

PCA Case No. 2024-23

**IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT ESTABLISHING
THE ASEAN-AUSTRALIA-NEW ZEALAND FREE TRADE AREA,
SIGNED ON 27 FEBRUARY 2009**

- and -

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW, AS REVISED IN 2021**

- between -

ZEPH INVESTMENTS PTE. LTD. (Singapore)

(the “Claimant”)

- and -

THE COMMONWEALTH OF AUSTRALIA

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

PROCEDURAL ORDER NO. 1

Arbitral Tribunal

Dr. Veijo Heiskanen (Presiding Arbitrator)

Dr. Charles Poncet

Ms. Jean Kalicki

Secretary of the Tribunal

Mr. Bryce Williams

Secretariat

Permanent Court of Arbitration

9 December 2024

WHEREAS the Parties and the members of the Tribunal have signed the Terms of Appointment dated 6 December 2024;

WHEREAS on 12 August 2024, the Tribunal invited the Parties to indicate whether they would prefer to confer and jointly prepare a draft Procedural Order No. 1, or for the Tribunal to prepare a draft for the Parties' comments;

WHEREAS 16 August 2024, the Claimant indicated that it would prefer for the Tribunal to prepare a draft Order, whereas the Respondent indicated that it would prefer to jointly prepare a draft with the Claimant;

WHEREAS on 26 August 2024, the Tribunal circulated a draft Procedural Order No. 1 for the Parties' comments, in light of the Parties' indications;

WHEREAS on 30 September 2024, the Parties jointly submitted proposed amendments to the draft Procedural Order No. 1, and filed submissions on the areas of remaining disagreement, including the legal place (or seat) of the arbitration and the procedural timetable;

WHEREAS on 8 November 2024, the Parties informed the Tribunal that they had agreed upon the seat of the arbitration, and had agreed to exclude the procedural timetable from the Procedural Order No. 1 to be finalised by the Tribunal; and

WHEREAS this Procedural Order No. 1 records the agreement of the Parties on certain procedural matters and sets forth the Tribunal's directions, taking into account the Parties' views,

THE TRIBUNAL HEREBY ORDERS:

1. Language

- 1.1 The Parties shall submit their written submissions and other communications in English. Accompanying witness statements, expert reports, exhibits and legal authorities shall be submitted in their original language, together with a translation into English. If the documents requiring translation are lengthy and relevant only in part, it shall be sufficient to translate only relevant excerpts together with such other portions of the document necessary to place such excerpts in proper context (provided that only the translated portion may be relied upon).
- 1.2 Informal (non-certified) translations shall be accepted as accurate unless contested by the other Party or otherwise ordered by the Tribunal on its own motion. In the event of a challenge, the Parties shall attempt to reach agreement on the translation and, if necessary, produce a certified translation.
- 1.3 The Parties shall use their best efforts to resolve any conflicting translations prior to the relevant hearing. The Tribunal shall resolve any remaining differences after hearing the Parties.
- 1.4 Documents produced in response to requests or orders for production may be produced in their original language. If a Party submits any such document as an exhibit, the provisions of this section shall apply.
- 1.5 The Tribunal may require a Party to translate any document in whole or in part.

2. Place of the Arbitration

- 2.1 Pursuant to the Parties' agreement, the legal place (or seat) of the arbitration is Geneva, Switzerland.

3. Procedural Timetable

- 3.1 In its Response to the Notice of Arbitration, the Respondent raised objections to the jurisdiction of the Tribunal and the admissibility of the Claimant's claims, and requested that these objections be determined in a separate phase of the proceeding.
- 3.2 Pursuant to Article 25(1) of Chapter 11 of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area ("AANZFTA"), "[w]here issues relating to jurisdiction or admissibility are raised as preliminary objections, a tribunal shall decide the matter before proceeding to the merits".
- 3.3 Accordingly, the proceeding shall be bifurcated to address the Respondent's preliminary objections in a separate phase of the proceeding. The procedural timetable for the preliminary objections phase ("**Procedural Timetable**") will be determined by the Tribunal in due course, in consultation with the Parties.
- 3.4 Unless otherwise provided or directed by the Tribunal, all deadlines shall refer to 11.59pm (time of the legal place (or seat) of arbitration) on the day of the deadline.
- 3.5 Extensions of time may be agreed between the Parties or granted by the Tribunal for justifiable reasons, provided that such extensions do not affect the dates fixed for any hearing or other meeting and that the request for an extension is submitted as soon as practicable after a Party becomes aware of the circumstances that prevent it from complying with the deadline. Other than in cases of urgency, the Parties shall only seek an extension from the Tribunal after having conferred with the other Party.
- 3.6 The presiding arbitrator is authorised to make rulings on requests for limited extensions of time and other routine procedural issues, subject to reconsideration by the full Tribunal.

4. Filing of Written Submissions and Accompanying Documents

- 4.1 On or before the date of the deadline for any written submission, the Party in question shall send the submission, including any accompanying witness statements and expert reports, simultaneously to the Tribunal, the Secretary, the PCA and the opposing Party and its representatives, by e-mail.
- 4.2 All written submissions shall be accompanied by numerical indices of all exhibits, legal authorities, witness statements and expert reports submitted by that Party to date, separated by document type and describing each document by document number, date, title, author and recipient (as applicable).
- 4.3 Exhibits and legal authorities accompanying a submission must be uploaded and transmitted through a secure file sharing platform, administered by the PCA, within three business days from the deadline for the submission.

- 4.4 For any simultaneous submissions, each side shall submit all electronic and/or hard copies only to the PCA. The PCA will then distribute copies to the members of the Tribunal, the Secretary and the opposing Party and its representatives once both submissions have been received.

5. Content of Written Submissions and Accompanying Documents

- 5.1 The Parties shall set forth the facts and legal arguments on which they rely in their first exchange of submissions. 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. The Parties shall submit with their written submissions the evidence and authorities on which they rely in support of the factual and legal arguments advanced therein, including witness statements, expert reports, exhibits, legal authorities and all other evidence and authority in whatever form.
- 5.2 Absent a showing of good cause, the Parties' responsive submissions shall be limited to responding to allegations of fact and legal arguments made by the other Party in its immediately prior submission, or to address elements deriving from evidence obtained during the document production phase, unless new facts have arisen after the first exchange of submissions. To that end, additional evidence shall only be submitted in support of the factual or legal arguments advanced in rebuttal to the other side's prior written submission or in relation to new evidence arising from document production or new facts that have arisen.
- 5.3 Neither Party is permitted to submit additional evidence 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. Should such leave be granted, the other Party shall have an opportunity to submit rebuttal evidence.

6. Format of Written Submissions and Accompanying Documents

- 6.1 Written submissions shall contain a hyperlinked table of contents and paragraphs shall be consecutively numbered.
- 6.2 Written submissions and accompanying documents, including witness statements and expert reports, exhibits and legal authorities shall be provided as searchable Adobe Portable Document Format ("**PDF**") files where possible. However, Excel spreadsheets or other calculations performed by experts shall be provided in their native electronic format (*i.e.*, in Excel format rather than searchable PDF).
- 6.3 Exhibits shall be numbered consecutively throughout the proceedings, commencing with "CG-001" and "RG-001" respectively.
- 6.4 Legal authorities shall be numbered consecutively throughout the proceedings, commencing with "CGLA-001" and "RGLA-001" respectively.
- 6.5 Witness statements and expert reports should be numbered consecutively, beginning with "CGWS-001" and "RGWS-001", and "CGER-001" and "RGER-001", respectively, followed by the applicable name (*i.e.*, CGWS-001 [Smith]; CGWS-002 [Second Smith]).
- 6.6 The number of the exhibit, legal authority, witness statement and/or expert report shall appear on the first page of the document and shall also be incorporated into the file name of the electronic document.

6.7 Documents in a language other than English, to be submitted with an English translation further to paragraph 1.1, shall be identified with the suffix “T” (*i.e.*, CG-001T). The formatting of the translation shall follow the formatting of the original document as far as practicable. The translation shall be included in a single document, together and consecutively with the original.

7. Evidence

7.1 In addition to the relevant articles of the UNCITRAL Rules and the provisions on document production below, the Tribunal may be guided, but will not be bound by the *International Bar Association Rules on the Taking of Evidence in International Arbitration 2020* (“**IBA Rules**”) when considering matters of evidence.

7.2 All evidence submitted to the Tribunal shall be deemed to be authentic and complete, including evidence submitted in the form of copies, unless a Party disputes within a reasonable time its authenticity or completeness, or the Party submitting the relevant evidence indicates the respects in which any document is incomplete.

8. Document Production

8.1 Each Party may request the production of documents from the other Party in accordance with the Procedural Timetable.

8.2 Such a request for production shall:

- (a) identify each document or category of documents sought with precision;
- (b) specify why the documents sought are relevant to the dispute and material to the outcome of the case; and
- (c) explain why they are not in the possession or control of the requesting Party, but in the possession or control of the other Party.

8.3 Requests for the production of documents shall be in writing, using the model appended to this Procedural Order as **Annex I** (“**Document Production Schedule**”) and set forth reasons for the request in respect of each document or category of documents requested. Unless the requested Party objects to production, it shall produce the requested documents within the applicable deadline.

8.4 If the requested Party objects to production, the following procedure shall apply:

- (a) The requested Party shall submit a response stating which documents or category of documents it objects to producing. The response shall state the reasons for each objection in the Document Production Schedule provided by the requesting Party.
- (b) The requesting Party shall reply to the other Party’s objection, indicating whether it disputes the objection and the reasons therefor.
- (c) The Parties shall submit all outstanding requests, objections and replies to objections to the Tribunal for decision in the Document Production Schedule. The Parties shall use the same format throughout their exchange of requests, objections and replies.

- (d) The Tribunal shall rule on any outstanding requests, having regard to the requirements set out at paragraph 8.2, the legitimate interests of the other Party and all of the surrounding circumstances, including, as relevant, the burden of proof. The Tribunal may for this purpose be guided, but will not be bound by the IBA Rules. The Tribunal will also have regard to Article 26(5) of Chapter 11 of the AANZFTA.
 - (e) Documents ordered by the Tribunal to be disclosed shall be communicated directly to the requesting Party, without copying the Tribunal, within the deadline to be set forth in the Procedural Timetable.
- 8.5 The Tribunal reminds the Parties of their duty to act in good faith in the taking of evidence and within the framework of the processes laid down by the Tribunal in the production of documents. This requires the Parties not only to formulate narrow and specific document requests in the first instance, but also to cooperate in the process of achieving such formulations with respect to each other's requests. In consequence, a Party objecting to a request on grounds of overbreadth or excessive burden should indicate whether there is a narrower formulation with which it would be willing to comply. In reply, the requesting Party should likewise indicate, in addition to any comments on the other Party's objection to its original formulation, whether there is a narrower formulation that it would be willing to accept. The Parties should not shift entirely to the Tribunal the burden of identifying potential alternate formulations that avoid excessive burden while still allowing production of documents that are relevant and material to the outcome of the case.
- 8.6 Pursuant to the UNCITRAL Rules, the Tribunal may also, on its own motion, request the production of documents.
- 8.7 The Parties shall not copy the Tribunal on their correspondence or exchanges of documents in the course of the document production phase. Documents produced by the Parties in response to document production requests or Tribunal orders (except pursuant to paragraph 8.6 above) shall only form part of the evidentiary record if a Party subsequently submits them as exhibits to its written submissions or upon authorisation of the Tribunal after the exchange of submissions.
- 8.8 Should a Party fail to produce documents as ordered by the Tribunal, the Tribunal may draw the inferences it deems appropriate in relation to the documents not produced.

9. Witnesses

- 9.1 Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative. Party representatives and other fact witnesses shall be heard in the same manner.
- 9.2 For each witness, a written and signed witness statement shall be submitted to the Tribunal. Where in exceptional circumstances a Party is unable to obtain such a statement from a witness, the evidence of that witness shall be admitted only with leave of the Tribunal and, if the Tribunal grants such leave, in accordance with its directions.
- 9.3 Each witness statement shall contain at least the following:
- (a) the name, date of birth, and present address of the witness;
 - (b) a description of the witness's position and qualifications, if relevant to the dispute or to the contents of the statement;

- (c) a description of any past and present relationship between the witness and the Parties, counsel, or members of the Tribunal;
 - (d) a description of the facts on which the witness's testimony is offered and, if applicable, the source of the witness's knowledge; and
 - (e) the signature of the witness.
- 9.4 It shall not be improper for counsel to meet with witnesses and potential witnesses to establish the facts, prepare the witness statements and prepare for examination at a hearing.
- 9.5 Each Party shall notify witnesses to be examined in accordance with the Procedural Timetable. If a Party's witness is not called by the opposing Party, the Tribunal may, on its own motion, call the witness for examination at the hearing. The presenting Party may also apply for leave from the Tribunal to call their own witness to appear at the hearing. If a Party elects not to cross-examine a witness, that witness' statement shall remain admissible, but the facts contained therein shall not be deemed established by the fact that no cross-examination has been requested. The statement of such a witness shall be examined and weighed by the Tribunal, in its discretion, in light of all the evidence presented by the Parties.
- 9.6 The Tribunal may, having regard to all the relevant 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.
- 9.7 Witnesses shall in principle be summoned by the presenting Party. When the witness whose cross-examination has been requested by the other Party does not attend the hearing, the witness statement of such witness shall in principle be disregarded, unless the Parties agree or the Tribunal determines otherwise in light of the relevant circumstances.
- 9.8 If circumstances so justify, the Tribunal may allow a witness to appear and be examined by video-conference or other means and will issue appropriate directions.
- 9.9 Written statements shall be submitted in lieu of direct examination, provided however that, for fact witnesses, the presenting Party may conduct up to 10 minutes of direct examination, which shall be limited to introductory questions, corrections to the written statement and questions about matters that have arisen after the last opportunity for the Party who presented the witness to file witness statements.
- 9.10 The Tribunal remains in control over the examination of witnesses and may ask questions of the witnesses at any time. The Tribunal may also permit the Parties to ask questions of the witnesses under the control of the Tribunal.
- 9.11 Any further issues relating to the testimony of witnesses at an oral hearing, including the order of appearance, the scope of cross-examination, the sequestration of witnesses and the form and content of oaths or affirmations, shall be addressed by the Tribunal in a pre-hearing procedural order, after consultation with the Parties.

10. Experts

- 10.1 Each Party may retain and submit the evidence of one or more experts to the Tribunal.
- 10.2 For each expert, a written and signed expert report shall be submitted to the Tribunal.

- 10.3 The provisions of Section 9 apply to experts *mutatis mutandis*.
- 10.4 Expert reports shall identify the area of the expert's expertise, including their background, qualifications, training and experience. Expert reports shall also contain a description of the instructions pursuant to which the experts have provided their opinion, a statement of their independence from the Parties, counsel and members of the Tribunal, and a description of the method, evidence and information used in arriving at their conclusions.
- 10.5 Expert reports shall be accompanied by any documents or information upon which they rely, unless such documents or information have already been submitted with the Parties' written submissions, in which case the reference to the relevant document, identifying the number of the exhibit, shall be sufficient.
- 10.6 An expert may make a presentation to the Tribunal summarising their evidence in lieu of direct examination, not to exceed a duration to be determined by the Tribunal in a pre-hearing procedural order, after consultation with the Parties.
- 10.7 Any further issues relating to the testimony of experts at an oral hearing shall be addressed by the Tribunal in a pre-hearing procedural order, after consultation with the Parties.
- 10.8 The Tribunal may, on its own motion or at the request of a Party, appoint one or more experts. The Tribunal shall consult with the Parties on the selection and the terms of reference (including expert fees) of any such expert, and provide the Parties with an opportunity to comment on the expert's conclusions.

11. Hearings

- 11.1 A pre-hearing video-conference shall be held prior to each hearing to review procedural, administrative and logistical matters in advance of the hearing. The pre-hearing video-conference may be conducted by the presiding arbitrator, on behalf of the full Tribunal, unless the Parties or the Tribunal agree otherwise.
- 11.2 The Tribunal shall issue for each hearing, after consultation with the Parties, a procedural order convening the hearing, establishing its place, time, sequence, length of testimony and/or oral argument, court reporters, transcription and all other technical and ancillary aspects, including whether the hearing is conducted *in personam* or through video-conference, and the deadlines for any submissions following the hearing.
- 11.3 The Tribunal shall hold a hearing on the Respondent's preliminary objections on the dates to be set out in the Procedural Timetable. The hearing may be held in-person or remotely on a video-conferencing platform. The Tribunal will determine, after consultation with the Parties, the format and location of the hearing sufficiently in advance to allow the necessary logistical arrangements to be made. The number of days necessary for the hearing shall be determined, at the latest, at or immediately after the pre-hearing conference.
- 11.4 With the exception of procedural or organizational meetings, hearings shall be sound recorded and transcribed verbatim as follows:
 - (a) Live Notes or a similar court reporting system shall be used to make the transcript instantaneously accessible to the Parties and the Tribunal.

- (b) Electronic versions of the transcripts shall be provided by e-mail on the same day to the Parties and the Tribunal.
- (c) The Parties shall agree on the corrections to the transcript by a deadline to be fixed by the Tribunal in consultation with the Parties at the end of the hearing.

11.5 The Parties and the PCA shall make the necessary arrangements for the reservation of the hearing rooms, breakout rooms, video-conferencing platform, and if applicable, court reporters, interpreters and other logistics. The form of interpretation for any witness or expert evidence shall be determined by the Tribunal in a pre-hearing procedural order.

11.6 Expenses incurred in connection with the hearing, including for hearing rooms, court reporters and other matters, shall initially be shared equally between the Parties, without prejudice to the Tribunal's decision on the costs of the arbitration.

12. Post-Hearing Submissions and Cost Submissions

12.1 The Parties and the Tribunal shall discuss at the conclusion of each hearing whether post-hearing submissions are desirable and, if this is the case, the content, length and format of such submissions. The Tribunal shall also establish, in consultation with the Parties, a schedule for the Parties' cost submissions.

13. Transparency

13.1 The rules on transparency governing this arbitration are set out in Article 26 of Chapter 11 of the AANZFTA:

Article 26 Transparency of Arbitral Proceedings

1. Subject to Paragraphs 2 and 3, the disputing Party may make publicly available all awards and decisions produced by the tribunal.
2. Any of the disputing parties that intend to use information designated as confidential information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.
3. Any information specifically designated as confidential that is submitted to the tribunal or the disputing parties shall be protected from disclosure to the public.
4. A disputing party may disclose to persons directly connected with the arbitral proceedings such confidential information as it considers necessary for the preparation of its case, but it shall require that such confidential information is protected.
5. 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.
6. The non-disputing Party shall be entitled, at its cost, to receive from the disputing Party a copy of the notice of arbitration, no later than 30 days after the date that such document has been delivered to the disputing Party. The disputing Party shall notify all other Parties of the receipt of the notice of arbitration within 30 days thereof.

13.2 The UNCITRAL Rules on Transparency shall not apply in the proceeding, unless the Parties agree otherwise.

- 13.3 The Parties shall confer in an effort to agree on rules for the protection of any confidential information pursuant to Article 26 of Chapter 11 of the AANZFTA, to be addressed in a further procedural order.
- 13.4 Notwithstanding the foregoing, the PCA shall be authorised to publish on its website the fact of the existence of the arbitration, the names of the Parties, counsel representing the Parties and the members of the Tribunal. The PCA shall provide, prior to publication, a draft of the contents of the webpage relating to the case to the Tribunal and the Parties for their approval.
- 13.5 Additional measures on transparency shall be determined by agreement between the Parties or, in the absence of such agreement, by the Tribunal in consultation with the Parties.

14. Third-Party Funding

- 14.1 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 defence of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding. If such non-party is a juridical person, the notice shall disclose the names of the individuals and entities that own or control such juridical person.
- 14.2 A Party shall make the disclosure referred to in paragraph 14.1 to the Tribunal upon the issuance of this Procedural Order No. 1 or, if the funding arrangement is entered into at a later stage, immediately upon concluding such funding arrangement. The Party shall immediately notify the Tribunal of any changes to the information in the disclosure.
- 14.3 The Tribunal may order disclosure of further information regarding the funding arrangement and the non-party providing funding.



Dr. Veijo Heiskanen
(Presiding Arbitrator)

On behalf of the Tribunal

ANNEX I: MODEL DOCUMENT PRODUCTION SCHEDULE

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