

PCA Case No. 2023-67

**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. 3
(Transparency / Confidentiality)**

Arbitral Tribunal

Dr. Laurent Lévy (Presiding Arbitrator)

Dr. Charles Poncet

Professor Donald McRae

Secretary of the Tribunal

Dr. Magnus Jesko Langer

Secretariat

Permanent Court of Arbitration

25 June 2024

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

1. Relevant Procedural History

- 1.1 On 25 October 2023, the Parties and the Tribunal entered into the Terms of Appointment (“ToA”) for these proceedings, and the Tribunal issued its Procedural Order No. 1 (“PO1”). Paragraph 10.1 of PO1 refers to the regulation of transparency contained in Article 26 of Chapter 11 of the Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area (“AANZFTA”). Paragraph 10.3 of PO1 requires the Parties to “confer in an effort to agree on procedures 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”. Paragraph 10.6 provides: “Additional measures of transparency shall be determined by agreement between the Parties or, in the absence of such agreement, by the Tribunal”.
- 1.2 On 19 January 2024, the tribunal (“First Tribunal”) in PCA Case No. 2023-40 (“First Arbitration”) issued Procedural Order No. 3 addressing transparency and confidentiality issues in the context of the First Arbitration (“First Arbitration PO3”), after consulting the Parties.
- 1.3 On 14 February 2024, the First Tribunal accepted the Respondent’s proposal for information exchange between the First Arbitration and this arbitration, and issued the updated First Arbitration PO3, now including Section J, “Document Sharing with Second Arbitration”.
- 1.4 On 6 March 2024, the Parties agreed to adopt the First Arbitration PO3 (as amended) as the procedures for the protection of any confidential information in this arbitration, pursuant to Article 26 of Chapter 11 of the AANZFTA.
- 1.5 On 27 March 2024, as requested by the Tribunal, the Respondent circulated a draft of this Procedural Order, based on the First Arbitration PO3.
- 1.6 This Procedural Order records the Parties’ agreement on transparency/confidentiality in these proceedings.

2. Analysis

- 2.1 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**).

A. The Treaty

- 2.2 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.

2.3 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.

2.4 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

2.5 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

- 2.6 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

- 2.7 Regarding transparency, the Parties agreed on the following arrangements in the discussions leading up to the First Arbitration PO3:
- 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. 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*.
- 2.8 Accordingly, the Tribunal concludes that the Parties’ agreements are compatible with the Treaty and form part of the transparency regime governing these proceedings.
- 2.9 The Parties have also agreed that certain other elements of the First Arbitration PO3 shall apply to this arbitration, namely:
- i. **Hearings.** Hearings (other than procedural conferences) shall be open to the public.
 - ii. **Transcripts and recordings of hearings.** Transcripts of the hearings shall be made public, subject to the redaction of protected information. Sound and/or video recordings should not be made public.

- iii. **Written submissions.** The main written submissions on jurisdiction, admissibility and merits shall be made public, subject to the redaction of protected information. In respect of the current Procedural Calendar, these submissions appear in items 1, 2, 3, 10 and 11. The Parties agree that these 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.** Witness statements and expert reports shall not be made public, unless otherwise agreed by the Parties.

3. Conclusions

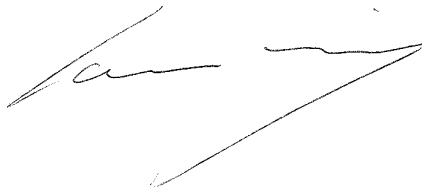
- 3.1 The Tribunal has transposed the conclusions reached in the prior sections in a set of rules, which are found in Annex I, and which have been agreed by the Parties.
- 3.2 To facilitate the redaction process specified in further detail in Annex I, the Parties shall use the transparency schedule contained in Annex II.

4. Order

- 4.1 For the foregoing reasons, the Tribunal 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.

Date: 25 June 2024

So ordered by the Tribunal.



Dr. Laurent Lévy
(Presiding Arbitrator)

On behalf of the Tribunal

ANNEX I: TRANSPARENCY RULES

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 8.4 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 Nos. 1 and 2, and the Terms of Appointment.

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 1-3 and 10-11, and will be published at the end of the hearing mentioned in item 14.

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, the PCA and the other Party that it requests the non-disclosure of such information within 30 days of:

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.

- 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). With respect to Procedural Orders Nos. 1 and 2, and the Terms of Appointment, the 30-day deadline starts running as of the issuance of this Procedural Order No. 3; or
 - iii. the filing of any written submission by that Party or the other Party (Section F above). With respect to the Notice of Arbitration dated 28 May 2023 and the Respondent's Response dated 27 June 2023, the 30-day deadline starts running as of the issuance of this Procedural Order No. 3.
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 FIRST ARBITRATION

20. For the purposes of this Section J, the "First Arbitration" means PCA Case No. 2023-40.
21. Where the Tribunal issues a procedural order, decision or award, it may be shared with or used in the First 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 First 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 First Arbitration only for purposes of the First 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	