UNDER THE 2021 ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

AND UNDER THE AGREEMENT ESTABLISHING THE ASEAN – AUSTRALIA – NEW ZEALAND FREE TRADE AREA

PCA Case No. 2023-40

ZEPH INVESTMENTS PTE LTD
Claimant

and

THE COMMONWEALTH OF AUSTRALIA
Respondent

AUSTRALIA'S POST-HEARING BRIEF

16 October 2024

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I. INTRODUCTION

1. The Commonwealth of Australia ("**Australia**" or "**Respondent**") provides this Post-Hearing Brief in accordance with paragraph 5 of the Tribunal's *Procedural Order No. 6* dated 23 September 2024 ("**PO6**").[1]

2. This Post-Hearing Brief responds to the Tribunal's question at the hearing on preliminary objections ("**Hearing**") regarding the interpretation of Article 27(2) of Chapter 11 of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area ("**AANZFTA**" or "**Treaty**").[2] That provision provides as follows:

> *The tribunal shall, on its own account or at the request of a disputing party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of the delivery of the request. Without prejudice to Paragraph 3, if the Parties fail to issue such a decision within 60 days, any interpretation submitted by a Party shall be forwarded to the disputing parties and the tribunal, which shall decide the issue on its own account.*

3. Article 27(3) provides that a joint decision issued under Article 27(2) has binding effect.

4. Australia's position is that Article 27(2) provides a disputing party or a tribunal with the power to request a joint interpretation of any provision of AANZFTA at issue in the dispute. Interpreting the Article as imposing a mandatory requirement on a tribunal, such that a tribunal has no choice but to request a joint interpretation, is inconsistent with a proper interpretation of Article 27(2) under Article 31 of the *Vienna Convention on the Law of Treaties* ("**VCLT**").[3]

II. INTERPRETATION OF ARTICLE 27(2)

5. Article 31(1) of the VCLT articulates the general rule of treaty interpretation as follows: "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[4] The below analysis of Article 27(2) follows the structure as set out in Article 31(1).

6. ***Ordinary meaning***: As the Tribunal observed, the first phrase of Article 27(2) ("[t]he tribunal shall … request") could be interpreted as indicating an obligation on the tribunal to request the

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1 *Procedural Order No. 6*, para. 5 (in which the Tribunal requested that "[t]he Parties shall file short submissions… regarding Article 27(2) of Chapter 11 of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area").

2 Transcript, Day 2 (17 September 2024), p. 295, lines 18-25, p. 296 lines 1-6. Transcript, Day 3 (18 September 2024), p. 51, lines 13-25.

3 Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('**VCLT**').

4 VCLT, Article 31(1).

AANZFTA Parties for a joint interpretation of any provision of AANZFTA at issue in these proceedings. The Oxford English Dictionary does indicate that "shall" can signify an imperative in this manner, and Australia accepts that use of "shall" in a treaty can indicate an obligation.[5] However, the Oxford English Dictionary also recognises that the word "shall" may be used as an auxiliary to designate, for example, "statements of a result to be expected from some action or occurrence"[6] or as "denoting a future contingency".[7]

7. The second sentence of Article 27(2), which includes the phrase "the Parties shall submit", confirms that AANZFTA does not always use the word "shall" in an imperative sense. This is because the third sentence of Article 27(2) expressly recognises that AANZFTA Parties may "fail to issue" the decision which the second sentence states they "shall submit". Other parts of Article 27(2) therefore use the word "shall" in a conditional sense, not as an imperative.

8. If the phrase "the tribunal shall … request" were to be interpreted as imposing a mandatory requirement, that would mean that the words "on [the tribunal's] own account or at the request of a disputing party" would have no work to do. The tribunal would be required to request a joint interpretation of every provision in issue in a dispute in each and every instance. An interpretation that makes those words redundant would be inconsistent with the ordinary meaning of the terms of Article 27(2).

9. The better interpretation, which gives meaning to all the words used, is that the word "shall" in the first sentence of Article 27(2) is not used in an imperative sense (as akin to "must"), but instead as designating that the tribunal and disputing parties have the power to request a joint interpretation under certain conditions.

10. So understood, the first sentence of Article 27(2) specifies the conditions under which the power to request a joint interpretation may be exercised ("on [the tribunal's] own account or at the request of a disputing party"). The inclusion of the preposition "on" indicates the trigger for the exercise of the power in Article 27(2). The "or" conjunction between "on its own account" and "at the request of a disputing party" applies to "coordinate two (or more) sentence elements between which there is an alternative".[8] Applied to Article 27(2), this coordination provides for two mutually exclusive triggers for a tribunal to request a joint interpretation: either (i) on its own account, or (ii) at the request of a disputing party. This indicates that, even if "shall" is interpreted as an imperative (*quod non*), that imperative would not "trigger" unless certain conditions are

5 *Oxford English Dictionary*, s.v. "shall (v.), sense II.i.5" September 2024, https://doi.org/10.1093/OED/5606512673.
6 *Oxford English Dictionary*, s.v. "shall (v.), sense II.i.8.f", September 2024, https://doi.org/10.1093/OED/5606512673.
7 *Oxford English Dictionary*, s.v. "shall (v.), sense II.i.10", September 2024, https://doi.org/10.1093/OED/5606512673.
8 *Oxford English Dictionary*, s.v. "or (*conj.1*), sense 1" September 2024, https://doi.org/10.1093/OED/8335466565.

met (being a request for such interpretation either on the tribunal's own account or at the request of a disputing party).

11. Article 27(2) does not specify qualitative criteria to guide the decision of the tribunal or the parties to request a joint interpretation. The Oxford English Dictionary defines "on one's own account" as: "for one's own interest, and at one's own risk; independently".[9] Applied to Article 27(2), the phrase "of [a tribunal's] own account" therefore involves some *independent* judgement on the part of the tribunal as to whether it should request a joint interpretation.

12. The scope of the joint interpretation that may be requested ("any provision of this Agreement that is in issue in dispute") further confirms that a tribunal must exercise some independent judgement to identify the issue/s to which the request for a joint interpretation will be directed. Article 27(2) specifies that "any" provisions of AANZFTA may be the subject of a joint interpretation; it does not require that "all" provisions in dispute be the subject of such a request. This confirms that the word "shall" is not being used in a mandatory sense: if a tribunal *must* request a joint interpretation, and must do so for "*any* provision" in issue in the dispute, it would be required to request an interpretation of *all* of the provisions at issue in the dispute. Such an interpretation of Article 27(2) would render many of the provisions in Chapter 11 concerning the conduct of arbitral proceedings and the powers of the tribunal without any meaningful effect. It would also impose a significant and unexpected resource burden on the numerous AANZFTA Parties, insofar as Article 27(2) indicates that any requested joint interpretation should be provided within 60 days.

13. ***Context***: The paragraphs immediately surrounding Article 27(2) support Australia's interpretation. Under the heading "Governing Law", Article 27(1) states that:

> *Subject to Paragraphs 2 and 3 … the tribunal shall decide the issues in dispute in accordance with this Agreement, any other applicable agreements between the Parties, any relevant rules of international law applicable in the relations between the Parties, and, where applicable, any relevant domestic law of the disputing Party.*

14. This opening paragraph requires a tribunal to apply AANZFTA and specific sources of international law as applicable law, with paragraphs 2 and 3 requiring it to also apply any joint interpretation that is requested in accordance with those provisions. If a tribunal was required to request a joint interpretation for every dispute the words "[s]ubject to" would be unnecessary.

[9] Oxford English Dictionary, s.v. "'on one's own account' in account (n.), sense P.1.f.ii," September 2024, https://doi.org/10.1093/OED/1255070184.

Rather, those words indicate that Article 27(2) and (3) apply as an exception to the usual governing law as set out in Article 27(1).

15. The reference in Article 27(1) to "any other applicable agreements between the Parties" confirms this. While this would capture a joint interpretation, the AANZFTA Parties have specifically distinguished joint interpretations from other "agreements between the Parties" to impose specified conditions on the circumstances in which the former may be issued and come to apply in arbitral proceedings under Chapter 11. As a consequence, the structure of Article 27 suggests that a tribunal must apply the sources of law identified in Article 27(1), "[s]ubject to" also applying any joint interpretation that may be requested under Article 27(2).[10]

16. Australia further notes that Article 27(2) is an unusual provision. Although Australia is party to nine other free trade agreements with clauses addressing joint interpretations,[11] in most instances these clauses provide for a binding decision of a Committee or a Commission (comprising the treaty Parties) rather than allowing, as per AANZFTA, either disputing party to request a binding joint interpretation.[12] Against this background, it would be surprising if the AANZFTA Parties intended to bestow a mandatory requirement on tribunals to request a joint interpretation of "any provision" that is "in issue in a dispute" without making such a requirement clear on the face of the provision.

17. ***Object and Purpose***: Interpreting Article 27(2) as imposing a mandatory requirement on the tribunal to request a joint interpretation in each dispute would also undermine the object and purpose of AANZFTA. As set out in Article 1 of Chapter 1, AANZFTA aims to "facilitate, promote and enhance investment opportunities" and "establish a co-operative framework for strengthening, diversifying and enhancing trade, investment and economic links among the Parties." Each Chapter of AANZFTA is calibrated to achieve these objectives, including Chapter 11, which delineates a framework for the settlement of investor-State disputes by independent and expert arbitral tribunals as a means of facilitating, promoting and enhancing investment opportunities and links between the Parties. Interpreting Article 27(2) in a mandatory

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10 Indeed, the Terms of Appointment reflect this: paragraph 10 of the Terms of Appointment provides greater clarity on this substantive law; namely, that "the Parties shall, in principle, establish the content of the applicable law. While it is not required to do so, the Tribunal may make its own inquiries into the content of the applicable law…".

11 *Indonesia-Australia Comprehensive Economic Partnership Agreement*, signed 4 March 2019 (entered into force 5 July 2020); *Peru-Australia Free Trade Agreement*, signed 12 February 2018 (entered into force 11 February 2020) ("**PAFTA**"); *Australia-Hong Kong Free Trade Agreement and Associated Investment Agreement*, signed 26 March 2019 (entered into force 17 January 2020); *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed 8 March 2018 (entered into force 30 December 2018) ("**CPTPP**"); *China-Australia Free Trade Agreement*, signed 17 June 2015 (entered into force 20 December 2015) ("ChAFTA"; *Korea-Australia Free Trade Agreement*, signed 8 April 2014 (entered into force 12 December 2014) ("**KAFTA**"); *Australia-Chile Free Trade Agreement*, signed 30 July 2008 (entered into force 6 March 2009). For an alternative formulation, see the *Thailand-Australia Free Trade Agreement*, signed 5 July 2004 (entered into force 1 January 2005) which provides for an arbitral tribunal, on its own initiative or at the request of a party, to seek information and technical advice from any person or body it deems appropriate provided that the parties so agree and subject to such terms and conditions as the Parties may set.

12 See e.g. PAFTA, Chapter 8, Article 8.26; CPTPP, Chapter 9, Article 9.25(3); ChAFTA, Chapter 9, Article 9.18; KAFTA, Chapter 11, Article 11.22.

way would undermine the achievement of such objectives. For the disputing parties, it would create higher costs and significant inefficiencies – a particularly strange result if no disputing party had requested a joint interpretation, and if a tribunal considered it could readily resolve a dispute over the interpretation of a treaty provision at issue in a dispute by recourse to the generally accepted rules of treaty interpretation.[13] It would also deprive the tribunal of the capacity to determine the dispute in accordance with the provisions of Chapter 11. It would further impose significant and unexpected burdens on the AANZFTA Parties given that a mandatory reading of the provision would entail a requirement on the tribunal to make requests for joint interpretations on "any" provision in issue in a dispute (i.e., in the absence of there being any particular interpretive dispute concerning a precise provision of Chapter 11 on which the tribunal seeks guidance).

III. CONCLUSION

18. For the above reasons, in the absence of a request by a disputing party, Australia submits that Article 27(2) provides the Tribunal with power to request a joint interpretation of any provision of AANZFTA at issue in the dispute before the Tribunal. However, it does not have the effect of requiring a tribunal to seek such an interpretation on its own account.

19. Australia respectfully requests that the Tribunal consult the disputing parties in the event it decides to exercise its discretion to request a joint interpretation, including the precise provision (and any element therein) to which such request may relate.

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[13] *International Bar Association Rules on the Taking of Evidence in International Arbitration 2020*, Preamble ("These IBA Rules on the Taking of Evidence in International Arbitration are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations"); see also Article 2(1).