

**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” or “Australia”, together with the Claimant, the “Parties”)

(PCA Case No. 2023-40)

**PROCEDURAL ORDER No. 5
(Pre-Hearing Matters)**

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

26 August 2024

I. PROCEDURAL BACKGROUND

1. On 19 August 2024, pursuant to Paragraph 8.1 of Procedural Order No. 1 (“**PO1**”) and Step 17 of the Procedural Calendar, each Party wrote to the Tribunal with respect to the cross-examination of the witnesses and experts of the opposing Party at the hearing on jurisdiction and admissibility (“**Hearing**”). The Respondent called 8 of the Claimant’s witnesses and experts, namely Mr. Clive Palmer, Mr. Domenic Martino, Mr. Nui Harris, [REDACTED], Mr. Alberto Migliucci, Mr. Scott Birkett, Mr. Peter Dunning, and [REDACTED]. The Respondent noted that it reserved the possibility of waiving the cross-examination of the last two individuals. Meanwhile, the Claimant stated that it did not intend to cross-examine any of the Respondent’s witnesses and experts.
2. On 20 August 2024, the Tribunal circulated a draft of this Order (“**Draft PO**”) and invited the Parties to comment in writing without prejudice to making additional comments at the pre-hearing video conference (“**PHVC**”), scheduled to take place on 23 August 2024.
3. On 21 August 2024, the Claimant commented on the Draft PO, stating *inter alia* that it “[did] not seek [to] rely on Messrs Martino, Harris, Migliucci and [REDACTED] witness statements and/or expert reports as evidence for the purposes of the Hearing”.
4. On 22 August 2024, while reserving its right to comment on the Draft PO and the Claimant’s communication of 21 August 2024 at the PHVC, the Respondent *inter alia* stated that it no longer intended to cross-examine Mr. Dunning and [REDACTED] at the Hearing.
5. On 23 August 2024, pursuant to Paragraph 8.4 of PO1 and Step 18 of the Procedural Calendar, the Parties and the Tribunal held the PHVC, to which the following participants joined:

Tribunal

Prof. Gabrielle Kaufmann-Kohler
Mr. William Kirtley
Prof. Donald McRae

Tribunal Secretary

Mr. Lukas Montoya

Permanent Court of Arbitration

Mr. Bryce Williams
Ms. Ioana Moraru

Claimant

Mr. Clive F. Palmer
Dr. Anna Kirk
Mr. Kris Byrne
Mr. Michael Sophocles
Mr. Jonathan Shaw
Mrs. Anna Palmer
Ms. Baljeet Singh
Mr. Daniel Jacobson
Mr. Thomas Browning

[REDACTED]

Respondent

Mr. Sam Wordsworth KC
Prof. Chester Brown

Dr. Naomi Hart
Dr. Esmé Shirlow
Mr. Jesse Clarke
Mr. James Mason
Ms. Lucy Martinez
Mr. Kyle Dickson-Smith
Ms. Annie Tan
Mr. Michael Olds
Mr. Alex Gibson

6. During the PHVC, the Parties and the Tribunal discussed the Draft PO and the Parties' communications of 21 and 22 August 2024. Notably, the Claimant confirmed its decision to withdraw the statements by Messrs. Martino, Harris, Migliucci, and [REDACTED] from the record of the present jurisdictional and admissibility phase of the proceedings, but clarified that the withdrawal did not extend to the exhibits referenced in those statements. It was therefore agreed that the Hearing would be dedicated to oral argument and the examination of Mr. Palmer and Mr. Birkett.
7. On this basis, the Tribunal issues the present Order.

II. ORGANIZATION OF THE HEARING

A. FORMAT, VENUE AND DATE

8. The Hearing will be held in person at the Peace Palace located at Carnegieplein 2, 2517 KJ The Hague, Netherlands, from 16 to 18 September 2024.

B. SCHEDULE

9. Subject to any necessary adjustments, each day will commence at 9:30 and end at approximately 18:00, with a 1-hour lunch break and at least two 20-minute breaks.
10. The Hearing will follow the schedule set out in **Annex 1**, subject to any modifications the Tribunal may deem necessary or appropriate during the Hearing.
11. The Parties shall use the Hearing days efficiently and avoid unnecessary delay (e.g., delays in returning from breaks). In the event of excessive delays, the Tribunal may revisit the length of the Hearing days, or, in exceptional circumstances, the time allocated to the Parties, bearing in mind due process.

C. ORAL STATEMENTS

12. The Parties may present opening statements of up to **3 hours** each during the first Hearing day. During the last Hearing day, there will be a Q&A session, during which the Parties will have up to **2 hours** each to answer questions, if any, put by the Tribunal at the close of the previous day or on the spot, and to make final observations. These durations must remain within the overall time allocation set out in Paragraph 13.

D. TIME ALLOCATION

13. The Respondent shall have **9.5 hours**, and the Claimant **6.5 hours**, to be used as they deem appropriate over the entire Hearing, including for oral opening statements and time for answering Tribunal questions and possible closing remarks. If the circumstances so require and the remaining time until the end of the Hearing so permits, the Tribunal may grant short extensions.
14. Time spent on direct (including expert presentations) and re-direct examination shall be counted toward the time of the Party presenting the witness or expert. Time spent on cross-examination shall be counted toward the time of the Party conducting the cross-examination.
15. Time spent on short interventions by the Tribunal during examinations or oral statements shall be counted against the time of the Party then conducting the examination or making the oral argument. All other time used by the Tribunal shall not be counted against a Party's time. In particular, time spent dealing with objections from a Party shall not be counted against that Party's time, unless the Tribunal determines otherwise.
16. The PCA will control the use of time by the Parties in accordance with the chess clock method and report at the end of each Hearing day.

E. ATTENDANCE

17. Each Party shall provide the Tribunal and the PCA with its list of participants ("**Hearing Participants**") by **30 August 2024**, and may amend it by no later than **6 September 2024**.

F. DOCUMENTS

18. Paragraphs 4.11, 4.12, and 8.5.2 of PO1 govern the use of documents during the Hearing, subject to any different rule in this Order.
19. The Parties have engaged Opus2 to provide evidence display services. When referring to material in the record, the Parties shall use the name/number given to it when filed, rather than the identification used by Opus2. The Parties shall ensure that, by **6 September 2024** an updated hyperlinked consolidated index is uploaded on the Opus2 platform.
20. The Parties may use demonstrative exhibits (such as graphs, tables, etc. compiling information which is on record but not presented in such form), provided that they (i) identify the source in the record from which the information is derived, (ii) are uploaded on the platform by **15 September 2024 at 12:00 CET**, if they are used for the opening statements, or, if they are used in expert presentations, at 21:00 CET on the eve of their use. For the avoidance of doubt, PowerPoint slides are not demonstrative exhibits per se unless they contain graphs, tables, etc. compiling information on record but not in that form.
21. The Parties may use PowerPoint slides during their oral statements and, subject to the rules regarding demonstrative exhibits above, shall upload them on the platform before their statements. The same rules apply to expert presentations.
22. Each witness/expert shall have, without annotations, a hard copy of his/her witness statement(s) or expert report(s) together with the annexes or exhibits to the statement or report, which shall be provided by the Party presenting the witness/expert.

G. WITNESS AND EXPERT EXAMINATION

23. Witness and expert examinations shall be governed by sections 6 and 7 of PO1, subject to any different rule in this Order.
24. Direct examination of witnesses shall be limited to 10 minutes. *In lieu* of direct examination, experts may make a presentation of no more than 20 minutes to summarize their methodology and conclusions.
25. The witnesses and experts shall be available one-half day before and after the time they are scheduled to be examined.
26. Prior to their examination, fact witnesses shall not have access to the Hearing (directly or in accordance with Section III.B. below), or access the Hearing's transcript or sound recording, except for witnesses who are also Party Representatives. These restrictions do not apply to experts.
27. Witnesses and experts shall be sequestered from the commencement of their examination until its conclusion. If an examination begins but does not conclude on the same day, the witness or expert shall remain sequestered overnight.

III. LOGISTICS

A. TRANSCRIPTS AND SOUND RECORDING

28. Transcripts and sound recording shall be governed by Paragraph 8.5 of PO1.
29. The transcripts shall be communicated by the court reporter(s) to the Tribunal, the Secretary, the PCA, and the Parties at the end of each Hearing day.
30. The PCA shall arrange for sound recording and for court reporting services and shall liaise with the Parties accordingly.

B. PUBLIC ACCESS

31. Further to Paragraph 2 of Annex I to Procedural Order No. 3 (“**PO3**”), there shall be a public webcast of the Hearing. Viewers shall register online to access the Hearing and shall commit not to use the webcast feed for any improper purpose, including not to record the webcast, nor to make it available online or otherwise. The PCA shall make the necessary arrangements.
32. The webcast feed will be slightly delayed to facilitate the safeguarding of Protected Information. A Party who intends to refer to Protected Information shall so inform the Tribunal prior to making any such reference. Subject to any immediate objection from the opposing Party, the Tribunal shall then direct the PCA to pause the webcast for the time that such information is being addressed. The Tribunal may also direct the PCA to pause the webcast on its own motion at any time.
33. The Parties shall use their best efforts to organize their oral submissions in a way that efficiently addresses Protected Information so as to minimize disruption to the Hearing. Except if they agree otherwise, by **6 September 2024**, the Parties shall provide a list of anonyms to refer at the Hearing to names which were designated as Protected Information earlier in the proceedings.

34. In accordance with Paragraph 4 of Annex I to PO3, the audio and video recordings of the Hearing shall not be made public.

C. OTHER LOGISTICAL ASPECTS

35. The PCA will address any other logistical aspects (set up, catering, etc.).

IV. POST-HEARING BRIEFS AND STATEMENTS OF COSTS

36. In accordance with Paragraph 9.1 of PO1, in principle there will be no post-hearing briefs, unless the Tribunal determines otherwise at the end of the Hearing in consultation with the Parties. If so, the Tribunal will give appropriate directions.


37. Pursuant to Paragraph 9.2 of PO1, after consulting the Parties, the Tribunal will also give appropriate directions in respect of the statements of costs.

V. DATA PRIVACY

38. The list of Hearing Participants will contain personal data provided to the PCA, including names and contact information, such as business email addresses and telephone numbers. It is in the legitimate interest of the Parties that this data will be processed in the context of the Hearing.

Seat of the arbitration: Geneva, Switzerland.

On behalf of the Tribunal,



Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal

ANNEX 1 – HEARING SCHEDULE

Day 1: Monday, 16 September 2024

TIME	PROCEDURAL STEP
9:30-	Tribunal's opening remarks
	Respondent's Opening Statement
- 18:00	Claimant's Opening Statement

Day 2: Tuesday, 17 September 2024

TIME	PROCEDURAL STEP
9:30	Examination of Mr. Palmer
	Examination of Mr. Birkett
-18:00	Tribunal's questions to be answered on the next day

Day 3: Wednesday, 18 September 2024

TIME	PROCEDURAL STEP
9:30	Continuation of examinations if necessary
	Parties' answers to Tribunal's questions and final observations
	Procedural discussion
-18:00	End of Hearing