of other courts and tribunals regarding bifurcation. While the Tribunal agrees that taking into account such other jurisprudence is indeed helpful and appropriate, and will do so in its considerations, the present procedure must be examined in light of its own specific factual and legal circumstances which differ in various ways from the cases addressed by other courts and tribunals. In particular, as both Parties refer to the wording in the award in the *Caratube* case, it should be pointed out that, in the *Caratube* case, the Respondent had been expressly given the choice to request bifurcation and decided not to do so, which then led to the hindsight evaluation that the decision to deny jurisdiction in that case had the effect that the work on the merits proved to be without relevance for the final decision on the case.

104. A further general consideration relevant for the issue of bifurcation is the fact that, indeed, already a long period of time has passed from the beginning of the present procedure. However, as both the Parties and the Tribunal are aware, this is mainly due to the fact that:

- in view of the importance and complexity of the dispute, both sides agreed on rather long periods for their submissions,
- as had been requested by the Claimant, the Tribunal ruled in Procedural Order No. 4 that the Respondent had to submit a full Statement of Defence, before the Tribunal felt it could address the issue of bifurcation,
- the Claimant, due to its change of legal counsel, in December 2012 requested a postponement of the timetable which was granted by the Tribunal by Procedural Order No. 7 including the setting of the hearing date of 20 February 2014.

105. In this context it is also relevant for the issue of bifurcation that, in accordance with the above-mentioned ruling, the Respondent has already submitted its full Statement of Defence. Thus, should the proceedings continue without bifurcation, a major part of the submissions is already

available and the work involved and the period up to a final hearing would be shorter than in the usual scenario where, after a decision on the preliminary objections, two rounds of memorials on the merits would still have to be exchanged.

106. On the other hand, already from the Statement of Claim and the Statement of Defence that have been submitted so far it is obvious that, should the proceedings reach the merits phase, they will be extremely large and complex in the submissions, documents, witness and expert testimonies, and issues to be evaluated. Therefore, should preliminary objections prevail with the result that no procedure on the merits becomes necessary, this would result in a major saving of work and costs.

107. The Tribunal has taken note of the Respondent's contention that bifurcation would be in the public interest, because the present dispute has "produced and is producing a deep and profound regulatory chill across the globe", and because the longer the resolution of this dispute is delayed, the longer every other state that is considering a similar plain packaging regulatory measure (including the 177 parties to the WHO Framework Convention on Tobacco Control) will be prevented from enacting such measures.[212] The Tribunal is not persuaded by this argument, since that argument presumes that the procedure will end due to the prevailing preliminary objections. Such a presumption is not possible at the present stage of the procedure. And if that presumption proves not correct and the procedure continues on the merits, the bifurcated procedure will be considerably longer and so would be "the chill" alleged by the Respondent.

108. The Tribunal agrees with the Parties that, for the issue of bifurcation, it is relevant whether the Respondent's objections involve facts that are inextricably linked to the merits. The Parties disagree in this regard and the Tribunal will consider this aspect when, hereafter, examining the three objections raised by the Respondent. In that context, it will have to be examined whether, as alleged by the Claimant, a bifurcated procedure would severely prejudice its ability to present its case since the facts relevant to the objections overlap with the merits. The Tribunal is aware that it cannot be excluded that, in case of bifurcation, the Parties in the first phase would submit arguments and evidence which the Tribunal would consider to belong to the merits. In such a case, in so far as the Tribunal considers submissions to exclusively deal with the merits, it will not consider them in a first phase of the procedure. On the other hand, in so far as the Tribunal considers submissions to deal both with preliminary objections and the merits, the Tribunal may use its discretion under Article 17 and 23(3) UNCITRAL Rules to join the objection to the merits in the event there is a merits procedure, in order to ensure that any decision on the

212 Bifurcation Hearing Transcript, at p. 28:17-29:4.

preliminary objections neither prejudges the merits nor is taken in the absence of sufficient information. These considerations will be taken into account in the Tribunal's examination of the three objections hereafter.

109. In accordance with both Parties' suggestions,[213] the Tribunal's examination of the three Objections will be based on the following three criteria:

1) Is the objection *prima facie* serious and substantial?

2) Can the objection be examined without prejudging or entering the merits?

3) Could the objection, if successful, dispose of all or an essential part of the claims raised?

B. BIFURCATION REGARDING THE NON-ADMISSION OF INVESTMENT OBJECTION (FIRST OBJECTION)?

110. The Respondent's First Objection is that the Claimant's purported "investment" – i.e. its acquisition of shares in PM Australia – has not been admitted by the Respondent in accordance with Article 1(e) of the Treaty, which provides that an "investment" must be "admitted by [Australia] subject to its law and investment policies applicable from time to time".

111. First, the Tribunal does not agree with the Claimant's argument that this Objection is not substantial. While the various reasons put forward by the Claimant as to why this Objection is not justified are indeed serious, so are the reasons submitted by the Respondent for the justification of this Objection. The Tribunal cannot *prima facie* exclude that this Objection might be successful.

112. Regarding the Claimant's view that there is a significant overlap between the evidence relevant to this objection and the evidence on the merits, the Tribunal is not persuaded that a hearing in a bifurcated procedure dealing with this First Objection would have to include major aspects of the merits. The issues mentioned by the Claimant in this context are an analysis of what Australia's national interest was, whether Australia had a strong BIT program that encouraged foreign investment and investor-State arbitration, whether plain packaging was not supported by empirical evidence, whether there was any basis to believe that plain packaging would advance the government's health objectives, whether plain packaging was against Australia's international obligations, and whether plain packaging could result in increased rather than reduced tobacco consumption and would cause enormous damage to the industry. All of these could be distinguished from the mere admission issue. On the other hand, the Claimant's further

213 Bifurcation Hearing Transcript, at p. 19:4-19:16 and 101:3-102:6.

question of whether plain packaging legislation had been introduced in Parliament could be examined without entering into any merits issue.

113. The Tribunal agrees with the Respondent that the Non-Admission of Investment Objection is suitable for bifurcation because it concerns the foundation of the Tribunal's jurisdiction under the Treaty. In the Tribunal's view, it can be considered as a discrete and self-contained question both factually and legally limited to the application of Australian law concerning the invalidity of the [redacted] decision to admit the investment under the FATA and its relevance under both Australian and international law.

114. The Tribunal is aware that it cannot be excluded that, in case of bifurcation, the Parties in the first phase would submit arguments and evidence which the Tribunal considers to belong to the merits. In such a case, the consequences described in paragraph 108 above may apply.

115. Finally, the Tribunal considers, and the Parties seem to agree in this regard, that if the Non-Admission of Investment Objection were upheld by the Tribunal, it would dispose of the entire proceedings.

116. Therefore the Tribunal, using its discretion under Article 23(3), concludes that bifurcation regarding this First Objection is appropriate.

C. BIFURCATION REGARDING THE TEMPORAL OBJECTION (SECOND OBJECTION)?

117. The Respondent's second objection is that the Claimant's claim falls outside the scope of Article 10 of the Treaty because it relates to a pre-existing dispute (the "**Ratione Temporis Argument**"); or, alternatively, that the Claimant's claim amounts to an abuse of right because, the Claimant cannot restructure its investment to gain Treaty protection over a pre-existing or reasonably foreseeable dispute (the "**Abuse of Right Argument**").

118. The Tribunal agrees with the Respondent that, at least for the issue of bifurcation, it does not matter whether the Temporal Objection is characterized as going to jurisdiction or admissibility, since, even assuming that Article 23(1) of the UNCITRAL Rules addresses only jurisdiction and not 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. In that context, the Tribunal agrees with the Claimant that the general discretion in Article 17 of the UNCITRAL Rules is subsumed by the requirement of procedural efficiency. But this requirement may indeed be used to bifurcate in order to end the procedure at the phase of preliminary objections if that saves the very considerable work and time that would be needed for a procedure on the merits.

119. Most of the arguments put forward by the Claimant against bifurcation regarding this Second Objection are in fact arguments suggesting that both the Ratione Temporis Argument and the Abuse of Right Argument are unjustified. Again, while the Claimant's various reasons are indeed serious, so are the reasons submitted by the Respondent for the justification of this Objection. The Tribunal cannot *prima facie* exclude that this Objection might be successful.

120. The Tribunal is not persuaded by the Claimant's argument (*see* particularly the Claimant's summary on Slide 7 presented with its Opening Statement at the Hearing) that, if it were to decide that the dispute arose out of facts other than or earlier in time than the enactment of the plain packaging measures, it will inevitably require extensive argumentation from the Parties on numerous facts that overlap with the merits of the case. In the Tribunal's view, the examination could be restricted to facts showing whether a dispute existed prior to the time the Claimant acquired ownership of the Australian assets in February 2011. Resolving those limited factual issues during a preliminary phase of a bifurcated proceeding would not prejudice the Claimant's ability to present its case on the merits, if a merits procedure follows. This also applies to the Respondent's Abuse of Right Argument in so far as the allegedly abusive conduct may serve to obtain jurisdiction. Such a procedural abuse of rights would indeed be very suitable for bifurcation, since a respondent should not be obligated to participate in arbitral proceedings that were initiated abusively.

121. Again, the Tribunal is aware that it cannot be excluded that, in case of bifurcation, the Parties, in the first phase, would submit arguments and evidence which the Tribunal considers as belonging to the merits. And again, in such a case, the consequences described in paragraph 108 above may apply.

122. Finally, the Tribunal considers, and the Parties seem to agree in this regard, that if the Temporal Objection is upheld by the Tribunal, it would dispose of the entire proceedings.

123. Therefore the Tribunal, using its discretion under Article 23(3), concludes that bifurcation regarding this Second Objection is appropriate.

D. BIFURCATION REGARDING THE NO INVESTMENTS OBJECTION (THIRD OBJECTION)?

124. The Respondent's Third Objection is that neither the shares in PML nor PML's assets constitute "investments" for the purposes of the BIT under Articles 1(e), 1(b)(i) and 13(1).

125. Most of the arguments put forward by the Parties on bifurcation regarding this Third Objection are in fact arguments suggesting that the Respondent's arguments are either justified or unjustified in substance. Again, while the Claimant's various reasons are indeed serious, so are

the reasons submitted by the Respondent for the justification of this Objection. The Tribunal cannot *prima facie* exclude that this Objection might be successful.

126. Regarding the question whether this Objection can be distinguished from the merits, the Tribunal agrees with the Claimant that the Respondent's objections relating to the Claimant's lack of ownership and control over its investments factually largely overlaps with the merits. Indeed, this is apparent from the similarity of the discussion of the nature of the intellectual property rights at issue in this case in both volumes of the Statement of Defence.

127. Finally, regarding the question whether this Third Objection, if found justified, would dispose of the case, the Tribunal notes that the Respondent itself concedes that this Objection will not be able to do so. In its reasoning that the definition of "investment" under the Treaty does not include investments which are owned and controlled indirectly, and that the Claimant cannot be said to "own" or "control" its "investment" within the meaning of Article 1(e) of the Treaty,[214] the Respondent expressly adds "(with the exception of the intellectual property associated with the Peter Jackson brand family)". The Respondent has conceded that PML owns the *Peter Jackson* brand and its associated trademarks, and that the Claimant therefore owns and controls the *Peter Jackson* brand by virtue of its indirect ownership and control of PML.[215] Accordingly, the Claimant would still be able to claim damages with respect to the *Peter Jackson* brand, and the Tribunal would still be called upon to address all the respective legal and factual issues described in the Statement of Claim.

128. Thus, even if the Respondent's argument that the Claimant does not own or control the trademark licences were to succeed, this would not dispose of the dispute.

129. Therefore, the two following scenarios are possible:

- First, if either the Respondent's First or Second Objection is upheld by the Tribunal, that decision would dispose of the case with the result that the Third Objection is not relevant any more.
- Second, if both the Respondent's First and Second Objections are *not* upheld, the procedure will have to continue to the merits irrespective of the Tribunal's conclusion regarding the Third Objection, because it alone cannot dispose of the dispute.

130. In view of the considerable overlap between this Third Objection and the merits, and as this Objection could not in any event dispose of the case, the Tribunal considers it appropriate not to

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214 Statement of Defence, Volume A, at para. 219.

215 Claimant's Opposition to Bifurcation, at paras. 14 and 66; Bifurcation Hearing Transcript, at p. 169:13-169:23.

deal with this Third Objection in the first phase of the bifurcated proceedings, but to join that Third Objection to the merits in the event that the First and Second Objections are not upheld by the Tribunal and the procedure continues to the merits.

E. CONCLUSION REGARDING BIFURCATION AND RESULTING TIMETABLE

131. The Tribunal's conclusions from the above considerations are that:

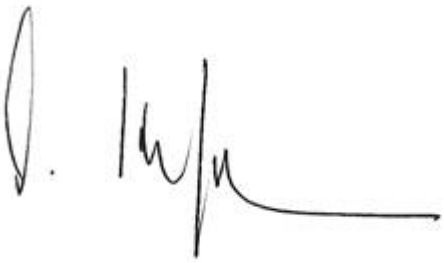
- The proceedings shall be bifurcated.
- The first phase of the proceedings shall deal with the Respondent's "Non-Admission of Investment Objection" (First Objection) and "Temporal Objection" (Second Objection).
- The Respondent's "No Investments Objection" (Third Objection) shall be joined to the merits in the event that the First and Second Objections are not upheld by the Tribunal and the procedure continues to the merits.

132. Regarding the resulting timetable, the Tribunal has taken note of the Parties' proposals summarized above in section VI of this Order. The Tribunal points out that the Parties' submissions and the procedure up to and including the Hearing shall be restricted to the Respondent's First and Second Objections. Using its discretion granted by Articles 23(3) and 17 UNCITRAL Rules, the Tribunal sets the Timetable for the First Phase of the Bifurcated Proceedings attached to this Order as **Annex 1**.

VIII. THE TRIBUNAL'S DECISION

1. **The proceedings shall be bifurcated.**
2. **The first phase of the proceedings shall deal with the Respondent's "Non-Admission of Investment Objection" (First Objection) and "Temporal Objection" (Second Objection).**
3. **The Respondent's "No Investments Objection" (Third Objection) shall be joined to the merits in the event that the First and Second Objections are not upheld by the Tribunal and the procedure continues to the merits.**
4. **The Tribunal sets the Timetable attached to this Order as Annex 1.**

Dated 14 April 2014



Professor Gabrielle Kaufmann-Kohler

Professor Donald M. McRae

Professor Karl-Heinz Böckstiegel
President of the Tribunal