

**IN THE MATTER OF AN ARBITRATION UNDER THE 2021
RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
and
THE ASEAN-AUSTRALIA-NEW ZEALAND FREE
TRADE AGREEMENT
(PCA Case No. 2023-40)**

**ZEPH INVESTMENTS PTE
LIMITED**

CLAIMANT

v

**THE COMMONWEALTH OF
AUSTRALIA**

RESPONDENT

CLAIMANT'S STATEMENT OF COSTS

7 FEBRUARY 2025

Tribunal:

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

**For the Claimant:
Mr Clive F Palmer
Director & Representative
Email: [REDACTED]**

Introduction

1. The Claimant's Statement of Costs is made pursuant to Procedural Order No.6 and in accordance with the Tribunal's oral instructions at the Hearing on Jurisdiction.¹
2. The Claimant recalls that, in relation to objections to jurisdiction, Article 25(4) of Chapter 11 of the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA) states as follows:

“The tribunal may, if warranted, award the prevailing party reasonable costs and fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claim or the objection was frivolous or manifestly without merit, and shall provide the disputing parties a reasonable opportunity to comment.”
3. It is evident from this provision that, in relation to jurisdictional objections, the Tribunal has discretion to award the prevailing party its reasonable costs, consistent with the “*costs follow the event*” principle usually applied in both Australia and Singapore. When exercising this discretion, the Tribunal is to consider the merits of the claim or the objection.
4. In the Claimant's submission, this clause is consistent with Articles 40-42 of the UNCITRAL Arbitration Rules 2021, pursuant to which reasonable costs of the arbitration shall in principle be borne by the unsuccessful party, but the Tribunal retains discretion to apportion costs as it considers reasonable in the circumstances of the case (Article 42).
5. The Claimant confirms that, if it is successful in the jurisdiction phase of the arbitration, it claims all its costs associated with that phase of the proceedings. The Claimant submits these costs are reasonable for the reasons set out below and awarding such costs is warranted in the circumstances given the unnecessary expense and delay the Claimant has been put to in answering the Respondent's objections. In the Claimant's view, the Respondent's objections

¹ Hearing on Jurisdiction, Transcript, Day 3, 168:9-20; 173:16-20; 178:2-179:3.

lack merit for the reasons that have been set out in its submissions on jurisdiction. In particular:

- a. The Respondent's abuse of right objection should not have been maintained following the Respondent's (correct) admission that the Amendment Act was unforeseeable.
- b. Similarly, the overwhelming evidence of the existence of the Claimant's business in Singapore renders the Respondent's denial of benefits claim manifestly without merit.
- c. Finally, the Respondent's objection regarding the requirement that an investor must make an active contribution should be dismissed in light of the authorities on this issue. This is also the case for the Respondent's related argument that a (*Salini*-style) contribution is an inherent requirement for an investment, even in a corporate restructuring situation.

Given this lack of merit, an award of costs in favour of the Claimant is warranted.

6. The Claimant also submits that, if it is successful in the jurisdiction phase, there are no circumstances that would warrant the Tribunal departing from the usual "costs follow the event" principle expressed in the UNCITRAL Rules (and consistent with Article 25(4) of the AANZFTA). The Claimant avers that this principle should be applied and the Claimant awarded its reasonable costs as set out below.
7. Should the Tribunal deny jurisdiction, the Claimant submits that cost considerations must take account of: (i) the strong merits of the Claimant's underlying claims;² (ii) the egregious nature of the Respondent's underlying conduct; and (iii) the extent to which each of the Respondent's objections have been accepted (or not) by the Tribunal.
8. To this end, if the Respondent is successful, the strength of the Claimant's merits claims (to which no defence has been offered) militates against any cost award in accordance with Article 25(4). However, if the Tribunal determines that

² It is recalled that the Respondent has offered no defence to liability in its Answer to the Notice of Arbitration.

an award of costs is warranted, such costs should reflect the extent that the Respondent prevailed on each objection. Any costs awarded should also be adjusted to take account of the Claimant's success in its position on the seat of the arbitration.

9. The degree of success is often a factor considered by tribunals in allocating costs and it is particularly pertinent in the present case where four separate objections were raised by the Respondent, each of which required a separate answer. Moreover, the Respondent's jurisdictional objections were lengthy, based on vast quantities of irrelevant (and no doubt expensive) evidence; requiring a commensurate detailed response from the Claimant. To the extent that some of those objections proved unfounded, deductions should be made from any cost allocation. As noted above, tribunals routinely take account of the level of parties' success and it is submitted that it would be appropriate to do so in the present case, if jurisdiction is denied.³
10. Such an approach is also consistent with the costs follow the event principle as it allows costs to be apportioned equitably, reflecting the mixed outcome of the jurisdictional phase. Costs may follow the event, but only to the extent of a party's success.
11. The Claimant reserves its right to object to the reasonableness of the Respondent's costs.

The Claimant's Costs

12. The Claimant sets out in the Schedule below the fees and expenses incurred in the jurisdiction phase of the arbitration. As requested by the Tribunal, the Claimant has separated out the costs of the interim measures phase from the costs of the jurisdiction phase.
13. In accordance with Article 40 of the UNCITRAL Rules, costs claimed include:

³ See, for example, *Philip Morris v Australia* UNCITRAL, PCA Case No. 2012-12, Final Award Regarding Costs, 8 July 2017, paras 68-70 (**Exh CLA-274**); *Orazul International España Holdings S.L. v. Argentine Republic*, ICSID Case No. ARB/19/25, Award, 14 December 2023, paras. 1039-1040 and 1052 (**Exh CLA-275**); *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Final Award, 25 July 2022, paras. 798-807 (**Exh CLA-276**); *B-Mex and others v. Mexico* ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, para 271 (**Exh. CLA-277**).

- a. Reasonable fees and expenses of the Tribunal;
 - b. Reasonable fees and expenses of experts;
 - c. Reasonable travel and other expenses of witnesses; and
 - d. Reasonable legal fees and other costs incurred by the Claimant in relation to the arbitration.
14. The Claimant submits that the costs incurred by the Claimant in connection with this dispute are reasonable. This is especially so when the nature of the claim and the length of the objections raised by the Respondent are taken into account. The Respondent raised four preliminary objections to jurisdiction. The Claimant was forced to engage with each of these objections and respond in like detail, even though it viewed them as meritless. In light of this, the Claimant respectfully submits that it is entitled to the entirety of its costs for the jurisdiction phase and no reduction is justified.
15. The Claimant submits that it has been efficient in its conduct of the jurisdiction phase. In particular:
- a. Once the Respondent admitted that the Amendment Act was not foreseeable, the Claimant made the decision not to rely on evidence that was relevant only if the Amendment Act was foreseeable (i.e., evidence relating to the reasons for offshoring). The Claimant thus minimised the hearing length and quantity of evidence the Tribunal was required to address in its award. This approach was taken pragmatically and in order to maximise efficiency and streamline the arbitration.
 - b. Similarly, to increase efficiency at the Hearing, the Claimant did not cross-examine witnesses whose testimony was not relevant to the issues to be determined by the Tribunal (as it related to reasons for offshoring) or where clear contrary evidence had been provided in the documentation (such as the extent of the Claimant's business activities in Singapore).
 - c. This contrasts with the Respondent, who insisted Mr Birkett travel from Australia to The Hague for a brief cross-examination on issues that were

largely irrelevant or uncontentious. This cross-examination could easily have been conducted online, saving time and cost.

- d. The Claimant has worked co-operatively with the Respondent to try and minimise procedural issues, including those relating to redactions, timetabling issues and hearing logistics.

Costs of the Interim Measures Phase

16. The Tribunal requested that the parties separately set out any costs claimed for the interim measures phase of the Arbitration. The Claimant does not claim any costs for the Interim Measures Phase.
17. The Claimant submits that, for the reasons set out below, each party should bear their own costs for the interim measures phase and the costs of the Tribunal should be borne equally. This cost allocation would fairly and reasonably reflect the circumstances surrounding the interim measures phase, as discussed below.
18. The Claimant submits that factors the Tribunal should consider when apportioning costs for the interim measures phase include:
 - a. The bulk of the parties' costs were incurred in making and answering the initial interim measures' application (the Reply and Rejoinder submissions were relatively short). The Claimant's Interim Measures Application was required because of the considerable risk to the Claimant posed by the indemnity provisions in the Amendment Act (as defined in the Claimant's Interim Measures Application). Despite requests from the Claimant prior to seeking interim measures, the Respondent had failed to provide an undertaking that it would not enforce those indemnities – eventually providing that undertaking only after the Claimant had filed its Interim Measures Application. The Respondent's failure to provide the undertaking earlier necessitated the interim measures application.
 - b. The Claimant sought to be efficient in the conduct of the Interim Measures phase by withdrawing certain requested measures following

refinement of the parties' positions through submissions (see Reply, para 4).

- c. While five of the requested interim measures were not granted, the issues raised by the Claimant were serious and important – including issues around potential witness intimidation, inappropriate statements that were being made about investment treaty arbitration in the Australian Parliament and concerns about tampering with the Claimant's emails.
 - d. In relation to the issues with the Claimant's emails, the Tribunal expressed its concern in Procedural Order No.2 and reminded the Parties of their obligation to arbitrate in good faith.⁴
 - e. In order to address the Claimant's concerns about the scope of the undertaking, the Tribunal ordered 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.
 - f. In order to address the Claimant's concerns about witness intimidation, the Tribunal ordered 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.
 - g. In relation to the requested measure regarding the leaking of confidential information to the media, the Tribunal deferred consideration of this issue until transparency directions were in place.
 - h. These orders show that the Claimant's concerns were not frivolous and that the Tribunal took seriously the protection of the Claimant's ability to properly and freely participate in the arbitration.
19. If the Tribunal is minded to allocate costs in favour the Respondent, the Claimant submits that only a (small) proportion of the Respondent's costs should be awarded for the reasons stated above.

⁴ Procedural Order No.2, para 60.

Costs of the Jurisdiction Phase

20. The Claimant claims its costs for the jurisdiction phase as set out in the Schedule below. The Claimant notes the following:
- a. The Claimant's costs for the jurisdiction phase are calculated from the date of the Respondent's Statement of Preliminary Objections (22 January 2024), marking the beginning of the jurisdiction phase. Costs claimed do not include the Notice of Arbitration or any of the costs associated with establishing the Tribunal or the early procedural steps, with the exception of some costs of Claimant's external legal counsel (specifically Mr George Spalton KC and Dr Anna Kirk) for work undertaken in preparation for the jurisdictional phase based on the Claimant's understanding of the Respondent's objections as indicated in the Answer to the Notice of Arbitration and the Respondent's previous communications. No costs have been claimed in respect of the Claimant's Representative, Mr Clive Palmer. The Claimant reserves its right to claim its remaining costs (not claimed in this submission) at the end of the merits/quantum phase, especially those relating to the Notice of Arbitration and general procedural matters.
 - b. The Claimant's costs have been incurred in various currencies, including Australian dollars, British pounds, New Zealand dollars, Euro and Swiss francs. For ease, the Claimant has converted all costs into Euro (EUR). The conversion rate applied is the rate as at the first date of the hearing (16 September 2024).
 - c. The Claimant has engaged three law firms to assist it in conducting the arbitration proceedings, as well as a number of Counsel including George Spalton KC, Simon Foote KC, Dr Anna Kirk and Kris Byrne and parties assisting the Claimant's Representative. The costs claimed for the jurisdiction phase of this arbitration appears under the heading Counsel.
 - d. The Claimant claims the cost of performed legal, administrative and logistical work as set out in the Schedule.

- e. The expert fees claimed below relate to Mr Scott Birkett (BDO), Mr Peter Dunning KC / Ms Tracey Robinson (legal experts) and Ms Sharnie Mitchell (BDO) only. The fees of other experts relied on by the Claimant in support of the Notice of Arbitration, including Mr Migliucci and Mr Sorenson, will be claimed as part of the merits/quantum phase.
- f. The Claimant was represented by Mr Palmer who has not charged a fee for his services. This is a conservative stance taken by the Claimant, given the hundreds of hours that Mr Palmer has devoted to the conduct of the arbitration, including the drafting of the Statement of Defence to Preliminary Objections and the Rejoinder, liaising with experts and witnesses and conducting the bulk of the advocacy at the oral hearing. Despite this considerable amount of work, the Claimant has not claimed any fees for Mr Palmer's time.

Costs of determining the seat of the arbitration

- 21. The Claimant has not claimed costs for the determination of the seat of arbitration but reserves its right to do so should we proceed to the merits and damages phase.

Respectfully submitted,

[Redacted Signature]

Clive F Palmer

Claimant's Representative and Director

Clive F Palmer
Representative for Claimant

[Redacted Address Line 1]

[Redacted Address Line 2]

Telephone: [Redacted Phone Number]

Email: [Redacted Email Address]

Date: 7 February 2025

Schedule
Claimant's Costs for Jurisdiction Phase

Cost by Type	Euro
Counsel Fees	€ 4,426,279.00
Travel, Accommodation and Communications Expenses	€ 2,808,215.00
Expert Fees	€ 85,577.00
PCA Costs (including Tribunal fees)	€ 468,607.00
Printing and Translation Costs	€ 97,906.00
Opus 2 Costs	€ 17,458.00
Office and Administrative Costs (The Hague)	€ 9,316.00
Total	€ 7,913,358.00