

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Hela Schwarz GmbH**

**v.**

**People's Republic of China**

**(ICSID Case No. ARB/17/19)**

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**PROCEDURAL ORDER NO. 8  
ORGANIZATION OF THE HEARING**

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***Members of the Tribunal***

Sir Daniel Bethlehem KC, President of the Tribunal  
Professor Campbell McLachlan KC, Arbitrator  
Mr. Roland Ziadé, Arbitrator

***Secretary of the Tribunal***

Mr. Francisco Abriani

8 November 2022

## **I. BACKGROUND**

1. On 25 September 2020, the Tribunal issued Procedural Order No. 6 deciding that a hearing in this matter would be held in-person in either Paris, France, or London, United Kingdom, from the period 5–16 July 2021 (the “**Hearing**”).
2. Following exchanges between the Parties, on 27 January 2022, the Tribunal issued Procedural Order No. 7 directing that the Hearing be rescheduled for the period 3–11 December 2022, with final Hearing dates within this window to be determined in due course, having regard to a priority to be given to Hearing dates on 5–9 December 2022. The Tribunal also informed the Parties that the Hearing will take place in either an in-person or a video format, the format of the Hearing to be determined closer to the Hearing date in the light of the prevailing circumstances.
3. By letter to the Parties of 22 August 2022, the Tribunal provisionally directed that the Hearing would be held in-person at the International Dispute Resolution Centre in London, United Kingdom.
4. On 10 and 12 September 2022, the Respondent and the Claimant, respectively, notified the other Party and the Tribunal of the witnesses and experts they intend to call for cross-examination at the hearing.
5. On 15 September 2022, in advance of the upcoming pre-hearing organizational meeting, the Tribunal circulated to the Parties a Draft Procedural Order No. 8, inviting them to agree on the hearing protocol and to identify any points of disagreement; each Party provided its comments on 27 September 2022.
6. On 28 September 2022, pursuant to Section 22.1 of Procedural Order No. 1, the Tribunal held a pre-hearing organizational meeting with the Parties by video conference, to discuss outstanding procedural, administrative, and logistical matters in preparation for the Hearing. Participating were:

The Tribunal:

Sir Daniel Bethlehem KC, President of the Tribunal  
Professor Campbell McLachlan KC, Arbitrator  
Mr. Roland Ziadé, Arbitrator

ICSID Secretariat:

Mr. Francisco Abriani, Secretary of the Tribunal

On behalf of the Claimant:

Ms. Laura Halonen	WAGNER Arbitration
Mr. Florian Dupuy	WAGNER Arbitration
Mr. Philipp Wagner	WAGNER Arbitration
Ms. Sophie Eichhorn	WAGNER Arbitration

On behalf of the Respondent:

Mr. Emmanuel Jacomy	Shearman & Sterling
Mr. Edward Taylor	Shearman & Sterling
Ms. Kitty Zheng	Shearman & Sterling
Mr. Joris Bertrand	Shearman & Sterling
Mr. Xiusong Xing	Global Law Office
Mr. Xin Zhang	Global Law Office
Mr. Qing Ren	Global Law Office
Ms. Yalin Li	Global Law Office
Ms. Ningxin Huo	Global Law Office
Ms. Shuang Cheng	Global Law Office
Ms. Mengdi Zhou	Global Law Office
Mr. Sun Zhao	MOFCOM
Mr. Huang Jie	MOFCOM

7. During the pre-hearing organizational meeting, the Parties and the Tribunal discussed Draft Procedural Order No. 8 circulated to the Parties on 15 September 2022, as well as their respective positions where no agreement was reached.
8. Amongst the issues addressed in the pre-hearing organizational meeting was the issue of the in-person attendance of Respondent's representatives, particular counsel team members, and witnesses based in the People's Republic of China. Pursuant to directions given in the course of the pre-hearing organizational meeting, the Respondent was given until 28 October 2022 to revert to the Claimant and Tribunal with any application that it

may wish to make with regards to the proposed non-attendance, in-person, of any such persons. No such application was made by the deadline in question.

9. A recording of the pre-hearing organizational meeting was made and deposited in the archives of ICSID, and it was made available to the Members of the Tribunal and the Parties on 29 September 2022.
10. The Tribunal has considered the Parties' positions and, in the present Order, sets out the procedural rules that the Parties have agreed upon and/or the Tribunal has determined will govern the conduct of the Hearing.

## **II. ORGANIZATION OF THE HEARING**

### **A. DATE AND FORMAT OF THE HEARING**

11. The Hearing will take place in-person at the International Dispute Resolution Centre Ltd (IDRC) located at 1 Paternoster Lane, London EC4M 7BQ, United Kingdom, from 5 to 9 December 2022.
12. The Parties having previously indicated their agreement that the hearing should, if at all possible, take place in person, as well as for other reasons addressed in the pre-hearing organizational meeting, the Tribunal considers that, but for circumstances of *force majeure*, including overriding considerations of health and imperative State-imposed travel restrictions, the hearing will take place fully in person. Any application to vary such arrangement in respect of any person based on any exigent circumstances should be made as expeditiously as possible after the circumstances in question become known. In this regard, the 28 October 2022 deadline noted in paragraph 8 above having passed, the Tribunal notes that it will proceed on the basis of a presumption that the in-person approach will not be varied simply to accommodate the convenience of a Party or person.

### **B. ORDER OF PROCEEDINGS AND SCHEDULE**

13. The order of proceedings and witness and expert evidence running order schedule is given in **Annex A** hereto. The hearing will start and conclude as follows on each of the Hearing days:

**Monday, 5 December**

Start: 09.30

Conclude: 16.30

**Tuesday, 6 December**

Start: 08.15

Conclude: 17.45

**Wednesday, 7 December**

Start: 08.15

Conclude: 17.45

**Thursday, 8 December**

Start: 08.15

Conclude: 16.00

**Friday, 9 December**

Start: 11.00

Conclude: 17.00

14. The Parties, including their representatives, counsel and witnesses, shall be available for one hour after the scheduled end of each hearing day, in the event that it is necessary to sit longer for any reason, such as to enable witness examination to be concluded or to allow time to be made up because of a timing slippage or technical problems. Witnesses and experts shall be available to give evidence on the day before and the day after their indicative day / date of testimony indicated in **Annex A**.
15. There will be a 15-minute coffee break approximately every 90 minutes during the Hearing day (save on Friday, 9 December, in which each Party will have an uninterrupted 2 hour period in which to make its closing submissions), as well as a lunch break of approximately 1 hour.
16. The hearing schedule will be subject to any changes that the Tribunal may deem necessary or appropriate during the Hearing in the interests of a fair and efficient hearing.

**C. TIME ALLOCATION**

17. The Hearing will proceed on the principle that the Parties are allocated an equal (and maximum) amount of time that they may use as they wish for their opening and closing

statements, namely, 2.5 hours per Party for their opening statements and 2.0 hours per Party for their closing statements. Time allocated to opening and closing statements may not be re-assigned for purposes of witness or expert examination. The time allocated to each Party for their opening and closing statements shall include time taken up by Tribunal questions and responses thereto, it being the responsibility of counsel to manage their allocated time appropriately.

18. The Parties are allocated an equitable amount of time for the presentation and examination of witnesses and experts, subject to the sequence for the examination of witnesses and experts indicated in **Annex A**, and opening presentations by expert witnesses. Each Party may use their allocated time as they wish for the examination of witnesses and experts. The Tribunal notes in this regard that the Parties agreed that the Respondent should be allocated more time than the Claimant for witness / expert examination. Having regard to this agreement, and the schedule indicated above, the Claimant is allocated 8.5 hours for the presentation and examination of witnesses and experts and the Respondent is allocated 9.5 hours for the presentation and examination of witnesses and experts. Time attributable to Tribunal questions to witnesses and experts to clarify points being made shall not interrupt the clock for the Party presenting the witness or expert or conducting the examination, as the case may be, but any extended Tribunal questioning lasting longer than 5 minutes will be allocated to Tribunal time.
19. Time used for housekeeping or to resolve technical difficulties shall not be counted against the Parties' time, but shall be considered Tribunal time.
20. The Secretary of the Tribunal shall keep a chess clock account of time and advise the Parties of the total daily time used at the end of each Hearing day.
21. The Tribunal emphasizes that the Parties are expected to use the Hearing day efficiently and avoid unnecessary slippage (*e.g.*, delays in returning from breaks). In the event of excess slippage, the Tribunal may revisit the length of the sitting day or, in unusual circumstances, the time allocated to the Parties, bearing in mind principles of predictability, equal treatment and a fair opportunity for the Parties to be heard.

**D. DOCUMENTS FOR USE AT THE HEARING**

**(1) Electronic Hearing Bundle**

22. The Parties shall prepare an electronic copy of the entire case file (including pleadings, witness statements, expert reports, exhibits, legal authorities and Tribunal decisions and orders to date) with a consolidated hyperlinked index of all documents.
23. This case file shall be used as the single Electronic Hearing Bundle and shall not contain any document not previously filed. It shall be organized as follows:

**Electronic Hearing Bundle:**

**01. Pleadings**

- A. Claimants
- B. Respondent

**02. Exhibits**

- A. Claimants
- B. Respondent

**03. Legal Authorities**

- A. Claimants
- B. Respondent

**04. Witness Statements and Exhibits**

- A. Claimants
  - i. Statements
  - ii. Exhibits
- B. Respondent
  - i. Statements
  - ii. Exhibits

**05. Expert Reports**

- A. Claimants
  - i. Reports
  - ii. Exhibits
- B. Respondent

i. Reports

ii. Exhibits

## **06. Tribunal's Rulings and Key Correspondence**

24. The Electronic Hearing Bundle shall be uploaded by the Parties to a designated sub-folder in the Box filesharing platform. To ensure operation of the hyperlinked index, the entire Electronic Hearing Bundle shall be housed within one folder and then uploaded to Box as a single .zip file. Should the size of the .zip file make the upload to Box impossible, the Parties shall upload the organized Electronic Hearing Bundle to a designated sub-folder on to the Box filesharing platform, in a sub-folder using the structure indicated at paragraph 23 above, and including a consolidated (non-hyperlinked) index.
25. The Electronic Hearing Bundle shall be uploaded to Box, by no later than 18.00 GMT on Monday, 28 November 2022.
26. Prior to the Hearing, the participants shall download the Electronic Hearing Bundle from the Box Case Folder into their own devices to have access to it offline during the Hearing. The court reporter, interpreters, and any Technical Operator will also be provided a copy of the Electronic Hearing Bundle via the ICSID Secretariat.
27. The Parties are requested to endeavour to reach agreement, in advance of the Hearing, on a chronology of key events, in as much detail as possible (subject to relevance), and to provide this to the Tribunal by 18.00 GMT on Monday, 28 November 2022.

### **(2) Electronic Presentation of Evidence**

28. Hearing participants are advised to have the Electronic Hearing Bundle and any demonstrative exhibit previously distributed in accordance with paragraphs 33-34 below downloaded onto their own devices and available for access offline. Parties will be able to share documents from the Electronic Hearing Bundle on screens in the hearing room.
29. Documents that do not form part of the record may not be presented or referred to at the Hearing without the leave of the Tribunal following a reasoned application to do so and an opportunity for the opposing Party to be heard on the matter.



**(3) Electronic Hearing Bundle to be used for Witness Examination**

30. During witness and expert examination, the Parties will refer to exhibits and legal authorities that already form part of the record of the case, using the Electronic Hearing Bundle.
31. The witnesses and experts are entitled to ask to be shown a full copy of any exhibit or authority on which they will be questioned (*i.e.*, they are not to be restricted to reviewing excerpts of documents shown on a screen). Prior to commencing the examination of any witness or expert, the Parties shall provide a hard copy of such witness's or expert's examination bundle containing the exhibits and legal authorities that the Party intends to cross-examine the witness/expert on to the Tribunal, the other Party, the witness/expert, the Secretary of the Tribunal, and the interpreters. The witness or expert shall also be provided a clean copy of his written testimony that they can use while giving oral testimony.

**(4) Demonstrative Exhibits**

32. The Parties may use PowerPoint or other slide presentations for their oral statements, subject to the below rule on demonstrative exhibits.
33. Demonstrative exhibits shall be used in accordance with Section 19.7 of Procedural Order No. 1, reproduced below:

Demonstrative exhibits (such as charts, tabulations, or any other manipulations of exhibits, including if used in PowerPoint slides) may be used at any hearing, provided they contain no new evidence. Each Party shall number its demonstrative exhibits consecutively, and indicate on each demonstrative exhibit the number of the document(s) from which it is derived. The Party submitting such exhibits shall provide them in hard and soft copy to the other Party, the Tribunal Members, the Tribunal Secretary and the Tribunal Assistant no later than at the start of the hearing session at which demonstrative exhibit is addressed. Copies of demonstrative exhibits shall be provided to the court reporter(s) and interpreter(s) sufficiently in advance of the hearing session in which they will be addressed to enable the court reporter(s) and interpreter(s) an adequate opportunity to familiarise themselves with the demonstrative exhibits.

34. Section 19.7 of Procedural Order No. 1 is amended such that: an electronic copy of each demonstrative shall be distributed by the Party intending to use it *via* electronic mail sent to the entire case email distribution for each Party, the Secretary of the Tribunal, the Members of the Tribunal, the court reporter, and the interpreters no later than 1 hour *prior* to its use (subject to any application to the Tribunal, and direction by the Tribunal, to the contrary), in order to facilitate access to the demonstrative by the Hearing participants. It is advisable to transmit the demonstrative exhibits to the Members of the Tribunal and the ICSID Secretary earlier than 1 hour prior to the demonstrative exhibit's use. No hard copies of demonstrative exhibits need to be provided.
35. In addition, by no later than promptly after the conclusion of the Hearing day on which the corresponding demonstrative exhibit is used, the Parties shall upload such demonstrative and any PowerPoint presentation they may have used to the case folder in the Box filesharing platform, designating each with the corresponding CD-\_\_ or RD-\_\_ number.

**E. WITNESS AND EXPERT EXAMINATION**

36. The rules set out in Procedural Order No. 1 for the examination of witnesses and experts are confirmed. In particular, the examination and cross-examination will proceed in accordance with Section 21.10 of Procedural Order No. 1, which reads as follows:

The Tribunal shall, at all times, have complete control over the evidentiary hearing as set forth in IBA Article 8(2).

37. In addition, the following rules will also apply to the examination of witnesses and experts:
- a. Witnesses and experts shall be examined in the order set forth in the Hearing schedule attached as **Annex A**.
  - b. The examination of each witness shall proceed as follows:
    - i. The Party who has presented the witness may examine the witness for purposes of asking introductory questions strictly limited to the scope of the written witness statement, including about any corrections to be made to the written statement, of addressing matters which have arisen after that

- witness' written statement was signed (direct examination), and briefly framing the witness evidence.
- ii. The other Party may then cross-examine the witness about relevant facts within the witness' knowledge but not necessarily limited to facts addressed in the witness statement. Any objections on the scope of the cross-examination of a given witness or expert that may arise during the Hearing shall be addressed by the Tribunal on a case-by-case basis;
  - iii. The Party who has presented the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination;
  - iv. The Tribunal may examine the witness at any time, either before, during or after examination by one of the Parties;
  - v. Following any questions from the Tribunal, the Parties, at the discretion of the Tribunal, may be afforded an opportunity to put questions to the witness strictly confined to the issues arising from the Tribunal's questions and the answers thereto; and
  - vi. Subject to a different agreement by the Parties, a fact witness shall not be present in the hearing room during oral testimony and arguments, and shall not read the transcript of oral testimony or argument prior to his or her examination.
- c. The rules set forth in paragraph 36(a) above shall apply by analogy to the evidence of experts, except that:
- i. Each expert may make a presentation, up to a maximum of 30 minutes, of their main conclusions instead of direct examination by counsel, in accordance with the schedule indicated in **Annex A**. The expert may use PowerPoint slides and demonstratives during their presentation, provided that paragraphs 32-34 above are adhered to in relation to any new demonstratives and PowerPoint slides.

- ii. The limitations relating to the presence of fact witnesses in the hearing room and access of fact witnesses to the transcript do not apply to expert witnesses.

38. The Parties have called for examination the following witnesses and experts:

- a. The Respondent has called the Claimant's witnesses and experts: Mr. Helmut Naujoks; Mr. David Nicholas Faulkner; Mr. Heiko Ziehms; and Prof. Lin Feng; and
- b. The Claimant has called the Respondent's witnesses and experts: Ms. Huang Bei; Mr. Neill Paul Poole; Prof. He Haibo; and Prof. Lou Jianbo.

**F. RECORDINGS OF THE HEARING**

39. Section 24.1 of Procedural Order No. 1 concerning audio recording (reproduced below) continues to apply:

Sound recordings shall be made of all hearings and sessions. The sound recordings shall be provided to the Parties and the Tribunal Members.

40. The audio recording will be shared with the Parties and the Tribunal at the conclusion of the Hearing.

41. Except for the court reporters, who will make their own audio recording of the Hearing for the purposes of preparing the transcript, the Tribunal and the Parties agree that the attendees will not otherwise record the Hearing or any part of it, including *via* audio, video or screenshot methods of recording.

**G. TRANSCRIPTION**

42. The provisions of Procedural Order No. 1, Sections 24.2 and 24.3 concerning transcription (reproduced below) apply:

24.2. Verbatim transcript(s) in English shall be made of any hearing and session other than sessions on procedural issues. Unless otherwise agreed by the Parties or ordered by the

Tribunal, the verbatim transcripts shall be available in real-time using LiveNote or similar software and electronic transcripts shall be provided to the Parties and the Tribunal on a same-day basis.

24.3. The Parties shall agree on any corrections to the transcripts within 30 days of the later of the dates of the receipt of the sound recordings and transcripts. The agreed corrections may be entered by the Parties or the court reporter in the transcripts. The Tribunal shall decide upon any disagreement between the Parties and any correction adopted by the Tribunal shall be entered by the Parties or the court reporter in the revised transcripts. Real-time court reporting in English shall be made available to the Hearing participants *via* an online link connection to be provided by the court reporter. Hearing participants shall connect to the transcript by opening a link on a separate device. The details (link, password) and instructions to connect to the streamed transcript shall be provided by the Secretariat to the Hearing participants before the start of the Hearing day.

43. Transcription services will be provided by Ms. Claire Hill. The court reporter may seek to clarify the record from time to time during the course of the Hearing.

44. A Chinese language transcription will be made available to counsel for the Parties but not for the use of witnesses or experts.

#### **H. INTERPRETATION**

45. ICSID will arrange for simultaneous interpretation between Chinese and English and German and English for examination of those witnesses and experts who have indicated in their statements that interpretation is required.

46. Simultaneous interpretation between Chinese and English will be provided by Mr. William White, Mr. Guangbo Zhang and Mr. Philip Yubang He. Simultaneous interpretation between German and English will be provided by Ms. Barbara Chisholm, Ms. Monika Brasse and Ms. Silke Schoenbuchner.

47. The Parties confirm that the following witnesses and experts require interpretation when testifying:

- a. *Fact Witnesses*: Mr. Helmut Naujoks, Ms. Huang Bei; and
- b. *Expert Witnesses*: Prof. He Haibo, Prof. Lou Jianbo.

48. The participants should speak slowly, one person at a time, during the periods of the Hearing being interpreted, and should pause briefly when handing the floor to another participant.

#### **I. POST-HEARING SUBMISSIONS AND STATEMENTS OF COSTS**

49. The provisions of Section 25.1 of Procedural Order No. 1, reproduced below, apply:

Towards the end of the hearing, the Tribunal will consult with the Parties on the issue of the need for and submission of Post-Hearing Briefs and, as appropriate, will determine the additional details regarding such briefs, including whether additional evidence may be submitted.

#### **J. PARTICIPANTS**

50. Each Party shall provide its respective List of Hearing Participants (“List of Participants”) by 18 November 2022, using the template format to be provided by the Centre.

#### **K. GENERAL PROVISIONS**

##### **(1) Confidentiality**

51. All participants in the Hearing, must continue to comply with any applicable legal and ethical obligations with respect to confidentiality.

52. Participants providing services shall (i) keep confidential all documents and information coming to their knowledge as a result of their participation in the Hearing; (ii) not use, or authorize any other person to use, such documents and information other than for the purpose of performing their work at the Hearing; and (iii) dispose all documents if printed, as confidential material, and delete all electronic copies that might be stored on personal devices when their Hearing-related work has been completed.

**(2) Data Privacy**

53. The personal data that may be provided to ICSID by the participants in the context of the organization of the Hearing, including names and contact information, such as business email addresses and telephone numbers is processed for the purpose of the legitimate interests of the Parties in resolving efficiently their dispute and, in particular, to ensure that procedural documents and Hearing arrangements are properly communicated to the Parties, their legal representatives, the Members of the Tribunal and other participants providing services for the Hearing. The Parties, the Members of the Tribunal and ICSID will retain the information to the extent necessary pending the conclusion of the arbitration. All other hearing participants must delete all electronic copies and dispose of any printed copies, as confidential material, as soon as they fulfil their Hearing-related obligations.

**L. OTHER MATTERS**

**(1) COVID Protocols for In-Person Hearing**

54. All participants must at all times comply with any COVID-19 requirements and/or policies which the venue has in place at the time of the Hearing, and/or the directions of the Tribunal. The ICSID Secretariat will liaise with the Parties and the Tribunal concerning the COVID-19 related restrictions regarding in-person attendance at the Hearing.
55. Participants will wear a face mask and can take it off when they are speaking. The Tribunal reserves the right to limit the number of persons in the Hearing room at any time.
56. Any participant who experiences signs of a cold, shortness of breath, temperature or other COVID-19 symptoms is asked to refrain from coming to the Hearing until they have obtained a negative rapid antigen test (the results of which are usually available within a matter of hours). A participant who has already been in attendance at the Hearing and experiences such symptoms during the course of the Hearing is asked to immediately inform the ICSID Secretariat of this development, pending the results of their test.

On behalf of the Tribunal,

[signed]

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**Sir Daniel Bethlehem KC**

President of the Tribunal

Date: 8 November 2022