

**IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT ESTABLISHING  
THE ASEAN-AUSTRALIA-NEW ZEALAND FREE TRADE AREA**

**- and -**

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW (2021)**

**- between -**

**ZEPH INVESTMENTS PTE. LTD.**

(“Claimant” or “Zeph”)

and

**THE COMMONWEALTH OF AUSTRALIA**

(“Respondent”, “Australia”, or “Commonwealth”, together with the Claimant, the “Parties”)

(PCA Case No. 2023-40)

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**PROCEDURAL ORDER No. 2  
(Claimant’s Interim Measures Application)**

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**Tribunal**

Prof. Gabrielle Kaufmann-Kohler (Presiding Arbitrator)  
Mr. William Kirtley  
Prof. Donald McRae

**Tribunal Secretary**  
Mr. Lukas Montoya

**Registry**  
Mr. Bryce Williams  
Permanent Court of Arbitration

**17 November 2023**

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## **I. PROCEDURAL BACKGROUND**

1. On 4 August 2023, the Claimant filed an application for interim measures (“IMA”) in accordance with the Procedural Calendar.
2. On 15 September 2023, the Respondent submitted its response to the IMA (“IMA Response”).
3. On 27 September 2023, the Claimant submitted its reply (“IMA Reply”).
4. On 9 October 2023, the Respondent submitted its rejoinder (“IMA Rejoinder”).
5. On 18 October 2023, in accordance with the Procedural Calendar in Annex 1 to Procedural Order No. 1, the Parties and the Tribunal held a hearing by videoconference on the IMA (“Hearing”).
6. This Order decides the IMA.

## **II. PRAYERS FOR RELIEF**

7. The Claimant requests the Tribunal to order the Respondent to take measures necessary:
  - a. to refrain from taking any steps to enforce, invoke or otherwise activate the indemnities contained in the Amendment Act;
  - b. to [...] stay the prosecution through the Commonwealth Director of Public Prosecutions (at the behest of the Australian Securities and Investments Commission) in the proceedings identified as MAG-00060180/18(1), MAG-00060187/18(5) and MAG-00044652/20(0) in the Magistrates Court of Queensland, Australia, until the arbitration proceedings are complete;
  - c. to refrain from breaching the confidentiality of the arbitration, including by providing or leaking documents, evidence, submissions or any confidential communications in this arbitration to the media or any other entity not associated with this arbitration, unless otherwise agreed by the Claimant;
  - d. to ensure that officers and representatives of the Respondent refrain from making public comments or remarks about this arbitration, the Tribunal or the ISDS system in general that may undermine the integrity of the arbitral process, until the arbitration proceedings are complete;
  - e. to refrain from interfering in any way with the Claimant’s witnesses, representatives or counsel including (without limitation) by demanding notice of meetings between the Claimant and potential witnesses or by attempting to access the Microsoft or other accounts of the Claimant’s Representative or those assisting the Representative;
  - f. to refrain from taking any other steps that may aggravate the dispute, including invoking section 30 of the Amendment Act (known as the “Henry VIII” clause) to amend or use the Amendment Act to the detriment of the Claimant, its subsidiaries, investments, officers or employees; [...]
  - i. any other measures the Tribunal considers appropriate.<sup>1</sup>
8. The Respondent requests that the Tribunal deny the IMA.<sup>2</sup>

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<sup>1</sup> IMA, ¶ 170 (as amended by the Claimant in accordance with its communication of 17 August 2023 and the IMA Reply (¶ 2)).

<sup>2</sup> IMA Response, ¶ 109; IMA Rejoinder, ¶ 34.

### III. ANALYSIS

9. The Tribunal will first define the applicable legal framework and requirements for interim measures (**A**), which it will then apply to each of the requested interim measures (**B**). In doing so, the positions of the Parties are incorporated into the Tribunal’s reasoning when necessary. In any event, the Tribunal has considered all of the Parties’ allegations and arguments, even if specific reference is not made to a given particular allegation or argument.

#### A. APPLICABLE LEGAL FRAMEWORK AND REQUIREMENTS FOR INTERIM MEASURES

10. This arbitration is seated in Geneva, Switzerland.<sup>3</sup> As such, the Tribunal’s power to order interim measures derives from Article 183(1) of the Swiss Private International Law Act, which provides that, “[u]nless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, order interim or conservatory measures”. Similarly, Article 26(1) of the 2021 UNCITRAL Arbitration Rules (“UNCITRAL Rules”), which are also applicable,<sup>4</sup> provides that an “arbitral tribunal may, at the request of a party, grant interim measures”.
11. Article 26(2) of the UNCITRAL Rules sets out the nature, scope, and purpose of interim measures that the Tribunal may order. This provision reads as follows:

An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:

- (a) Maintain or restore the status quo pending determination of the dispute;
- (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
- (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

12. The Claimant seeks neither the preservation of assets out of which a subsequent award may be satisfied, nor the preservation of evidence. It essentially requests measures under Article 26(2)(a) and (b) of the UNCITRAL Rules, i.e. measures to maintain or restore the *status quo*, and to prevent the Respondent from taking actions likely to cause current or imminent harm to the Claimant or prejudice to the arbitral process.

13. In addition, according to Article 26(3) of the UNCITRAL Rules, the requested interim measures must also meet the following requirements:

- (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
- (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. [...]

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<sup>3</sup> Tribunal’s decision on the seat of the arbitration, 28 September 2023, ¶ 18.

<sup>4</sup> Terms of Appointment, § 9.1.c.

14. Moreover, despite the UNCITRAL Rules' silence, it is well-established that the issuance of provisional measures is subject to the tribunal having *prima facie* jurisdiction over the dispute.<sup>5</sup>
15. Against this background, arbitral case law has identified five cumulative requirements or criteria for interim measures, which are consistent with Article 26 of the UNCITRAL Rules.<sup>6</sup> The Parties agree on these criteria,<sup>7</sup> which are the following:
- i. *Prima facie* jurisdiction of the tribunal over the dispute.
  - ii. Reasonable possibility of success of the requesting party's case on the merits.<sup>8</sup>
  - iii. Necessity, i.e., the requested measure must be necessary to prevent the requesting party from suffering harm or prejudice that is likely to occur and not susceptible to being adequately repaired by an award of damages.<sup>9</sup>
  - iv. Urgency, i.e., the actions susceptible of causing harm or prejudice must be likely to occur before the award is issued.<sup>10</sup>
  - v. Proportionality, i.e., the harm or prejudice likely to be inflicted on the requesting party must substantially outweigh the harm that is likely to result to the Respondent if the interim measure is granted.<sup>11</sup>
16. This Order does not address *prima facie* jurisdiction or the likelihood of success on the merits. The IMA can be decided exclusively on the basis of points (iii) – (v) above.<sup>12</sup>

## **B. REQUESTED INTERIM MEASURES**

17. In essence, the IMA seeks the issuance of five interim measures. Specifically, the Claimant requests that the Tribunal order the Respondent to:

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<sup>5</sup> See e.g., *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Provisional Measures Order, 10 May 1984, I.C.J. Rep. 1984, p. 169, ¶ 24; *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL (formerly EnCana Corporation v. Government of the Republic of Ecuador), Interim Award – Request for Interim Measures of Protection, 31 January 2004, ¶ 13; *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Order for Interim Measures, 9 February 2011, ¶ (A).

<sup>6</sup> See e.g., *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, Order on Interim Measures, 2 September 2008, ¶ 45; *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9 (Decision on the Respondent's Request for Provisional Measures), 20 June 2018, ¶¶ 188-189; *Merck Sharpe & Dohme (I.A.) LLC v. The Republic of Ecuador*, PCA Case No. 2012-10, First Decision on Interim Measures, 7 March 2016, ¶ 69.

<sup>7</sup> IMA, ¶¶ 83, 76ss, 156ss; IMA Response, ¶ 10.

<sup>8</sup> UNCITRAL Rules, Article 26(3)(b); *supra*, ¶ 13.

<sup>9</sup> UNCITRAL Rules, Article 26(3)(a); *supra*, ¶ 13.

<sup>10</sup> See e.g., *Immunities and Criminal Proceedings* (Equatorial Guinea v. France), Provisional Measures Order, 7 December 2016, I.C.J. Rep. 2016, p. 1148, ¶ 90; *Passage through the Great Belt* (Finland v. Denmark), Provisional Measures Order, 29 July 1991, I.C.J. Rep. 1991, p. 12, ¶ 23.

<sup>11</sup> UNCITRAL Rules, Article 26(3)(a); *supra*, ¶ 13.

<sup>12</sup> That being said, given the early stages of the proceedings, any references in this Order to elements that may be construed as relevant to jurisdiction or the merits are *prima facie* only and, accordingly, do not constitute a final determination or finding.

- i. Refrain from enforcing or otherwise invoking certain provisions of legislation enacted by Western Australia (“WA”), namely the “Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 (WA)” (the “Act”),<sup>13</sup> as amended by the “Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020 (WA)” (the “Amendment Act”).<sup>14</sup> In particular, Sections 14-16 and/or 22-24 (the “Indemnities”),<sup>15</sup> on the one hand, and Section 30 (the so-called “Henry VIII Clause”),<sup>16</sup> on the other hand. The Tribunal refers to this interim measure request as the “Amendment Act Request” **(1)**.
- ii. Stay two sets of criminal charges brought by the Commonwealth Director of Public Prosecutions (“CDPP”) and the Australian Security and Investment Commission (“ASIC”). The first is a February 2018 charge against Mr. Clive Palmer and Palmer Leisure Coolum Pty Ltd (“PLC”), a company where Mr. Palmer acts as a director (the “First Criminal Charge”).<sup>17</sup> The second is a February 2020 charge against Mr. Palmer (the “Second Criminal Charge”),<sup>18</sup> together with the First Criminal Charge, the “Criminal Charges”). The Tribunal refers to this interim measure request as the “Criminal Charges Request” **(2)**.<sup>19</sup>
- iii. Refrain from interfering with the Claimant’s witnesses, representatives, or counsel, particularly from demanding notice of meetings between the Claimant and Mr. Charles Christian Porter, and from attempting to access the Microsoft accounts of Claimant’s counsel. The Tribunal refers to this interim measure request as the “Interference Request” **(3)**.<sup>20</sup>
- iv. Ensure that its “officers and representatives” refrain from making public comments or remarks about this arbitration, the Tribunal, or the ISDS system in general.<sup>21</sup> The Tribunal refers to this interim measure request as the “Public Remarks Request” **(4)**.
- v. Refrain from breaching the confidentiality of the arbitration, *inter alia* by not distributing documents, evidence, submissions, or any confidential communications related to this arbitration to the media or any unrelated parties, unless otherwise agreed by the Claimant. The Tribunal refers to this interim measure request as the “Confidentiality Request” **(5)**.<sup>22</sup>

18. The Tribunal addresses each of the requested interim measures separately in turn.

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<sup>13</sup> **CLA-2**, Act. For clarity, unless indicated otherwise, this Order refers to the Notice of Arbitration and accompanying documents as resubmitted by the Claimant on 30 September 2023.

<sup>14</sup> **C-1**, Amendment Act.

<sup>15</sup> IMA, ¶ 170(a); *supra*, ¶ 7.

<sup>16</sup> IMA, ¶ 170(f); *supra*, ¶ 7.

<sup>17</sup> See generally **R-11**, *Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland* [2019] QSC 8 (Ryan J judgment); **R-4**, *Palmer v Magistrates Court of Queensland & Ors; Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland & Ors* [2020] QCA 47 (2020) 3 QR 546 (Court of Appeal judgment).

<sup>18</sup> See generally **R-6**, *Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland; Palmer v Magistrates Court of Queensland* [2022] QSC 227 (Callaghan J judgment).

<sup>19</sup> IMA, ¶ 170(b).

<sup>20</sup> IMA, ¶ 170(e).

<sup>21</sup> IMA, ¶ 170(d).

<sup>22</sup> IMA, ¶ 170(c).

## 1. The Amendment Act Request

19. The Amendment Act Request seeks to prevent the Respondent from enforcing or otherwise invoking the Indemnities and/or the Henry VIII Clause in the Act as introduced by the Amendment Act.<sup>23</sup> For context, the Tribunal notes the following preliminary points regarding the process leading to the enactment of the Amendment Act as well as its content:
- i. Mr. Michael McHugh, acting as sole arbitrator, issued two domestic arbitration awards against WA and in favor of Mineralogy Pty Ltd (“Mineralogy”) and International Minerals Pty Ltd (“International Minerals”, together with Mineralogy, the “Subsidiaries”). The first award was issued in May 2014 (the “First Award”),<sup>24</sup> while the second award was issued in October 2019 (the “Second Award”).<sup>25</sup>
  - ii. The First and the Second Award concerned the “Iron Ore Processing (Mineralogy) Agreement”, concluded between WA and *inter alios* the Subsidiaries (the “State Agreement”).<sup>26</sup> In particular:
    - a. The First Award involved a proposal that the Subsidiaries submitted to WA in August 2012 regarding the Balmoral South Iron Ore Project (“BSIOP”). Mr. McHugh found that, in breach of the State Agreement,<sup>27</sup> WA had failed to “deal” with the said proposal.<sup>28</sup>
    - b. The Second Award focused on whether and to what extent the First Award addressed all issues in dispute and barred the Subsidiaries from pursuing additional claims regarding the BSIOP. Mr. McHugh found *inter alia* that the Subsidiaries’ “right to recover damages was not heard and determined in the [First Award]”, and that the Subsidiaries were “not foreclosed from further pursuing claims for damages arising from any breach or breaches of the State Agreement”.<sup>29</sup>
  - iii. In May 2020, the Subsidiaries filed with Mr. McHugh an “amended statement of issues, facts, and contentions” seeking damages from WA in relation to the BSIOP (the “2020 Arbitration”).<sup>30</sup> The Subsidiaries and WA concluded a distinct arbitration agreement in July 2020 for the 2020 Arbitration (the “2020 Arbitration Agreement”) *inter alia* confirming Mr.

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<sup>23</sup> *Supra*, ¶ 17.i.

<sup>24</sup> C-442, First Award, 20 May 2014.

<sup>25</sup> C-443, Second Award, 11 October 2019.

<sup>26</sup> The State Agreement was concluded in December 2001 (CLA-2, State Agreement, 5 December 2001, p. 7 (of PDF)), and ratified through the Act in September 2002 (CLA-2, Act, 24 September 2002, § 4 and p. 109 (of PDF); *supra*, ¶ 17.i.). The State Agreement was then subject to a mutually agreed “variation” in November 2008 (CLA-2, State Agreement, 14 November 2008, pp. 75ss (of PDF)), which was ratified through the Act as amended in December 2008 (CLA-2, Act, 10 December 2008, § 6 and p. 109 (of PDF)).

<sup>27</sup> C-442, First Award, 20 May 2014, ¶ 70.

<sup>28</sup> C-442, First Award, 20 May 2014, p. 51.

<sup>29</sup> C-443, Second Award, 11 October 2019, p. 41.

<sup>30</sup> C-170, Mineralogy’s and International Minerals’ Amended Statement of Issues, Facts and Contentions, 28 May 2020.

McHugh's appointment as sole arbitrator.<sup>31</sup> The hearing in the 2020 Arbitration was expected to take place between November and December 2020.<sup>32</sup>

- iv. In August 2020, WA passed the Amendment Act,<sup>33</sup> which *inter alia*:
- a. Provides that the First and the Second Award are of “no effect” and are “taken never to have had any effect”,<sup>34</sup> and that the arbitration agreements serving as the jurisdictional basis of those awards are “not valid” and are “taken never to have been valid”.<sup>35</sup>
  - b. Provides that the 2020 Arbitration and the 2020 Arbitration Agreement are “terminated”.<sup>36</sup>
  - c. Provides, through the Henry VIII Clause,<sup>37</sup> that WA's executive government may “amend [the Amendment Act] to address the circumstances” or “make any other provision necessary or convenient to address the circumstances”.<sup>38</sup>
  - d. Entitles WA to certain Indemnities.<sup>39</sup> In essence, any “relevant person”<sup>40</sup> must “joint[ly] and several[ly]”<sup>41</sup> “indemnify [and] keep indemnified”<sup>42</sup> WA against “any loss [or] liability [...] connected with”<sup>43</sup> a “disputed matter”<sup>44</sup> or a “protected matter”,<sup>45</sup> or against a “protected proceeding”.<sup>46</sup> WA may “enforce” the Indemnities “even if [it] has not made any payment, or done anything else, to meet, perform or address, the proceedings, liability or loss in question”.<sup>47</sup> WA may also assign to the Commonwealth any right WA

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<sup>31</sup> C-242, Arbitration Agreement, 8 July 2020, pp. 9ss, 15ss (of PDF).

<sup>32</sup> C-384, Email from Mr McHugh to Claimant's Subsidiaries and the Respondent's WA and its enclosure: signed minute of directions, 26 June 2020, ¶ 10.1.

<sup>33</sup> *Supra*, ¶ 17.i.

<sup>34</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing §§ 10(4) and 10(6) of the Act (pp. 23-24 of PDF).

<sup>35</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing §§ 10(5) and 10(7) of the Act (pp. 23-24 of PDF).

<sup>36</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing §§ 10(1)-(2) of the Act (p. 23 of PDF). *See also* C-1, Amendment Act, 13 August 2020, § 7, introducing § 7(1) of the Act (definition of “relevant arbitration” at p. 18 of PDF); C-404, Letter from the Respondent's WA to Mr McHugh, Claimant's Subsidiaries, 17 August 2020, ¶¶ 2-3; Australia's Response to the Notice of Arbitration, 28 April 2023, ¶ 24.

<sup>37</sup> *Supra*, ¶ 17.i.

<sup>38</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing § 30(2) of the Act (p. 67 of PDF).

<sup>39</sup> *Supra*, ¶ 17.i.

<sup>40</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing §§ 14(4), 15(2), 22(4) of the Act (pp. 34, 37 55 of PDF).

<sup>41</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing §§ 14(5), 15(4), 22(5) of the Act (pp. 35, 37 55 of PDF).

<sup>42</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing §§ 14(4), 15(2), 22(4) of the Act (pp. 34, 37 55 of PDF).

<sup>43</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing §§ 14(4), 22(4) of the Act (pp. 34, 55 of PDF).

<sup>44</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing § 14(4) of the Act (p. 34 of PDF).

<sup>45</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing § 22(4) of the Act (p. 55 of PDF).

<sup>46</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing § 15(2) of the Act (p. 37 of PDF).

<sup>47</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing §§ 14(7), 22(7) of the Act (pp. 35, 56 of PDF).



has “under or connected” with the Indemnities.<sup>48</sup> In this respect, the Amendment Act defines:

- A “relevant person” as having two meanings. In some instances, a “relevant person” is defined as the Subsidiaries, Mr. Palmer, and every “relevant transferee”.<sup>49</sup> The latter includes any person being the transferee of any right of the Subsidiaries or Mr. Palmer involving a “disputed matter” or a “protected matter”.<sup>50</sup> In other instances, a “relevant person” is defined as including any person having or having had any right in respect of a “protected proceeding” or its subject matter.<sup>51</sup>
- A “disputed matter” as any matter “connected with” the BSIOP.<sup>52</sup>
- A “protected matter” as the “consideration of courses of action [...] dealing with a disputed matter [or] proceedings [...] connected with a disputed matter”, as well as virtually all aspects concerning *inter alia* the “preparation”, “enactment”, and “operation” of the Amendment Act and “subsidiary legislation”.<sup>53</sup>
- A “protected proceeding” as a proceeding “brought, made, begun, or purportedly brought, made or begun” and “connected with a disputed matter”.<sup>54</sup>
- The term “proceedings” as including “non-WA proceedings”,<sup>55</sup> which covers proceedings that “tak[e] place or occu[r]” either “under the law of a country or territory [...] outside Australia”, or “under international law (including an international treaty or other agreement or instrument)”.<sup>56</sup>
- A “loss” as including “any loss, harm, damage, cost or expense (whether economic, non-economic or otherwise and whether actual, contingent, prospective or otherwise)”.<sup>57</sup>
- A “liability” as including a “non-WA liability”,<sup>58</sup> which covers “a liability, obligation or duty (whether actual, contingent, prospective or otherwise and whether incurred alone or jointly or jointly and severally or otherwise) arising on any basis

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<sup>48</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing §§ 16(5), 24(5) of the Act (pp. 40, 61 of PDF).

<sup>49</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing §§14(2), 22(2) of the Act (pp. 33, 54 of PDF).

<sup>50</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing §§14(3), 22(3) of the Act (pp. 34, 54 of PDF).

<sup>51</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing § 15(1) of the Act (p. 36 of PDF).

<sup>52</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing § 7(1) of the Act (p. 11 of PDF).

<sup>53</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing § 7(1) of the Act (p. 17 of PDF).

<sup>54</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing § 14(1) of the Act (p. 32 of PDF).

<sup>55</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing § 7(1) of the Act (p. 16 of PDF).

<sup>56</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing § 7(1) of the Act (p. 14 of PDF).

<sup>57</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing § 7(1) of the Act (p. 13 of PDF).

<sup>58</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing § 7(1) of the Act (p. 13 of PDF).

[...] under international law (including an international treaty or other agreement or instrument)".<sup>59</sup>

20. In this context, the Tribunal notes that the Claimant's substantive claims and prayers for relief in this arbitration involve the Subsidiaries, the BSIOP, and the 2020 Arbitration. Moreover, the Claimant challenges the legality of the Amendment Act under the AANZFTA and seeks damages in the approximate amount of USD 200 billion.<sup>60</sup>
21. Consequently, based on the language of the Amendment Act, the Tribunal understands that the present case could be construed as a "proceeding" involving a "loss" or "liability" connected with a "disputed matter" or "protected matter".<sup>61</sup> Thus, the Claimant argues, this arbitration could permit WA, or the Commonwealth if such right is assigned by WA,<sup>62</sup> to "enforce"<sup>63</sup> the Indemnities at any moment, before the Tribunal can decide the overarching dispute between the Claimant and the Respondent under the AANZFTA. This enforcement could be against all "relevant persons",<sup>64</sup> including Mr. Palmer, the Subsidiaries, and arguably also the Claimant if deemed a "relevant person" holding a right in respect of a "protected proceeding" or its subject matter.<sup>65</sup> The Tribunal understands that, if enforced, the Indemnities could be in the amount of the Claimant's USD 200 billion claim.
22. Notably, the Claimant argues that the Indemnities can be "imposed" on "all relevant persons, simply by virtue of commencing [...] this arbitration".<sup>66</sup> This being so, the Claimant submits that the enforcement of the Indemnities "would be devastating on the Claimant and its ability to continue to prosecute its claims in this arbitration".<sup>67</sup> For the Claimant, "requiring the Respondent to refrain from enforcing the [Indemnities] would preserve the Claimant's due process rights and maintain the *status quo*, allowing the Claimant to prosecute its claim unimpeded before this Tribunal".<sup>68</sup> In addition, the Claimant alleges that the risk of the Indemnities' enforcement has prevented the "Claimant and its subsidiaries from undertaking further business ventures that require financing (whether relating to [...] iron ore concessions or otherwise)".<sup>69</sup> Hence, the Claimant contends that the harm caused by the potential enforcement of the Indemnities is not limited to the Claimant's due process rights, but extends to its "business interests", which "cannot be adequately repaired by an award of damages".<sup>70</sup>

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<sup>59</sup> C-1, Amendment Act, 13 August 2020, § 7, introducing § 7(1) of the Act (pp. 13-14 of PDF).

<sup>60</sup> Notice of Arbitration, ¶¶ 32-43, 75-83 and "Schedule – Relief sought by the Claimant".

<sup>61</sup> *Supra*, fns. 52-59.

<sup>62</sup> *Supra*, fn. 48.

<sup>63</sup> *Supra*, fn. 47.

<sup>64</sup> *Supra*, fns. 49-51.

<sup>65</sup> *Supra*, fns. 51, 54. Indeed, the record does not currently show whether and to what extent the Claimant has been assigned any right by the Subsidiaries or Mr. Palmer involving a "disputed matter" or a "protected matter", and hence been made a "relevant transferee" (*supra*, fns. 49-50).

<sup>66</sup> IMA, ¶ 89.

<sup>67</sup> IMA, ¶ 88.

<sup>68</sup> IMA, ¶ 91.

<sup>69</sup> IMA, ¶ 92, referring to Palmer WS II, ¶¶ 42-44.

<sup>70</sup> IMA, ¶ 93. *See also* IMA, ¶¶ 65-66.

23. The Respondent does not dispute that, pursuant to the Amendment Act, the enforcement of the Indemnities against all “relevant persons” (including the Claimant, Mr. Palmer, and the Subsidiaries) is permissible due to the Claimant's decision to initiate this arbitration, even before the Tribunal has resolved the Parties’ dispute under the AANZFTA. Nor does the Respondent challenge the Claimant’s arguments regarding the effects of the Indemnities’ potential enforcement both inside and outside this arbitration. The Respondent’s position is limited to submitting that the Amendment Act Request has been rendered “moot”<sup>71</sup> by the undertaking issued on 28 August 2023 by Mr. John Quigley, in his capacity as Attorney General of WA, on behalf of WA (the “Undertaking”). The full Undertaking is as follows:

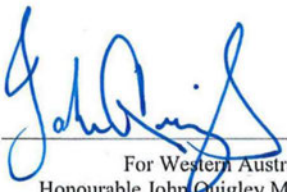
**Zeph Investments Pte Ltd v The Commonwealth of Australia**  
**PCA Case No. 2023-40**

**Undertaking**

The State (as defined in the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) (Act), including in ss14(1) and 22(1)) undertakes that it shall not take any action to:

- (a) enforce any liability against Zeph Investments Pte Ltd (**Zeph**) or a 'relevant person' (as defined in ss14(2) and 15(1), or ss22(2) and 23(1) of the Act, as the case may be) arising under ss14-16 and/or 22-24 of the Act, in connection with the international arbitration commenced by Zeph against the Commonwealth of Australia pursuant to the AANZFTA (PCA Case No. 2023-40); or
- (b) assign any right to the Commonwealth of Australia pursuant to ss16(5) or 24(5) of the Act; or
- (c) invoke s30 of the Act,

until the final determination of PCA Case No. 2023-40 or such earlier date as the Tribunal orders.

  
For Western Australia  
Honourable John Quigley MLA  
Attorney General of Western Australia  
28 August 2023

24. In short, the Undertaking states that, until the conclusion of this arbitration, WA “shall not”:
- i. Enforce the Indemnities against the Claimant, Mr. Palmer, or the Subsidiaries in connection with this arbitration.<sup>72</sup>

<sup>71</sup> IMA Response, ¶¶ 2, 13ss; IMA Rejoinder, ¶¶ 7ss.

<sup>72</sup> Undertaking, 28 August 2023, ¶ (a).

- ii. Assign its rights regarding the Indemnities to the Commonwealth,<sup>73</sup> including the right to enforce the Indemnities.
  - iii. Seek to amend the Amendment Act pursuant to the Henry VIII Clause.<sup>74</sup>
25. According to the Claimant, however, the Undertaking cannot dispose of the Amendment Act Request. The Claimant submits that:
- i. The phrase “in connection with the international arbitration commenced by Zeph against the Commonwealth of Australia pursuant to the AANZFTA (PCA Case No. 2023-40)” in paragraph (a) of the Undertaking, should be removed to alleviate the Claimant’s concerns about the Indemnities.<sup>75</sup>
  - ii. For the Undertaking to be “enforceable[e]”<sup>76</sup> or “actionable”<sup>77</sup> by the Claimant against WA and the Respondent in “Australian Courts”,<sup>78</sup> the Undertaking must be addressed “directly to the Claimant and the Tribunal”<sup>79</sup> and must emanate not only from WA but also from the Respondent.<sup>80</sup>
  - iii. In any event, “the Undertaking ought to be given the imprimatur of a Tribunal order which enjoins the respondent State (Australia) as well as its constituent state (WA) from acting pursuant to the Amendment Act”.<sup>81</sup> This is so for two main reasons. The first reason is the Respondent’s history of “underhand political tactics in international disputes”, as illustrated in the *Timor-Leste* case, where the International Court of Justice (“ICJ”) ordered interim measures despite an undertaking from Australia.<sup>82</sup> The second reason is that the Undertaking was issued by Mr. Quigley, who is “not to be trusted”<sup>83</sup> on these matters as he was “the very same official who first conceived what would become the Amendment Act”.<sup>84</sup>
26. Having considered the Parties’ positions, the Tribunal makes the following threshold points.
- i. The Claimant argues that the Indemnities’ enforcement risk has hindered Zeph’s and/or the Subsidiaries’ ability to obtain financing to undertake other business ventures. That, however, hardly constitutes a relevant substantive or procedural right necessitating protection through interim measures. Zeph has not established that it itself has been unable to obtain such financing. The main evidence that the Claimant puts forward in this respect is Mr. Palmer’s

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<sup>73</sup> Undertaking, 28 August 2023, ¶ (b).

<sup>74</sup> Undertaking, 28 August 2023, ¶ (c).

<sup>75</sup> Claimant’s communication of 31 August 2023, ¶ 6.

<sup>76</sup> Claimant’s communication of 6 September 2023, ¶ 8(a).

<sup>77</sup> Claimant’s communication of 6 September 2023, ¶ 8(b).

<sup>78</sup> Claimant’s communication of 6 September 2023, ¶ 8(b).

<sup>79</sup> Claimant’s communication of 31 August 2023, ¶ 5.

<sup>80</sup> Claimant’s communication of 6 September 2023, ¶ 8(b).

<sup>81</sup> IMA Reply, ¶ 10.

<sup>82</sup> IMA Reply, ¶ 11.

<sup>83</sup> IMA Reply, ¶ 18.

<sup>84</sup> IMA Reply, ¶¶ 13ss.

testimony, who asserts that he was denied a bank guarantee in May 2023, in his “understand[ing]” because of uncertainty about the Indemnities and their impact.<sup>85</sup> Yet, not only is Mr. Palmer’s understanding unsubstantiated, but Mr. Palmer is not the Claimant. More importantly, the loss of an opportunity due to lack of financing is a harm that, if established, is typically reparable through an award on damages.

- ii. By contrast, the Amendment Act is at the core of the merits in this case,<sup>86</sup> and it seems undisputed that, in principle, the Indemnities can be enforced against Mr. Palmer, the Claimant, and the Subsidiaries. Hence, the possibility of enforcing these Indemnities has the capacity to affect the *status quo* or otherwise aggravate the dispute. Further, given the significant quantum at stake in any such enforcement,<sup>87</sup> the financial burden involved could impede the Claimant’s ability to continue this arbitration. Therefore, the risk of enforcement of the Indemnities (as they presently exist and potentially more so if amended pursuant to the Henry VIII Clause) implicates both substantive and procedural rights that warrant safeguarding through interim measures.

27. That being said, for the following reasons, the Tribunal considers that the Undertaking sufficiently deals with the Amendment Act Request:

- i. In the Claimant’s own words, the main concern behind the Amendment Act Request is that the Indemnities can be enforced against all “relevant persons [...] by virtue of commencing [...] **this** arbitration”,<sup>88</sup> which would be “devastating [for the Claimant] to continue to prosecute its claims in **this** arbitration”.<sup>89</sup> The Undertaking provides that WA “shall not” enforce the Indemnities against the Claimant, Mr. Palmer, or the Subsidiaries “in connection” with *this* arbitration, which is identified by its case number.<sup>90</sup> Hence, the phrase in the Undertaking to which the Claimant objects specifically addresses the Claimant’s concern. Moreover, that phrase is merely a reflection of the obvious circumstances that the Undertaking was provided in the context and on the occasion of this arbitration.
- ii. The Undertaking not only identifies this arbitration by case number. It also identifies the full name of the Parties. Therefore, it is unnecessary for the Undertaking to be made expressly to the Claimant and the Tribunal. It is clear that the Undertaking is made for the purposes of this arbitration and as such covers the Claimant. Even if that were not the case, it is not dispositive for present purposes that the Claimant may not enforce the Undertaking against WA or the Respondent before the Australian courts due to the Claimant not being an express addressee of the Undertaking. In the event WA breaches the Undertaking, nothing prevents the Claimant from making an application before the Tribunal, which it will consider appropriately and, if necessary, urgently.

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<sup>85</sup> Palmer WS II, ¶ 43 (“In early May 2023, I approached the Bendigo Bank to provide a bank guarantee for \$2,000,000 secured by a cash deposit of \$2,000,000 which the bank refused. I understand this was because of the indemnities and their impact was uncertain.”).

<sup>86</sup> *Supra*, ¶ 20.

<sup>87</sup> *Supra*, ¶ 21.

<sup>88</sup> IMA, ¶ 89 (emphasis added); *supra*, ¶ 23.

<sup>89</sup> IMA, ¶ 88 (emphasis added); *supra*, ¶ 23.

<sup>90</sup> Undertaking, 28 August 2023, ¶ (a).

- iii. In any event, the Claimant has not met its burden of showing that, as a matter of Australian law, it cannot enforce the Undertaking in the Australian courts in case of a breach. The Claimant has provided no legal authorities to that effect. At the Hearing, the Respondent stated that the Commonwealth or WA could hardly argue that the Undertaking “is somehow not enforceable” through the Australian courts “when it plainly is”, and that it is “difficult to see how the fact that [the Undertaking] was provided in the context of this arbitration makes any difference whatsoever”.<sup>91</sup> While the Claimant briefly expressed a contrary view right before the Respondent made these statements,<sup>92</sup> it offered no legal basis to substantiate its argument.
- iv. The Claimant’s reservations concerning Mr. Quigley's reliability or character are inapposite. The issue is not the trustworthiness of Mr. Quigley as an individual but the legal efficacy of the Undertaking. Mr. Quigley signed the Undertaking not in his personal capacity but as WA’s Attorney General. The issue, therefore, is whether, under Australian law, the Attorney General of WA has the authority to bind WA. According to the Respondent, “[WA’s] Attorney General is the appropriate public official to give the Undertaking on behalf [WA]”.<sup>93</sup> The Claimant has not attempted argue otherwise and the Tribunal has no reason to doubt the Respondent’s assertion.
- v. It is clear to the Tribunal that, according to the Amendment Act, it is WA, not the Commonwealth, which may enforce the Indemnities, assign rights regarding the Indemnities to the Commonwealth, or invoke the Henry VIII Clause. As a consequence, WA is the competent Australian constituent State to provide the Undertaking. The Commonwealth has no relevant direct powers under the Amendment Act, if any.
- vi. The Respondent produced the Undertaking voluntarily and the Tribunal has no reason to doubt that it did so in good faith. Nor does the Tribunal consider the Claimant’s reliance on the *Timor-Leste* case to be persuasive or indicative that the Respondent will somehow take action to undermine the Undertaking. The bulk of the Claimant’s evidence regarding Australia’s conduct in that case consists of news articles and broadcasts,<sup>94</sup> which the Tribunal cannot take as facts. Regarding the provisional measures proceedings before the ICJ, the Court established that, in 2013, pursuant to an intelligence operation invoking national security,<sup>95</sup> Australia seized certain documents and data relating to a pending arbitration or possible future negotiations on maritime delimitation between Timor-Leste and Australia.<sup>96</sup> According to the Court, the right of Timor-Leste to conduct arbitral proceedings and negotiations without interference could suffer irreparable harm if Australia failed to

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<sup>91</sup> Hearing Transcript, 124:12-15 (Respondent).

<sup>92</sup> Hearing Transcript, 123:4-9 (Claimant) (“Well, we don't know if that undertaking would be enforceable in an Australian court of law because it's not made out to us, and it's not made out to the Tribunal either. So we don't think an Australian court would necessarily enforce that undertaking, or that would stop them.”).

<sup>93</sup> IM Rejoinder, ¶ 12. *See also* Hearing Transcript 105:1-4 (Respondent) (“The important thing, so far as concerns Mr Quigley, is that he, as the senior legal officer in Western Australia, is the appropriate person to give the undertaking. That's why the undertaking comes from him.”).

<sup>94</sup> IMA, fns. 114, 116.

<sup>95</sup> *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Order - Request for the indication of provisional measures, 3 March 2014, I.C.J Rep. 2014, p. 147, ¶ 36.

<sup>96</sup> *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Order - Request for the indication of provisional measures, 3 March 2014, I.C.J Rep. 2014, p. 147, ¶¶ 27, 1.

safeguard the confidentiality of the material seized by its agents.<sup>97</sup> To alleviate that concern, Australia provided an undertaking by its Attorney-General stating that it would keep the seized material confidential.<sup>98</sup> Contrary to the Claimant’s submissions, the Court expressly confirmed that it had “no reason to believe that the written undertaking [would] not be implemented by Australia”.<sup>99</sup> However, the Court noted that the undertaking stated that the seized material would not be used “by any part of the Australian Government for any purpose other than national security purposes”.<sup>100</sup> For the Court, this wording meant that the undertaking did not fully address the risk of “disclosure [of the] potentially highly prejudicial information” at issue.<sup>101</sup> It is for this reason that, despite Australia’s undertaking, the Court ordered Australia to ensure the confidentiality of the seized material.<sup>102</sup> In contrast, the Undertaking contains no exceptions that undermine WA’s commitment not to enforce the Indemnities, assign its rights regarding the Indemnities to the Commonwealth, or invoke the Henry VIII Clause.

28. For these reasons, the Tribunal finds that the Amendment Act Request lacks necessity.<sup>103</sup> Due to the Undertaking, the harm or prejudice that the Amendment Act Request seeks to prevent is not likely to occur. That unlikelihood is underscored by two factors.
29. First, if WA were to breach the Undertaking, the Claimant can resort to the Tribunal or possibly to the Australian courts for relief.<sup>104</sup> Second, and more importantly, WA (or the Commonwealth as assignee) cannot enforce the Indemnities directly. It must first commence debt collection proceedings in court and obtain a judgment. This is undisputed.<sup>105</sup> As a result, there would still be ample time for the Claimant to seek protection from the Tribunal.
30. While the Tribunal therefore denies the Amendment Act Request, it remains cognizant of the risk to the *status quo* and the Claimant's rights if WA were to breach the Undertaking. Thus, pursuant to its general power to conduct the proceedings in an orderly manner, it will order the Respondent to promptly inform the Claimant and the Tribunal of any action taken by WA or the Commonwealth that could reasonably be deemed contrary to the Undertaking. This includes steps toward enforcing the Indemnities (against the Claimant, Mr. Palmer, or the Subsidiaries), assigning that enforcement right to the Commonwealth, or invoking the Henry VIII Clause.

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<sup>97</sup> *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Order - Request for the indication of provisional measures, 3 March 2014, I.C.J Rep. 2014, p. 147, ¶ 42.

<sup>98</sup> *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Order - Request for the indication of provisional measures, 3 March 2014, I.C.J Rep. 2014, p. 147, ¶¶ 37-38.

<sup>99</sup> *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Order - Request for the indication of provisional measures, 3 March 2014, I.C.J Rep. 2014, p. 147, ¶ 44.

<sup>100</sup> *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Order - Request for the indication of provisional measures, 3 March 2014, I.C.J Rep. 2014, p. 147, ¶ 45.

<sup>101</sup> *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Order - Request for the indication of provisional measures, 3 March 2014, I.C.J Rep. 2014, p. 147, ¶ 45.

<sup>102</sup> *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Order - Request for the indication of provisional measures, 3 March 2014, I.C.J Rep. 2014, p. 147, ¶ 55(1).

<sup>103</sup> *Supra*, ¶ 15.iii.

<sup>104</sup> *Supra*, ¶¶ 27.ii-iii.

<sup>105</sup> Hearing Transcript, 120:25 – 121:6 (Claimant); Hearing Transcript, 123:15-25, 124:25 – 125:4 (Respondent).

## 2. The Criminal Charges Request

31. The Criminal Charges Request seeks the stay of the Criminal Charges filed by the CDPP until the conclusion of these proceedings.<sup>106</sup> The First Criminal Charge, filed against Mr. Palmer and PLC in February 2018, concerns an April 2012 takeover bid for securities in The President’s Club (“TPC”).<sup>107</sup> The Second Criminal Charge, filed against Mr. Palmer in February 2020, relates to certain payments made by Mineralogy in August-September 2013, which allegedly constitute undue benefits or advantages to Cosmo Developments Pty Ltd, Media Circus Network Pty Ltd, and/or the Palmer United Party.<sup>108</sup>
32. The Claimant submits that the Criminal Charges have been designed solely to exert pressure on Mr. Palmer, the Claimant, and the Subsidiaries,<sup>109</sup> which is shown by the following main considerations:
- i. The timing of the Criminal Charges is suspect.<sup>110</sup> It implies that the laying of the Criminal Charges is “linked” to the domestic arbitrations concerning the State Agreement and the BSIOP, including the 2020 Arbitration, which all form the subject matter of the Amendment Act and the merits of this dispute.<sup>111</sup> The First Criminal Charge was brought nearly six years after the alleged illegalities took place, at a time when WA was aware that the Subsidiaries would pursue damages in light of the outcome of the First Award,<sup>112</sup> and shortly before the Subsidiaries commenced the proceedings that would conclude with the Second Award.<sup>113</sup> Similarly, the Second Criminal Charge was brought nearly seven years after the alleged illegalities and shortly before the Subsidiaries filed their amended statement of issues, facts, and contentions in the 2020 Arbitration.<sup>114</sup>
  - ii. Neither the First nor the Second Criminal Charge have progressed to a committal hearing despite the Criminal Charges having been laid in 2018 and 2020, respectively.<sup>115</sup> In turn, it was only after the Claimant served the Notice of Intent in this arbitration on the Respondent in October 2022, that “the Respondent became active” in relation to the Criminal Charges.<sup>116</sup>

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<sup>106</sup> *Supra*, ¶ 17.ii.

<sup>107</sup> See generally **R-11**, *Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland* [2019] QSC 8 (Ryan J judgment); **R-4**, *Palmer v Magistrates Court of Queensland & Ors*; *Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland & Ors* [2020] QCA 47 (2020) 3 QR 546 (Court of Appeal judgment).

<sup>108</sup> See generally **R-6**, *Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland*; *Palmer v Magistrates Court of Queensland* [2022] QSC 227 (Callaghan J judgment).

<sup>109</sup> IMA, ¶¶ 99-100.

<sup>110</sup> IMA, ¶ 96.

<sup>111</sup> IMA, ¶ 98.

<sup>112</sup> IMA, ¶ 96(a); *supra*, ¶¶ 19.i-19.ii, 19.ii.a.

<sup>113</sup> IMA, ¶ 96(a); *supra*, ¶¶ 19.i, 19.ii.a.

<sup>114</sup> IMA, ¶ 96(b); *supra*, ¶ 19.iii.

<sup>115</sup> IMA, ¶ 99.

<sup>116</sup> IMA, ¶ 107.



- iii. The Criminal Charges are abusive, are “doomed to fail”,<sup>117</sup> “cannot succeed”,<sup>118</sup> and should be withdrawn “[i]n the face of [the] overwhelming evidence and the improbability of securing a conviction”.<sup>119</sup>
33. In this context, the Claimant submits that the Criminal Charges affect the *status quo* and aggravate the dispute.<sup>120</sup> Moreover, the Claimant argues that, to the extent that the Criminal Charges seek the conviction of Mr. Palmer, the latter is “required to divert significant time, cost, effort and other resources into defending those charges, rather than expending those resources in this arbitration” as the Claimant’s main representative.<sup>121</sup> The Claimant stresses that defending the Criminal Charges occupy 50% of Mr. Palmer’s working time, which significantly limits his availability to represent the Claimant in this arbitration.<sup>122</sup> For the Claimant, the hindrances faced by Mr. Palmer because of the Criminal Charges compromise the Claimant’s ability to prosecute its claims and thereby undermine its due process rights and the integrity of the proceedings.<sup>123</sup>
34. As a threshold matter, the Tribunal notes that the Claimant is not a party to the Criminal Charges, nor are the Criminal Charges the subject of the claims on the merits. Hence, the Criminal Charges are incapable of affecting the claims in dispute under the AANZFTA. However, they may impact the proceedings, for instance by aggravating the relationship between the Parties. Their existence may also exert pressure on Mr. Palmer as the Claimant’s main representative in this case. Nevertheless, for the reasons set out below, the Tribunal considers that this request lacks proportionality, as the effect of the Criminal Charges on these proceedings is insufficient to justify a restraint of Australia’s power and obligation to prosecute criminal conduct.
35. It is an essential sovereign prerogative and duty of States to investigate and prosecute criminal conduct. For that reason, a “particularly high threshold must be overcome” for an investment arbitration tribunal to enjoin a State from initiating or continuing criminal proceedings.<sup>124</sup> The stay of a criminal investigation or prosecution should be ordered solely when “absolutely necessary”.<sup>125</sup> In the Tribunal’s view, that is the case only in exceptional circumstances, for instance when the criminal process is instrumentalized to deter witnesses from testifying in the arbitration; to prevent a claimant from adequately preparing and making its case; or generally to

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<sup>117</sup> IMA, ¶ 100(a).

<sup>118</sup> IMA, ¶ 100(a).

<sup>119</sup> IMA, ¶ 101.

<sup>120</sup> IMA, ¶ 73.

<sup>121</sup> IMA, ¶ 104.

<sup>122</sup> IMA, ¶ 105, quoting Palmer WS II, ¶¶ 48-49.

<sup>123</sup> IMA, ¶ 104.

<sup>124</sup> *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision Regarding Claimant’s Application for Provisional Measures, 31 July 2009, ¶ 137. See also e.g., *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/40 and 12/14, Procedural Order No. 14 (Provisional Measures), 22 December 2014, ¶ 73; *Sergei Viktorovich Pugachev v. The Russian Federation*, Interim Award, 7 July 2017, ¶ 272.

<sup>125</sup> *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Provisional Measures, 30 April 2015, ¶ 191. See also e.g., *Hydro S.r.l., Costruzioni S.r.l., Francesco Becchetti, Mauro De Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, 3 March 2016, ¶ 3.16.

gain an unfair advantage in the arbitration by misusing the criminal process under the compulsion of law.<sup>126</sup> No such exceptional circumstances are demonstrated to be present here.

36. First, the Respondent has explained to the Tribunal's satisfaction why the First Criminal Charge against Mr. Palmer and PLC was brought in February 2018 although the underlying facts occurred in April 2012.<sup>127</sup> The Respondent relies on the procedural history and determinations made in domestic judgments that *inter alia* denied applications by Mr. Palmer and PLC regarding the alleged delay in the laying of the First Criminal Charge.<sup>128</sup> The Claimant does not challenge the accuracy of these judgments.
37. From these judgments, it is apparent that several civil proceedings between TPC and PLC took place before the Takeovers Panel and the Federal Court between June 2012 and early 2016.<sup>129</sup> In January 2016, ASIC advised PLC that it was subject to investigation.<sup>130</sup> In April 2016, ASIC indicated that it would not investigate or pursue action against TPC.<sup>131</sup> Then, in February 2018, the CDPP charged PLC and Mr. Palmer (as Director of PLC).<sup>132</sup> As such, ASIC and the CDPP conducted their respective investigations and the First Criminal Charge was laid two years after the conclusion of the civil proceedings before the Takeovers Panel and the Federal Court. If anything, that seems rather expeditious.
38. Second, the record does not show the specific actions taken in the course of the criminal investigation leading up to the laying of the Second Criminal Charge against Mr. Palmer in February 2020.<sup>133</sup> In turn, the facts underlying the Second Criminal Charge date back to August-September 2013.<sup>134</sup> However, like in the First Criminal Charge, the civil aspects of the allegedly criminal conduct underlying the Second Criminal Charge were also subject to litigation. The record suggests that such civil litigation concluded in May 2015.<sup>135</sup> The Tribunal assumes that the criminal investigation only commenced thereafter. It follows that, ASIC and the CDPP conducted their respective investigations and the latter laid the Second Criminal Charge essentially within five years. This is not an inordinate amount of time, which may be explained by a number of legitimate reasons.

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<sup>126</sup> See generally *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010; *Lao Holdings N.V. v. Lao People's Democratic Republic (I)*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order, 30 May 2014; *Ipek Investment Limited v. Republic of Turkey*, ICSID Case No. ARB/18/18, Procedural Order No. 5 (Claimant's Request for Provisional Measures), 19 September 2019.

<sup>127</sup> IMA Response, ¶¶ 37ss, Annexure 1; *supra*, ¶ 31.

<sup>128</sup> See generally **R-11**, *Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland* [2019] QSC 8 (Ryan J judgment); **R-4**, *Palmer v Magistrates Court of Queensland & Ors; Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland & Ors* [2020] QCA 47 (2020) 3 QR 546 (Court of Appeal judgment).

<sup>129</sup> **R-11**, *Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland* [2019] QSC 8 (Ryan J judgment), ¶¶ 11-12, 215; **R-4**, *Palmer v Magistrates Court of Queensland & Ors; Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland & Ors* [2020] QCA 47 (2020) 3 QR 546 (Court of Appeal judgment), ¶ 50.

<sup>130</sup> **R-11**, *Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland* [2019] QSC 8 (Ryan J judgment), ¶ 14.

<sup>131</sup> **R-11**, *Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland* [2019] QSC 8 (Ryan J judgment), ¶ 14.

<sup>132</sup> **R-11**, *Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland* [2019] QSC 8 (Ryan J judgment), ¶¶ 9, 16.

<sup>133</sup> Hearing Transcript, 129:18-21 (Respondent).

<sup>134</sup> IMA Response, ¶¶ 37ss, Annexure 1; *supra*, ¶ 31.

<sup>135</sup> Hearing Transcript, 127:11-15; Porter WS, ¶¶ 25, 45.

39. Third, criminal prosecution is a matter of public interest, which a State is better placed to assess than international investment tribunals. Therefore, international tribunals should pay deference to States in determining what serves the public interest. Here, the Tribunal sees no indications in the record that would lead it to question the public interest behind the Criminal Charges.
40. It may be that the timing of the Criminal Charges coincides with the period between the First and Second Award, or with the initiation of the 2020 Arbitration. Yet, coincidence does not equate to correlation, let alone causation. Simply put, the Claimant has not established that the Criminal Charges were caused by the dispute between the Subsidiaries and WA regarding the BSIOP, the State Agreement, or the 2020 Arbitration at issue in this arbitration.
41. Notably, Mr. Palmer and PLC argued before the Australian courts that the First Criminal Charge was being prosecuted for a distinct alleged improper purpose: “political or policy differences” between the Commonwealth and Mr. Palmer dating back to 2006 but heightened in 2017, with respect to the loss of workers’ entitlements in the liquidation of another company owned or controlled by Mr. Palmer.<sup>136</sup> Concerning the Second Criminal Charge, Mr. Palmer argued before the Australian courts that the prosecution constituted an abuse of process,<sup>137</sup> but discontinued those proceedings.<sup>138</sup>
42. In other words, before the Australian courts, Mr. Palmer and PLC either withdrew their claims of prosecutorial misconduct based on an improper purpose, or maintained that the Criminal Charges were motivated by reasons unrelated to the BSIOP, the State Agreement, or the 2020 Arbitration. Such a shift of position undermines the Claimant’s argument that the Criminal Charges serve no public interest or are improperly motivated to retaliate against and exert pressure on the Claimant for initiating this arbitration.
43. Fourth, the Claimant rightly notes that the Criminal Charges are still at the pre-committal stage. However, that appears unrelated to the filing of the Claimant’s Notice of Intent in October 2022. Regarding the First Criminal Charge, the Respondent has shown that the committal delay is in great part attributable to Mr. Palmer and PLC.<sup>139</sup> So much so that the competent Australian court remarked that “applications [by Mr. Palmer and PLC had been] slapped onto the Registry counter like cards in an enthusiastic game of Uno”.<sup>140</sup> In turn, while the CDPP brought the Second Criminal Charge in February 2020, the record shows that Mr. Palmer instituted proceedings seeking a permanent stay of the prosecution,<sup>141</sup> which can explain why the committal stage has not been reached.

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<sup>136</sup> **R-4**, *Palmer v Magistrates Court of Queensland & Ors; Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland & Ors* [2020] QCA 47 (2020) 3 QR 546 (Court of Appeal judgment), ¶¶ 62-64. See also IMA Response, ¶ 35 (uncontested by the Claimant).

<sup>137</sup> **R-6**, *Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland; Palmer v Magistrates Court of Queensland* [2022] QSC 227 (Callaghan J judgment), Annexure A, ¶ 11.

<sup>138</sup> **R-6**, *Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland; Palmer v Magistrates Court of Queensland* [2022] QSC 227 (Callaghan J judgment), Annexure A, ¶ 11.

<sup>139</sup> IMA Response, ¶¶ 40-44.

<sup>140</sup> **R-6**, *Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland; Palmer v Magistrates Court of Queensland* [2022] QSC 227 (Callaghan J judgment), ¶ 6.

<sup>141</sup> **R-6**, *Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland; Palmer v Magistrates Court of Queensland* [2022] QSC 227 (Callaghan J judgment), ¶ 4; IMA Response, ¶ 45.

44. Lastly, whether the Criminal Charges are likely to succeed or not is for the Australian courts to decide. If, as the Claimant contends, they are “doomed to fail”,<sup>142</sup> that should come as a relief to Mr. Palmer.
45. In these circumstances, the Tribunal certainly appreciates the pressure that Mr. Palmer feels in light of the Criminal Charges, as must be the case for anyone subject to criminal proceedings. Nevertheless, the fact remains that the CDPP laid the Criminal Charges against Mr. Palmer and PLC (not the Claimant or the Subsidiaries), well before the initiation of this arbitration. While it is correct that disputing parties are entitled to the counsel of their choice,<sup>143</sup> Mr. Palmer’s workload arising from the Criminal Charges ought to have informed the Claimant’s decision to designate Mr. Palmer as its main representative in this arbitration.
46. Be this as it may, the Claimant’s legal team in this arbitration, in addition to Mr. Palmer, comprises at least ten other practitioners.<sup>144</sup> The number of representatives within that team can accommodate Mr. Palmer’s need to defend himself against the Criminal Charges while continuing to serve as the Claimant’s main representative. While this may involve some adjustments within the team, it certainly does not deprive the Claimant of its right to representation or justify an order to stay the Criminal Charges. Accordingly, the Tribunal denies the Criminal Charges Request.

### 3. The Interference Request

47. The Interference Request seeks to enjoin the Respondent from interfering with the Claimant’s witnesses, representatives, or counsel.<sup>145</sup> It seeks an order that the Respondent refrain from:
- i. Threatening Mr. Porter, who was previously part of the Claimant’s counsel team and now acts as a witness,<sup>146</sup> by requiring the Claimant to give the Respondent advance notice of any meeting with Mr. Porter.<sup>147</sup>
  - ii. Attempting to access the Microsoft accounts of Claimant’s counsel, notably those of Ms. Singh and Messrs. Palmer, Iskander, and Sophocles.<sup>148</sup>
48. According to the Claimant, these interferences constitute examples of “intimidation” and “targeting” of the Claimant’s witnesses and representatives, which irreparably harm the Claimant’s due process rights and the integrity of the proceedings.<sup>149</sup> The Tribunal addresses the Claimant’s submissions with respect to Mr. Porter **(i)** and then the accounts of Ms. Singh and Messrs. Palmer, Iskander, and Sophocles **(ii)**.

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<sup>142</sup> *Supra*, ¶ 32.iii.

<sup>143</sup> IMA Rejoinder, ¶ 16(c).

<sup>144</sup> Terms of Appointment, § 1.1.

<sup>145</sup> *Supra*, ¶ 17.iii.

<sup>146</sup> Notice of Arbitration (notified to the Respondent on 29 March 2023), ¶ 54; *cf.* Notice of Arbitration, ¶ 52 and Porter WS.

<sup>147</sup> IMA, ¶¶ 57-63; IMA Rejoinder, ¶¶ 45-46.

<sup>148</sup> IMA, ¶ 64.

<sup>149</sup> IMA, ¶ 143.

**(i) Mr. Porter**

49. The following is common ground between the Parties concerning Mr. Porter:

- i. Mr. Porter served as Australia’s Attorney-General from 20 December 2017 until 30 March 2021.<sup>150</sup>
- ii. Between April and June 2023, the Respondent, the Claimant, and Mr. Porter exchanged a number of communications. The focus of the discussion was the Respondent’s concern that Mr. Porter, either as counsel or witness for the Claimant, could disclose information to the Claimant prejudicial to the Respondent and in breach of Mr. Porter’s alleged continuing duties as Australia’s former Attorney-General. Notably, confidential information that Mr. Porter may have received during his tenure as Attorney-General about the Respondent’s position in this arbitration.<sup>151</sup>
- iii. By a letter of 1 May 2023, the Respondent informed Mr. Porter that it reserved its rights to “assert privilege over any evidence [he] may give regarding matters that are protected by legal professional privilege held by the Commonwealth”, and to “seek appropriate remedies before the domestic courts or the [Tribunal]”.<sup>152</sup> Moreover, by a letter of 14 June 2023, the Respondent informed the Claimant that, while it did not seek to prevent Mr. Porter from being called as a witness in this arbitration, it did seek to take “appropriate steps to protect its confidential and privileged information”.<sup>153</sup> To that end, the Respondent requested the Claimant to “give the Commonwealth at least 5 business days’ notice before seeking to have any conference with Mr. Porter related to these proceedings, to enable the Commonwealth to take steps to protect [that] information”.<sup>154</sup> By a letter of 19 June 2023, the Claimant denied the Respondent’s notice request. The Claimant argued that it is entitled to “speak to any witnesses that it so chooses”, that there is no reason to assume that Mr. Porter would breach his continuing confidentiality obligations, and that it had not received any confidential information from Mr. Porter.<sup>155</sup>

50. It is also undisputed between the Parties that Mr. Porter has continuing obligations that prevent him from disclosing to the Claimant any confidential or privileged information that he received during his tenure as Attorney-General. Further, the Tribunal notes the Claimant’s representation that it has received no protected information from Mr. Porter. It also notes the Respondent’s representation that, as Attorney-General, Mr. Porter may have been privy to legal advice about the Claimant’s potential claim, as well as confidential ministerial correspondence between the Commonwealth and WA concerning the preparation for the present dispute, among other privileged information.<sup>156</sup>

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<sup>150</sup> Porter WS, ¶ 6.

<sup>151</sup> IMA, ¶¶ 57-63; IMA Response, ¶ 92.

<sup>152</sup> R-17, Letter from the Respondent to Mr Porter, 1 May 2023.

<sup>153</sup> C-30, Letter from the Respondent to the Claimant, 14 June 2023.

<sup>154</sup> C-30, Letter from the Respondent to the Claimant, 14 June 2023.

<sup>155</sup> C-51, Letter from the Claimant to the Respondent, 19 June 2023.

<sup>156</sup> IMA Response, ¶ 91 (uncontested by the Claimant).

51. In his communications to the Respondent of 19 April and 8 May 2023, Mr. Porter stated that he did not possess or recall possessing such information.<sup>157</sup> Be that as it may, the Claimant served its Notice of Intent in October 2020 when Mr. Porter still served as Attorney-General, that is, as the First Law Officer of Australia. Given the seniority of that role, it is possible that Mr. Porter was privy to confidential information about this case.
52. Therefore, the Tribunal finds that the Respondent's attempts to protect that information are not objectionable to the extent they do not amount to intimidation and respect proportionality. More specifically, it considers that the Respondent's conduct:
- i. Does not amount to witness intimidation, not least because Mr. Porter has provided witness evidence on behalf of the Claimant.<sup>158</sup> This is consistent with the fact there is no indication from Mr. Porter, either in his communications to the Respondent or in his witness statement, that he perceives himself as being the subject of intimidation. To the contrary, in his letter to the Respondent of 19 April 2023, he stated being "willing to engage in an appropriate process to allow for independent advice to be provided regarding the contended information [and the] potential conflicts arising from that information".<sup>159</sup>
  - ii. Is proportionate and does not unduly infringe upon the Claimant's due process rights or the integrity of the proceedings. The potential detriment to the Respondent, should the Claimant access the confidential and privileged information at issue, justifies the Respondent's cautious approach. In contrast, if the Interference Request were to be granted in relation to Mr. Porter, and the Claimant were to access confidential privileged information as a result, the prejudice to the Respondent would far outweigh that to the Claimant.
53. In consequence, the Tribunal dismisses the Interference Request insofar as Mr. Porter is concerned. However, pursuant to its general powers in terms of procedure, the Tribunal invites the Respondent to notify the Claimant and the Tribunal whenever it asserts privilege or otherwise takes steps to protect confidential information in the possession of Mr. Porter, which relates to the present dispute.

**(ii) The accounts of Ms. Singh and Messrs. Palmer, Iskander, and Sophocles**

54. The Claimant alleges that, in July 2023, there were several attempts by "persons unknown" to access the Microsoft Accounts of Ms. Singh and Messrs. Palmer, Iskander, and Sophocles ("Counsel").<sup>160</sup> The Claimant asserts that all Counsel received notifications from Microsoft nearly at the same time, each indicating a request for a "single-use code", despite none of the Counsel having made such a request and having seldom, if ever, previously received such notifications.<sup>161</sup>

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<sup>157</sup> **R-18**, Letter from Mr Porter to the Respondent, 19 April 2023; **R-19**, Letter from Mr Porter to the Respondent, 8 May 2023.

<sup>158</sup> *See generally* Porter WS.

<sup>159</sup> **R-18**, Letter from Mr Porter to the Respondent, 19 April 2023.

<sup>160</sup> IMA, ¶ 64.

<sup>161</sup> IMA, ¶ 136; IMA Reply, ¶ 20. *See also* witness statements and evidence referred to at IMA, ¶ 64.

55. According to the Claimant, the receipt of single-use codes indicates that “someone” has attempted to access the corresponding Microsoft account.<sup>162</sup> Therefore, referring to the *Timor-Leste* case,<sup>163</sup> the Claimant submits “that the communications of its representative and those assisting its representative [...] may be [being] monitored by Australian intelligence agencies”,<sup>164</sup> which if so would irreparably prejudice the Claimant’s due process rights and the integrity of the proceedings.<sup>165</sup>
56. The record shows that Ms. Singh received a single-use code notification on 9, 16, and 22 July 2023 from “account-security-noreply@accountprotection.microsoft.com”.<sup>166</sup> Each time the signatory was identified as “The Microsoft account team”.<sup>167</sup> Ms. Singh’s Microsoft Security Page also indicates that, on 25 July 2023, an “[u]nsuccessful sync” with her account took place from Poland as an “approximate location”, despite her being in Australia at the time.<sup>168</sup> In turn, in their witness statements, Messrs. Palmer and Iskander affirm having received single-use code notices from Microsoft also in July 2023.<sup>169</sup> Similarly, an email from Mr. Sophocles to Mr. Palmer shows that, on 21 July 2023, the former too received a single-use code notification from the same sender as Ms. Singh, and equally signed by “The Microsoft account team”.<sup>170</sup>
57. As a threshold point, the Tribunal recalls that whatever conduct Australia may or may not have displayed in the context of the *Timor-Leste* case appears to say little to nothing about the Respondent’s conduct in the instant case.<sup>171</sup> However, having no reason to doubt Messrs. Palmer’s and Iskander’s statements that they received single-use code notifications just like Ms. Singh and Mr. Sophocles did, the Tribunal finds it remarkably coincidental and perhaps disconcerting that four members of the Claimant’s legal team received such notifications around the same time. More so, as the receipt of a single-use code can mean that a third unauthorized party is attempting to access a Microsoft account.<sup>172</sup>
58. Yet, even assuming that the notices received by Counsel are indicative of an unauthorized third-party attempt to access their Microsoft accounts, the Claimant has not discharged its burden of showing that said third party was the Respondent. That would require specific expert evidence that the Claimant has not furnished despite being aware it ought to have done so. Indeed, in his July 2023 email to Mr. Palmer referenced above,<sup>173</sup> Mr. Sophocles acknowledged that the Claimant “should get a forensic check done as to where” the potentially unauthorized access attempt was “emanating from”.<sup>174</sup>

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<sup>162</sup> IMA, ¶ 136.

<sup>163</sup> IMA, ¶¶ 125-134.

<sup>164</sup> IMA, ¶ 136.

<sup>165</sup> IMA, ¶ 137.

<sup>166</sup> C-28, Email to Ms. Singh, 9 July 2023; C-29, Email to Ms. Singh, 16 July 2023; C-30, Email to Ms. Singh, 22 July 2023.

<sup>167</sup> C-28, Email to Ms. Singh, 9 July 2023; C-29, Email to Ms. Singh, 16 July 2023; C-30, Email to Ms. Singh, 22 July 2023.

<sup>168</sup> C-31, Microsoft Security Page, 30 July 2023; Singh WS, ¶ 14.

<sup>169</sup> Palmer WS II, ¶ 17; Iskander WS, ¶ 57.

<sup>170</sup> C-32, Email from Mr. Sophocles to Mr. Palmer, 22 July 2023.

<sup>171</sup> *Supra*, ¶ 27.vi.

<sup>172</sup> C-22, Geekflare, “Why Are You Getting Single-Use Code Emails?”, last accessed on 4 August 2023.

<sup>173</sup> *Supra*, ¶ 56.

<sup>174</sup> C-32, Email from Mr. Sophocles to Mr. Palmer, 22 July 2023.

59. In other words, the evidence before the Tribunal is insufficient to determine that the Respondent has engaged in conduct resulting in actual or impending harm to the Claimant’s substantive or procedural rights or to the integrity of the arbitral process. Consequently, the Tribunal cannot issue interim measures and preclude the Respondent from engaging in conduct not demonstrably attributable to the Respondent in the first place. The Tribunal thus denies the Interference Request not only in relation to Mr. Porter, as determined previously, but also with respect to Counsel.
60. Nonetheless, the Tribunal remains concerned about the Microsoft notifications received by Counsel. Accordingly, it will remind the Parties that they have a duty to arbitrate in good faith, which includes the obligation to refrain from conduct that may undermine the fairness and integrity of the proceedings.

#### **4. The Public Remarks Request**

61. The Public Remarks Request seeks to ensure that the Respondent’s “officers and representatives” refrain from making public remarks about this arbitration, the Tribunal, or the ISDS system in general.<sup>175</sup> The Claimant’s submissions focus exclusively on Mr. Josh Wilson, MP for the Labor Party, and Chair of the Australian Parliament’s Joint Standing Committee on Treaties.<sup>176</sup>
62. It is undisputed that, between March and June 2023, Mr. Wilson made a number of public statements highly critical of the ISDS system, including by reference to the *Phillip Morris v. Australia* case.<sup>177</sup> According to the Claimant, Mr. Wilson’s remarks constitute an attack by the Respondent,<sup>178</sup> which must stop because it undermines the integrity of the proceedings and interferes with the orderly conduct of the arbitration.<sup>179</sup>
63. While under international law the State is a unity for purposes of its international responsibility, for other purposes States are typically represented by their Head of State, Head of Government, Minister of Foreign Affairs, diplomats, and/or other officers specifically empowered for such representation. The Claimant has not shown that Mr. Wilson, who is a Member of Parliament and chairs its Joint Standing Committee on Treaties, has been empowered to represent Australia on international policy matters. Therefore, Mr. Wilson’s public remarks were not made on behalf of the Respondent.
64. Moreover, Mr. Wilson’s remarks, critical of ISDS as they may be, are an expression of Australia’s constitutional democracy. Strong discourse by members of the legislative branch is a usual component of political life in democracies. In any event, the Tribunal cannot see how Mr. Wilson’s remarks infringe upon the integrity of the proceedings or the orderly conduct of the arbitration. As a result, the Tribunal denies the Public Remarks Request.

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<sup>175</sup> IMA, ¶ 170(d); *supra*, ¶ 17.iv.

<sup>176</sup> IMA, ¶¶ 46ss; IMA Reply, ¶¶ 29ss.

<sup>177</sup> IMA, ¶¶ 46ss; IMA Reply, ¶¶ 29ss.

<sup>178</sup> IMA Reply, ¶ 40.

<sup>179</sup> IMA Reply, ¶ 42.



## 5. The Confidentiality Request

65. The Confidentiality Request seeks an order enjoining the Respondent from breaching the confidentiality of the arbitration, by disclosing documents, evidence, submissions, and other confidential communications pertaining to this arbitration to the media or third parties.<sup>180</sup> This request is premised on the Claimant’s allegation that the Respondent leaked the Notice of Arbitration (“NoA”) to the press almost immediately after it was served on the Respondent on 29 March 2023.<sup>181</sup>
66. The Claimant argues that it is entitled to expect that its submissions and evidence will be kept confidential, save if agreed otherwise between the Parties. In all other circumstances, the Claimant contends, “[t]he harm to the integrity of the proceedings if the Respondent’s breaches continue is obvious, as is the harm to the Claimant’s due process rights”.<sup>182</sup> In turn, the Respondent deems the Claimant’s leak allegation unproven,<sup>183</sup> and submits that, Australia was, in any event, not under a duty to maintain the confidentiality of the NoA,<sup>184</sup> while noting that transparency is normally appropriate in ISDS proceedings.<sup>185</sup>
67. The Tribunal addresses the Confidentiality Request summarily. Whether or not the Respondent leaked the NoA to the press, the request is not ripe for determination. Pursuant to Section 18.2 of the Terms of Appointment, the Parties agreed that the confidentiality/transparency regime of this arbitration would be “determined by agreement between the Parties or, in the absence of such agreement, by the Tribunal”, further to a “draft order [by the Tribunal] to facilitate the Parties’ discussions”. The Tribunal intends to provide the Parties with a draft order on transparency/confidentiality shortly, and thus defers the resolution of the Confidentiality Request to a time after the establishment of the confidentiality/transparency regime of these proceedings, if it remains relevant then.

### C. ORDER

68. For the reasons set out above the Tribunal:
- i. Denies the interim measures requests, save for the Confidentiality Request, which will be determined, if necessary, once the transparency/confidentiality regime to govern these proceedings is set in accordance with Section 18.2 of the Terms of Appointment.
  - ii. Orders the Respondent to:
    - a. Promptly inform the Claimant and the Tribunal of any action taken by WA or the Commonwealth that could reasonably be deemed contrary to the Undertaking. This includes any steps toward enforcing the Indemnities (against the Claimant, Mr. Palmer,

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<sup>180</sup> *Supra*, ¶ 17.v.

<sup>181</sup> IMA, ¶¶ 41-45, 110, 113.

<sup>182</sup> IMA, ¶ 118.

<sup>183</sup> IMA Response, ¶ 72; IMA Rejoinder, ¶ 22(a).

<sup>184</sup> IMA, ¶ 73.

<sup>185</sup> IMA, ¶ 73.

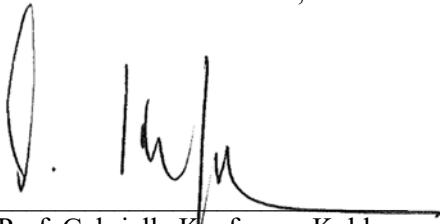
or the Subsidiaries), transferring that enforcement right to the Commonwealth, or invoking the Henry VIII Clause.

- b. Promptly notify the Claimant and the Tribunal whenever it asserts privilege or otherwise takes steps to protect confidential information in the possession of Mr. Porter, which relates to the present dispute.
- iii. Reminds the Parties of their duty to arbitrate in good faith, which includes the obligation to refrain from conduct that may undermine the fairness and integrity of the proceedings.
- iv. Reserves its decision on costs.

Seat of the arbitration: Geneva, Switzerland

Date: 17 November 2023

On behalf of the Tribunal,

A handwritten signature in black ink, appearing to read 'G. Kaufmann-Kohler', with a long horizontal flourish extending to the right.

Prof. Gabrielle Kaufmann-Kohler  
President of the Tribunal