

**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”)**

**(PCA Case No. 2023-40)**

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**TERMS OF APPOINTMENT**

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*Tribunal*

Prof. Gabrielle Kaufmann-Kohler (Presiding Arbitrator)

Mr. William Kirtley

Prof. Donald McRae

**1 September 2023**

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- b. to the “parties assisting”, by email to: [REDACTED];
- c. and, if in hard copy, to the following address:

Zeph Investments Pte. Ltd.  
c/- Mineralogy Pty Ltd

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

1.3. The respondent is the Commonwealth of Australia (the “Respondent” or “Australia” and, together with the Claimant, the “Parties”). The Respondent is represented in this arbitration by:

- Jesse Clarke  
General Counsel (International Law)  
Office of International Law  
Attorney-General's Department  
Robert Garran Offices  
3-5 National Circuit  
Barton ACT 2600  
Australia  
Tel: + 61 2 6141 6666  
Email: jesse.clarke@ag.gov.au
  
- Dr. Stephen Donaghue KC  
Solicitor-General of Australia  
Attorney-General's Department  
Robert Garran Offices  
3-5 National Circuit  
Barton ACT 2600  
Australia  
Email: [REDACTED]  
[REDACTED]  
Copied to christine.moy@ag.gov.au
  
- Sam Wordsworth KC  
Essex Court Chambers  
24-28 Lincoln's Inn Fields  
London WC2A 3EG  
United Kingdom  
Email: swordsworth@essexcourt.net

- Prof. Chester Brown  
7 Wentworth Selborne Chambers  
7 /180 Phillip St  
Sydney NSW 2000  
Australia  
Email:   cbrown@essexcourt.net  
          cwb@7thfloor.com.au
- Dr. Naomi Hart  
Essex Court Chambers  
24-28 Lincoln's Inn Fields  
London WC2A 3EG  
Email:   naomihart@essexcourt.net

1.4. All correspondence and documents in this arbitration directed to the Respondent shall be delivered to the Respondent's representatives listed above. Hard copies, where required, shall be delivered exclusively to Mr. Jesse Clarke at the address mentioned above.<sup>2</sup>

## 2. The Arbitral Tribunal

2.1. The Claimant appointed as arbitrator:

**Mr. William Kirtley**

Aceris Law LLC

[REDACTED]

[REDACTED]

[REDACTED]

Tel.: [REDACTED]

Email: [REDACTED]

2.2. The Respondent appointed as arbitrator:

**Prof. Donald McRae**

Faculty of Law, Common Law Section University of Ottawa

[REDACTED]

[REDACTED]

[REDACTED]

Tel: [REDACTED]

Email: [REDACTED]

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<sup>2</sup> Response, §44.

2.3. The Parties appointed as President of the Tribunal:

**Prof. Gabrielle Kaufmann-Kohler**

Lévy Kaufmann-Kohler

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Tel: [REDACTED]

E-mail: [REDACTED]

2.4. In the context of the constitution of the Tribunal, each Member of the Tribunal made disclosures. The Parties confirm that they have seen these disclosures and that they have no objection arising from the disclosures or otherwise to the constitution of the Tribunal or to any of its Members on the basis of facts of which they have knowledge.

2.5. For the Members of the Tribunal to fulfil their continuing disclosure obligation, the Tribunal asks each Party to promptly advise it of any circumstance in respect of which that Party considers that further information would be appropriate as soon as such circumstance becomes known to that Party.

**3. Tribunal Secretary**

3.1. With the consent of the Parties, the Tribunal appoints as Secretary:

**Mr. Lukas Montoya**

Lévy Kaufmann-Kohler

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Tel: [REDACTED]

E-mail: [REDACTED]

3.2. The Secretary is and shall remain impartial and independent of the Parties. His CV has been circulated to the Parties.

3.3. The Secretary shall undertake only such specific tasks as are assigned to him by the Tribunal or the President, which may include:

- i. Assisting the Tribunal or the President in the review of the evidence and of the issues in dispute, including through the review of submissions and

evidence, preparation of summaries and/or memoranda, and research on specific factual or legal issues;

- ii. Assisting the Tribunal or the President in the preparation and communication of the Tribunal's decisions to the Parties on issues of procedure and substance, including by preparing initial drafts of procedural orders and awards, under the direction and supervision of the President;
  - iii. Providing other administrative support to the Tribunal and the President, at any time, especially during hearings and deliberations, which the Secretary may attend.
- 3.4. Under no circumstances shall the Tribunal or the President delegate any decision-making functions to the Secretary, and the President shall ensure that the Secretary does not influence the Tribunal's decision-making in any manner. The Secretary will work at all times under the specific instructions and continuous control and supervision of the President.
- 3.5. The Secretary will not duplicate the work performed by the PCA counsel assigned to this arbitration.

#### **4. The Tribunal's Fees and Expenses**

- 4.1. In accordance with Article 23(5) of the Agreement Establishing the ASEAN - Australia-New Zealand Free Trade Area ("AANZFTA")<sup>3</sup> and Article 41 of the UNCITRAL Arbitration Rules (2021) (the "UNCITRAL Rules"), the fees of the Arbitral Tribunal shall be reasonable, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the Tribunal members and any other relevant circumstances of the case.
- 4.2. Each member of the Tribunal shall be remunerated at an hourly rate of EUR 650. The Secretary shall be remunerated at an hourly rate EUR 300. Travel time shall be remunerated at half rate.
- 4.3. The members of the Tribunal and the Secretary shall be reimbursed for all travel expenses, disbursements and charges reasonably incurred in connection with the arbitration (including telecommunication and IT, courier, and other office

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<sup>3</sup> Article 23(5) of the AANZFTA: "The disputing parties may establish rules relating to expenses incurred by the tribunal, including arbitrators' remuneration."

expenses). Value Added Tax (VAT) and any other local tax or duty applicable to any Tribunal member's fees shall also be reimbursed.

- 4.4. Members of the Tribunal shall submit a statement for fees and expenses and be paid quarterly. In any event, outstanding fees, expenses and disbursements shall be paid before any final award is issued . In the event that the Parties enter into an amicable settlement before the award is issued, any outstanding fees and expenses not covered by the deposit will be paid by the Parties within three weeks of receipt of the related invoice.
- 4.5. Non-refundable expenses incurred in connection with a hearing resulting from a postponement or cancellation of the hearing shall be reimbursed.

## **5. Procedural Background**

- 5.1. On 29 March 2023, the Claimant served a "Notice of Arbitration" dated 28 March 2023 (the "NoA") on the Respondent pursuant to the provisions of Articles 20, 21 and 22 of Chapter 11 of AANZFTA. The Claimant appointed Mr. William Kirtley as arbitrator.
- 5.2. On 28 April 2023, the Respondent submitted its "Response to the Notice of the Arbitration" of the same date (the "Response"). The Claimant appointed Prof. Donald McRae as arbitrator.
- 5.3. On 9 June 2023, the Parties advised Prof. Gabrielle Kaufmann-Kohler that they had agreed to appoint her as presiding arbitrator in this arbitration, and requested her to accept the appointment.
- 5.4. On 12 June 2023, Prof. Gabrielle Kaufmann-Kohler accepted the appointment and made certain disclosures based on the information supplied by the Parties. She requested the Parties to provide the NoA, Response and accompanying documents.
- 5.5. On 19 June 2023, the Tribunal acknowledged receipt of these documents and confirmed that it was duly constituted. It recalled that the Parties had agreed (i) to conduct this arbitration under the UNCITRAL Rules; (ii) that the Permanent Court of Arbitration ("PCA") would administer the proceedings, to which the PCA had agreed; (iii) to appoint the Secretary-General of the PCA as Appointing Authority under the UNCITRAL Rules; and, (iv) that English would be the language of the arbitration. The Parties were advised that the Tribunal would circulate draft Terms

of Appointment and a draft Procedural Order No. 1 for the Parties' written comments and discussion at an initial procedural hearing, together with the timetable for this arbitration. On the latter point, the Tribunal noted that (i) pursuant to Article 25(1) of the AANZFTA, it was to decide the Respondent's preliminary objections before proceeding to the merits;<sup>4</sup> and (ii) the Claimant had elected for its NoA to be treated as its Statement of Claim pursuant to Article 21(1) of the UNCITRAL Rules.<sup>5</sup> By contrast, the Respondent had not elected for its Response to be treated as its Statement of Defence.<sup>6</sup> Finally, the Tribunal proposed several dates and times for the initial procedural hearing via videoconference on Zoom.

- 5.6. On 20 June 2023, the Claimant sent the President several communications exchanged between the Parties. The President forwarded these communications to the entire mailing list, reminding the Parties that all communications from the Parties to the Tribunal were to be sent to each member of the Tribunal and to the opposing Party.
- 5.7. On the next day, the Claimant stated its availability for the initial hearing on either 18 or 19 July 2023 at 08:00 (CET). It requested the Tribunal to pass directions on the seat of the arbitration and on the site visit it had proposed in its NoA at or immediately following the initial hearing. It added that it would request interim measures before the hearing and proposed a schedule for that request, including a one-day hearing before the end of August 2023.
- 5.8. On 22 June 2023, the Tribunal advised the Parties that the Claimant's communication just mentioned contained several points that the Tribunal would add in the forthcoming draft initial documents as agenda items for the Parties' written comments in advance of the initial hearing as well as for discussion at the hearing.
- 5.9. On 23 June 2023, the Claimant advised the Tribunal of an addition to its list of representatives. It requested permission to file short submissions on the seat of the arbitration and on the site visit before the initial hearing.
- 5.10. On the same day, the Tribunal clarified that the Parties would have the opportunity to comment on the forthcoming draft procedural documents in advance of the initial

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<sup>4</sup> Article 25(1), Chapter 11 of the AANZFTA: "Where issues relating to jurisdiction or admissibility are raised as preliminary objections, a tribunal shall decide the matter before proceeding to the merits".

<sup>5</sup> NoA, 48.

<sup>6</sup> Response, 52.

hearing. That would be the time to make submissions on the seat of the arbitration and other matters.

- 5.11. On 26 June 2023, the Respondent advised the Tribunal that its availability for the initial hearing was limited to 10 August 2023. It stated that the Tribunal should decide on the site visit the Claimant had requested after it ruled on the Respondent's preliminary objections. It added that it would liaise with the Claimant on the seat of the arbitration as well as on the transparency of the proceedings. Finally, it would need "sufficient time" to reply to the Claimant's forthcoming request for interim relief bearing in mind that it also had to prepare its submissions on its preliminary objections.
- 5.12. On the same day, the President made certain further disclosures based on the information contained in the NoA and Response. Mr. William Kirtley and Prof. Donald McRae made their disclosures on 28 June 2023 and 4 July 2023 respectively.
- 5.13. On 28 June 2023, the Claimant confirmed that it was available on 10 August 2023 for the initial hearing. It added that all parties assisting need not be available for future procedural hearings as that would make it difficult to move forward and cause delay.
- 5.14. On 29 June 2023, the Tribunal circulated drafts of the Terms of Appointment and Procedural Order No. 1 to the Parties and invited them to provide comments on the drafts by 3 August, with further submissions at the upcoming initial hearing.
- 5.15. On 8 July 2023 the Tribunal referred to the Claimant's communications of 6 July 2023 which addressed a number of issues including (i) site visit to the Pilbara region; (ii) seat of the arbitration; (iii) transparency; (iv) application for interim measures; and (v) response to the merits of the claims pursuant to Article 4(1)(b) of the UNCITRAL Rules. The Parties were advised that issues (i)-(iv) will be addressed at the procedural hearing on 10 August 2023 in light of the Parties' comments on the draft initial procedural documents, due on 3 August 2023 and the Respondent was invited to comment on issue (v) within that same time limit.
- 5.16. The initial hearing took place on 10 August 2023 (CEST / 11 August AEST) (the "Initial Hearing"). The Parties and the Tribunal discussed and finalized the provisions of the Terms of Appointment and Procedural Order No. 1.

## 6. Jurisdiction

- 6.1. The Claimant initiated this arbitration pursuant to the provisions of Articles 20, 21 and 22 of Chapter 11 of AANZFTA:<sup>7</sup>

### “Article 20

#### Claim by an Investor of a Party

If an investment dispute has not been resolved within 180 days of the receipt by a disputing Party of a request for consultations, the disputing investor may, subject to this Article, submit to conciliation or arbitration a claim:

- a. that the disputing Party has breached an obligation arising under Article 4 (National Treatment), Article 6 (Treatment of Investment), Article 7 (Compensation for Losses), Article 8 (Transfers), and Article 9 (Expropriation and Compensation) relating to the management, conduct, operation or sale or other disposition of a covered investment; and
- b. that the disputing investor or the covered investment has incurred loss or damage by reason of, or arising out of, that breach.

### Article 21

#### Submission of a Claim

1. A disputing investor may submit a claim referred to in Article 20 (Claim by an Investor of a Party) at the choice of the disputing investor:
  - a. where the Philippines or Viet Nam is the disputing Party, to the courts or tribunals of that Party, provided that such courts or tribunals have jurisdiction over such claim; or
  - b. under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings<sup>[14]</sup>, provided that both the disputing Party and the non-disputing Party are parties to the ICSID Convention; or
  - c. under the ICSID Additional Facility Rules, provided that either of the disputing Party or non-disputing Party are a party to the ICSID Convention; or
  - d. under the UNCITRAL Arbitration Rules; or
  - e. if the disputing parties agree, to any other arbitration institution or under any other arbitration rules, provided that resort to one of the fora under Subparagraphs (a) to (e) shall exclude resort to any other.
2. A claim shall be deemed submitted to arbitration under this Article when the disputing investor's notice of or request for arbitration made in accordance with this Section (notice of arbitration) is received under the applicable arbitration rules.
3. The arbitration rules applicable under Paragraph 1(b) to (e) as in effect on the date the claim or claims were submitted to arbitration under this Article, shall govern the arbitration except to the extent modified by this Section.
4. In relation to a specific investment dispute or class of disputes, the applicable arbitration rules may be waived, varied or modified by written agreement between the disputing parties. Such rules shall be binding on the relevant tribunal or tribunals established pursuant to this Section, and on individual arbitrators serving on such tribunals.
5. The disputing investor shall provide with the notice of arbitration:
  - a. the name of the arbitrator that the disputing investor appoints; or

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<sup>7</sup> NoA, §64.

- b. the disputing investor's written consent for the Appointing Authority to appoint that arbitrator.

## Article 22

### Conditions and Limitations on Submission of a Claim

1. The submission of a dispute as provided for in Article 20 (Claim by an Investor of a Party) to conciliation or arbitration under Article 21.1(b) to (e) (Submission of a Claim) in accordance with this Section, shall be conditional upon:
  - a. the submission of the investment dispute to such conciliation or arbitration taking place within three years of the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation referred to in Article 20(a) (Claim by an Investor of a Party) causing loss or damage to the disputing investor or a covered investment;
  - b. the disputing investor providing written notice, which shall be submitted at least 90 days before the claim is submitted, to the disputing Party of its intent to submit the investment dispute to such conciliation or arbitration and which briefly summarises the alleged breach of the disputing Party (including the articles or provisions alleged to have been breached) and the loss or damage allegedly caused to the disputing investor or a covered investment; and
  - c. the notice of arbitration being accompanied by the disputing investor's written waiver of its right to initiate or continue any proceedings before the courts or administrative tribunals of either Party, or other dispute settlement procedures, of any proceeding with respect to any measure alleged to constitute a breach referred to in Article 20 (Claim by an Investor of a Party).
2. Notwithstanding Paragraph 1(c), no Party shall prevent the disputing investor from initiating or continuing an action that seeks interim measures of protection for the sole purpose of preserving its rights and interests and does not involve the payment of damages or resolution of the substance of the matter in dispute, before the courts or administrative tribunals of the disputing Party.
3. No Party shall give diplomatic protection, or bring an international claim, in respect of a dispute which has been submitted to conciliation or arbitration under this Article, unless such other Party has failed to abide by and comply with the award rendered in such dispute. Diplomatic protection, for the purposes of this Paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.
4. A disputing Party shall not assert, as a defence, counter-claim, right of set-off or otherwise, that the disputing investor or the covered investment has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss.

## **7. Seat of the Arbitration and Venue of the Hearings**

- 7.1. To the extent that the Parties disagree on the seat of the arbitration, the Tribunal will determine the seat subsequently.
- 7.2. The Tribunal may convene hearings at a location other than the seat of the arbitration, after consulting the Parties and taking into account all the relevant

circumstances. The Tribunal may meet at any location it considers appropriate for deliberations.

- 7.3. Hearings may be held in person or by videoconference. The Tribunal will consult the Parties in due time about the format of the hearing(s). For the avoidance of doubt, if the Tribunal determines that a virtual hearing must be convened, the Parties agree that such a virtual hearing qualifies as a hearing for the purposes of the UNCITRAL Rules.

## **8. Language**

- 8.1. Pursuant to the Parties agreement, the language of the arbitration shall be English.

## **9. Applicable Procedural Rules**

- 9.1. This arbitration shall be governed by (in the following order of precedence):
- a. the mandatory rules of the law on international arbitration applicable at the seat of the arbitration;
  - b. Chapter 11 of AANZFTA;
  - c. the UNCITRAL Rules;<sup>8</sup>
  - d. these Terms of Appointment and the procedural rules issued by the Tribunal, as reflected in Procedural Order No. 1 and any amendments thereof.
- 9.2. If the provisions therein do not address a specific procedural issue, the applicable procedural issue shall be determined by agreement between the Parties or, in the absence of such agreement, by the Tribunal.

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<sup>8</sup> Article 18(4)(k) of Chapter 11 of the AANZFTA defines “UNCITRAL Arbitration Rules” as “the arbitration rules of the United Nations Commission on International Trade Law, approved by the United Nations General Assembly on 15 December 1976”. However, Article 21(3) of Chapter 11 of the AANZFTA, reproduced above (§ 6), states “[t]he arbitration rules applicable [...] as in effect on the date the claim or claims were submitted to arbitration under this Article, shall govern the arbitration except to the extent modified by this Section”. The claims were submitted to arbitration through the NoA of 29 March 2023, at which time the 2021 version UNCITRAL Rules were in effect. As a result, the 2021 version of the UNCITRAL Rules govern this arbitration, to which the Parties have also agreed (§ 5). For the avoidance of doubt, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“UNCITRAL Rules on Transparency”) do not apply in accordance with Article 1(4) of the 2021 UNCITRAL Rules and Articles 1(1) and 1(2) of the UNCITRAL Rules on Transparency.

## **10. Applicable Substantive Law**

10.1. Article 27 of Chapter 11 of the AANZFTA contains the following rules on the governing law:

“Article 27  
Governing Law

1. Subject to Paragraphs 2 and 3, when a claim is submitted under Article 20 (Claim by an Investor of a Party), 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.
2. 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. A joint decision of the Parties, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.”

10.2. 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, in which case it will give the Parties an opportunity to comment if it intends to rely on a legal theory that departs substantially from the Parties’ submissions. The Tribunal shall be free to refer to relevant legal authorities that the Parties have not cited.

## **11. Rulings by the President**

11.1. The presence of all members of the Tribunal, including by any appropriate means of communication, constitutes a quorum for the Tribunal’s decisions.

11.2. Decisions of the Tribunal shall be taken by a majority of the Members of the Tribunal. The President may decide urgent routine matters (such as requests to extend time limits) without consulting the Members of the Tribunal, subject to possible reconsideration by the full Tribunal.

11.3. The Tribunal will issue all rulings, including the award, within a reasonable time period.

11.4. The President is authorized to issue procedural orders on behalf of the Tribunal.

## 12. Awards

12.1. In addition to the rules contained in Article 28 of Chapter 11 of the AANZFTA, the Tribunal shall be free to decide any issue by way of one or more partial or interim awards, or by way of a final award, as it may deem appropriate. All awards, whether interim or final, shall be in writing and shall state the reasons upon which the award is based.

## 13. Permanent Court of Arbitration

13.1. By agreement of the Parties, the PCA shall serve as the registry and administer the arbitral proceedings on the following terms:

- a. Submissions and communications from the Parties to the Tribunal and vice-versa shall be copied to the PCA.
- b. The PCA shall maintain an archive of correspondence and submissions. The PCA shall also provide the Parties and the Tribunal with administrative or logistical support, if necessary.
- c. The PCA shall manage the Parties' deposits to cover the costs of the arbitration, subject to the Tribunal's supervision.
- d. If needed, the PCA shall make its hearing and meeting rooms at the Peace Palace in The Hague or elsewhere available to the Parties and the Tribunal at no or at reduced charge. Costs of catering, court reporting, or other technical support associated with hearings or meetings at the Peace Palace or elsewhere shall be borne by the Parties.

13.2. The PCA's contact details are as follows:

Permanent Court of Arbitration

Attn: Mr. Bryce Williams, Legal Counsel  
Mr. Benjamin Craddock, Case Manager

Address: Peace Palace  
Carnegieplein 2  
2517 KJ The Hague  
The Netherlands

Tel.: [REDACTED]

Fax: [REDACTED]

E-mail: [REDACTED]  
[REDACTED]

13.3. Work carried out by PCA staff shall be billed in accordance with the PCA's Schedule of Fees and Costs, the relevant rates being EUR 195 per hour for legal staff, EUR 145 per hour for assistant legal staff and EUR 60 per hour for secretarial or clerical work. The PCA's fees and expenses shall be paid in the same manner as the Tribunal's fees and expenses.

#### **14. Advance of Arbitration Costs**

14.1. Article 43 of the UNCITRAL Rules applies in respect of the advance on costs. The Parties shall pay to the PCA an initial cost advance of EUR 150.000 each within 30 days of the signature of these Terms of Appointment.

14.2. Account details for such payment are as follows:

Bank: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Account number: [REDACTED]

IBAN: [REDACTED]

BIC: [REDACTED]

Beneficiary: Permanent Court of Arbitration

Reference: PCA Case No. 2023-40 [Please specify "Claimant" or "Respondent" as applicable]

14.3. The PCA will review the adequacy of the deposit from time to time and the Tribunal may request the Parties to make supplementary advances in accordance with Article 43(2) of the UNCITRAL Rules.

14.4. Any transfer fees or other bank charges shall be charged by the PCA to the deposit. No interest will be paid on the deposit.

14.5. The unused balance held on deposit at the end of the arbitration shall be returned by the PCA, as directed by the Tribunal.

#### **15. Party Representation**

15.1. Persons representing the Parties in this arbitration are identified in Section 1 above. A Party should promptly inform the Tribunal and the other Party of any change in such representation.

15.2. After the constitution of the Tribunal, a Party shall not retain new representatives when a relationship exists between the representative and a Member of the

Tribunal that would create a conflict of interest, unless the other Party does not object after disclosure.

15.3. In case of breach of the obligation contained in the preceding paragraph, the Tribunal may take appropriate measures to safeguard the integrity of the proceedings, including the exclusion of the new Party representative from participating in all or part of the arbitral proceedings.

15.4. For the purposes of this Section, “representative” means any person who appears in this arbitration on behalf of a Party and makes submissions, arguments or representations to the Tribunal on behalf of such Party, other than in the capacity as a witness or expert.

## **16. Data Protection**

16.1. The Tribunal, the Secretary, the PCA and the Parties and their representatives acknowledge that the processing of their personal data is necessary for the purposes of these arbitration proceedings.

16.2. The Parties and their representatives agree to comply with all applicable data protection and privacy regulations, including providing appropriate notice to data subjects whose personal data will be processed in the arbitration proceedings, where necessary. If compliance with applicable law requires action from another participant in the arbitration, the Parties are invited to bring it to the attention of the other participants and/or to apply to the Tribunal for specific data protection measures to be put in place.

16.3. The Parties and their representatives shall indemnify and hold harmless the Tribunal with respect to any breach of applicable data protection and privacy regulations by such Party or their representatives in relation to the arbitration proceedings.

## **17. Cyber Security**

17.1. The Parties shall take appropriate measures for the secure transmission of documents, information and communications in this arbitration. If particular documents, information and/or communications require heightened security measures, the Parties will confer in order to take appropriate security measures for the transmission of such documents, information and/or communications. Unless instructed otherwise by the Parties, the Tribunal will not take any special

measures beyond its standard procedures to safeguard the cyber-security of arbitration-related information. The Parties confirm that communications may be sent by email.

## **18. Transparency**

18.1. The transparency of this arbitration is subject to 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.”

18.2. 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.

18.3. For the avoidance of doubt, the UNCITRAL Rules on Transparency (defined in footnote 11) do not apply, unless otherwise agreed.

## **19. Mediation or Other Methods of Amicable Dispute Resolution**

- 19.1. At any time in the course of the arbitration, considering the circumstances of the dispute and the interests at stake, the Tribunal may suggest to the Parties to resort to mediation or other appropriate methods of amicable resolution and to stay the arbitration for a limited period of time pending the outcome of such attempt at settling the dispute amicably.
- 19.2. Beyond making a suggestion to the Parties, the Tribunal will not become involved in mediation or other settlement attempts and will continue or resume the proceedings if the Parties do not agree to follow the Tribunal's suggestion or if they agree but do not reach an amicable settlement.

## **20. Disposal of Documents**

- 20.1. Six months after the Tribunal has notified the final award to the Parties, the arbitrators shall be at liberty to destroy the documents submitted in the arbitration, unless a Party requests the return of documents, in which case that Party shall bear the related cost.

## **21. Immunity**

- 21.1. Save for conscious and deliberate wrongdoing or gross negligence:
  - a. the Parties undertake not to initiate legal proceedings against, or in any other manner impair the independence and/or immunity of, any of the Members of the Tribunal, the Secretary or the staff of the PCA in respect of any act or omission in connection with this arbitration;
  - b. the Members of the Tribunal, the Secretary and the staff of the PCA shall not be required to be a party or witness in any judicial or other proceedings arising out of this arbitration;
  - c. neither the Members of the Tribunal, the Secretary nor the staff of the PCA shall be liable to any Party in respect of any act or omission in connection with any matter related to this arbitration; and
  - d. the Parties agree to jointly and severally indemnify the Members of the Tribunal, the Secretary and the staff of the PCA in respect of any liability, cost or claim in relation to this arbitration.

## **22. Acknowledgement of the Parties**

- 22.1. By signing these Terms of Appointment, each Party acknowledges that it has no knowledge of any objection that would affect the regularity of the constitution of the Tribunal, the independence and impartiality of its members and/or compromise the integrity of the present arbitral proceedings. More generally, each Party confirms that it is not currently aware of any other objections of a procedural nature at this stage other than those mentioned in the present Terms of Appointment or those which the Parties have reserved to introduce at a later stage.
- 22.2. Each Party shall give prompt notice to the Tribunal of any complaint it may have with respect to these arbitration proceedings.

## **23. Counterparts**

- 23.1. These Terms of Appointment and other documents (including the awards) may be signed in separate counterparts, each of which when signed shall constitute an original, but all the counterparts shall together constitute one and the same document.

## **24. Execution of the Terms of Appointment**

- 24.1. As agreed by the Parties, these Terms of Appointment are executed electronically. Where applicable, the Parties have provided the Tribunal with powers of attorney confirming the authority of the persons executing these Terms of Appointment on their behalf.

*[signature page follows]*

CLAIMANT

RESPONDENT



CLIVE F PALMER, DIRECTOR AND REPRESENTATIVE

Zeph Investments Pte. Ltd.

Date: 30 AUGUST 2023



Commonwealth of Australia

Date: 31 August 2023

THE TRIBUNAL

William Kirtley

Date: 31 August 2023

Donald McRae

Date: 31 August 2023

Gabrielle Kaufmann-Kohler  
(Presiding Arbitrator)

Date: 1 September 2023