IN THE MATTER OF AN ARBITRATION

PURSUANT TO THE AGREEMENT ESTABLISHING THE ASEAN-AUSTRALIA-NEW ZEALAND FREE TRADE AREA

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

PCA CASE NO. 2023-40

B E T W E E N:

ZEPH INVESTMENTS PTE LTD

Claimant (or "Zeph")

-and-

THE COMMONWEALTH OF AUSTRALIA

Respondent (or "Australia")

CLAIMANT'S SUBMISSIONS ON ARTICLE 27(2) OF AANZFTA

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16 OCTOBER 2024

Tribunal:
Prof. Gabrielle-Kaufmann-Kohler
Mr William Kirtley
Prof. Donald McRae

For the Claimant:
Mr Clive F Palmer
Director & Representative
[redacted]

I. INTRODUCTION

1. These short submissions are served on behalf of Zeph Investments Pte Ltd ("**Claimant**" or "**Zeph**") following the recent hearing which took place in the Hague from 16 to 18 September 2024 ("**Jurisdiction Hearing**") pursuant to paragraph 5 of Procedural Order No 6 (Post Hearing Matters) which required the parties to "*file short submissions (of up to 5 pages) regarding Article 27(2) of Chapter 11 of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area*" ("**AANZFTA**").

2. These submissions address the following points:

   (1) Introduction,

   (2) The parties' agreed position in the Jurisdiction Hearing (Section II below),

   (3) The correct and agreed approach to Article 27(2) of AANZFTA (Section III below),

   (4) Rule of Law and the power of a tribunal to request an interpretation under Article 27(2) of AANZFTA after the commencement of an Arbitration (Section IV below), and

   (5) Conclusion.

II. THE DISPUTING PARTIES' AGREED POSITION

3. The first and most important point is that the parties (Zeph and Australia) set out their position on Article 27(2) on Day 3 of the Jurisdiction Hearing and agreed on the approach that the Tribunal should adopt to that provision and a possible request by the Tribunal for a joint interpretation of AANZFTA.

4. The parties dealt with the issue as follows at the Jurisdiction Hearing:

   (1) Australia addressed the Tribunal first, making the following points:

      i. (Day 3, page 50, line 6-9): "*At this advanced procedural stage of the arbitration, Australia does not propose to request a joint interpretation.*"

      ii. (Day 3, page 50, lines 10-15):

> 10 In the preliminary objections phase of this case,
> 11 there are, of course, questions of interpretation of
> 12 specific provisions of AANZFTA that the Tribunal will
> 13 need to resolve. The Respondent has full confidence in
> 14 the Tribunal completing this important task without
> 15 needing to request a joint interpretation. [Emphasis added]

      iii. (Day 3, page 50, line 21 – page 51, line 2):

> 21 It is the Respondent's position that the textual
> 22 basis in AANZFTA for our preliminary objections is clear
> 23 and conclusive, and that the Tribunal should itself
> 24 properly determine any questions of interpretation of
> 25 the provisions of AANZFTA by having recourse to the

1 well-established rules and principles of treaty
2 interpretation. [Emphasis added]

(2) The Claimant then confirmed that its position on Article 27(2) had not altered since the issue was first raised by the Tribunal in October 2023 – i.e. (i) the Claimant was not requesting a joint interpretation of any provision; (ii) there was no need for the Tribunal to seek a joint interpretation on its own account (and the Tribunal should not seek a joint interpretation in this case); and (iii) there is no provision in dispute.

(3) The Respondent also addressed the topic in the context of discussion about post-hearing briefs, with counsel submitting that the Respondent does not read Article 27(2) as a mandatory provision, relying on "*various textual reasons*" for its stance (Day 3, page 171, lines 5 to 13).

5. Accordingly, the parties agree:

(1) That there is no general or overriding mandatory requirement for the Tribunal to request a joint interpretation where the parties to the proceedings disagree on the correct interpretation of a specific provision in AANZFTA;

(2) That there are no issues (in the jurisdictional phase) in respect of which the Tribunal should seek assistance by way of a joint interpretation; and

(3) The Tribunal should proceed with the drafting of the Award on jurisdiction without requesting a joint interpretation from the AANZFTA treaty parties.

6. The Claimant submits that that joint approach is both correct and further that the Tribunal should act in accordance with the parties' agreement on this issue.

III. THE CORRECT AND AGREED APPROACH TO ARTICLE 27(2)

7. Without prejudice to the matters set out above and in section IV below, the Claimant submits that the parties' submissions on Article 27(2) at the Jurisdiction Hearing are correct for the reasons set out in this section III and section IV.

8. First, to place the submissions in context, it is important to read Article 27(2) in full (with the key section underlined below):

> "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." [**Emphasis added**]

9. Focussing on the underlined wording, and the immediate context for the requirement to seek a joint interpretation (both in terms of grammar and syntax), on its proper construction Article 27(2) provides that the Tribunal may, as a matter of discretion, request a joint interpretation - whether on its own account or following a request by a disputing party.

(1) The fact that this is a discretionary exercise is borne out by the phrase '*on its own account or at the request of a disputing party*' which governs the circumstances in which a Tribunal 'shall' make a request for a joint interpretation. Put another way, if the Tribunal was required on a mandatory basis to seek a joint interpretation of any provision in dispute between two disputing parties there would be no need to include that language. The provision would simply say "*The tribunal shall [omitted wording] request a joint interpretation of any provision of this Agreement that is in issue in a dispute*."

(2) Instead, the reference to the basis on which a tribunal may seek a joint interpretation – either on its own account or at the request of a disputing party imports into AANZFTA a clause clarifying and delineating the circumstances in which a request for a joint interpretation may be made. Accordingly, the use of the word 'shall' does not indicate a mandatory requirement to request a joint interpretation, it merely confirms that if a tribunal or a disputing party raises the need for a joint interpretation the tribunal 'shall' then make a request.

10. It is also important to be clear about the reference to a tribunal acting 'on its own account'. In order to act 'on its own account' the tribunal will have had to deliberate and conclude that in all the circumstances, and taking account of the parties' submissions, it is appropriate and necessary to make a request. Any alternative approach would be contrary to natural justice, unfair and perverse. That reinforces the fact that it is not mandatory to make a request and significantly it requires a tribunal to take into account, in this particular case, the parties' agreement that there is no need to seek a joint interpretation.

11. Finally, broader context is always important when construing a treaty provision. In this instance, broader context supports the parties' construction:

(1) First because, if a tribunal were required as a matter of course to seek a joint interpretation each and every time there was a dispute about interpretation of a provision (a scenario which arises in almost all investment disputes), one would expect that process to be built into the arbitral procedure in very clear mandatory terms. However, that is not what the parties wrote into the treaty in this case – and it would also cut across the requirement in the Preamble to "*lower business costs; increase trade and investment; enhance economic efficiency*" by adding time and cost into the arbitral process.

(2) Secondly because, absent the clearest of language, it cannot reasonably have been the expectation of the state parties to AANZFTA that each and every arbitration would involve an unwieldy and time-consuming request for one or more joint interpretations. It is highly unlikely that the 12 state parties would expect to be consulted on every issue of interpretation that arises throughout jurisdiction and merit hearings, some of which may arise during the hearings themselves. That would introduce a two-layer system of adjudicators in every dispute and as emphasised below would result in the state respondent party in every case being a judge in its own cause.

IV. RULE OF LAW AND THE POWER OF A TRIBUNAL TO REQUEST A JOINT INTERPRETATION AFTER THE COMMENCEMENT OF ARBITRATION

12. It is important to recognise that interpretive powers must assist the Rule of Law. The Rule of Law requires consistency and predictability, relying on rules that are straightforward. There is an implied limitation in Article 27 (2) of Chapter 11 of AANZFTA whereby a tribunal can only be required to follow an interpretation carried out by others prior to the commencement of that arbitration. This is because there is a requirement that all tribunals comply with due process, in accordance with fundamental Rule of Law principles, namely *promulgation*, *prospectivity* and *congruence*.[1]

13. In relation to *promulgation*, that is because the requirement of clarity dictates that *"an interpretation should not require interpretation"*.[2]

14. In relation to *prospectivity*, in "Fifteen Years of NAFTA Chapter 11 Arbitration", Professor Gabrielle Kaufmann-Kohler author of the chapter titled "Interpretive Powers of the Free Trade Commission and the Rule of Law",[3] at pages 191 to 192 states as follows:

> "*Prospectivity is one of the tenets of the Rule of Law. Accordingly, the conduct of the host State of the investment must be measured on the basis of norms in effect when the conduct occurred and not of newly created norms. The latter may happen if the purported interpretation is issued after the conduct and is in reality an amendment.*"

15. Any interpretation after an arbitration has commenced can only be given by the tribunal. An interpretation must be made in good faith consistent with section 31(1) and 31(3)(c) of the Vienna Convention. (i.e. no meaning can be adopted which will take away an investor's rights).

16. In relation to *congruence*, the Rule of Law requires *"an impartial and fair dispute settlement system"*, i.e., *"a system that complies with the fundamental procedural rights of the litigants"*.[4]

17. To this end, the Respondent cannot be permitted to act in the capacity of "wearing two hats" such that it is both a disputing party and a State Party to the AANZFTA. As a litigant, the Respondent is a beneficiary of any interpretation which could result in a decision which will be in the Respondent's favour. This would be contrary to due process, and especially to *"the principle of independence and impartiality of justice, which includes the principle that no one can be the judge of its own cause"*.[5] No party to litigation should become the judge in their own cause.[6]

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[1] Professor Gabrielle Kaufmann-Kohler, *"Interpretive Powers of the Free Trade Commission and the Rule of Law"* in Emmanuel Gaillard et al. (eds.), *Fifteen Years of NAFTA Chapter 11 Arbitration*, Juris Publishing, 2011, pp. 175-194 (**Kaufmann-Kohler 2011**).
[2] Kaufmann-Kohler 2011, at p. 189.
[3] Gabrielle Kaufmann-Kohler, "Interpretive Powers of the Free Trade Commission and the Rule of Law" in *Fifteen Years of NAFTA Chapter 11 Arbitration*, IAI Series No. 7 (F. Bachand ed., 2011), page 194.
[4] Ibid., at p. 192 and 194.
[5] Ibid., at p. 192.
[6] The maxim "*nemo judex in parte sua*" has been widely recognized as a principle of international law. *See*, *e.g.,* in the U.K., Dimes v. Grand Junction Canal (1852) 3 H.L.C. 759, 793, *per* Lord Campbell, and Frome United Breweries Co. v. Bath Justices, [1926] A.C. 586; Restatement (Third) of the Foreign Relations Law of the United States 102 (identifying the rule that no one may be judge in his own cause as a general principle that has achieved the status of international law). This principle is also reflected in the IBA Guidelines on Conflicts of Interest in International Arbitration (approved on May 22, 2004 by the Council of the International Bar

Such a procedure destroys the equal treatment of the disputing parties and the Claimant's rights of natural justice and procedural rights, and usurps the decision making functions that the parties have mutually appointed the Tribunal to determine. Upon the commencement of an arbitration, a tribunal must determine and apply any interpretation in conformity with AANZFTA to follow the Rule of Law and due process then in effect, not based on subsequently created norms.[7]

18. Professor Kaufmann-Kohler[8] at page 194 in the penultimate and last paragraph, states as follows:

"Third, the exercise of the interpretive powers must not breach fundamental procedural rights. Such a breach may occur when an interpretation rendered during the pendency of an arbitration influences the outcome of that arbitration, a situation that would defeat the test of congruence.

If these latter breaches materialize, there is good reason for an arbitral tribunal to disregard the interpretation. Doing otherwise would not only fail to sanction the breach, it would also be an impediment to the rule of law. "

19. For all the above reasons, if the Tribunal were to refer a matter while the Arbitration was in progress, it could not be in conformity with Article 27(2) of the AANZFTA.

V. CONCLUSION

20. For the reasons set out above the Tribunal is not required to and cannot, once Arbitration has commenced, request a joint interpretation from the AANZFTA treaty parties and, respectfully, the Tribunal should not request any such joint interpretation under Article 27(2) AANZFTA during the proceedings. This stance is consistent with and supported by the common ground between the parties, the Rule of Law, due process and International Law.

21. Save as aforesaid the Claimant's rights are fully reserved.

Served on behalf of the Claimant

[redacted]

Clive F Palmer
Director and Representative
Zeph Investments Pte Ltd
16 October 2024

Association). *See also* Rudolf Dolzer & Christopher Schreuer, Principles of International Investment Law 35 (2008); Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent?*, *in* The Oxford Handbook of International Investment Law 1201 (P. Muchlinski, F. Ortino & C. Schreuer eds., 2008).

[7] The principle of non-retroactivity is in particular embodied in Article 28 of the Vienna Convention.

[8] Gabrielle Kaufmann-Kohler, "Interpretive Powers of the Free Trade Commission and the Rule of Law" in *Fifteen Years of NAFTA Chapter 11 Arbitration*, IAI Series No. 7 (F. Bachand ed., 2011), page 194.