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. 3
(Transparency / Confidentiality)

Tribunal

Prof. Gabrielle Kaufmann-Kohler (Presiding Arbitrator)
Mr. William Kirtley
Prof. Donald McRae

Tribunal Secretary
Mr. Lukas Montoya

Registry
Mr. Bryce Williams
Permanent Court of Arbitration

19 January 2024

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

I. PROCEDURAL BACKGROUND

1. On 1 September 2023, the Parties and the Tribunal entered into the Terms of Appointment ("ToA") for these proceedings. Paragraph 18.1 refers to the regulation of transparency contained in Article 26 of Chapter 11 of the AANZFTA, and Paragraph 18.2 provides as follows:

> In accordance with the above, additional measures of transparency shall be determined by agreement between the Parties or, in the absence of such agreement, by the Tribunal. The Tribunal will provide a draft order to facilitate the Parties' discussions.

2. On 17 November 2023, further to Paragraph 18.2 of the ToA, the Tribunal provided the Parties with a draft of this Procedural Order ("Draft PO3"), and invited them to engage in consultations and revert by 1 December 2023.

3. On 28 November 2023, the Parties met virtually to discuss Draft PO3 and subsequently exchanged written comments on the same.

4. On 1 December 2023, the Parties commented on Draft PO3 and provided additional comments in separate letters.

5. This Procedural Order records the Parties' agreement or the Tribunal's determinations on transparency/confidentiality.

II. ANALYSIS

6. The legal framework governing the transparency/confidentiality regime applicable to these proceedings is determined by (in the following order of precedence):

   i. Chapter 11 of the AANZFTA (the "Treaty") (**A**).

   ii. The mandatory provisions of the *lex arbitri*, namely the Swiss Private International Law Act ("PILA") (**B**).

   iii. The mandatory provisions of the (2021) UNCITRAL Arbitration Rules (**C**).

   iv. The Parties' agreement, where neither of the foregoing instruments deals with a given issue (**D**).

   v. The Tribunal's decision (**E**).

A. THE TREATY

7. Article 26 of the Treaty, titled "Transparency of Arbitral Proceedings", reads as follows:

> 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.

8. In keeping with its title, a closer look at Article 26 shows that it assumes that proceedings are transparent. The best illustration may be found in Article 26(2), which provides that when the Parties intend to use information designated as confidential during a hearing, they must inform the Tribunal. The Tribunal is then required to protect that information from disclosure. Differently stated, a Party must assert confidentiality when confidential matters are raised at a hearing. Further, Article 26(5) addresses exceptions to transparency, i.e. situations where information is protected from disclosure. If confidentiality of the proceedings and non-disclosure of information were the predominant principle, there would be no need to specify when information cannot be made accessible to third parties. Moreover, Article 26(3) stipulates that information submitted to the Tribunal or to either Party shall be protected from disclosure to the public if specifically designated as confidential. *A contrario* this implies that, absent such a specific confidentiality designation, the information in the record may be disclosed to the public.

9. That being said, the Treaty does not establish a comprehensive transparency regime. While it considers transparency as the rule, subject to exceptions, it only contains a fragmented regulation of transparent proceedings. In particular, it does not appear to fully delimit the exceptions to transparency, nor does it address the transparency regime for all the aspects of an arbitration. Specifically, it does not explicitly refer to the transcripts/recordings of hearings, the Parties' written submissions, factual exhibits, legal authorities, witness statements, expert reports, or the correspondence between the Parties and the Tribunal.

B. THE PILA

10. The PILA is non-prescriptive in terms of transparency/confidentiality, but nevertheless contains rules that are of assistance in the present context. Articles 182(1) and (2) of the PILA provide that, where no mandatory rules of procedure apply, the solution will depend, first, on the disputing parties' agreement and second, in the absence of an agreement, on the decision of the tribunal. Under Article 182(1), the disputing parties can agree on a procedural matter by submitting to a set of arbitral rules, which they did here in the form of the (2021) UNCITRAL Arbitration Rules (**C**), or directly through ad hoc solutions, which they did here as well (**D**).

C. THE UNCITRAL ARBITRATION RULES

11. Article 28(3) of the UNCITRAL Arbitration Rules states that "[h]earings shall be held in camera unless the parties agree otherwise", while Article 34(5) states that "[a]n award may be made public with the consent of all parties". However, these provisions are incompatible with and are thus superseded by Articles 26(1) and (2) of the Treaty, which prevails in the hierarchy of norms.

D. THE PARTIES' AGREEMENT

12. Regarding transparency, the Parties agree on the following arrangements:

    i. The PCA shall publish on its website the fact of the existence of the arbitration, as well as the names of the Parties, counsel representing the Parties, and the members of the Tribunal. This agreement is consistent with the Treaty's underlying assumption of transparency.

    ii. The PCA shall publish on its website the Tribunal's awards, decisions, and orders. This agreement aligns with Article 26(1) of the Treaty, while expanding its scope to include orders (beyond awards and decisions) and removing the sole discretion of publication from the Respondent. That agreement also conforms with the transparency assumption underlying the Treaty.

    iii. "Protected Information" shall be safeguarded from disclosure to the public. To implement this agreement, the Parties define the term "Protected Information" and the procedure to effect protection. This agreement is compatible with the rationale behind Articles 26(2)-(5) of the Treaty and largely corresponds to parameters for protection from publication found in other investment arbitration texts. For instance, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, or the (2022) ICSID Arbitration Rules.

    iv. Supporting documents like factual exhibits and legal authorities shall not be public, unless otherwise agreed by the Parties. The Treaty does not appear to impose a different solution. While the Treaty favors transparency, the implementation of that transparency must be reasonably consistent with the efficient conduct of the arbitration. Given the volume of the record already at this early stage, it would be impractical and highly cost-inefficient for the Parties and the Tribunal to engage in the exercise of identifying and redacting the protected portions of factual exhibits prior to their publication. In addition, legal authorities are generally publicly accessible, making their publication unnecessary.

    v. The correspondence between the Parties and the Tribunal shall not be public, unless otherwise agreed by the Parties. Nothing in the Treaty appears to dictate a different solution and the reasoning in (iv) above applies equally *mutatis mutandis*.

13. Accordingly, the Tribunal comes to the conclusion that the Parties' agreements are compatible with the Treaty and form part of the transparency regime governing these proceedings.

E. THE TRIBUNAL'S DECISION

14. There remain a few issues that are not covered by the normative framework set out above and on which the Parties do not agree. In application of the *lex arbitri*, it is thus for the Tribunal to decide these issues. It will do so taking into account the Treaty's underlying assumption of transparency; the interest of the public in accessing information on investment disputes, as these disputes involve public interests affecting a state's population and budget; the need to safeguard confidential or otherwise protected information from disclosure which would harm various private or public interests; the Parties' due process rights and the integrity of the proceedings, including the risks of aggravating the dispute; and the Tribunal's duty to conduct the proceedings efficiently both in terms of costs and time.

15. The following issues are still open or at least are required to be mentioned in this context:

i. **Hearings**. As discussed above, the Treaty in Article 26(2) envisages open hearings, subject to the Tribunal adopting appropriate measures to safeguard protected information. Hence, the Parties' disagreement in this respect is immaterial. A connected question is whether procedural conferences should also be accessible to the public. Article 26(2) does not appear to extend to procedural conferences, and the Tribunal fails to see the public interest in open procedural conferences. Therefore, hearings (other than procedural conferences) shall be open to the public.

ii. **Transcripts and recordings of hearings**. To the extent that the Treaty envisages open hearings, the Tribunal sees no reason to adopt a different rule with respect to the transcripts, subject to the redaction of protected information. As for recordings, their redaction may entail higher and distinct costs compared to those of redacting transcripts. In addition, if the hearing is open and the transcript accessible, it is reasonable to say that the public will be sufficiently informed about developments in the arbitration without the publication of recordings. Therefore, on balance, the Tribunal comes to the conclusion that sound and/or video recordings should not be made public.

iii. **Written submissions**. In the Tribunal's view, there is an obvious public interest in the publication of the main written submissions on jurisdiction, admissibility and merits, as these submissions reflect the contents of the dispute. In respect of the current Procedural Calendar, these submissions appear in items 1, 7, 8, 15 and 16. Their disclosure is in conformity with the transparency assumption underlying the Treaty. Moreover, the Tribunal understands that important aspects of the dispute are already in the public domain as a result of the proceedings before the Australian courts. On the other hand, submissions by definition advocate a one-sided position and do not always provide a complete and balanced view of the dispute. Their publication hence entails the risk of aggravating the dispute and giving the public a distorted view of the facts and issues at stake. This risk is heightened considering the potentially sensitive matters in dispute in this arbitration. To avoid such counterproductive consequences of transparency, the Tribunal considers that the main written submissions shall be published at the end of the hearing to which they relate, namely the hearing on preliminary objections or merits.

iv. **Witness statements and expert reports**. In light of the previous determinations, publishing witness statements and expert reports would minimally, if at all, contribute to advancing the Treaty's transparency assumption or the public interest in the dispute. The key content of these documents will be addressed during open hearings, reflected in the publicly available transcripts, and their essence will also be incorporated into the Parties' written submissions or the Tribunal's awards, decisions, or orders. In addition, the redaction procedures related to potentially protected information in witness statements and expert reports are likely to result in significant extra costs and effort that do not appear justified by the added value of publication, if any. Therefore, witness statements and expert reports shall not be made public, unless otherwise agreed by the Parties.

III. CONCLUSIONS

16. The Tribunal has transposed the conclusions reached in the prior sections in a set of rules, which are found in Annex I.

17. To facilitate the redaction process specified in further detail in Annex I, the Parties shall use the transparency schedule contained in Annex II.

18. Finally, the Tribunal notes that the Respondent has made a proposal for information exchange between this arbitration and PCA Case No. 2023-67 (the "Second Arbitration") and that the Claimant had no opportunity to comment on such proposal. Therefore, the Claimant will now be given this opportunity and the Tribunal will rule on this separate issue after having reviewed the Claimant's views.

IV. ORDER

19. For the foregoing reasons, the Tribunal:

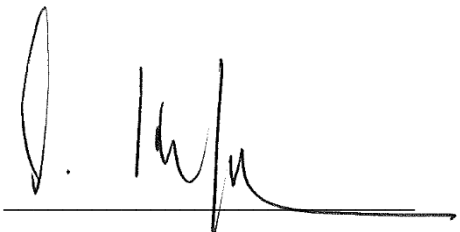
i. Adopts the Transparency Rules and the Transparency Schedule set forth in Annexes I and II to this Procedural Order, which form an integral part of this Order.

ii. Invites the Claimant to comment on the Respondent's proposal for information exchange between this arbitration and the Second Arbitration, by **2 February 2024**.

Seat of the arbitration: Geneva, Switzerland

Date: 19 January 2024

On behalf of the Tribunal,



Prof. Gabrielle Kaufmann-Kohler

President of the Tribunal

ANNEX I: TRANSPARENCY RULES

(Revised on 14 February 2024)

A. Existence of the Arbitration and Basic Case Information

1. The PCA shall publish the fact of the existence of the arbitration, the names of the Parties, counsel representing the Parties, and the members of the Tribunal on its website. The PCA shall provide an advance draft of the contents of any webpage relating to the case to the Tribunal and the Parties for their approval prior to publication on its website.

B. Hearings

2. Hearings (other than procedural conferences) shall be open to the public. After consultation with the Parties, the Tribunal will determine how to implement such publicity and make appropriate arrangements, in consultation with the Parties and the PCA, to protect any Protected Information in accordance with Section I below.

C. Transcripts and Recordings Of Hearings

3. Transcripts of hearings (other than of procedural conferences) shall be published on the PCA website, subject to any redactions of Protected Information in accordance with Section I below.

4. Recordings of hearings (including sound recordings made pursuant to paragraph 8.5 of Procedural Order No. 1) shall not be made public, unless otherwise agreed by the Parties within 15 days of the circulation of the recording to the Parties.

D. Award(s)

5. Award(s) shall be published on the PCA website, subject to any redactions of Protected Information in accordance with Section I below.

6. To that end, the Parties agree that the Tribunal shall not become *functus officio* until it has decided any disputed redactions of the Final Award or of any interpretation, correction, or additional Award pursuant to Articles 37, 38, or 39 of the UNCITRAL Arbitration Rules.

E. Orders And Decisions

7. Procedural orders and decisions shall be published on the PCA website, subject to any redactions of Protected Information in accordance with Section I below.

8. The PCA shall publish on its website Procedural Orders No. 1 and 2.

F. Written Submissions

9. The Parties' main written submissions shall be published on the PCA website at the end of the hearing to which they relate, subject to any prior redactions of Protected Information in accordance with Section I below. In respect of the current Procedural Calendar, the main written submissions are listed in items 1, 7-8, 15-16, and will be published at the end of the hearing mentioned in item 19.

G. SUPPORTING DOCUMENTS

10. Supporting documents, namely factual exhibits, legal authorities, witness statements, and expert reports (including annexes, appendices, or exhibits thereto) shall not be made public, unless otherwise agreed by the Parties within 30 days of the filing of the respective supporting document.

11. For the avoidance of doubt, documents produced by one Party to the other Party pursuant to Section 5 of Procedural Order No. 1 and not filed as exhibits shall not be made public, unless the Parties agree otherwise no later than 15 days from the production of those documents.

H. CORRESPONDENCE

12. Correspondence between the Parties and the Tribunal shall not be made public, unless otherwise agreed by the Parties.

I. REDACTION AND NON-DISCLOSURE OF PROTECTED INFORMATION

13. Protected Information shall be protected from disclosure to the public.[1]

14. "Protected Information" means information that is not already in the public domain (other than information in the public domain contrary to an order of the Tribunal):

    i. that is deemed as such by agreement of the Parties, including as a result of the process set out below;

    ii. the disclosure of which would impede law enforcement;

    iii. the disclosure of which would be contrary to Australia's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions;

    iv. the disclosure of which Australia determines to be contrary to its essential security interests;

    v. the disclosure of which would make public commercially or technically sensitive information;

    vi. the disclosure of which would aggravate the dispute between the Parties or jeopardize the integrity of the arbitral process; or

    vii. the disclosure of which would be contrary to the law or rules that the Tribunal determines to be applicable to the disclosure of such information, after consultation with the Parties.

15. A Party shall specifically designate any Protected Information and give notice to the Tribunal and the other Party that it requests the non-disclosure of such information within 30 days of:

    i. the distribution of finalized transcripts to the Parties (Section C above);

    ii. the issuance of any award, decision, or procedural order (Sections D and E above); or

    iii. the filing of any written submission by that Party or the other Party (Section F above). With respect to the Statement of Claim (listed in item 1 of the current Procedural Calendar), the 30-day deadline starts running as of the issuance of Procedural Order No. 3.

[1] The content of Articles 26(2)-(5) of the Treaty is subsumed in the definition of "Protected Information" in paragraph 14 below, and implemented in paragraphs 15 and subsequent of this Annex.

16. Such notice shall identify the part(s) of the document sought not to be disclosed in the form of proposed redactions (in a separate copy of the document attached to the notice).

17. Absent such notice, and unless the Tribunal otherwise determines that compelling interests require information to be protected in accordance with this Section I, the Tribunal will authorize the PCA to publish the document without redactions.

18. Within 30 days from such notice, the other Party may raise reasoned objections to the designation:

    i. If no objections are raised, the PCA will publish the document at issue with the requested redactions;

    ii. If objections are raised, the Parties shall confer and seek to resolve the disagreement within 15 days. If the Parties reach an agreement, the PCA will publish the document at issue with the agreed redactions. The Parties shall cooperate in good faith in resolving any objections and it is the Tribunal's expectation that disputes will only be referred to it in exceptional circumstances;

    iii. If objections remain unresolved, the disputed redaction requests and the related objections shall be submitted to the Tribunal in the form of the Transparency Schedule set out in Annex II to Procedural Order No. 3 (in both .docx and .pdf formats);

    iv. The Tribunal will then decide whether the designated information is to be protected and the PCA will publish the document with any redactions as decided by the Tribunal.

19. If the Parties agree to publish materials addressed in Paragraphs 4, 10 or 12 above, the Tribunal will give directions on the process to determine whether information contained in those materials must be protected from disclosure.

J. DOCUMENT SHARING WITH SECOND ARBITRATION

20. For the purposes of this Section J, the "Second Arbitration" means PCA Case No. 2023-67.

21. Where the Tribunal issues a procedural order, decision or award, it may be shared with or used in the Second Arbitration without requiring leave from the Tribunal or agreement between the Parties, subject to any redactions of Protected Information agreed by the Parties or decided by the Tribunal in accordance with Section I above.

22. Where a Party produces or files a document in the course of this arbitration (including but not limited to a witness statement, expert report, exhibit, written submission, document produced during document production, correspondence, evidence, or otherwise), it may be shared with or used in the Second Arbitration without requiring leave from the Tribunal or agreement between the Parties, subject to any redactions of Protected Information agreed by the Parties or decided by the Tribunal in accordance with Section I above.

23. Under this Section J, procedural orders, decisions, awards, and documents referred to in paragraphs 21 and 22 may be shared with or used in the Second Arbitration only for purposes of the Second Arbitration.

24. The obligations on the Parties created by this Section J shall survive the termination of this arbitration.

ANNEX II: TRANSPARENCY SCHEDULE

[Party]'s Protected Information Request No. [#]	
Information sought to be protected	
Legal basis for protection	
Comments from requesting Party	
Objection to Request from opposing Party	
Decision	