PCA Case No. 2012-12

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

-and-

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

-between-

PHILIP MORRIS ASIA LIMITED

("Claimant")

-and-

THE COMMONWEALTH OF AUSTRALIA

("Respondent", and together with the Claimant, the "Parties")

PROCEDURAL ORDER NO. 12

Regarding the Parties' Privilege Claims

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14 November 2014

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

Registry
Permanent Court of Arbitration

WHEREAS, in accordance with the timetable set out in Procedural Order No. 10, on 20 October 2014, the Parties exchanged privilege logs listing any documents that a Party wished to withhold on grounds of legal impediment or privilege or special political or institutional sensitivity; whereas on 27 October 2014, the Parties exchanged objections in respect of the other Party's privilege claims; and whereas on 31 October 2014, the Parties responded to the other Party's objections;

WHEREAS, on 5 November 2014, the Parties informed the Tribunal about an agreed extension of the due date for submitting any unresolved objections to privilege claims to the Tribunal; and whereas the Tribunal, having regard to Section 7.1 of Procedural Order No. 6, pursuant to which "[s]hort extensions may be agreed between the Parties as long as they do not affect later dates fixed for the present proceedings by the Tribunal, and the Tribunal is informed before the original due date," confirmed that the Tribunal had no objection to the extension agreed by the Parties in this instance;

WHEREAS, by letter dated 6 November 2014, the Claimant submitted its unresolved objections to the Respondent's claims of privilege;

WHEREAS, in the same letter, the Claimant requested that the Tribunal order the Respondent immediately to produce documents that the Respondent had agreed to produce in its 1 November 2014 letter but had allegedly not produced on 6 November 2014, including documents [redacted];

WHEREAS, by letter dated 7 November 2014, the Respondent submitted its unresolved objections to the Claimant's claims of privilege;

WHEREAS, on 8 November 2014, the Respondent wrote to the Tribunal to advise that the Claimant's request for an order of immediate production of documents was unnecessary because document [redacted] was already produced, document [redacted] and document [redacted] were duplicates of other documents already produced, and the Respondent had in fact not agreed to produce document [redacted] and document [redacted];

WHEREAS, on 10 November 2014, the Claimant submitted objections to redactions on grounds of privilege in respect of documents that the Respondent had produced on 6 November 2014;

WHEREAS, in the same letter, the Claimant also addressed the Respondent's argument that the immediate production of five documents was unnecessary; and whereas the Claimant noted that it had received document [redacted] on 7 November 2014 and no longer pressed its objection regarding this document, that it accepted the Respondent's representation that two documents were duplicates of others that were produced by the Respondent, and that it confirmed receipt of a redacted version of document [redacted], adding that it no longer maintained its objection concerning this document; and whereas, finally, the Claimant asked the Respondent to clarify the status of document [redacted];

WHEREAS, on 12 November 2014, the Respondent informed the Tribunal that it had disclosed document [redacted] to the Claimant, with redactions based only on grounds of Commercial-In-Confidence. The Respondent also provided the full text of the reasons it provided to the Claimant in relation to each privilege claim that the Respondent maintained;

WHEREAS, Section 7 of Procedural Order No. 10 provides that "[b]y 14 November 2014 the Tribunal shall rule on such unresolved privilege claims";

NOW, THEREFORE, THE TRIBUNAL DECIDES:

1. Introduction

1.1 The Parties have refused production of certain documents on the grounds that these documents are subject to legal professional privilege ("LPP") or are protected for reasons of special political or institutional sensitivity ("SPIS"). The present Order addresses the Parties' objections to the other Party's privilege claims.

1.2 The Tribunal recalls the Parties' agreement that the Tribunal address any claims of LPP and SPIS at a second stage of the document production phase on the basis of privilege logs, after the Tribunal has ruled on the Parties' objections to production of documents on other grounds. Accordingly, this Order must be read in conjunction with the Tribunal's Procedural Order No. 11 regarding the Parties' requests for the production of documents.

1.3 As in Procedural Order No. 11, the Tribunal recalls Section 2 of Procedural Order No. 6, pursuant to which the IBA Rules on the Taking of Evidence in International Arbitration of 2010 ("IBA Rules") may be used as a guideline in this case. The term "documents" in the present Order shall be understood as defined in the "Definitions" section of the IBA Rules.

1.4 Similarly, as previously indicated in Procedural Order No. 11, all documents produced pursuant to this Order may be utilized by the other Party only in direct connection with the present arbitration proceedings, and the present Order is without prejudice to the Tribunal's Procedural Order No. 5 regarding confidentiality arrangements in the present arbitration.

2. The Claimant's Position

2.1 The Claimant objects to several of the Respondent's LPP claims. These objections, expressed on a document-by-document basis, notably relate to [redacted] The Claimant argues that [redacted], implying a waiver of legal privilege in respect of any information contained in such documents. The same is true, in the Claimant's view, with respect to [redacted]. In respect of one document, finally, the Claimant contends that the Respondent has provided insufficient information for the Claimant to gauge the legitimacy of the Respondent's LPP claim.

2.2 The Claimant also takes issue with the Respondent's approach to SPIS. At the outset, the Claimant observes that SPIS claims are "not claims to privilege, properly understood". To withhold a document on grounds of SPIS, the Respondent must demonstrate to the Tribunal that "there is a compelling reason not to produce it", which cannot be addressed by enhanced confidentiality arrangements. The Claimant does not regards as compelling the Respondent's explanations that documents relate to [redacted]; that certain redactions are minor in scope; or that the Respondent itself has taken appropriate care in balancing the various interests at stake.

2.3 Turning to the applicable law in respect of SPIS claims, the Claimant contends that the SPIS standard to be applied in the present proceedings is distinct from the concept of "public interest immunity" under Australian law. The Claimant refers in this regard to Procedural Order No. 2

in the arbitration between Biwater Gauff and the Republic of Tanzania (*Biwater Gauff v. Republic of Tanzania,* ICSID Case No. ARB/05/22).

2.4 More specifically, the Claimant observes that most of the documents that the Respondent considers itself to be entitled to withhold relate to [redacted]. The Claimant asserts that the Respondent's SPIS claims essentially fall within two categories—claims that disclosure would damage international relations and claims that disclosure would affect the secrecy of deliberations of Cabinet. Both claims are, in the Claimant's view, misguided.

2.5 In response to the Respondent's concerns about Australia's international relations, the Claimant notes that [redacted].

2.6 In response to the Respondent's assertion of Cabinet privilege, the Claimant observes that the Respondent is not seeking protection for Cabinet papers but for documents that "would allow inferences to be drawn" or "would tend to disclose" Cabinet deliberations. In view of the direct relevance of these documents to this arbitration, the Claimant requests their production.

3. The Respondent's Position

3.1 The Respondent challenges several LPP claims asserted by the Claimant on the basis that the Claimant has provided insufficient information as to why these documents should be considered privileged. Specifically, the Respondent objects to the redaction of the titles of several documents by the Claimant on the basis that these titles could reveal the legal advice provided to the Claimant. The Respondent argues that the Claimant's redaction of document titles is in contrast with the Claimant's own approach in the remainder of its privilege log, which indicates the topic of each document. In respect of other documents, the document description is, in the Respondent's view, "insufficient to substantively understand the nature of the document, as required by paragraph 2 of [Procedural Order No. 10]".

3.2 Turning to its own LPP claims, the Respondent contests the Claimant's continued objections in respect of some of these claims. The Respondent claims LLP over certain specified documents on the basis that they record communications with a third party—[redacted]. The Respondent submits that, while these documents refer to communications with a third party, they in fact record communications within the Australian Government and were drafted for the purpose of the preparation of the Respondent's legal defence in the present arbitration and, accordingly, are covered by LPP. [redacted].

3.3 The Respondent highlights that, at the time each of the relevant documents was created, the expectation was that Australian law was applicable. Under Australian law, LPP protects the confidentiality of certain communications made in the provision of legal services, such as representation in legal proceedings, commonly known as "litigation privilege". Litigation privilege attaches to confidential communications between a legal adviser or client and a third party if made for the dominant purpose of use in, or in relation to, litigation, then existing or

reasonably anticipated. The Respondent explains that "advice privilege" is also applicable to communications between a legal adviser or client and a third party made for the dominant purpose of the legal adviser providing advice to the client, even though the third party is not an agent of the client or legal adviser. The Respondent refers to Australian case law in support of the privileges claimed.

3.4 The Respondent also takes issue with the Claimant's objections to its SPIS claims. While the Respondent observes that the Claimant no longer appears to request the disclosure of documents falling within three of the categories of sensitive documents identified by the Respondent, the Respondent requests the Tribunal to uphold its other privilege claims on grounds of SPIS. First, the Respondent maintains that disclosure of certain specified documents would reveal [redacted] or would damage international relations. In pressing its privilege claims over these documents, the Respondent stresses that it has nonetheless disclosed [redacted]. The Respondent has also provided the vast majority of [redacted]

3.5 Second, the Respondent adds that disclosure of certain specified documents would allow inferences to be drawn about the deliberations of Cabinet or the Federal Executive Council, or would tend to disclose those deliberations. The Respondent asserts that it has confined its SPIS claims to a very small number of documents that would ordinarily be protected from disclosure under Australian law and that are directly submitted to the highest level of decision-making organs of the Australian Government. [redacted] The Respondent submits that several international tribunals have taken into account domestic law on the disclosure of Cabinet material. The Respondent also asserts that many tribunals have refused to order that States produce material relating to Cabinet deliberations on grounds of SPIS.

3.6 Lastly, the Respondent claims that certain specified documents are highly sensitive and relate to [redacted]. Disclosure of these documents is likely to cause harm to Australia's international relations. These documents can be grouped into two categories [redacted]

3.7 The Respondent maintains that SPIS claims are in the nature of a *qualified* privilege, which the asserting party has the burden of establishing by the provision of sufficient information. The Respondent notes that sensitivities underpinning a SPIS claim may limit the level of descriptive detail that the asserting party can provide. In support, the Respondent refers to Procedural Order No. 13 in the NAFTA arbitration between Bilcon and Canada (*William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04).

3.8 The Respondent adds that any SPIS claim "necessarily involves a balancing exercise of weighing, on the one hand, the sensitivity of the document with, on the other hand, the materiality of the documents to the proceedings." In this regard, the Respondent considers that "[t]he extent to which claims are recognized as legitimate under domestic law is a relevant factor" in the balancing exercise to be undertaken.

4. The Tribunal's Ruling

4.1 The Tribunal wishes to emphasize at the outset that the present Order addresses questions of privilege in a specific context of the proceedings, namely the consideration of two preliminary objections raised by the Respondent. Accordingly, in Procedural Order No. 10, the Parties were invited to "limit the requests that they will submit in their Redfern Schedules to those documents that are absolutely necessary for the limited purpose of dealing with the preliminary objections to be addressed at the Hearing on Preliminary Objections in February 2015". Similarly, in Procedural Order No. 11, the Tribunal "adopted a relatively restrictive approach, focusing on the issues that it considers relevant for its future decision on jurisdiction and admissibility". The same approach underlies the Tribunal's ruling on the Parties' privilege claims in the present Order.

4.2 The Tribunal has carefully taken into account the Parties' arguments relating to specific documents and categories of documents in respect of which a Party's privilege claim is contested by the opposing Party. In view of the very short time periods under the applicable timetable, which had been extended at the request of the Parties and which were further shortened by the late submission of certain documents by the Parties, the Tribunal was left with only a few days to issue this Procedural Order. As it is of primary importance that the remaining schedule up to the Hearing on Preliminary Objections provide the Parties sufficient opportunity to prepare and file the submissions foreseen in the timetable, the Tribunal has not summarized and discussed the respective arguments of the Parties on a document-by-document basis. Hereafter follow the Tribunal's general observations regarding its approach to the respective issues addressed by the Parties in this context.

4.3 Regarding the law applicable to issues of privilege, Section 4 of Procedural Order No. 1 provides that:

> 4.1 Pursuant to Article 10 of the Treaty, the Parties have agreed that the arbitration be conducted in accordance with the 2010 UNCITRAL Arbitration Rules, as reflected in Paragraph 9.1(a) of the Claimant's Notice of Arbitration and Paragraph 63 of the Respondent's Response to the Notice of Arbitration.
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> 4.2 By agreement of the Parties, the Secretary-General of the PCA acts as the appointing authority in this matter.
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> 4.3 For procedural matters not addressed by the UNCITRAL Rules, pursuant to Article 17 of these Rules, the Tribunal shall decide as it deems appropriate in the circumstances after consultation with the Parties, subject to any agreement of the Parties as to such procedural matters, such agreement to be formalized by way of Procedural Order.

4.4 Beyond these provisions, as in Procedural Order No. 11, the Tribunal recalls Section 2 of Procedural Order No. 6, pursuant to which the IBA Rules on the Taking of Evidence in International Arbitration of 2010 ("IBA Rules") may be used as a guideline in this case. Both Parties have relied specifically on Article 9 of the IBA Rules, and in particular Article 9(2)(b) and (f). The Tribunal agrees with the application of these standards. Applied as a guideline together with the above-mentioned Article 17 of the UNCITRAL Rules, they leave considerable discretion to the Tribunal.

4.5 The Tribunal is aware of the jurisprudence of NAFTA and other tribunals regarding privilege to which both Parties have referred. While the Tribunal agrees that taking into account such other jurisprudence is indeed helpful and appropriate, the present procedure under the Treaty between Australia and Hong Kong, referring to the UNCITRAL Rules, 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.

4.6 In particular, the Tribunal considers that, in a dispute between a private company and a State, the different scopes of Article 9(2)(b) of the IBA Rules, which can be relied upon by both Parties in this dispute, and of Article 9(2)(f) of the IBA Rules, which can essentially be relied upon only by the Respondent in the present case, should be applied in such a way that neither side is put at a disadvantage regarding privilege claims. With regard to "home-oriented" privilege justifications relying on ethical rules and standards in the home jurisdiction of a party or its counsel, Article 9(2)(b) of the IBA Rules refers to the ethical rules that are *"determined by the Tribunal to be applicable"* and Article 9(2)(f) of the IBA Rules refers to such sensitivity grounds *"that the Tribunal determines to be compelling"*. In light of this, the Tribunal concludes that, while the home rules of either Party might provide useful analogies, they cannot provide the basis for the Tribunal's decision or can be otherwise determinative in the present case.

4.7 Now, using the discretion set out above in examining the privilege claims still remaining to be decided after the Parties have made laudable efforts at several stages to produce documents either in unredacted form or at least in a redacted version, the Tribunal has the impression that both Parties have made a good-faith effort to go as far as reasonably possible in producing documents to the other side.

4.8 Taking this general approach, the Tribunal has come to the decisions in Annexes 1 and 2 attached to this Order. These decisions are only made for the present procedural phase dealing with questions of privilege in the specific context of the proceedings regarding two preliminary objections raised by the Respondent. Again it is recalled for the avoidance of doubt that the Tribunal's decisions in the present Order do not preclude a Party from seeking disclosure at a potential merits stage of any documents or categories of documents in respect of which claims of LPP or SPIS have been asserted.

4.9 All documents listed in the updated privilege logs submitted by the Parties on 6 November 2014, 7 November 2014 and 10 November 2014, are referred to in **Annexes 1 and 2** to the present Order. Annex 1 lists the Claimant's remaining objections to the Respondent's privilege claims. Annex 2 lists the Respondent's remaining objections to the Claimant's privilege claims. The Tribunal's decision in respect of each document is contained in the last column of each Annex.

4.10 The Tribunal notes that a certain number of documents [redacted] were listed in Attachment B of the Respondent's letter dated 7 November 2014 but not in Annex 2 to the Claimant's letter dated 6 November 2014. As it is for the Claimant to put forward any unresolved objections to the Respondent's privilege claims, the Tribunal has not taken any decision in respect of these documents.

4.11 To the extent that the Tribunal orders the production of documents, such documents shall be produced to the requesting Party (but not to the Tribunal) **by 19 November 2014**. The further procedure for document production shall be as set out in Procedural Order No. 10.

Dated: 14 November 2014

On behalf of the Tribunal

Professor Karl-Heinz Böckstiegel
President of the Tribunal