

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. 1

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 October 2023

WHEREAS the Parties and the members of the Tribunal have signed the Terms of Appointment dated 25 October 2023;

WHEREAS on 10 October 2023, a First Procedural Hearing was held by video-conference, in which representatives for both Parties and the members of the Tribunal participated;

WHEREAS this Procedural Order records the agreement of the Parties on certain procedural matters discussed at the First Procedural Hearing, and to the extent that no agreement was reached, sets forth the Tribunal's directions, taking the Parties' views into account;

THE TRIBUNAL HEREBY ORDERS:

1. Language

- 1.1 The language of the arbitration shall be English.
- 1.2 The Parties shall submit their written submissions and other communications in English. Accompanying witness statements, expert reports, exhibits, and legal authorities shall be submitted in their original language, together with a translation into English. If the documents requiring translation are lengthy and relevant only in part, it shall be sufficient to translate only relevant excerpts together with such other portions of the document necessary to place such excerpts in proper context (provided that only the translated portion may be relied upon).
- 1.3 Informal (non-certified) translations shall be accepted as accurate unless contested by the other Party or otherwise ordered by the Tribunal *proprio motu*. In the event of a challenge, the Parties shall attempt to reach agreement on the translation and, if necessary, produce a certified translation.
- 1.4 The Parties should use their best efforts to resolve any competing translations in order to have an agreed translation prior to the relevant hearing. To the extent that any translation differences remain, the Parties should meet and confer to narrow the differences as much as possible and then provide the Tribunal with redlines showing the disagreements.
- 1.5 Documents produced in response to requests or orders for production may be produced in their original language. If a Party submits any such document as an exhibit, the provisions of this section shall apply.
- 1.6 The Tribunal reserves the right to require a Party to translate any document in whole or in part.

2. Procedural Timetable

- 2.1 In its Response to the Notice of Arbitration, the Respondent raised objections to the jurisdiction of the Tribunal and the admissibility of the Claimant's claims, and requested that these objections be determined in a separate phase of the proceedings. Pursuant to Article 25(1) of Chapter 11 of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area ("AANZFTA"), "[w]here issues relating to jurisdiction or admissibility are raised as preliminary objections, a tribunal shall decide the matter before proceeding to the merits".
- 2.2 On 9 October 2023, the Claimant announced its intention to apply for interim measures. During the First Procedural Hearing, the Parties agreed to hold a hearing on interim measures.

- 2.3 The procedural timetable for the interim measures and the preliminary objections phases (“**Procedural Timetable**”) is enclosed as **Annex 1** to this order.
- 2.4 Unless otherwise provided or directed by the Tribunal, all deadlines shall refer to 11.59pm, time of the dispatching Party, on the day of the deadline.
- 2.5 Extensions may be agreed between the Parties or granted by the Tribunal for justifiable reasons, provided that such extensions do not affect the dates fixed for any hearing or other meeting and that the request for an extension is submitted as soon as practicable after a Party becomes aware of the circumstances which prevent it from complying with the deadline. Other than in cases of urgency, the Parties shall only seek extensions from the Tribunal after having conferred with the other Party.
- 2.6 The presiding arbitrator is authorised to make rulings on requests for limited extensions, and other similar procedural issues, on his own, subject to reconsideration by the full Tribunal.

3. Communications and Submissions

- 3.1 On or before the date of the deadline for any written submission, the Party in question shall send the submission, including any accompanying witness statements and expert reports, simultaneously to the Tribunal, the Secretary, the PCA, and the opposing Party and its representatives, by e-mail.
- 3.2 In their first exchange of submissions, the Parties shall set forth the facts and legal arguments on which they intend to rely. Allegations of fact and legal arguments shall be presented in a detailed, specific, and comprehensive manner, and shall respond to all allegations of fact and legal arguments made by the other Party. The Parties shall submit with their written submissions the evidence and authorities on which they intend to rely in support of the factual and legal arguments advanced therein, including witness statements, expert reports, exhibits, legal authorities, and all other evidence and authority in whatever form.
- 3.3 In the Party’s responsive submissions, absent a showing of good cause, the Parties shall limit themselves to responding to allegations of fact and legal arguments made by the other Party in the first exchange of submissions, or to address elements deriving from evidence obtained during the document production phase, unless new facts have arisen after the first exchange of submissions. To that end, additional evidence shall only be submitted in support of the factual or legal arguments advanced in rebuttal to the other side’s prior written submission or in relation to new evidence arising from document production or new facts that have arisen.
- 3.4 Neither Party is permitted to submit additional evidence after the filing of its respective last written submission, unless the Tribunal determines that special circumstances exist based on a reasoned written request followed by observations from the other Party. As the hearing approaches, the Tribunal shall require increasingly exceptional circumstances to submit new documents. Should such leave be granted to one side, the other side shall have an opportunity to submit counter-evidence.
- 3.5 Exhibits and legal authorities accompanying a submission must be uploaded and transmitted through a secure file sharing platform, administered by the PCA, within three business days from the time limit for the submission.

- 3.6 Subject to paragraph 4.6, all written submissions and accompanying documents, including witness statements and expert reports, exhibits, and legal authorities shall be provided as searchable Adobe Portable Document Format (“PDF”) files where possible.
- 3.7 All written submissions shall contain a hyperlinked table of contents and paragraphs shall be consecutively numbered. All written submissions shall be accompanied by numerical indices of all exhibits, legal authorities, witness statements, and expert reports submitted by that Party to date, separated by document type, and describing each document by document number, date, title, author, and recipient (as applicable).
- 3.8 For any simultaneous submissions, each side shall submit all electronic copies only to the PCA. The PCA will then distribute copies to the members of the Tribunal, the Secretary, and the opposing Party and its representatives once both submissions have been received.

4. Documentary Evidence and Legal Authorities

- 4.1 Exhibits shall be numbered consecutively throughout the proceedings, commencing with “CO-001” and “RO-001” respectively.
- 4.2 Legal authorities shall be numbered consecutively throughout the proceedings, commencing with “COLA-001” and “ROLA-001” respectively.
- 4.3 Witness statements and expert reports should be numbered consecutively, beginning with “COWS-001” and “ROWS-001”, and “COER-001” and “ROER-001”, respectively, followed by the applicable name (*i.e.*, COWS-001 [Smith]; COWS-002 [Second Smith]).
- 4.4 The number of the exhibit, legal authority, witness statement, and/or expert report shall appear on the first page of the document and shall also be incorporated into the file name of the electronic document.
- 4.5 Documents in a language other than English, to be submitted with an English translation further to paragraph 1.2, shall be identified with the suffix “T” (*i.e.*, CO-001T). The formatting of the translation shall emulate the formatting of the original document as far as practicable. The translation shall be included in a single document, together and consecutively with the original.
- 4.6 Excel spreadsheets or other calculations performed by experts shall be provided in their native electronic format (*i.e.*, in Excel format rather than searchable PDF).
- 4.7 All evidence submitted to the Tribunal shall be deemed to be authentic and complete, including evidence submitted in the form of copies, unless a Party disputes within a reasonable time its authenticity or completeness, or the Party submitting the relevant evidence indicates the respects in which any document is incomplete.
- 4.8 The admissibility, relevance, weight, and materiality of the evidence offered by a Party shall be determined by the Tribunal.

5. Document Production

- 5.1 Each Party may request the production of documents from the other Party in accordance with the Procedural Timetable. Such a request for production shall (i) identify each document or category of documents sought with precision, (ii) specify why the documents sought are relevant to the

dispute and material to the outcome of the case, and (iii) explain why they are not in the possession or control of the requesting Party, but in the possession or control of the other Party.

- 5.2 Requests for the production of documents shall be in writing using the model appended to this Procedural Order as **Annex 2** (“Redfern schedule”) and set forth reasons for the request in respect of each document or category of documents requested. Unless the requested Party objects to production, it shall produce the requested documents within the applicable time limit.
- 5.3 If the requested Party objects to production, the following procedure shall apply:
- (a) The requested Party shall submit a response stating which documents or category of documents it objects to producing. The response shall state the reasons for each objection in the Redfern schedule provided by the requesting Party.
 - (b) The requesting Party shall reply to the other Party’s objection, indicating, with reasons, whether it disputes the objection.
 - (c) The Parties shall submit all outstanding requests, objections, and responses to objections to the Tribunal for decision in the Redfern schedule. The Parties shall use the same format throughout their exchange of requests, objections, and replies.
 - (d) The Tribunal shall rule on any outstanding requests having regard to the requirements set out at para. 4.1, the legitimate interests of the other Party and all of the surrounding circumstances, including if fit the burden of proof. It may for this purpose be guided, but not bound by the *International Bar Association Rules on the Taking of Evidence in International Arbitration 2020*. The Tribunal will also have regard to Article 26(5) of AANZFTA.
 - (e) Documents ordered by the Tribunal to be disclosed shall be communicated directly to the requesting Party without copying the Tribunal within the time limit set forth in the Procedural Timetable.
- 5.4 Pursuant to the UNCITRAL Rules, the Tribunal may also, on its own motion, request the production of documents.
- 5.5 The Parties shall not copy the Tribunal on their correspondence or exchanges of documents in the course of the document production phase. Documents produced by the Parties in response to document production requests or Tribunal orders (except pursuant to paragraph 5.4 above) shall only form part of the evidentiary record if a Party subsequently submits them as exhibits to its written submissions or upon authorisation of the Tribunal after the exchange of submissions.
- 5.6 Should a Party fail to produce documents as ordered by the Tribunal, the Tribunal may draw the inferences it deems appropriate in relation to the documents not produced.

6. Witnesses

- 6.1 Any person may present evidence as a witness, including a Party or a Party’s officer, employee, or other representative. Party representatives and other fact witnesses shall be heard in the same manner.
- 6.2 For each witness, a written and signed witness statement shall be submitted to the Tribunal. Where in exceptional circumstances a Party is unable to obtain such a statement from a witness,

the evidence of that witness shall be admitted only with leave of the Tribunal and, if the Tribunal grants such leave, in accordance with its directions.

- 6.3 Each witness statement shall contain at least the following:
- (a) the name, date of birth, and present address of the witness;
 - (b) a description of the witness's position and qualifications, if relevant to the dispute or to the contents of the statement;
 - (c) a description of any past and present relationship between the witness and the Parties, counsel, or members of the Tribunal;
 - (d) a description of the facts on which the witness's testimony is offered and, if applicable, the source of the witness's knowledge; and
 - (e) the signature of the witness.
- 6.4 It shall not be improper for counsel to meet with witnesses and potential witnesses to establish the facts, prepare the witness statements, and prepare for examination at a hearing.
- 6.5 Each Party shall notify witnesses to be examined at a hearing no less than eight weeks prior to the relevant hearing, in accordance with the Procedural Timetable. If a Party's witness is not called by the opposing Party, the Tribunal may, on its own motion, call the witness for examination at the hearing. The presenting party may also apply for leave from the Tribunal to call their own witness to appear at the hearing. If a Party elects not to cross-examine a witness, that witness' statement shall remain admissible, but the facts contained therein shall not be deemed established by the fact that no cross-examination has been requested. Rather, the statement of such a witness shall be examined and weighed by the Tribunal, in its discretion, in light of all the evidence presented by the Parties.
- 6.6 The Tribunal may, having regard to all the relevant circumstances, summon the appearance as a witness of a person who may have knowledge of relevant facts and has not been offered as a witness by the Parties.
- 6.7 Witnesses shall in principle be summoned by the presenting Party. When the witness whose cross-examination has been requested by the other Party does not attend the hearing, the witness statement of such witness shall in principle be disregarded, unless the Parties agree or the Tribunal determines otherwise in light of the relevant circumstances.
- 6.8 If circumstances so justify, the Tribunal may allow a witness to appear and be examined by videoconference or otherwise and will issue appropriate directions.
- 6.9 The Tribunal may consider the written statement of a witness who provides a valid reason for failing to appear when summoned to a hearing, having regard to all the surrounding circumstances, including the fact that the witness was not subject to cross-examination. The Tribunal shall not consider the witness statement of a witness who fails to appear and does not provide a valid reason. A witness who has not been summoned to testify in person has a valid reason not to appear and a witness who has been authorized to testify by videoconference is deemed to have appeared.

- 6.10 Written statements shall be submitted in lieu of direct examination, provided however that, for fact witnesses, the presenting party may conduct up to 10 minutes of direct examination, which shall be limited to introductory questions, corrections to the written statement, and questions about matters which have arisen after the last opportunity for the Party who presented the witness to file witness statements.
- 6.11 The Tribunal remains in control over the examination of witnesses at all times, and may ask questions of the witnesses at any time. The Tribunal may also permit the Parties to ask questions of the witnesses under the control of the Tribunal.
- 6.12 The admissibility, relevance, weight, and materiality of the evidence offered by a witness shall be determined by the Tribunal.
- 6.13 Any further issues relating to the testimony of witnesses at an oral hearing, including the order of appearance, scope of cross-examination, the sequestration of witnesses and the form and content of oaths or affirmations, shall be addressed by the Tribunal in a subsequent pre-hearing procedural order, after consultation with the Parties.

7. Experts

- 7.1 Each Party may retain and submit the evidence of one or more experts to the Tribunal.
- 7.2 For each expert, a written and signed expert report shall be submitted to the Tribunal.
- 7.3 The provisions of paragraph 6 apply to experts *mutatis mutandis*.
- 7.4 Expert reports shall identify the area of the expert's expertise, including their background, qualifications, training, and experience. Expert reports shall also contain a description of the instructions pursuant to which the experts have provided their opinion, a statement of their independence from the Parties, counsel, and members of the Tribunal, and a description of the method, evidence, and information used in arriving at their conclusions.
- 7.5 Expert reports shall be accompanied by any documents or information upon which they rely, unless such documents or information have already been submitted with the Parties' written submissions, in which case the reference to the number of the exhibit will be sufficient.
- 7.6 Experts may make a presentation to the Tribunal summarising their expert evidence in lieu of direct examination, not to exceed a certain duration to be determined by the Tribunal in a subsequent pre-hearing procedural order, after consultation with the Parties.
- 7.7 Any further issues relating to the testimony of experts at an oral hearing shall be addressed by the Tribunal in a subsequent pre-hearing procedural order, after consultation with the Parties.
- 7.8 The Tribunal may, on its own initiative or at the request of a Party, appoint one or more experts. The Tribunal shall consult with the Parties on the selection, terms of reference (including expert fees), and conclusions of any such expert.

8. Hearings

- 8.1 A pre-hearing video-conference shall be held at least four weeks prior to each hearing to review logistical, administrative and procedural matters in advance of the hearing. The Tribunal may be represented by the President on this occasion.

- 8.2 After consultation with the Parties, the Tribunal shall issue, for each hearing, a procedural order convening the hearing, establishing its place, time, sequence, length of testimony and/or oral argument, court reporters, transcription, and all other technical and ancillary aspects, including whether the hearing is conducted *in personam* or through video-conference, and the timing of any submissions following the hearing.
- 8.3 On the dates set out in Annex 1 hereto, the Tribunal shall hold a hearing on preliminary objections. The hearing may be held in-person or remotely on a videoconferencing platform. After consultation with the Parties and taking account of all the circumstances, the Tribunal will determine the format of the hearing sufficiently in advance to allow making logistical arrangements. An in-person hearing would be held at a place to be determined after consultation with the Parties. The exact number of days necessary for the hearing shall be determined at or immediately after the pre-hearing telephone conference.
- 8.4 Hearings, other than procedural or organizational sessions, shall be sound recorded and transcribed *verbatim* as follows:
- (a) *Live Notes* or similar court reporting system shall be used to make the transcript instantaneously accessible to the Parties and the Tribunal;
 - (b) Electronic versions of the transcripts shall be provided by email on the same day to the Parties and the Tribunal;
 - (c) On a date to be determined by the Tribunal in consultation with the Parties at the end of the hearing, the Parties shall agree on the corrections to the transcript.
- 8.5 The Parties and the PCA shall make the necessary arrangements for the reservation of the hearing rooms, breakout rooms, videoconferencing platform, and if applicable, court reporters, interpreters, and other logistics. The form of interpretation for any witness or expert evidence shall be determined by the Tribunal in its pre-hearing procedural order.
- 8.6 The expenses of hearing rooms, court reporters and other expenses incurred in connection with the hearing will initially be shared equally between the Parties, without prejudice to the Tribunal's decision on the costs of the arbitration.

9. Post-Hearing Briefs and Cost Submissions

- 9.1 At the conclusion of each hearing, the Parties and the Tribunal shall discuss whether post-hearing briefs are desirable and if so the content, length and format of the post-hearing briefs. They shall also establish a schedule for transmission of cost submissions.

10. Transparency

- 10.1 The transparency of this arbitration is governed by Article 26 of Chapter 11 of the AANZFTA, which reads as follows:

Article 26 Transparency

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.

10.2 Unless the Parties otherwise agree, the UNCITRAL Rules on Transparency shall not apply in the present proceedings.

10.3 The Parties shall 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.

10.4 Notwithstanding the foregoing, the PCA shall have permission to 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.

10.5 In accordance with Article 25(4) of the UNCITRAL Rules, hearings shall be held *in camera* unless the Parties agree otherwise.

10.6 Additional measures of transparency shall be determined by agreement between the Parties or, in the absence of such agreement, by the Tribunal.

11. Third-Party Funding

11.1 A Party shall disclose the name and address of any non-party from which the Party, its counsel or the Claimant's representative, directly or indirectly, has received or will receive funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding ("third-party funding"). If the non-party providing funding is a juridical person, the notice shall include the names of the persons and entities that own and control that juridical person.

11.2 A party shall make the disclosure referred to in Section 11.1 with the Tribunal upon the issuance of this order or, if entered into thereafter, immediately upon concluding a third-party funding arrangement. The party shall immediately notify the Tribunal of any changes to the information in the disclosure.

11.3 The Tribunal may order disclosure of further information regarding the funding agreement and the non-party providing funding.

So ordered by the Tribunal.



Dr. Laurent Lévy
(Presiding Arbitrator)

On behalf of the Tribunal

Annex 1: Revised Procedural Timetable
(12 December 2023)

	Description	By	Interval (days)	Date ¹
	First Procedural Hearing	All	NA	Tuesday, 10 October 2023
i	Interim Measures Application	Claimant	NA	No later than 7 November 2023, should the Claimant choose to bring an Interim Measures Application
ii	Response to Interim Measures Application	Respondent	42 ²	Monday, 29 January 2024
iii	Reply to Interim Measures Application	Claimant	12	Monday, 12 February 2024
iv	Rejoinder to Interim Measures Application	Respondent	12	Monday, 26 February 2024
v	Hearing on Interim Measures	All	14	11 March 2024
1	Statement of Claim	Claimant	NA	Friday, 19 July 2024
2	Statement of Preliminary Objections	Respondent	98	Friday 25 October 2024
3	Defence to Preliminary Objections	Claimant	56	Friday, 20 December 2024
4	Decision on format and venue of the Hearing	Tribunal	17 ³	Friday, 14 February 2025
5	<i>Document Production Requests (limited to preliminary objections)</i>	<i>Claimant and Respondent</i>	3	Monday, 17 February 2025

¹ Time frames for the Claimant to complete a measure may be shorter than listed in this Procedural Order and, where that occurs, time shall commence for the Respondent in respect of the next step in the procedural timetable from the date of the Claimant completing the relevant measure, save for the date provided to file the Statement of Claim.

² Holiday Period: for the purposes of calculating intervals between the procedural steps in this timetable, time shall not run from Monday 18 December 2023 to Friday 26 January 2024 inclusive (39 days).

³ Holiday Period: for the purposes of calculating intervals between the procedural steps in this timetable, time shall not run from Saturday 21 December 2024, to Monday 27 January 2025 inclusive (37 days).

	Description	By	Interval (days)	Date¹
6	<i>Objections to Document Production Requests</i>	<i>Claimant and Respondent</i>	28	Monday, 17 March 2025
7	<i>Reply to Objections to Document Production Requests</i>	<i>Claimant and Respondent</i>	14	Monday, 31 March 2025
8	<i>Decision on Document Production</i>	<i>Tribunal</i>	14	Monday, 14 April 2025
9	<i>Production of Documents</i>	<i>Claimant and Respondent</i>	14	Monday, 28 April 2025
10	Reply on Preliminary Objections	Respondent	42	Monday, 9 June 2025
11	Rejoinder on Preliminary Objections	Claimant	21	Monday, 30 June 2025
12	Notification of witnesses and/or experts to be cross-examined (if any)	Claimant and Respondent	7	Monday, 7 July 2025
13	Pre-Hearing Conference	Parties and President	39	Friday, 15 August 2025
14	Hearing on Preliminary Objections	All	45	Monday, 29 September to Friday, 3 October 2025 (3 days + 2 reserve)
15	Post-Hearing Briefs (if any)	Claimant and Respondent	TBD	TBD
16	Costs Submissions	Claimant and Respondent	TBD	TBD
17	Award on Preliminary Objections	Tribunal	TBD	TBD

Annex 2: Model Redfern Schedule for Document Requests

No.	Documents or category of documents requested (requesting Party)	Relevance and materiality, incl. references to submission (requesting Party)		Reasoned objections to document production request (objecting Party)	Response to objections to document production request (requesting Party)	Decision (Tribunal)
		References to Submissions, Exhibits, Witness Statements or Expert Reports	Comments			