

**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.

(the “Claimant” or “Zeph”)

and

THE COMMONWEALTH OF AUSTRALIA

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

(PCA Case No. 2023-40)

PROCEDURAL ORDER NO. 1

Tribunal

Prof. Gabrielle Kaufmann-Kohler (Presiding Arbitrator)

Mr. William Kirtley

Prof. Donald McRae

1 September 2023

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The Tribunal, having consulted the Parties, issues the following Procedural Order.

1 Procedural Calendar

- 1.1 The procedural calendar is set forth in Annex 1.
- 1.2 The Claimant shall have 30 days from the issuance of this Order to bring its Notice of Arbitration (which it has elected to be treated as its Statement of Claim in accordance with Article 20 of the 2021 UNCITRAL Rules) and accompanying evidence into conformity with the requirements of this Procedural Order. The re-filing of the Statement of Claim shall have no impact on the Procedural Calendar set out in Annex 1 to this Order.

2 Notifications and Communications

- 2.1 The rules on filing written submissions and supporting materials, and compliance with time limits for these submissions, are governed by Sections 3 and 4 below.
- 2.2 All other notifications and communications by the Parties and by the Tribunal shall be made by email.
- 2.3 The Parties shall address all their communications referred to in Section 2.2 above directly to each member of the Arbitral Tribunal, the Secretary and the Registry mentioned in Section 13 of the Terms of Appointment (the "Registry"), with a copy to the other Party, as set out below. Communications to be filed simultaneously shall be transmitted to the Secretary of the Tribunal only, who shall send them to the Tribunal, the Registry and the opposing Party once the communications or submissions are received from both Parties.
- 2.4 All notifications and communications in this arbitration shall be valid, provided they are made:
 - a. If to the Tribunal, to each member and the Secretary at the addresses set out in Sections 2 and 3 of the Terms of Appointment or notified later in this arbitration, and the Registry at the address set out in Section 13.2 of the Terms of Appointment; and
 - b. If to the Parties, to their respective counsel and the Claimant's representative at the addresses set out in Section 1 of the Terms of Appointment or notified later in this arbitration.
- 2.5 Notifications and communications shall be timely if the email to which they are attached is sent by midnight (CET) of the day of the expiration of the relevant time limit.

3 Written Submissions

- 3.1 The Parties shall file their written submissions in accordance with the procedural calendar set out in Annex 1 and with the rules set out below.
- 3.2 In their first exchange of submissions, the Parties shall set forth the facts and legal arguments on which they intend to rely. Allegations of fact and legal arguments shall be presented in a detailed, specific and comprehensive manner, and shall respond to all allegations of fact and legal arguments made by the other Party. Together with such submissions, each Party shall produce all of the evidence upon which it wishes to rely, including documentary evidence, written witness statements and expert reports, if any, with the exception of documents to be obtained during the document production phase. The Parties shall also produce excerpts of the legal sources they invoke.
- 3.3 In their second exchange of submissions, if any, absent a showing of good cause, the Parties shall limit themselves to responding to allegations of fact and legal arguments made by the other Party in the first exchange of submissions, or to address elements deriving from evidence obtained during the document production phase, unless new facts have arisen after the first exchange of submissions. Together with the second exchange of submissions, the Parties may file additional documents, witness statements and expert reports only insofar as the relevance of such additional evidence has arisen as a result of the adverse Party's preceding submission (including the documents, witness statements and expert reports produced therewith) or the documents produced by the Parties during the document production phase.
- 3.4 Following each factual allegation, the Parties shall, whenever possible, identify the evidence adduced in support of that allegation.
- 3.5 All written submissions shall be divided into consecutively numbered paragraphs.
- 3.6 The written submissions (including witness statements, expert reports, and the list of exhibits) shall be transmitted pursuant to the directions set out in the Terms of Appointment within the time limit set. For the avoidance of doubt, exhibits and legal authorities are not required to accompany a Party's written submission on the date it is due, but must be uploaded and transmitted through a secure file sharing platform, administered by the PCA, within three business days from the time limit for the submission. The written submission is deemed to be filed in a timely manner if it is sent by email to the PCA before midnight (CET) of the evening of the day of the deadline.

- 3.7 Electronic versions of written submissions (including witness statements and expert reports; for exhibits see Section 4 below) shall be submitted in searchable .pdf format, unless it is impossible or disproportionately burdensome to produce a particular document in such format.
- 3.8 Neither Party shall be permitted to submit additional documents after the filing of its respective last written submission, unless the Tribunal determines that special circumstances exist, based on a reasoned written request followed by observations from the other Party.
- 3.8.1 If a Party requests leave to file additional or responsive documents, that Party shall not annex the documents that it seeks to file to its request.
- 3.8.2 If the Tribunal grants an application for submission of an additional or responsive document, the Tribunal shall ensure that the other Party is afforded sufficient opportunity to submit its observations and any responsive documents relating to such a document.

4 Documents

- 4.1 Exhibits shall be consecutively numbered. Each fact exhibit submitted by the Claimant shall commence with “Exh. C-” followed by the applicable number. Each fact exhibit submitted by the Respondent shall commence with “Exh. R-” followed by the applicable number.
- 4.2 Legal authorities shall commence with “Exh. CLA-” for the Claimant and “Exh. RLA-” for the Respondent, followed by the applicable number.
- 4.3 Exhibits shall be arranged in chronological order or any other sensible order (such as the order of appearance). A comprehensive index of exhibits mentioning each exhibit by number, date, type of document, author and addressee (if applicable) shall be put at the beginning of the volume(s) of exhibits.
- 4.4 Subject to Section 3.6 and 3.8, exhibits shall be annexed to the corresponding written submission.
- 4.5 The Parties shall submit exhibits in electronic format, which may be submitted in ‘scanned’ .pdf format, but shall, to the extent possible, be searchable. Each exhibit shall constitute a single electronic document. Electronic versions of exhibits shall commence by the appropriate letter and number, so that they may be ordered consecutively.
- 4.6 Exhibits and legal authorities shall be clearly referenced in the written submissions.

- 4.7 Documents shall either be submitted in complete form or the submitting Party shall indicate in which respect a document is incomplete. All documents filed, including originals and copies, shall be deemed to be authentic and complete, unless disputed by the other Party.
- 4.8 Exhibits, legal authorities, witness statements and expert reports shall be submitted in the original language together with a translation into English. Whenever long documents need to be translated, the translation may be limited to all relevant passages together with such other portions of the document necessary to put such passages in proper context, being specified that the Tribunal, proprio motu or on request, may require a full translation of documents of particular importance to the dispute. Unless otherwise ordered by the Tribunal proprio motu or on an objection of the other Party, translations will be presumed to be accurate.
- 4.9 Translations need not be certified, unless there is a dispute as to the content of a translation provided and the Party disputing the translation specifically requests a certified version of the whole translation or of the relevant parts.
- 4.10 As a general principle, the cost of a translation shall be borne initially by the Party providing the translation, without prejudice to the decision of the Tribunal as to which Party or Parties shall ultimately bear those costs and in what amount.
- 4.11 On a date to be determined by the Tribunal, the Parties shall submit an updated and hyperlinked version of their respective lists of exhibits.
- 4.12 The use of demonstrative exhibits (such as charts, graphs, tabulations, etc., compiling information that is in the record but is not presented in that form) shall be permitted at the hearing by counsel, the Claimant's representative and experts, provided that such exhibits contain no new evidence, that their sources in the record are referred to, and that they are submitted at the time and in the format that the Tribunal will specify in a later order. For the avoidance of doubt, PowerPoint slides presented by a Party in support of its oral argument or by an expert in support of his/her presentation are not considered as demonstrative exhibits, except to the extent that they contain charts, graphs, tabulations, etc. compiling information that is in the record but is not presented in that form. PowerPoint presentations shall be submitted in electronic format at the beginning of the oral argument or expert presentation to which they relate.

5 Requests for Document Production

- 5.1 Within the time limit set in Annex 1, a Party may request the other Party to produce documents or categories of documents, using the form of the "Redfern Schedule" in Annex

2 hereto, in both Word and .pdf format. The Tribunal recommends that the number of requests per Party do not exceed 20, including sub-requests. A Party wishing to exceed this number shall announce it two weeks before the submission of the Redfern Schedule, explaining the reasons and need for a number higher than recommended.

5.2 Each request for production shall:

a. identify with specificity:

- i. the type(s) or category of documents whose production is sought (for example, letters, emails, minutes of meetings, memoranda, notes, reports). Parties shall not use a generic formulation, such as “all documents” or “all records”, or use such formulation and then define it to “include” specific types of documents;
- ii. the author, sender, recipient, and/or custodian of the requested document or category of documents (i.e., by the name of the individual, department, entity, or organ, as the case may be). A Party asserting that such identification is not possible must adequately substantiate such assertion;
- iii. a date for individual documents or a narrow and proportionate period for a category of documents;

b. describe the subject matter in sufficient detail and with necessary particulars to enable an effective search for responsive documents to be carried out;

c. specify that the documents requested are not in the possession, custody or control of the requesting Party (or explain why it would be unreasonably burdensome for the requesting Party to produce them), and that they are likely to exist and be in the possession, custody or control of the other Party; and

d. explain, with specific references to the record, why the document or category of documents sought is relevant to the case and material to its outcome and, more specifically, which fact alleged in the arbitration the document sought is intended to prove.

5.3 If the Tribunal considers that a request lacks sufficient specificity, it will in principle not narrow it down of its own initiative.

5.4 Within the time limit set in Annex 1, the responding Party shall:

a. where it has no objection, produce the documents requested;

- b. where it has an objection, using the Redfern Schedule provided by the requesting Party (in both Word and .pdf format), provide the requesting Party with its objections to producing the requested documents.
- 5.5 Within the time limit set in Annex 1, the requesting Party may reply to the other Party's objections in the same Redfern Schedule (in both Word and .pdf format). The reply shall answer specific objections and may not be used to re-formulate the initial request.
- 5.6 The Tribunal will, in its discretion, rule upon the production of the documents or categories of documents having regard to Article 26(5) of Chapter 11 of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area ("AANZFTA"),¹ the requirements set out above, the legitimate interests of the Parties and all of the surrounding circumstances. In deciding document production requests, the Tribunal may take guidance from the 2020 IBA Rules on the Taking of Evidence in International Arbitration.
- 5.7 When ruling on production, the Tribunal will in particular take into account that a Party shall not be entitled to the production of a document:
 - a. seeking to establish a fact that is already proven by evidence on record;
 - b. seeking to establish a fact for which the other Party bears the burden of proof;
 - c. whose search would be too burdensome, taking into consideration the added value of the document for the resolution of the dispute and the burden of the search efforts; and
 - d. that is privileged and or otherwise protected, provided the legal basis for such claim of privilege or protection is set out in sufficient detail for the Tribunal to make an informed decision in case of objection.
- 5.8 Where production is offered by a Party or ordered by the Tribunal, responsive documents shall be communicated directly to the requesting Party without copying the Tribunal. Documents so communicated shall not be considered part of the record unless and until the requesting Party subsequently files them as exhibits in accordance with Sections 3 and 4 above.

¹ Article 26(5), Chapter 11 of the AANZFTA: "The tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security".

5.9 In addition, the Tribunal may order a Party to produce documents on its own initiative at any time. In that case, the documents shall be submitted to the other Party and to the Tribunal in accordance with Section 4 above and shall be considered to be on record.

6 Witnesses

6.1 Any person may present evidence as a witness, including a Party or a Party's officer, employee, or other representative.

6.2 For each witness, a written and signed witness statement shall be submitted to the Tribunal. A person who has not submitted a written witness statement shall not be heard as a witness, unless the Tribunal so determines in exceptional circumstances, upon a substantiated request of a Party including a list of facts on which the person should testify.

6.3 Each witness statement shall state the witness's name, date of birth, current address, involvement in the case, an affirmation as to the truth of its contents, be signed by the witness and indicate the date and place of signature.

6.4 In accordance with Section 3 above, each Party will submit its witness statements together with its written submission. The witness statements shall be numbered independently from other documents and properly identified. If a Party submits two witness statements of the same witness, the subsequent witness statement shall be identified as "Second".

6.5 It shall not be improper for counsel or the Claimant's representative to meet witnesses and potential witnesses to establish the facts, prepare the witness statements and the examinations.

6.6 Each Party shall be responsible for summoning its own witnesses to the hearing, except when the other Party has waived cross-examination of a witness and the Tribunal does not direct his or her appearance. Accordingly, a witness who has not been summoned for cross-examination and whose appearance has not been ordered by the Tribunal will not be examined.

6.7 The fact that a Party does not call a witness or expert whose statement has been submitted with the opposing party's written submissions does not mean that it accepts the content of the witness statement or expert opinion. Unless the Tribunal determines that the witness must be heard, it will assess the weight of the written statement taking into account the entire record and all the relevant circumstances. The same applies in case of partial cross-examination of a witness, regarding the elements which have not been the subject of the cross-examination.

- 6.8 Each Party shall be responsible for the practical arrangements, costs, and availability of the witnesses and experts it offers. The Tribunal will decide upon the appropriate allocation of such costs in the final award.
- 6.9 The Tribunal may, having regard to all the surrounding circumstances, summon the appearance as a witness of a person who may have knowledge of relevant facts and has not been offered as a witness by the Parties.
- 6.10 If a witness fails to appear at a hearing (whether he was called for cross-examination by the opposing Party or called for examination by the Tribunal), the Tribunal may in its discretion allow the witness to appear a second time if satisfied that (i) there was a compelling reason for the first failure to appear, (ii) the testimony of the witness appears to be relevant to the adjudication of the dispute, and (iii) providing a second opportunity for the witness to appear will not unduly delay the proceedings.
- 6.11 In the event that the hearing is held in person, the Tribunal may allow a witness to appear and be examined by videoconference and will issue appropriate directions.
- 6.12 The Tribunal may consider the written statement of a witness who provides a valid reason for failing to appear at a hearing (whether called for cross-examination by the opposing Party or called for examination by the Tribunal), having regard to all the surrounding circumstances, including the fact that the witness was not subject to cross-examination. The Tribunal shall not consider the witness statement of a witness who fails to appear and does not provide a valid reason. A witness who has not been called for cross-examination (or for examination by the Tribunal) has a valid reason not to appear and a witness who has been authorized to testify by videoconference is deemed to have appeared.
- 6.13 The order of appearance of fact witnesses during the hearing as well as the modalities of the examinations shall be determined during the pre-hearing conference.

7 Experts

- 7.1 Each Party may retain and produce evidence of one or more independent experts.
- 7.2 After having heard the Parties, the Tribunal may appoint one or more experts. The Tribunal shall consult with the Parties on the selection, terms of reference and conclusions of any such expert. The Tribunal may, on its own initiative or at the request of a Party, take oral evidence of such expert(s).

- 7.3 Expert reports shall be accompanied by documents or information upon which the experts rely, unless such documents or information have already been submitted as exhibits with the Parties' submissions, in which case reference to such exhibits shall be sufficient.
- 7.4 The order and modalities of the examination of experts at the hearing (including whether experts may make presentations in lieu of direct examination) shall be addressed at the pre-hearing conference. The procedural rules set out in Section 6 above shall apply by analogy to the evidence of experts.

8 Hearing

- 8.1 On the date provided in Annex 1 hereto, each Party shall communicate the list of witnesses and experts of the other Party whom it intends to cross-examine during the hearing.
- 8.2 On the date provided in Annex 1 hereto, after consultation with the Parties, the Tribunal will determine (i) whether the hearing shall be held in person, online or in a hybrid format, and (ii) if applicable, where the hearing will be held, subject to any later change that the circumstances may require.
- 8.3 If applicable, the Tribunal will issue an online/hybrid hearing protocol following consultation with the Parties.
- 8.4 On the date provided in Annex 1, the Tribunal and the Parties will hold a pre-hearing conference to discuss any outstanding questions regarding the organization of the hearing, including oral arguments, examination of witnesses and/or experts, time allocation and logistics. The Tribunal may be represented by the President on this occasion.
- 8.5 The following arrangements shall apply to hearings, other than procedural conferences:
- 8.5.1 The Hearing shall be sound recorded and transcribed verbatim in real time:
- 8.5.2 Documents, such as exhibits, slides and demonstratives presented during the hearing shall be displayed on screens available to counsel and the Claimant's representative, each member of the Tribunal, the relevant witness/expert and the Secretary of the Tribunal;
- 8.5.3 Electronic versions of the transcripts shall be uploaded or provided by email on the same day to the Parties and the Tribunal;
- 8.5.4 The transcript shall be taken in English. Sound recordings shall be made in English and in any other language used by a witness or expert;

- 8.5.5 Testimony in a language other than English shall be interpreted simultaneously into English.
- 8.6 In principle, each Party will have an equal time allocation for examinations and oral arguments at the hearing, subject to adjustments required or appropriate under the circumstances.
- 8.7 Unless otherwise agreed during the pre-hearing conference, the Parties shall make opening statements. At the pre-hearing conference, the Parties and the Tribunal will discuss the need and modalities for oral closing statements.
- 8.8 The Parties and the PCA shall make the necessary arrangements for the reservation of the hearing rooms, breakout rooms, videoconferencing platform, if applicable, court reporters, interpreters and other logistics.
- 8.9 The expenses in connection with the hearing will initially be shared equally between the Parties, without prejudice to the Tribunal's decision on the costs of the arbitration.
- 8.10 If a hearing is to take place at a location where any member of the Tribunal or the Secretary requires a visa or other permission for entry or work purposes, each Party shall take the necessary action in a timely fashion to assist in obtaining such visa or permission.

9 Post-Hearing Briefs and Statements of Costs

- 9.1 In principle, there will be no post-hearing briefs on preliminary objections, unless after consultation with the Parties the Tribunal requests the Parties to address specific issues. In the latter event, the Tribunal will give appropriate directions at the close of the hearing or shortly thereafter.
- 9.2 The Tribunal will issue directions on the Parties' statements of costs at the appropriate stage.

10 Time Limits

- 10.1 As a rule, the Parties shall endeavor to comply with time limits and avoid jeopardizing the hearing dates.
- 10.2 Subject to situations of emergency, the Parties shall only seek extensions from the Tribunal after having consulted the other side. If the Parties are unable to reach agreement, the President of the Tribunal may extend time limits to the extent necessary.

10.3 The President will only grant the extension of a time limit as an exception and provided that the request is made without undue delay and before the time limit to be extended has lapsed.

11 Third-Party Funding

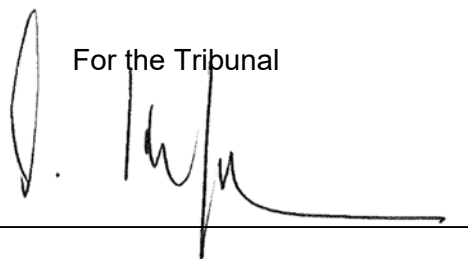
11.1 A Party shall disclose the name and address of any non-party from which the Party, its counsel or the Claimant's representative, directly or indirectly, has received or will receive funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding ("third-party funding"). If the non-party providing funding is a juridical person, the notice shall include the names of the persons and entities that own and control that juridical person.

11.2 A party shall make the disclosure referred to in Section 11.1 with the Tribunal upon the issuance of this order or, if entered into thereafter, immediately upon concluding a third-party funding arrangement. The party shall immediately notify the Tribunal of any changes to the information in the disclosure.

11.3 The Tribunal may order disclosure of further information regarding the funding agreement and the non-party providing funding.

Date: 1 September 2023

For the Tribunal



Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal

Annexes: 1. Procedural calendar
2. Redfern Schedule

ANNEX 1: PROCEDURAL CALENDAR

| No. | Procedural Step | Actor(s) | Interval (Days from previous step) | Date |
|-----|---|------------|--|---|
| 1 | Statement of Claim | Claimant | | 29-Mar-23 |
| 2 | Interim Measures Application | Claimant | 128 | 4-Aug-23 |
| 3 | Response to Interim Measures Application | Respondent | 42 | 15-Sep-23 |
| 4 | Reply to Interim Measures Application | Claimant | 12 | 27-Sep-23 |
| 5 | Rejoinder to Interim Measures Application | Respondent | 12 | 9-Oct-23 |
| 6 | Hearing on Interim Measures Application | All | 9 | 18-19 October 2023 (Sitting hours from 6:00 Ottawa/12:00 Geneva/20:00 Sydney until 10:00 Ottawa/16:00 Geneva/24:00 Sydney). |
| 7 | Statement on Preliminary Objections ("SPO") | Respondent | 95 | 22-Jan-24 |
| 8 | Statement of Defense on Preliminary Objections | Claimant | 56 | 18-Mar-24 |
| 9 | Decision on format and possibly venue of the Hearing (after consulting the Parties) | Tribunal | 18 | 5-Apr-24 |
| 10 | Document Production Requests (limited to jurisdiction and admissibility matters) | Parties | 3 | 8-Apr-24 |

| No. | Procedural Step | Actor(s) | Interval (Days from previous step) | Date |
|-----|--|------------|--|---|
| 11 | Objections to Document Production Requests and production of documents not subject to an objection | Parties | 21 | 29-Apr-24 |
| 12 | Replies to Objections to Document Production Requests | Parties | 11 | 10-May-24 |
| 13 | Decision on Document Production Requests | Tribunal | 14 | 24-May-24 |
| 14 | Production of documents ordered by the Tribunal | Parties | 14 | 7-Jun-24 |
| 15 | Reply on Preliminary Objections | Respondent | 42 | 19-Jul-24 |
| 16 | Rejoinder on Preliminary Objections | Claimant | 21 | 9-Aug-24 |
| 17 | Identification of witnesses and experts called at the Hearing, if any | Parties | 7 | 16-Aug-24 |
| 18 | Pre-hearing telephone/video conference | All | 7 | 23-Aug-24 |
| 19 | Hearing | All | 24 | 16-20 September 2024 (3 days + 2 in reserve) |
| 20 | Cost statements | Parties | | TBD end of Hearing |
| 21 | Decision/Award on Preliminary Objections | Tribunal | | |
| 22 | If applicable, directions for merits phase | Tribunal | 14 | |

ANNEX 2: REDFERN SCHEDULE FOR DOCUMENT PRODUCTION REQUESTS

| | | |
|---------------------------------------|-------------------------------------|--|
| [Party]'s Document Request No. | | |
| Document(s) Requested | | |
| Relevance | Reference to Submissions | |
| | Comments | |
| Objections | | |
| Reply | | |
| Decision by the Tribunal | | |