

**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.

(“Claimant” or “Zeph”)

and

THE COMMONWEALTH OF AUSTRALIA

(“Respondent”, “Australia”, or “Commonwealth”, together with the Claimant, the “Parties”)

(PCA Case No. 2023-40)

**PROCEDURAL ORDER No. 4
(Document Production)**

Tribunal

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

Tribunal Secretary
Mr. Lukas Montoya

Registry
Mr. Bryce Williams
Permanent Court of Arbitration

24 May 2024

I. PROCEDURAL BACKGROUND

1. On 1 September 2023, the Tribunal issued Procedural Order No. (“**PO1**”) together with the Procedural Calendar.¹ Section 5.1 of PO1 regulates the time limits, form, and expected number of the Parties’ document production requests as follows:

Within the time limit set in [the Procedural Calendar], a Party may request the other Party to produce documents or categories of documents, using the form of the “Redfern Schedule” in Annex 2 hereto, in both Word and .pdf format. **The Tribunal recommends that the number of requests per Party do not exceed 20, including sub-requests. A Party wishing to exceed this number shall announce it two weeks before the submission of the Redfern Schedule, explaining the reasons and need for a number higher than recommended.**²

2. On 26 March 2024, in accordance with Section 5.1 of PO1, the Respondent notified the Tribunal and the Claimant that it was likely to exceed 20 document production requests, while providing reasons.³
3. On 8 April 2024, pursuant to Section 5 of PO1 and the Procedural Calendar, the Parties submitted their Document Production Requests (“**Request(s)**”) in the form of Redfern Schedules. The Claimant filed 8 Requests and the Respondent filed 22 Requests.
4. On 29 April 2024, the Parties submitted their objections to the opposing Party’s Requests.
5. On 10 May 2024, each Party replied to the opposing Party’s objections and provided the Tribunal with the corresponding Redfern Schedules for determination.
6. The present Order deals with the Parties’ Requests.⁴ The Tribunal will first determine the applicable legal framework and standards (**II**). On this basis, it will then address certain general or recurring issues raised by the Parties (**III**), before deciding the Requests in the Redfern Schedules attached as Annexes A (for the Claimant) and B (for the Respondent)⁵ (**IV**).

II. APPLICABLE LEGAL FRAMEWORK AND STANDARDS

7. The legal framework governing document production in these proceedings is determined by (in the following order of precedence) Chapter 11 of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (“**AANZFTA**” or the “**Treaty**”); the *lex arbitri*, namely Chapter 12 of the Swiss Private International Law Act (“**PILA**”); the 2021 UNCITRAL Arbitration Rules (“**Arbitration Rules**”); and PO1.

¹ The Procedural Calendar was revised on 12 December 2023.

² PO1, § 5.1 (emphasis added).

³ The Respondent filed its notice on 25 March 2024 with the Tribunal Secretary, who circulated it with the Claimant and the Tribunal on 26 March 2024, and again with the Claimant on 3 April 2024 at the latter’s request.

⁴ All terms not specifically defined in this Order have the meaning used and commonly understood by the Parties either in their main scheduled submissions and/or in Annexes A and B attached to this Order.

⁵ For ease of reference, the Tribunal has used Annex B as abridged by the Respondent.

8. The AANZFTA generally does not regulate document production. However, Article 26(5) sets out information that the Tribunal may not require the Respondent to furnish:

The tribunal shall not require [the Respondent] to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the [Respondent'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.

9. As for the *lex arbitri*, where the Parties have not agreed on a specific rule of procedure “either themselves or by reference to [a set] of arbitration rules”,⁶ Articles 182(2) and 184(1) of the PILA grant the Tribunal broad discretion in procedural matters, including the taking of evidence and document production.

10. The Arbitration Rules, applicable by agreement of the Parties,⁷ confirm the Tribunal’s discretion to order the production of documents. Article 27(3) of the Arbitration Rules reads as follows:

At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.

11. Moreover, PO1, issued in consultation with the Parties, contains certain rules on document production. In addition to Section 5.1 of PO1 quoted above,⁸ the following are relevant for the present Order:

5.2 Each request for production shall:

- a. identify with specificity:
 - i. the type(s) or category of documents whose production is sought (for example, letters, emails, minutes of meetings, memoranda, notes, reports). Parties shall not use a generic formulation, such as “all documents” or “all records”, or use such formulation and then define it to “include” specific types of documents;
 - ii. the author, sender, recipient, and/or custodian of the requested document or category of documents (i.e., by the name of the individual, department, entity, or organ, as the case may be). A Party asserting that such identification is not possible must adequately substantiate such assertion;
 - iii. a date for individual documents or a narrow and proportionate period for a category of documents;
- b. describe the subject matter in sufficient detail and with necessary particulars to enable an effective search for responsive documents to be carried out;
- c. specify that the documents requested are not in the possession, custody or control of the requesting Party (or explain why it would be unreasonably burdensome for the requesting Party to produce them), and that they are likely to exist and be in the possession, custody or control of the other Party; and
- d. explain, with specific references to the record, why the document or category of documents sought is relevant to the case and material to its outcome and, more

⁶ Article 182(1) of the PILA provides where relevant that “[t]he parties may determine the arbitral procedure, either themselves or by reference to arbitration rules”. The “arbitral procedure” includes document production and the taking of evidence more broadly.

⁷ Terms of Appointment, § 9.1.c.

⁸ *Supra*, ¶ 1.

specifically, which fact alleged in the arbitration the document sought is intended to prove.

5.3 If the Tribunal considers that a request lacks sufficient specificity, it will in principle not narrow it down of its own initiative.

5.4 Within the time limit set in Annex 1, the responding Party shall:

- a. where it has no objection, produce the documents requested;
- b. where it has an objection, using the Redfern Schedule provided by the requesting Party (in both Word and .pdf format), provide the requesting Party with its objections to producing the requested documents.

5.5 Within the time limit set in Annex 1, the requesting Party may reply to the other Party's objections in the same Redfern Schedule (in both Word and .pdf format). The reply shall answer specific objections and may not be used to re-formulate the initial request.

5.6 The Tribunal will, in its discretion, rule upon the production of the documents or categories of documents having regard to Article 26(5) of [Treaty], the requirements set out above, the legitimate interests of the Parties and all of the surrounding circumstances. In deciding document production requests, the Tribunal may take guidance from the 2020 IBA Rules on the Taking of Evidence in International Arbitration [“IBA Rules”].

5.7 When ruling on production, the Tribunal will in particular take into account that a Party shall not be entitled to the production of a document:

- a. seeking to establish a fact that is already proven by evidence on record;
- b. seeking to establish a fact for which the other Party bears the burden of proof;
- c. whose search would be too burdensome, taking into consideration the added value of the document for the resolution of the dispute and the burden of the search efforts; and
- d. that is privileged and or otherwise protected, provided the legal basis for such claim of privilege or protection is set out in sufficient detail for the Tribunal to make an informed decision in case of objection.

5.8 Where production is offered by a Party or ordered by the Tribunal, responsive documents shall be communicated directly to the requesting Party without copying the Tribunal. Documents so communicated shall not be considered part of the record unless and until the requesting Party subsequently files them as exhibits in accordance with Sections 3 and 4 above.

12. In view of these rules, particularly Section 5.6 of PO1, the Tribunal may take guidance from the following provisions of the IBA Rules:

i. Article 3.3:

A Request to Produce shall contain:

- (a) (i) a description of each requested Document sufficient to identify it, or
(ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
- (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and

- (c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and
- (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.

ii. Article 3.4:

Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, all the Documents requested in its possession, custody or control as to which it makes no objection.

iii. Article 3.5:

If the Party to whom the Request to Produce is addressed has an objection to some or all of the Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Articles 9.2 or 9.3, or a failure to satisfy any of the requirements of Article 3.3. If so directed by the Arbitral Tribunal, and within the time so ordered, the requesting party may respond to the objection.

iv. Article 3.7:

Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in timely fashion, consider the Request to Produce, the objection and any response thereto. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (ii) none of the reasons for objection set forth in Articles 9.2 or 9.3 applies; and (iii) the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.

v. Article 9.2:

The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection, in whole or in part, for any of the following reasons:

- (a) lack of sufficient relevance to the case or materiality to its outcome;
- (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (see Article 9.4 below);
- (c) unreasonable burden to produce the requested evidence;
- (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;
- (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
- (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
- (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.

13. Accordingly, the Tribunal has applied the following standards when deciding on the Requests:
- i. **Specificity:** The Requests must identify each document or category of documents with precision in terms both of subject matter and temporal scope. The Tribunal has dismissed Requests that fail to comply with this requirement, unless it considered that the circumstances justified narrowing down a given Request *proprio motu*. It has done so, for instance, where the *prima facie* relevance of the documents sought seemed particularly significant.
 - ii. **Relevance:** The Request must establish the relevance of each document or category of documents to prove facts alleged in the submissions. For the purposes of this Order, the term “relevance” encompasses both relevance to the dispute and materiality to its outcome. At this stage of the proceedings, the Tribunal has only assessed the *prima facie* relevance of the documents requested, having regard to the factual allegations made so far. This *prima facie* assessment does not preclude a different assessment later in the arbitration with the benefit of a more developed record. That being said, as a general matter, documents seeking to establish facts already proven by evidence in the record lack *prima facie* materiality.
 - iii. **Possession, custody or control:** The Request must show that it is more likely than not that the requested documents exist, that they are not within the possession, custody or control of the requesting Party, and that they are within the possession, custody or control of the other Party.
 - iv. **Balance of interests:** Where appropriate, the Tribunal has balanced the legitimate interests of the requesting Party with those of the requested Party, taking into account all relevant circumstances. These include *inter alia* any legal privileges applicable to certain types of communications; the need to safeguard confidentiality when applicable; the proportionality between the convenience of revealing potentially relevant facts and the burden imposed on the requested Party; and procedural economy.
 - v. **Burden of proof:** The Requests must seek to establish a fact for which the requesting Party has the burden of proof. However, whether a Party has the burden of proving a given fact is not always clear at the early stages of the proceedings. Moreover, the fact that one Party *prima facie* has the burden of proof does not necessarily negate the opposing Party’s burden of and legitimate interest in contesting alleged facts and thus filing Requests accordingly where appropriate in view of all relevant circumstances. In a bifurcated proceeding, these relevant circumstances include the Tribunal’s duty to ascertain its jurisdiction.

III. GENERAL OR RECURRING ISSUES

14. This section deals with the Claimant’s “Overall Objection” (A), and other recurring objections raised by the Parties in their Redfern Schedules (B).

A. CLAIMANT’S OVERALL OBJECTION

15. Notwithstanding its specific objections to each of the Respondent’s individual Requests, the Claimant formulates an Overall Objection against the Respondent’s Requests, which the Respondent opposes.

16. In essence, the Overall Objection has three main components. The Claimant contends that the Tribunal should dismiss all of the Respondent's Requests, to the extent that the Respondent has made 655 Requests,⁹ which is inconsistent with PO1 and good faith (1);¹⁰ the Respondent's Requests constitute an abuse of process (2);¹¹ and the Respondent's Requests are unspecific and seek the production of documents already produced to the Respondent,¹² which in addition are irrelevant and immaterial,¹³ or concern facts that do not go the Respondent's burden of proof (3).¹⁴ The Tribunal addresses these components next.

1. The 655 Requests and resulting breach of PO1 and good faith

17. Pursuant to Section 5.1 of PO1, each Party's Requests were expected "not to exceed 20, including sub-requests".¹⁵ The Respondent filed instead 22 Requests.

18. The Claimant does not take issue with the Respondent's additional two requests, and rightly so. As Section 5.1 of PO1 makes clear, the 20-request threshold was not a hard rule, but a "recommend[ation]" aimed at achieving greater cost and time efficiency. The threshold could be exceeded if the "Party wishing to exceed this number [...] announce[d] it two weeks before the submission of the Redfern Schedule, explaining the reasons and need for a number higher than recommended". The Respondent complied with this requirement to file its 22 Requests.¹⁶

19. However, the Claimant argues that, contrary to PO1 and good faith, the Respondent's 22 Requests in reality amount to 655 Requests.¹⁷ Moreover, it contends that, if at all defined,¹⁸ the "temporal scope for each of the 655 [R]equests varies, with over 200 of the [R]equests in the hundreds of days and over 300 of the [R]equests for over 1,000 days with many up to 2,006 days in respect of each of the [R]equests".¹⁹ On this basis, the Claimant submits that the Respondent's Requests "must both in the terms of the number of documents requested and temporal scope made, be one of the largest made in interlocutory proceedings in an international arbitration".²⁰ For the Claimant, this means that it "cannot possibly be expected to object properly to [the] 655 [...] Requests within 21 days" (that is, within the time set by the Procedural Calendar for each Party to object to the opposing Party's Requests),²¹ with the result that the Tribunal must dismiss the entirety of the Respondent's Requests.

⁹ Annex B, Overall Objection, ¶ 5.

¹⁰ Annex B, Overall Objection, ¶ 6.

¹¹ Annex B, Overall Objection, ¶¶ 7-13.

¹² Annex B, Overall Objection, ¶¶ 14-15, 31, 33.

¹³ Annex B, Overall Objection, ¶¶ 24-31, 16-17.

¹⁴ Annex B, Overall Objection, ¶¶ 19-23.

¹⁵ *Supra*, ¶ 1.

¹⁶ *Supra*, ¶ 2.

¹⁷ Annex B, Overall Objection, ¶ 5(b) (emphasis removed), referring to Schedule A attached to the Claimant's objections of 29 April 2024 ("Schedule A").

¹⁸ Annex B, Overall Objection, ¶ 5(c).

¹⁹ Annex B, Overall Objection, ¶ 5(b) (emphasis removed), referring to Schedule A.

²⁰ Annex B, Overall Objection, ¶ 5(b).

²¹ Annex B, Overall Objection, ¶¶ 5(e). *See also* Annex B, ¶ 5(f).

20. Whether the temporal scope of the Respondent's Requests is overly broad is an aspect that the Tribunal has considered when deciding the Requests on a case-by-case basis.²² That said, the key premise of the Claimant's argument, namely, that the Respondent has filed 655 Requests, is misguided. As the Respondent notes,²³ this number stems from extrapolating each sub-request per potential custodian and then per category of document requested, into a separate Request.
21. It may be that the Respondent has filed more than 22 Requests if one were to break down each Request per sub-requests. Overall, however, the Tribunal finds nothing objectionable about the Respondent's approach to document production. It could even be seen as an exercise of restraint consistent with the efficiency objective embedded in Section 5.1 of PO1.
22. Therefore, the Tribunal dismisses the first component of the Overall Objection.

2. Abuse of process

23. It is undisputed that Mineralogy International Limited ("**MIL**") and Zeph were inserted into the Mineralogy Group corporate chain in December 2018 and January 2019, respectively (the "**Restructure**"). In this respect, the Respondent makes a preliminary objection arguing that the Claimant's claims are not within the Tribunal's jurisdiction and/or are inadmissible on the ground of abuse of process, to the extent that the Restructure was aimed at acquiring protection under the AANZFTA in relation to an already existing or foreseeable dispute (the "**Abuse of Process Objection**" or "**APO**").²⁴
24. Several of the Respondent's Requests seek documents to substantiate the APO. According to the Claimant, the APO is in itself abusive,²⁵ and hence any reliance by the Respondent on the APO to justify its Requests must be dismissed as it represents "a further abuse" contrary to good faith.²⁶
25. The Claimant's argument is inapposite in the context of document production. The characterization of the APO goes to the merits of that preliminary objection and is an important issue regarding the Tribunal's jurisdiction or the admissibility of the claims. It is thus clear that the Tribunal cannot rule on this issue in the present context and that the Respondent is entitled to formulate Requests aimed at advancing the APO.
26. Therefore, the Tribunal dismisses the second component of the Overall Objection.

²² *Supra*, ¶ 13.i.

²³ Annex B, Respondent's Answer to the Overall Objection, ¶ 7.

²⁴ See *inter alia* Respondent's Statement of Preliminary Objections of 22 January 2024 ("**SOPO**"), ¶¶ 264ss.

²⁵ Annex B, Overall Objection, ¶¶ 7-11, referring *inter alia* to the Preamble to the Claimant's Response to the SOPO of 14 March 2024 ("**SOPO Response**"). See also *inter alia* SOPO Response, ¶¶ 144ss.

²⁶ Annex B, Overall Objection, ¶ 11.

3. Unspecific requests for irrelevant documents already produced or concerning facts not falling within the Respondent’s burden of proof

27. Further to the document production standards set out above, whether the Respondent’s Requests lack specificity²⁷ or relevance;²⁸ or concern documents in its possession, custody, or control;²⁹ or relate to facts for which the Respondent does not bear the burden of proof,³⁰ are all aspects that the Tribunal has considered when deciding each of the Requests.
28. In other words, the Tribunal has in effect decided the third component of the Overall Objection throughout Annex B.

B. OTHER RECURRING ISSUES

29. Each Party has raised a number of recurring objections to the opposing Party’s Requests. While the Tribunal has considered all of the Parties’ arguments to decide on document production, this section briefly addresses two recurring objections or issues that warrant particular attention in the interest of streamlining the proceedings and of procedural economy. This section thus aims at informing the Tribunal’s decisions on some of the individual Requests while providing guidance to the Parties on the implementation of those decisions and the remaining steps of the jurisdictional/admissibility phase of this arbitration.

1. The foreseeability of the Amendment Act

30. The Claimant argues that the overarching dispute before the Tribunal commenced with and is determined by the Amendment Act passed by Western Australia (“WA”) in August 2020.³¹ According to the Claimant, the Amendment Act, through which the Respondent *inter alia* “terminate[d] the Arbitration Agreement and the Mediation Agreement and the State Agreement Arbitration which the Respondent had just entered into one month earlier”, is what “has given rise to this [a]rbitration”.³² Thus, the Claimant argues that it only seeks “relief in this arbitration in respect of the damages caused to it by the Amendment Act”.³³
31. In this context, with respect to the APO,³⁴ the Claimant contends that, “regardless of the purpose” behind the Restructure, at the time the Restructure was planned or took place “the specific dispute before this Tribunal” (namely the passing the Amendment Act) “was not in existence [...] nor was it foreseeable as a reasonable prospect”.³⁵ In consequence, the Claimant submits that the APO

²⁷ *Supra*, ¶ 13.i.

²⁸ *Supra*, ¶ 13.ii.

²⁹ *Supra*, ¶ 13.iii

³⁰ *Supra*, ¶ 13.v.

³¹ See *inter alia* SOPO Response, ¶¶ 221,

³² SOPO Response, ¶ 9.

³³ See *inter alia* SOPO Response, ¶¶ 221,

³⁴ See *supra*, ¶ 23.

³⁵ SOPO Response, ¶ 490. See also SOPO Response, ¶ 634. For the avoidance of doubt, the Tribunal takes note that the Claimant also argues that the Restructure was effected for a “genuine commercial purpose” (SOPO Response, ¶ 489).

“must fail”.³⁶ This being so, several of the Claimant’s Requests seek documents to prove that the Amendment Act was not and could not have been foreseeable before the Restructure occurred (the “**Foreseeability Requests**”).³⁷

32. The Respondent objects to the Foreseeability Requests *inter alia* on the basis that the documents sought are not relevant and material to the Claimant’s defense against the APO, because “the foreseeability test for the purposes of an abuse of process objection focuses on the foreseeability of the *dispute*, and not the precise *measure* at issue in the resulting claim”.³⁸ In this regard, the Respondent submits that, by “late 2018”,³⁹ at “least two inter-connected disputes between Mineralogy and the WA Government had crystallised or were reasonably foreseeable at the time of the [Restructure], namely, a dispute concerning the lawfulness of any unilateral modification by the WA Government of Mineralogy’s rights under the State Agreement to address a dispute between Mineralogy and the CITIC Parties [...], and a dispute concerning the lawfulness of the WA Government’s conduct in relation to the BSIOP Proposal”.⁴⁰ Therefore, the Respondent alleges that, when the Restructure took place in January 2019, “Mineralogy, Mr Palmer and Zeph actually knew [that] WA was contemplating [a] unilateral amendment of Mineralogy’s rights under the State Agreement, and indeed [...] had in mind that such action might provide the foundation for a claim under [the] AANZFTA”.⁴¹
33. Consequently, in the Respondent’s view, “it is irrelevant whether the Mineralogy Group predicted the passage of the Amendment Act prior to the [Restructure in] January 2019. What matters [...] is that, at the time of the [Restructure], it was reasonably foreseeable that WA would adopt measures that unilaterally impacted Mineralogy’s rights under the State Agreement [...]. Once that was reasonably foreseeable, the insertion of Zeph into the corporate chain in order to allow such a claim to be made has the consequence that — if such a claim is made — then that is an abuse of process. That is so whether or not the precise form that WA’s action would take was reasonably foreseeable. It therefore does not matter whether the passage of [the Amendment Act] was foreseeable. What matters is that, when [the Amendment Act] commenced in 2020, Zeph became — as it was created to become — the vehicle through which the mechanisms of AANZFTA were invoked in relation to a domestic dispute that was already in prospect”.⁴²
34. In addition to objecting to the Foreseeability Requests, and in line with its APO, several of the Respondent’s Requests seek documents to test whether the Restructure was indeed effected “for a genuine commercial purpose”,⁴³ as the Claimant alleges (the “**Restructure Requests**”).⁴⁴ The Claimant objects to the Restructure Requests in essence referring to the reasons that it puts forward to justify the Foreseeability Requests. Differently stated, the Claimant *inter alia* argues that the

³⁶ SOPO Response, ¶ 364.

³⁷ See Annex A, Claimant’s Requests No. 1-3, 5 and 6.

³⁸ SOPO, ¶ 312 (cursive original).

³⁹ SOPO, ¶ 308.

⁴⁰ Annex A, Respondent’s Objections to Claimant’s Request No. 1 (*see also* Respondent’s Objections to the remaining Foreseeability Requests).

⁴¹ SOPO, ¶ 308.

⁴² SOPO, ¶ 316.

⁴³ *See supra*, fn. 35.

⁴⁴ *See inter alia* Annex B, Respondent’s Requests No. 1-5, 7-11, and 22.

Restructure Requests seek the production of documents that are irrelevant and immaterial to the APO, as they are incapable of informing whether and to what extent the Amendment Act was foreseeable at the time of the Restructure, which according to the Claimant is the dispositive issue.⁴⁵

35. Against this background, it is clear that the controversy between the Parties regarding the Foreseeability and the Restructure Requests derives from the Parties' conflicting case theories as to which foreseeable dispute, if any, is relevant to resolve the APO. The Claimant submits that such dispute is determined by the Amendment Act, while the Respondent argues that the dispute is determined by the domestic disputes between WA and the CITIC Parties, on the one hand, and Mineralogy and WA, on the other hand.
36. The determination of the relevant dispute (if any) for purposes of foreseeability and of the APO is a matter of law that the Tribunal cannot settle at this juncture, without the benefit of a fully developed record on jurisdiction and admissibility.
37. However, the Tribunal understands that the Respondent acknowledges that the *fact* of the passing of the Amendment Act *per se* was not foreseeable to the Claimant at the time of the January 2019 Restructure.⁴⁶ Indeed, referring to evidence already in the record and in part furnished by the Claimant, the Respondent concedes that the Amendment Act was not conceptualized before March-May 2020;⁴⁷ that the draft bill that would become the Amendment Act was not approved before July 2020;⁴⁸ and that the draft bills were not only kept secret,⁴⁹ but were accessible only to a handful of high-level public officials.⁵⁰

⁴⁵ See *inter alia* Annex B, Claimant's Objections to the Respondent's Request No. 1 (see also Claimant's Objections to the remaining Restructure Requests).

⁴⁶ The Tribunal's understanding should not be construed as prejudging the APO, and is subject to change in view of the Parties' further briefing on the matter.

⁴⁷ See *inter alia* Annex A, Respondent's Objections to the Claimant's Request No. 1 ("The Claimant seeks documents evidencing "the date on which the concept of the draft legislation which became the Amendment Act was first conceived or proposed". The Federal Court of Australia has found that Mr Mark McGowan and Mr John Quigley discussed the prospect of legislation as a means of dealing with Mr Palmer's damages claim from about March 2020 (*Palmer v McGowan (No 5)* [2022] FCA 893 at para. 27, Exh. R-166."). Paragraph 27 of the judgement referred to by the Respondent reads as follows: "Mr McGowan said that from **about March 2020**, he and Mr Quigley were discussing the prospect of legislation as a means of dealing with the problem represented by Mr Palmer's damages claim: T463.21-464.1. In **late May** Mr Quigley and Mr McGowan had an **SMS exchange** in the following terms [...]" (**R-166**, ¶ 27, emphasis added). The Claimant has furnished the "late May [...] SMS exchange" between Messrs. McGowan and Mr. Quigley referred to by the Federal Court of Australia as **C-432**, and on that basis argues that it could not have foreseen the passing of the Amendment Act (see *inter alia*, SOPO Response, ¶ 35). See *inter alia* SOPO Response, ¶ 35 quoting **C-432**, Text messages between Mr Quigley and Mr McGowan, May 2023.

⁴⁸ See *inter alia* Annex A, Respondent's Objections to the Claimant's Request No. 1 ("In relation to the 'date on which work first commenced on the drafting of the draft legislation which became the Amendment Act', the evidence on the record establishes that, in July 2020, Mr McGowan and Mr Quigley approved the drafting of the bill that would become the Amendment Act (Affidavit of Mr McGowan dated 26 March 2021 Exh. C-135; p. 136 at para 78).").

⁴⁹ See *inter alia* Annex A, Respondent's Objections to the Claimant's Request No. 1 ("In relation to the Claimant's position that 'the extent to which any such drafts of the Amendment Act were circulated internally at the Respondent is also relevant to the secrecy maintained during the preparation of the Amendment Act', the secrecy maintained in connection with the preparation of the Amendment Act is a fact that is already proven by the evidence on the record (text messages between Mr Quigley and Mr McGowan on 23 May 2020, extracted in *Palmer v McGowan (No 5)* [2022] FCA 893 at Annexure A, Exh. R-166; ABC Radio interview transcript, Exh. C-127; Affidavit of Mr Quigley dated 25 March 2021, Exh. C-135, p. 115 at paras. 7-9; Affidavit of Mr McGowan dated 26 March 2021, Exh. C-135; p. 136 at para 78)). On that basis, the Claimant is not entitled to the production of the documents sought.").

⁵⁰ See *inter alia* Annex A, Respondent's Objections to the Claimant's Request No. 3 ("Insofar as the Claimant seeks these documents to prove that 'the Amendment Act was prepared in secret', the fact that the Amendment Act was prepared in

38. Therefore, the Foreseeability Requests lack *prima facie* materiality. They seek documents to establish that the Amendment Act was not and could not have been foreseeable, a fact that is uncontroversial in view of the record. As a consequence, the Tribunal has denied the Foreseeability Requests.
39. By contrast, whether the Restructure was effected to achieve “a genuine commercial purpose” remains a disputed relevant fact. Accordingly, the Tribunal has applied the document production standards outlined above to each of the Restructure Requests in Annex B.

2. Documents from third parties

40. For context, it appears common ground that:
- i. Waratah Coal Pty Ltd (“**Waratah Coal**”), an Australian company, is a subsidiary of Mineralogy Pty Ltd (“**Mineralogy**”), another Australian company.
 - ii. Zeph (the Claimant), a Singaporean company, wholly owns Mineralogy, and two Singaporean companies, namely One Kleenmatic Pte Ltd (“**One Kleenmatic**”) and Kleen Venture Pte Ltd (“**Kleen Venture**”).
 - iii. Zeph is wholly owned by **MIL**,⁵¹ a New Zealand company. MIL’s shareholders are two Australian companies, namely Closeridge Pty Ltd (“**Closeridge**”) and River Crescent Pty Ltd (“**River Crescent**”), and Mr. Palmer, who owns 99.9 % of Closeridge’s shareholding and wholly owns River Crescent.
 - iv. Mr. Palmer is therefore the ultimate beneficial owner of Zeph. He is also the ultimate beneficial owner of Waratah Coal, Mineralogy, One Kleenmatic, Kleen Venture, MIL, Closeridge, and River Crescent (jointly, the “**Third Party Entities**” or “**TPEs**”).
41. In this context, the Respondent submits that requested “documents in the possession, custody or control of Mr Palmer [...] are in the possession, custody or control of the Claimant”.⁵² The Respondent further contends that “[d]ocuments in the possession, custody or control of the [TPEs] are also in the possession, custody or control of the Claimant because those [TPEs] are owned and/or controlled by the Claimant”.⁵³ Accordingly, all of the Respondent’s Requests seek documents, not only from the Claimant, but also from Mr. Palmer and/or at least one of the TPEs.

confidence is already proven by the evidence on the record, and is not contested by the Respondent. The Respondent repeats its objection in relation to Request No. 1. Insofar as the Claimant seeks these documents to prove ‘[t]he extent to which the WA Cabinet was (or was not briefed) about the Amendment Act’, that is also a fact that is already proven by the evidence on the record, or otherwise not contested by the Respondent. Other than Mr Mark McGowan and Mr John Quigley, and potentially one or two other Ministers, no member of Cabinet was aware of the existence of the draft legislation until a Cabinet meeting at 4.15pm on 11 August 2020 (45 minutes before the Bill was introduced into Parliament) (Palmer v McGowan (No 5) [2022] FCA 893 at para. 30, Exh. R-166).”

⁵¹ *Supra*, ¶ 23.

⁵² Annex B, Respondent’s Comments, ¶ 4.

⁵³ Annex B, Respondent’s Comments, ¶ 4.

In turn, the Claimant objects to the Requests arguing that it is a separate legal entity and thus has no possession, custody, or “direct control”⁵⁴ of Mr. Palmer’s or the TPEs’ documents.⁵⁵

42. It is clear that the Claimant does not have possession or custody of documents held by Mr. Palmer or the TPEs. The question is whether the Claimant has control over those documents, which is not limited to the direct control standard invoked by the Claimant.
43. Whether and to what extent there is a control relationship between the Claimant and Mr. Palmer is a disputed issue, which is part of the Respondent’s denial of benefits objection. It would thus be inappropriate and premature for the Tribunal to settle that issue now. Similarly, the fact that the Claimant wholly owns some but not all of the TPEs does not necessarily mean that it exercises control over them for the purposes of obtaining and producing documents if so ordered.
44. Yet, that is not the end of the matter. Mr. Palmer, in addition to being the Claimant’s and the TPEs’ ultimately beneficial owner, has played a central role in the dispute before the Tribunal. As the Claimant’s main representative and witness in this arbitration, Mr. Palmer also significantly influences the Claimant’s conduct in these proceedings. The Claimant cannot rely on Mr. Palmer to advance its claims, on the one hand, and resist the production of documents in Mr. Palmer’s possession, custody or control by invoking its separate legal personality, on the other.
45. Moreover, the Claimant has a duty to arbitrate in good faith. Multiple key facts involving the TPEs are integral to the Claimant’s claims and the Respondent’s preliminary objections. These facts include financial transactions, corporate decisions, and communications that could significantly impact the Tribunal’s assessment of the issues in dispute. The intertwined nature of the Claimant’s and TPEs’ operations necessitates adequate document production to ensure a fair review of the facts in dispute.
46. This being so, when the Tribunal has granted a Request in Annex B with respect to documents in the possession, custody, or control of Mr. Palmer or the TPEs, it is understood that at the very least the Claimant has a best efforts obligation to procure those documents and produce them to the Respondent. Failure to discharge best efforts may give rise to procedural consequences, including the drawing of negative inferences.

⁵⁴ Annex B, Claimant’s Objection to the Respondent’s Request No. 1, ¶ F.

⁵⁵ See *inter alia*, Annex B, Heading entitled “Disappointing Approach”, ¶ 37.b, and Claimant’s Objection to the Respondent’s Request No. 1, ¶¶ F-G.

IV. ORDER

47. In light of the foregoing:

- i. Regarding the Claimant's Requests, the Tribunal decides the Requests in the manner set out in Annex A attached, which forms an integral part of this Order.
- ii. Regarding the Respondent's Requests, the Tribunal decides the Requests in the manner set out in Annex B attached, which forms an integral part of this Order.
- iii. Regarding both Annexes A and B:
 - a. Each Party shall produce ordered documents to the opposing Party (not the Tribunal) by **7 June 2024**.
 - b. Within the same timeframe, if a Party objects against the production of a document or portions of it on the grounds of privilege, legal impediment, confidentiality, and/or institutional/political sensitivity (generally "privilege"), it shall:
 - (i) If the objection is limited to one or several points of the document, produce a version of the document redacting the allegedly privileged information;
 - (ii) In all cases, identify the document using the privilege log template attached as Annex C;
 - (iii) If the opposing Party considers that the privilege claim is unfounded, it shall present reasoned objections no later than **14 June 2024**, after which the Party invoking the privilege may reply by **21 June 2024**. Both the objections and replies must be set out in the privilege log. Subsequently, the Tribunal will decide any disputed matter.

Seat of the arbitration: Geneva, Switzerland.

On behalf of the Tribunal,



Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal

**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)

and

THE COMMONWEALTH OF AUSTRALIA

(the Respondent)

(PCA Case No. 2023-40)

CLAIMANT'S REQUEST FOR THE PRODUCTION OF DOCUMENTS

Tribunal:

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

8 April 2024

1 Introduction

1.1 The Claimant hereby submits its request for the production of documents pursuant to Section 5 of Procedural Order No. 1 dated 1 September 2023 (“**PO 1**”).

1.2 According to para 5.2 of PO 1, each request for production shall:

a. Identify with specificity:

- i. the type(s) or category of documents whose production is sought (for example, letters, emails, minutes of meetings, memoranda, notes, reports). Parties shall not use a generic formulation, such as “all documents” or “all records”, or use such formulation and then define it to “include” specific types of documents;
- ii. the author, sender, recipient, and/or custodian of the requested document or category of documents (i.e., by the name of the individual, department, entity, or organ, as the case may be). A Party asserting that such identification is not possible must adequately substantiate such assertion;
- iii. a date for individual documents or a narrow and proportionate period for a category of documents;

b. Describe the subject matter in sufficient detail and with necessary particulars to enable an effective search for responsive documents to be carried out;

c. Specify that the documents requested are not in the possession, custody or control of the requesting Party (or explain why it would be unreasonably burdensome for the requesting Party to produce them), and that they are likely to exist and be in the possession, custody or control of the other Party; and

d. Explain, with specific references to the record, why the document or category of documents sought is relevant to the case and material to its outcome and, more specifically, which fact alleged in the arbitration the document sought is intended to prove.

1.3 In addition, in accordance with para 5.6 of PO 1, the 2020 IBA Rules on The Taking of Evidence in International Arbitration may be used as guidance by the Tribunal.

1.4 In accordance with the above provisions, this request for the production of documents (“**Request for Document Production**”) contains a description of each requested Document sufficient to identify it, or a description in sufficient detail of a narrow and specific requested category of Documents that are reasonably believed to exist. In the context of

each individual request the Claimant explains why the requested Documents are relevant to an issue in dispute between the Parties, and material to the outcome of the case.

- 1.5 The Claimant confirms that, to the best of its knowledge, the Documents requested are not within its possession, custody or control. To the extent that any Documents responsive to any particular request have already been shared with the Claimant in these proceedings, such Documents need not be produced in response to that request.
- 1.6 The Respondent includes Western Australia, which is a constituent part of the Commonwealth of Australia. The Claimant understands that all Documents in the possession, custody or control of Western Australia are also in the possession, custody or control of the Respondent.

2 Definitions

- 2.1 Unless expressly stated otherwise, all undefined capitalised terms in this Request for Document Production have the same meaning as defined in the Claimant's Statement of Claim dated 28 March 2023 (as revised on 30 September 2023) and Response to the Respondent's Statement on Preliminary Objections dated 22 January 2024. In this Request for Document Production, the following terms have the meanings given below:
 - a. **AANZFTA:** the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area.
 - b. **Amendment Act:** the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020 (WA)*.
 - c. **Arbitration Agreement:** the agreement entered into between Mineralogy Pty Ltd and International Minerals Pty Ltd and WA (and the arbitrator, the Hon. Michael McHugh AC, QC) on 8 July 2020 (in relation to the third set of arbitral proceedings in the Domestic Arbitrations, as instituted in late 2019).
 - d. **ASIC:** Australian Securities and Investments Commission.
 - e. **ATO:** Australian Taxation Office.
 - f. **BSIOP:** the Balmoral South Iron Ore Project.
 - g. **Communication:** all forms of written correspondence (including, without limitation, emails, letters, SMS or other forms of electronic messaging, notes, memoranda, minutes, reports, presentations, faxes or other correspondence of whatever nature (including electronically stored documents) or any other Document, that has been

produced or circulated by, provided to, or is otherwise within the possession, custody or control of the Respondent.

- h. **Document** shall have the meaning provided in the IBA Rules, i.e.: “a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means”.
- i. **Domestic Arbitrations**: the arbitration proceedings between Mineralogy Pty Ltd and International Minerals Pty Ltd on the one hand and WA on the other hand, in which (in summary) arbitral awards were made in favour of Mineralogy Pty Ltd and International Minerals Pty Ltd in 2014 and 2019 and a third arbitration, to determine the damages to which they were entitled as a result, was instituted in late 2019.
- j. **Mediation Agreement**: the agreement entered into between Mineralogy Pty Ltd and International Minerals Pty Ltd and WA (and the mediator, the Hon. Wayne Martin AC, QC) on 5-6 August 2020 (in relation to the Domestic Arbitrations).
- k. **Request**: each request for the production of documents made in this Request for Document Production.
- l. **Response**: Claimant’s Response to the Respondent’s Statement on Preliminary Objections dated 14 March 2024.
- m. **SoPO**: Respondent’s Statement on Preliminary Objections dated 22 January 2024.
- n. **WA**: the State of Western Australia.

3 Interpretation

- 3.1 The Requests are continuing in nature so as to require the Respondent to produce additional responsive Documents if it discovers or obtains possession, custody, or control of such Documents at any time before the oral hearing.
- 3.2 Documents “sent” to or “received” by a person or party shall include Documents “cc’d” or “bcc’d” to a person or party.

4 Form of Document Production

- 4.1 Each Document should be produced in the manner in which it is found in the Respondent’s records and in its entirety, along with any attachments, annexures, schedules, dividing sheets, labelled folder covers, spine labels, exhibits, enclosures, cover letters and copies with notations on or attached to them, regardless of whether the Respondent considers the entire Document to be relevant or responsive to the Requests.

- 4.2 Documents should be grouped and produced (in an identified fashion) in relation to each specific Request.
- 4.3 If the Respondent has a good faith objection to any of the Requests, or any part thereof, on the ground that some of the requested Documents are privileged, the specific nature of the objection and whether it applies to the entirety of the relevant Request, or only to a portion thereof, should be expressly stated in the designated row of the relevant Request.
- 4.4 If the Respondent has an objection to only part, or parts, of a Request, it should identify the part, or parts, of the relevant Request objected to and produce Documents responsive to the remaining part, or parts, in respect of which no objection is made. The Respondent is requested to produce all severable portions of any responsive Document to which a claim of privilege or other basis for withholding the Document does not apply.

5 Claimant's Reply to the Respondent's Introduction to the Respondent's Objections

- 5.1 The Claimant in its Reply to the Objections raised by the Respondent in respect of each of the Claimant's 8 Document Requests uses definitions as set out in the Claimant's Response dated 14 March 2024.
- 5.2 The Claimant notes the Respondent's admissions set out in its Objections herein, in particular the Respondent's objections to Document Requests 1 and 2 and reserves its rights to rely on such admissions in the hearing of the Respondent's Preliminary Objections commencing on 18 September 2024.
- 5.3 At a hearing on 11 August 2023 (Australian time) counsel for the Respondent Mr Wordsworth KC stated in respect of the Respondent serving its statement on preliminary objections:

"we need the time to set out a series of objections in full. And the tribunal has already seen an outline of those three very substantial jurisdiction objections"

"Australia has three serious and substantive objections to jurisdiction"

"it is a very different thing to formulate and make a denial of benefits as opposed to putting forward a whole legal case with full legal argument"

"Australia has to put forward what it regards as highly critical jurisdictional objections in the matter".

5.4 The Respondent and their grounds of objections have now been proven not to be as Mr Wordsworth stated and are instead frivolous in nature and an abuse of process.

5.5 The Respondents' grounds of objection are as follows:

a. Respondents Objection 1 – Claimant's Abuse of Process

In respect of this ground of objection, the Respondent has admitted the following:

- *“the secrecy maintained in connection with the preparation of the Amendment Act is a fact that is already proven by the evidence on the record”* (see the Respondent's Objection to Document Request No. 1); and
- *“the fact that the Amendment Act was prepared in confidence is already proven by the evidence on the record, and is not contested by the Respondent”* (see the Respondent's Objection to Document Request no. 3).

b. Respondent's Objection 2 – Claimant Investor / Investment

In respect of this ground of objection:

- The Claimant, in its Response at inter alia para 239, states that Mineralogy Pty Ltd (the Claimant's investment in the respondent State) “retained profits for the financial years 2019 and 2020 of AU\$242.69 million” (see also the [REDACTED] Report within the Witness Statement of [REDACTED] at paras 6.2, 6.3 and 6.6).
- Under Article 2 of Chapter 11 of AANZFTA (“Definitions”), retained profits which are not distributed are investments. For the purposes of Article 2, *“returns that are invested shall be treated as investments”*. And “return” means *“an amount yielded by or derived from an investment, including profits, dividends, interest, capital gains, royalties and all other lawful income”*. Accordingly and undoubtedly, the Claimant has made an investment in Mineralogy. (See the Response at para 27.)

c. Respondent's Objection 3 - Denial of Benefits

- In respect of this ground of objection, the Claimant refers the Tribunal to “Section I: Preamble” within the Claimant's Response including inter alia that the Respondent approved the Claimant as a foreign company carrying on business in Australia on 29 March 2019.

- The Respondent's Professor Lys states in paragraph 216 of his Report, that "*my analysis of Zeph's contributions indicate that during 2020, the company had between 120 (December) and 132 (February) employees subject to CPF contributions*". The Respondent's expert has thus admitted that the Claimant has employed substantial staff in the relevant period, evidencing the Claimant's substantive business operations in Singapore. The Respondent has admitted that the Claimant has a substantive business in Singapore and has many employees engaged in the business (see Professor Lys Report at paragraph 216).

Claimant's Conclusion

- 5.6 The Respondent's Application for Preliminary Objections is an abuse of process and have not been made in good faith. It follows therefore, that all of the Respondent's objections, are themselves are a continuing abuse of process.

Claimant's Document Request No. 1	
Document(s) Requested	<p>All memoranda, minutes of meetings or conferences, file notes of meetings or conferences, reports, opinions, briefing papers or Communications which record or evidence:</p> <ol style="list-style-type: none"> 1. the date on which the concept of the draft legislation which became the Amendment Act was first conceived of or proposed; 2. the date on which work first commenced on the drafting of the draft legislation which became the Amendment Act; or 3. the date on which the first draft of the Amendment Act was completed.
Relevance	<p>Reference to Submissions</p> <p>Response, paras 35, 41-43, 491, 512, 619-620, 627-629, 645(e), 673.</p> <p>SMS from Mr. Quigley to Mr. McGowan, Exh. C-432 (Response, p.216).</p>
	<p>Comments</p> <p>This request is made as the Documents are relevant to the Claimant's submission that it could not have foreseen the Amendment Act when it was incorporated in 2019 and material, therefore, to the issue of whether the Claimant's claim in this arbitration is an abuse of process as is alleged by the Respondent.</p> <p>Further, the extent to which any such drafts of the Amendment Act were circulated internally at the Respondent is also relevant to the secrecy maintained during the preparation of the Amendment Act, which is again material to its foreseeability and the issue of whether the Claimant's claim is abusive as is alleged.</p>
Objections	<p>The Respondent objects to this request.</p> <p>Not relevant and material to the outcome of the case (PO1 para. 5.2(d); IBA Rules Articles 9.2(a) and 3.3(b)): The requested documents are not relevant and material to whether or not the Claimant's claim constitutes an abuse of process.</p> <p>The Respondent's case is that at least two inter-connected disputes between Mineralogy and the WA Government had crystallised or were reasonably foreseeable at the time of the Mineralogy Group Restructure, namely, a dispute concerning the lawfulness of any unilateral modification by the WA Government of Mineralogy's rights under the State Agreement to address a dispute between Mineralogy and the CITIC Parties (as defined in the SOPO), and a dispute concerning the lawfulness of the WA Government's conduct in relation to the BSIOP Proposal (SOPO paras. 266, 283-285).</p>

The Respondent's abuse of process objection turns on whether the facts established by the Respondent and summarised in the SOPO are sufficient to establish an abuse of process (SOPO paras. 22, 299).

The documents sought by the Claimant seek to prove only that the Amendment Act was not foreseeable. Whether or not the Amendment Act, as the specific measure ultimately imposed to unilaterally amend the State Agreement, was foreseeable is irrelevant (SOPO paras. 310-316). For that reason, the documents sought are also immaterial to the outcome of the Respondent's case that the Claimant's claim constitutes an abuse of process.

The request seeks documents to establish a fact that is already proven by evidence on record (PO1 para. 5.7(a)): The Claimant seeks documents evidencing “the date on which the concept of the draft legislation which became the Amendment Act was first conceived or proposed”. The Federal Court of Australia has found that Mr Mark McGowan and Mr John Quigley discussed the prospect of legislation as a means of dealing with Mr Palmer's damages claim from about March 2020 (*Palmer v McGowan (No 5)* [2022] FCA 893 at para. 27, Exh. R-166).

In relation to the “date on which work first commenced on the drafting of the draft legislation which became the Amendment Act”, the evidence on the record establishes that, in July 2020, Mr McGowan and Mr Quigley approved the drafting of the bill that would become the Amendment Act (Affidavit of Mr McGowan dated 26 March 2021 Exh. C-135; p. 136 at para 78).

In relation to the Claimant's position that “the extent to which any such drafts of the Amendment Act were circulated internally at the Respondent is also relevant to the secrecy maintained during the preparation of the Amendment Act”, the secrecy maintained in connection with the preparation of the Amendment Act is a fact that is already proven by the evidence on the record (text messages between Mr Quigley and Mr McGowan on 23 May 2020, extracted in *Palmer v McGowan (No 5)* [2022] FCA 893 at Annexure A, Exh. R-166; ABC Radio interview transcript, Exh. C-127; Affidavit of Mr Quigley dated 25 March 2021, Exh. C-135, p. 115 at paras. 7-9; Affidavit of Mr McGowan dated 26 March 2021, Exh. C-135; p. 136 at para 78)). On that basis, the Claimant is not entitled to the production of the documents sought.

The request seeks to establish a fact for which the Respondent bears the burden of proof (PO1 para. 5.7(b)): The Respondent bears the burden of proving that the Claimant's claim is an abuse of process, including the facts relevant to establishing that the dispute was foreseeable (SOPO paras. 22, 299). The stated purpose of the Claimant's request is to prove the Claimant's “submission” that “it could not have foreseen the Amendment Act when it was incorporated in 2019”. Even if the documents sought are relevant to the question of foreseeability of the Amendment Act (which is denied), the Respondent would, on the Claimant's case, bear the burden of

	<p>proving that the Amendment Act was foreseeable at time of the Mineralogy Group Restructure.</p> <p>Search would be too burdensome taking into consideration the added value of the documents (PO1 para. 5.7(c); IBA Rules Article 9.2(c)): Responding to this request would be unduly burdensome, given the large number of documents likely to be found to be responsive to this broad request. Additionally, taking into consideration the lack of any added value of the documents for the reasons set out above, the request should be denied.</p> <p>Legal professional privilege: If production is ordered, the Respondent anticipates making a claim for legal professional privilege over some or all of these documents, in full or in part, on the basis that the documents record communications between legal advisers for or on behalf of the State of Western Australia for the dominant purpose of seeking legal advice in relation to the Amendment Act, and are therefore privileged.</p> <p>The relevant system of law that the Tribunal should apply in determining claims for privilege is the law in Australia. This is the jurisdiction in which the legal advice was sought, the jurisdiction in which the documents were brought into existence and the jurisdiction in which the Amendment Act was enacted. Potentially responsive documents may be subject to legal professional privilege under the relevant Australian law of legal professional privilege.</p>
<p>Reply</p>	<p>There is no proper basis for the Respondent’s objection, and Request 1 is maintained as originally drafted.</p> <p>Evidence on record: There is no proper basis for the Respondent’s objection, and Request 1 is maintained as originally drafted. The Respondent makes important admissions in its Objections. The Claimant will inter alia rely on the Respondent’s admission inter alia that the following points are proven:</p> <ul style="list-style-type: none"> • The “prospect of legislation as a means of dealing with Mr Palmer’s damages claim” was discussed by those in the WA Government from about March 2020. • In July 2020, Mr McGowan and Mr Quigley approved the drafting of the bill that would become the <i>Amendment Act</i>. • The secrecy maintained in connection with the preparation of the Amendment Act. • The Claimant notes (i) the Respondent’s express acknowledgement that “the secrecy maintained in connection with the preparation of the Amendment Act” is a “proven” fact (which is, of course, inconsistent with the Respondent’s position that the Claimant’s claim is an abuse of process) and (ii) the express admissions on timing of steps taken in relation to the Amendment Act (all of which were in 2020).

- The remainder of this reply (in respect of all 8 requests) is without prejudice to the foregoing, on which the Claimant reserves the right to rely at the forthcoming jurisdiction hearing and during the merits phase.

The Respondent also states that “The documents sought by the Claimant seek to prove only that the *Amendment Act* was not foreseeable” which is an admission that this is also a fact that has now been proven.

The documents requested, are relevant to the Claimant proving that the Respondent’s preliminary objection application, is an abuse of process and that the Respondent always knew that the Amendment Act could not be foreseen at the time the Claimant was incorporated in January 2019.

The Respondent's Objection above discloses several misconceptions.

First, the Respondent is wrong to suggest that the matters to which it refers were “inter-connected” matters between Mineralogy and the WA Government”. Those two matters are not “inter-connected” in any sense. They had nothing to do with each other and, more importantly, they are not the dispute which is the subject of the present investor-State arbitration before this Tribunal as set out in the Claimants Response to the Respondent’s Statement on Preliminary Objections dated 14 March 2024 (**Response**) at paragraphs 217 to 221.

Secondly, it is wrong to say that there was ever a dispute concerning the lawfulness of any unilateral modification by the WA Government of Mineralogy's rights under the State Agreement. No such unilateral modification was ever formulated, let alone attempted, and nor was it foreseeable, in the light of the history of State Agreements in Western Australia dating back some 60 years, that such a thing could in practice ever occur. Indeed, it was unthinkable that a State Agreement could ever be varied except by consent of both parties as provided by the State Agreement.

Thirdly, the dispute concerning the lawfulness of the WA Government's conduct in relation to the BSIOP Proposal, which was the subject of a domestic arbitration terminated by the Amendment Act, is entirely irrelevant in this context. The only question is whether the *Amendment Act* was foreseeable at the time of incorporation of the Claimant, which plainly it was not. Indeed, it was completely unthinkable, prior to the introduction of the Bill for the Amendment Act on 11 August 2020, that WA would legislate out of existence a process in which it had participated (seemingly in good faith) for some 8 years and, in doing so, in breach of its contractual obligations under the 2020 Arbitration Agreement, its statutory obligations under domestic arbitration legislation, its obligation to act as a “model litigant” and the rule of law.

Fourthly, the Respondent is wrong to say that whether or not the *Amendment Act* was foreseeable is irrelevant. To the contrary, this is the key issue for the

hearing in September 2024. As explained in the Claimant's Response to the SOPO which set out the dispute before this tribunal in paragraphs 217 to 221, the point is clearly illustrated by previous decisions such as that in *Philip Morris v Australia* (*Philip Morris v Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015 (Exh. RLA-95). In this regard, see the Claimant's Response to the SOPO, particularly at paragraphs [43], [516], [534], [628], [645](g)(ii), [661], [663], [665] and [666]).

Relevance: Despite the above listed admissions by the Respondent, the Claimant maintains its Request.

The law, relied upon by both Parties, is clear. An abuse of process may occur "when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable" (*Philip Morris v Australia*, para 554, Exh. RLA-95). A dispute is reasonably foreseeable if it "*was in prospect at the time of the restructurings*" (*ConocoPhillips v Venezuela*, para 279, Exh. RLA-94). The dividing line between permissible and impermissible restructuring is where a party can "*see an actual dispute or can foresee a specific future dispute*" (SOPO, 273; *Pac Rim v El Salvador*, para 2.99, Exh. RLA-33). Importantly, in *Tidewater v Venezuela*, the tribunal confirmed that the existence of a separate commercial dispute did not mean that the investment treaty dispute at issue was foreseeable.

As noted above, in its objections, the Respondent refers to two domestic disputes existing at the time the Claimant made its investment. Neither dispute forms the basis of the Claimant's claims in this arbitration, which concerns the measures contained in the Amendment Act. It is the *Amendment Act* that breaches the Respondent's obligations in the AANZFTA, not any alleged conduct that may have been the subject of other domestic disputes.

The date that is relevant for abuse of process, is the date of this dispute. This dispute arose only when the measures contained in the Amendment Act were enacted (including denial of natural justice, the State's immunity from civil or criminal liability, the indemnities, nullification of valid arbitral awards and the termination of an existing arbitration). This dispute was entirely unforeseeable before the Amendment Act was passed.

While the Claimant cannot prevent the Respondent from advancing the hopeless proposition that the existence of separate domestic matters somehow made the present dispute foreseeable, the Respondent cannot use its misguided argument as a reason to resist producing the Documents requested by the Claimant. The Claimant is entitled to the production of Documents that go to prove the facts upon which it relies in its defence – namely, that the disputed measures were not even contemplated by the Respondent at the time of the restructure, let alone were reasonably foreseen by the Claimant.

Equally, the Respondent's impermissible attempt to recharacterise the present dispute and the legal test cannot be used to deny the Claimant's requests (SOPO, paras 310-316). The Respondent's suggestion that all that is required for abuse of process is that the Claimant foresaw the possibility that Parliament could pass a law at some stage that impacted the Claimant's rights does not bear scrutiny (SOPO, para 316). All parliaments all over the world are set up to pass laws. That fact is known by most people. The question is: What laws? When? On what terms? All of which were unforeseeable in the present case.

Neither the CITIC matter (which concerned an entirely separate project between two companies, not the Respondent) nor the BSIOP Domestic Arbitrations foreshadowed in any way the measures implemented in the *Amendment Act*. The Claimant is entitled to request documents that support its position that the present dispute could not possibly have been foreseen by anyone (including the Respondent) at the time the Claimant was incorporated and at the time the Claimant invested in Australia.

The requested documents are plainly relevant and material to the issue of whether the Claimant's claim constitutes an abuse of process, and, in particular, whether the specific act at the heart of this dispute – the Amendment Act – was foreseeable at the time of the Restructure. The test for foreseeability, in an abuse of process context, is whether a specific future dispute was foreseeable as a very high probability at the time of the restructuring; and, where such a dispute arises out of a unilateral legislative measure, the question is whether the investor could have foreseen that specific measure at that time. The specific measure and its terms were unprecedented and could not be foreseeable.

Burden of Proof: The Claimant agrees that the Respondent bears the burden of proving its Abuse of Process objection. However, the Claimant is entitled to request documents that are relevant to its defence of this objection and which assist it in proving the facts upon which it relies. "The principle that each party has the burden of proving the facts on which it relies is widely recognized and applied by international courts and tribunals (*Antonio del Valle Ruiz and Others v Kingdom of Spain*, para. 494, Exh. RLA-28).

The Claimant asserts that it did not foresee – and could not have foreseen – the present dispute because the measures that are now the subject of that dispute were never in contemplation by the Respondent at the time of the restructure. The requested Documents will assist the Claimant in proving the facts upon which it relies in its defense.

Burdensome: The Respondent's claim that responding to Request 1 would be "unduly burdensome" is extremely vague; the Respondent says only that a "large number of documents" are "likely to be found to be responsive to this broad request" (without apparently having sought to carry out any tests and without harvesting any documents). Request 1, like all of the Claimant's Requests, is narrow and focused. Further, the Claimant has made only 8

	<p>such Requests of the Respondent. The Respondent, by contrast, has made a vast number of requests of the Claimant (amounting to some 655 Requests), pursuant to which it seeks, for example, documents dating back to long before the Claimant was even incorporated and documents from non-parties that are not within the possession, custody, or control of the Claimant. This Request seeks documents on very specific issues. It is a narrow Request and the Respondent’s vague assertions of “undue burden” do not bear scrutiny.</p> <p><i>Privilege:</i></p> <p>The date of a document cannot be privileged and in these circumstances is highly relevant. Any privileged material in such a document can always be redacted. The Claimant notes what the Respondent says but it does not amount to an objection to production and does not comply with para. 5.7(d) of PO1 which requires the Respondent “set out in sufficient detail” the legal basis for the Respondent’s claim for legal professional privilege in order “for the Tribunal to make an informed decision”. The Respondent has failed to set out in any detail, let alone sufficient detail, the legal basis for its privilege claim.</p> <p>Further, the Respondent says that, if production is ordered, the Respondent anticipates making a claim for legal professional privilege over some or all of the relevant Documents. That may be so (and it may be that there is a justification for some Documents to be produced with redactions) but, in the meantime, production of the Documents should be ordered particularly given the absence of any detail in support of its claim for privilege.</p>
<p>Decision by the Tribunal</p>	<p>DENIED</p>

Claimant's Document Request No. 2	
Document(s) Requested	<p>A copy of the following Documents concerning advice received by the Respondent/WA from the law firm, Clayton Utz, on or prior to 13 August 2020 on matters pertaining to the (future) Amendment Act:</p> <p>a. The instructions provided by or on behalf of the Respondent/WA to Clayton Utz in relation to the matters pertaining to the (future) Amendment Act on which the Respondent/WA sought advice from Clayton Utz; and</p> <p>b. A copy of the advice provided to the Respondent/WA by Clayton Utz, as reported in the Australian media.</p>
Relevance	<p>Reference to Submissions</p> <p>Response, paras 35, 41-43, 491, 512, 619-620, 627-629, 645(e), 673.</p>
	<p>Comments</p> <p>The Claimant's position is that the Amendment Act (including the specific provisions relevant to the claim in this arbitration) was not foreseeable at the time that the Claimant was incorporated into the Mineralogy group structure.</p> <p>The timing of the advice sought by the Respondent/WA on the preparation and contents of the Amendment Act, and the instructions given (including as to how the Claimant's position as an international investor was or was not to be considered by Clayton Utz), is relevant to the Claimant's submission that it could not have foreseen the Amendment Act when it was incorporated in 2019 and material, therefore, to the issue of whether the Claimant's claim is an abuse of process as is alleged by the Respondent. In particular, it will demonstrate the timing of the Amendment Act and the development of its provisions, including the extent to which it evolved during the drafting process prior to its enactment.</p> <p>The Claimant's position is that any legal privilege that may previously have existed in such advice and/or instructions has been waived as a result of the Respondent/WA having shared the same with the Australian media, which has quoted directly from it, and thereby disclosed the conclusion, gist substance or effect of it, in publicly available publications: https://www.watoday.com.au/national/western-australia/fears-wa-s-rushed-anti-palmer-law-could-cost-commonwealth-billions-in-free-trade-dispute-20200820-p55nn7.html.</p>
Objections	<p>The Respondent objects to this request.</p>

Not relevant and material to the outcome of the case (PO1 para. 5.2(d), IBA Rules Articles 9.2(a) and 3.3(b)): The Respondent repeats its objection in relation to Request No. 1.

Specifically, the instructions to, and advice provided by, Clayton Utz, in relation to the Amendment Act are not relevant to the Claimant's "submission" that it could not have foreseen the Amendment Act at the time of the Mineralogy Group Restructure. In relation to the Claimant's position that the documents "will demonstrate the timing of the Amendment Act and the development of its provisions during the drafting process", these matters are also not relevant to the Claimant's submission that it could not have foreseen the Amendment Act at the time of the Mineralogy Group Restructure. Nor are any instructions to Clayton Utz "as to how the Claimant's position as an international investor was or was not to be considered by Clayton Utz" relevant to the question of foreseeability.

The request seeks documents to establish a fact that is already proven by evidence on record (PO1 para. 5.7(a)): Insofar as the Claimant seeks documents to prove "the timing of the Amendment Act", that is a fact already proven by the evidence on the record. The Respondent repeats its objection in relation to Request No. 1.

The request seeks to establish a fact for which the Respondent bears the burden of proof (PO1 para. 5.7(b)): The Respondent repeats its objection in relation to Request No. 1.

Legal professional privilege: The Respondent repeats its objection in relation to Request No. 1. If production is ordered, the Respondent anticipates making a claim for legal professional privilege over all of these documents on the basis that the documents record communications between legal advisers for or on behalf of the State of Western Australia for the dominant purpose of seeking legal advice in relation to the Amendment Act and are therefore privileged.

The State of Western Australia has not waived privilege over the documents sought in this request for the following reasons.

The Claimant, correctly, does not assert that the Respondent has *expressly* waived legal professional privilege in the requested documents. Rather, it appears that the Claimant asserts that the Respondent *impliedly* waived privilege. The well-settled test for implied waiver of legal professional privilege in Australia is whether the person entitled to the privilege has conducted themselves in a way that is inconsistent with maintaining the

	<p>confidentiality of the communication.¹ The assessment of the person's conduct is to be made in the context and circumstances of the case, and in the light of any considerations of fairness arising from that context or those circumstances.²</p> <p>The Claimant has the onus of establishing waiver.³ The Claimant asserts that “any legal privilege... has been waived as a result of the Respondent/WA having shared the same with the Australian media”, but has not adduced any evidence in support of that assertion. The Claimant has not discharged the burden of proof in relation to waiver.</p> <p>Disclosure of the conclusion, gist, substance or effect of legal advice may amount to a waiver of privilege depending on the circumstances of the case.⁴ In any event, there is no implied waiver as the WAToday article does not disclose the conclusion, gist, substance or effect of Clayton Utz's advice. Disclosure of instructions does not disclose the conclusion, gist, substance or effect of the advice. This is particularly true where the purported disclosure is of instructions to <i>not</i> consider a particular issue in the substantive advice. Legal professional privilege has been held not to have been waived even where the holder of the privilege has issued a press release revealing the conclusions reached in the privileged advice.⁵</p> <p>Considerations of fairness also do not support a conclusion that privilege has been waived.</p>
<p>Reply</p>	<p>There is no proper basis for the Respondent's objection, and Request 2 is maintained as originally drafted.</p> <p>The Claimant repeats its Reply to Objections to Request No.1 and adds:</p> <p>Relevance: The requested Documents are relevant to the Claimant's defence of the Abuse of Process objection as they will show the date on which the Respondent first sought external legal advice on the measures that now form the basis for this dispute. They will also likely show the extreme</p>

¹ *Osland v Secretary to the Department of Justice* [2008] HCA 37; (2008) 234 CLR 275 at para. 45 (Gleeson CJ, Gummow, Heydon and Kiefel JJ); *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1 at paras. 28-29 (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

² *Osland v Secretary to the Department of Justice* [2008] HCA 37; (2008) 234 CLR 275 at para. 45 (Gleeson CJ, Gummow, Heydon and Kiefel JJ); *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1 at para. 29 (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

³ *Taylor v Killer Queen LLC (No 2)* [2021] FCA 680 at para. 17.

⁴ *Secretary, Department of Justice v Osland* [2007] VSCA 96 at para. 49 (Maxwell P), approved and upheld by the High Court of Australia in *Osland v Secretary to the Department of Justice* [2008] HCA 37; (2008) 234 CLR 275 at para. 50 (Gleeson CJ, Gummow, Heydon and Kiefel JJ).

⁵ *Osland v Secretary to the Department of Justice* [2008] HCA 37; (2008) 234 CLR 275 at paras. 46-50 (Gleeson CJ, Gummow, Heydon and Kiefel JJ).

secrecy of these measures, which is highly relevant to the Claimant's position that it could not possibly have foreseen the present dispute.

The Claimant refutes the Respondent's suggestion that secrecy and the date on which it began to formulate the Amendment Act are irrelevant to foreseeability. The legal test clearly shows that the specific dispute must have been foreseeable at the time of the restructure.

Evidence on Record: The Respondent's contention that the request "seeks Documents to establish a fact that is already proven by evidence on record (PO1 para. 5.7(a))" is incorrect. The Claimant repeats its reply to the Respondent's objection in relation to Request No. 1.

Burden of Proof: The Respondent's contention that the request "seeks to establish a fact for which the Respondent bears the burden of proof (PO1 para. 5.7(b))" is incorrect. The Claimant repeats its reply to the Respondent's objection in relation to Request No. 1.

Privilege: The Claimant presses this request.

The Documents are relevant and material to the outcome of the case.

The Claimant repeats its reply to the Respondent's objection on legal professional privilege in relation to Request No. 1.

On the question of waiver, the evidence abundantly demonstrates the extent to which the Respondent's State of WA was working "hand in glove" with WA news media, as part of its overall strategy to defeat the legitimate rights and interests of the Claimant and its Subsidiaries.

The irresistible inference to be drawn from the fact that the Clayton Utz advice came into the possession of the WA news media is that WA shared the advice with the local news media because it perceived that there was some strategic advantage in doing so. Indeed, the fact that the WA news media obtained a copy of the advice admits of only two possibilities – either Clayton Utz provided the advice to the news media or the WA Government did so. The first possibility may be dismissed immediately as it is unthinkable that a reputable law firm such as Clayton Utz would ever breach client confidence in such a manner. The "Occam's razor" principle thus compels the conclusion that it was WA which shared the advice with the local news media. The media quoted from the advice in a manner which disclosed the conclusion, gist, substance or effect of the advice, thereby destroying any legal professional privilege which may previously have existed in such advice.

Once privilege in the advice has been waived in this way, the whole of the advice (including what it records about the instructions given to Clayton Utz) is required to be produced.

Finally, the Respondent is wrong to say that considerations of fairness "do not support a conclusion that privilege has been waived". Plainly, they do

	<p>because by electing to share the advice with the local news media, WA (as the recipient of the advice and the only party entitled to claim legal professional privilege in respect of it) conducted itself in a manner entirely inconsistent with the maintenance of legal professional privilege. The Tribunal should infer that WA shared the advice with the local news media in order to gain some perceived tactical advantage, as part of its overall strategy to defeat the legitimate rights and interests of the Claimant and its Subsidiaries. Having done so, it is monstrous for the Respondent to assert that the advice remains privileged. Any privilege in the advice has been waived. The Respondent acknowledges in its objection to Request No. 2 in the penultimate paragraph that the:</p> <p><i>“the disclosure of instructions does not disclose the conclusion, gist, substance or effect of the advice”.</i></p> <p>Therefore, no legal privilege attached to the requested document exists in the Respondent’s own argument.</p> <p>To the extent that the Respondent considers that the documents requested should be withheld from production on the basis of privilege, that is not a reason for the Tribunal not to order that they be produced; that is a matter for the Respondent to raise, and adequately to address (and if necessary, justify), during production. The Claimant’s rights are fully reserved in this regard, particularly in circumstances where, as set out in Request 2 itself, the instructions and/or advice in question have been shared with the Australian media, such that there is no longer any confidentiality in those instructions and/or advice.</p> <p>The Respondent should be ordered to produce the requested Documents accordingly.</p>
<p>Decision by the Tribunal</p>	<p>DENIED</p>

Claimant's Document Request No. 3	
Document(s) Requested	All Cabinet papers, briefing notes or other advisory Documents or Communications that were provided or sent to the WA Cabinet that referred or related to the Amendment Act, dated between 23 May 2020 and 13 August 2020.
Relevance	<p>Reference to Submissions</p> <p>Response, paras 35, 41-43, 491, 512, 619-620, 627-629, 645(e), 673.</p> <p>SMS from Mr. Quigley to Mr. McGowan, Exh. C-432 (Response, p.216).</p> <p>Various statements by Mr. Quigley and Mr. McGowan referring to the secrecy of the Amendment Act, Exhs C-63, C-429 and C-465 (Response, pp.219-228).</p>
	<p>Comments</p> <p>Again, the Claimant's position is that the Amendment Act (including the specific provisions relevant to the claim in this arbitration) was not foreseeable at the time that the Claimant was incorporated into the Mineralogy group structure.</p> <p>This is because (<i>inter alia</i>) the Amendment Act was prepared in secret and the WA Government went to great lengths to ensure that the Claimant and its subsidiaries did not know anything about it before its enactment (see Response, p.228). In this regard, Mr. Quigley is on record as having stated that: "<i>Such was the level of secrecy ... that even the State Solicitor vacated his office and worked on this at home, so that the office would not generally know what was happening.</i>" (Response, p.224)</p> <p>The extent to which the WA Cabinet was (or was not) briefed about the Amendment Act, as it was being drafted, and any instructions to the WA Cabinet to keep the Amendment Act secret, are relevant to the Claimant's submission that it could not have foreseen the Amendment Act when it was incorporated in 2019 (or at any point prior to its enactment in August 2020) and material, therefore, to the issue of whether the Claimant's claim is an abuse of process as is alleged by the Respondent.</p>
Objections	<p>The Respondent objects to this request.</p> <p>Not relevant and material to the outcome of the case (PO1 para. 5.2(d); IBA Rules Articles 9.2(a) and 3.3(b)): The Respondent repeats its objection in relation to Request No. 1.</p>

Cabinet papers and other Documents or Communications provided or sent to the WA Cabinet between 23 May 2020 and 13 August 2020 are not relevant and material to the outcome of the Respondent's "abuse of process" objection, and in particular in relation to the Claimant's "position" that it could not have foreseen the Amendment Act at the time of the Mineralogy Group Restructure.

"The extent to which the WA Cabinet was (or was not briefed) about the Amendment Act" between 23 May 2020 and 13 August 2020 is also not relevant and material to the outcome of the Respondent's "abuse of process" objection, and in particular in relation to whether the Amendment Act was foreseeable at the time of the Mineralogy Group Restructure.

The request seeks documents to establish a fact that is already proven by evidence on record or otherwise not contested (PO1 para. 5.7(a)): Insofar as the Claimant seeks these documents to prove that "the Amendment Act was prepared in secret", the fact that the Amendment Act was prepared in confidence is already proven by the evidence on the record, and is not contested by the Respondent. The Respondent repeats its objection in relation to Request No. 1.

Insofar as the Claimant seeks these documents to prove "[t]he extent to which the WA Cabinet was (or was not briefed) about the Amendment Act", that is also a fact that is already proven by the evidence on the record, or otherwise not contested by the Respondent. Other than Mr Mark McGowan and Mr John Quigley, and potentially one or two other Ministers, no member of Cabinet was aware of the existence of the draft legislation until a Cabinet meeting at 4.15pm on 11 August 2020 (45 minutes before the Bill was introduced into Parliament) (*Palmer v McGowan (No 5)* [2022] FCA 893 at para. 30, Exh. R-166).

The request seeks to establish a fact for which the Respondent bears the burden of proof (PO1 para. 5.7(b)): The Respondent repeats its objection in relation to Request No. 1.

Disclosure would be contrary to the Respondent's law protecting Cabinet confidences (AANZFTA, Ch 11, Article 26(5); PO1 paras. 5.6, 5.7(d); IBA Rules Article 9(2)(f)): The request seeks disclosure of "all Cabinet papers, briefing notes or other advisory Documents or Communications...provided or sent to the WA Cabinet". Disclosure of these documents would be contrary to Australian law protecting Cabinet confidences and the Tribunal should not order production of these documents.

In Australia, the class of "Cabinet documents" or "State papers" that the law recognises as *prima facie* protected by public interest immunity includes Cabinet papers, Cabinet minutes (which record matters put to Cabinet for discussion), documents submitted to Cabinet for its consideration (for example, Cabinet Submissions), and papers brought into existence for the purpose of preparing a submission to Cabinet (including drafts of documents

	<p>submitted to Cabinet and departmental comments on Cabinet Submissions).⁶</p> <p>Further examples of the types of protected documents which may fall within this request include:</p> <ol style="list-style-type: none"> 1. Communications between public servants which reveal the contents of Cabinet Submissions;⁷ and 2. a memorandum/brief prepared by a public servant for the purpose of advising a Minister in relation to a Cabinet Minute or Cabinet Submission and speaking points/notes prepared by a department for a Minister containing the department's advice on what the Minister might say to Cabinet when matters in question came before Cabinet.⁸ <p>The documents sought in this request are <i>prima facie</i> protected from disclosure. Under Australian law, documents attracting public interest immunity or Cabinet confidentiality will only be ordered to be produced where the public interest in the proper administration of justice outweighs the public interest in the protection of the materials. The High Court of Australia has held that the disclosure of cabinet documents will be ordered only in "exceptional circumstances", observing "we doubt whether the disclosure of the records of Cabinet deliberations upon matters which remain current or controversial would ever be warranted in civil proceedings. The public interest in avoiding serious damage to the proper working of government at the highest level must prevail over the interests of a litigant seeking to vindicate private rights".⁹</p> <p>The public interest in maintaining Cabinet confidence is particularly compelling when balanced against the request's irrelevance and immateriality to the outcome of the Respondent's preliminary objection on "abuse of process" in the jurisdictional phase of this case, as explained above.¹⁰</p> <p>Legal professional privilege: The Respondent repeats its objection in relation to Request No. 1. If production is ordered, the Respondent</p>
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⁶ See, eg *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1 at p. 39; *NT Power Generation Pty Ltd v Power & Water Authority* [1999] FCA 1185; *National Tertiary Education Industry Union v Commonwealth* [2001] FCA 610; *Sportsbet Pty Ltd v Harness Racing Victoria (No 4)* [2011] FCA 196 at paras. 10-14, 23-28; *New South Wales v Public Transport Ticketing Corporation* [2011] NSWCA 60 at para. 50; *Spencer v Commonwealth of Australia (No 3)* [2012] FCA 637 at para. 11; *Spencer v Commonwealth* [2012] FCAFC 169 (2012) 206 FCR 309 at paras. 32, 43.

⁷ *National Tertiary Education Industry Union v Commonwealth* [2001] FCA 610; *New South Wales v Public Transport Ticketing Corporation* [2011] NSWCA 60.

⁸ *Murrumbidgee Ground-Water Preservation Association v Minister for Natural Resources* [2003] NSWLEC 322, at paras. 8-9, 24; *National Tertiary Education Industry Union v Commonwealth* [2001] FCA 610; *Sportsbet Pty Ltd v Harness Racing Victoria (No 4)* [2011] FCA 196 at paras. 23-28; *Spencer v Commonwealth of Australia (No 3)* [2012] FCA 637; *Tatts Group Limited v State of Victoria* [2013] VSC 301.

⁹ *Commonwealth v Northern Land Council* [1993] HCA 24; (1993) 176 CLR 604 at p. 618.

¹⁰ *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Procedural Order No. 13 at para. 22.

	<p>anticipates making a claim for legal professional privilege over some of these documents, in full or in part, on the basis that the documents record communications between legal advisers for or on behalf of the State of Western Australia for the dominant purpose of seeking legal advice in relation to the Amendment Act, and are therefore privileged.</p>
<p>Reply</p>	<p>There is no proper basis for the Respondent’s objection, and Request 3 is maintained as originally drafted.</p> <p>The Claimant refers to its Reply to Objections in Request No.1 and adds:</p> <p>Relevance: The Respondent simply asserts that the Claimant’s requested documents are not relevant, without stating why that is the case. As detailed in the Claimant’s Reply to Objections in Request No.1, the foreseeability of the Amendment Act is relevant to the determination of the Abuse of Process objection. The timing of any briefing provided to the Cabinet and any directive to keep the Amendment Act secret go to foreseeability.</p> <p>The foreseeability of <u>this specific dispute</u> is the key issue in the Respondent’s Abuse of Process objection and the requested documents directly demonstrate that the Claimant could not have been aware of the potential dispute at the time of the restructure if the WA Cabinet was unaware of the measures or even the general plan to remove the Claimant’s rights, including its natural justice rights.</p> <p>The Documents are relevant and material to the outcome of the case: The Claimant repeats its reply to the Respondent’s objection in relation to Request No. 1.</p> <p>In addition, the Respondent makes the bald assertion that “Cabinet papers and other Documents or Communications provided or sent to the WA Cabinet between 23 May 2020 and 13 August 2020 are not relevant and material to the outcome of the Respondent’s ‘abuse of process’ objection, and in particular in relation to the Claimant’s ‘position’ that it could not have foreseen the Amendment Act at the time of the Mineralogy Group Restructure”.</p> <p>This assertion is not explained in any way and it should be rejected. It is self-evident that the requested Documents concern the secrecy surrounding the preparation of the Amendment Act, which goes to the heart of the key issue for the September 2024 hearing, namely whether the enactment of the Amendment Act could have been foreseen when the Claimant was incorporated in January 2019. As such, the Documents are plainly relevant and should be produced. Likewise, they are relevant to the Claimant’s position that the Respondent’s preliminary objections application is an abuse of process.</p>

The Respondent also makes the bald assertion that “The extent to which the WA Cabinet was (or was not briefed) about the Amendment Act’ between 23 May 2020 and 13 August 2020 is also not relevant and material to the outcome of the Respondent’s ‘abuse of process’ objection, and in particular in relation to whether the Amendment Act was foreseeable at the time of the Mineralogy Group Restructure”.

The Respondent’s contention that the request “seeks Documents to establish a fact that is already proven by evidence on record (PO1 para. 5.7(a))”: The Claimant repeats its reply to the Respondent’s objection in relation to Request No. 1.

The Claimant also notes that, in objecting to this Request, the Respondent also says the following:

“Other than Mr Mark McGowan and Mr John Quigley, and potentially one or two other Ministers, no member of Cabinet was aware of the existence of the draft legislation until a Cabinet meeting at 4.15pm on 11 August 2020 (45 minutes before the Bill was introduced into Parliament”.

The Respondent says that these matters are “already proven by the evidence on the record, or otherwise not contested by the Respondent”.

This admission is helpful to the Claimant’s case but it does not go far enough. Accordingly, as matters stand, the Claimant is entitled to press for the requested Documents.

In the circumstances, the Claimant is entitled to production of the Documents sought under this request.

Burden of Proof: The Respondent’s contention that the request “seeks to establish a fact for which the Respondent bears the burden of proof (PO1 para. 5.7(b))”: The Claimant repeats its reply to the Respondent’s objection in relation to Request No. 1.

Privilege: The Respondent has not explained how or why legal advice privilege applies. Cabinet documents are usually prepared by Government officers and are not usually subject to legal privilege. The Claimant repeats its reply to the Respondent’s objection in relation to Request No. 1.

Cabinet Confidences: The Respondent’s contention that disclosure would be contrary to the Respondent’s law protecting Cabinet confidences is not correct. The Amendment Act is an abuse of process and contrary to the Rule of Law.

The Claimant notes that, in objecting to this Request, the Respondent says the following:

“Other than Mr Mark McGowan and Mr John Quigley, and potentially one or two other Ministers, no member of Cabinet was aware of the

	<p><i>existence of the draft legislation until a Cabinet meeting at 4.15pm on 11 August 2020 (45 minutes before the Bill was introduced into Parliament)</i></p> <p>Consequently, the Respondent’s objection is embarrassing.</p> <p>The Respondent, in its objection to this Request relies on comments made by the High Court namely that:</p> <p><i>“The public interest in avoiding serious damage to the proper working of government at the highest level must prevail over the interests of a litigant seeking to vindicate private rights”.</i></p> <p>These comments by the High Court support the Claimant’s Request as clearly, providing draft legislation to Cabinet 45 minutes before the introduction of a Bill shows the actions of the WA Government are not “the proper working of government” envisioned by the High Court, are contrary to public interest and need to be exposed for their failure to accord with the Rule of Law.</p>
<p>Decision by the Tribunal</p>	<p>DENIED</p>

Claimant's Document Request No. 4	
Document(s) Requested	All Cabinet papers, briefing notes or other advisory Documents that were provided to the Federal Cabinet that referred to the Amendment Act, dated between August 2020 (when the Act was enacted) and June 2021 (when the Respondent purported to deny benefits to the Claimant).
Relevance	Reference to Submissions
	Comments
Objections	

Response, paras 20, 28, 55, 97, 109, 130.

The Claimant submits that the Respondent has previously recognised and approved the Claimant as a foreign investor in its jurisdiction, and admitted the Claimant's investment, such that: (1) the Respondent cannot now be permitted, for the purposes of the Claimant's claim in this arbitration, to refuse to recognise the Claimant's status as an investor or its investment; and (2) the Respondent cannot now deny the Claimant benefits on the basis that (*inter alia*) it is not a foreign investor.

The Respondent's decision purportedly to deny benefits to the Claimant, notwithstanding that it had previously recognised and approved it as a foreign investor, and admitted its investment, is directly relevant to the Claimant's above arguments.

The Documents requested will demonstrate the extent to which this inconsistency between the Respondent's prior conduct and its response to the Claimant's claim was considered by the Respondent, before purporting to deny benefits to the Claimant, and the rationale for its purporting to do so, after having previously approved and recognised the Claimant as a foreign investor and admitted its investment. They will be material, therefore, to the issues of whether the Respondent is entitled to (1) object to the Claimant's claim on the grounds that it is not an investor that has made an investment in the Respondent's jurisdiction; and (2) deny benefits to the Claimant on the basis that (*inter alia*) it is not a foreign investor.

The Respondent objects to this request.

Not relevant and material to the outcome of the case (PO1 para. 5.2(d); IBA Rules Articles 9.2(a) and 3.3(b)): The requested documents are not relevant and material to whether or not the Claimant has made an investment in Australia or is an investor for the purposes of Chapter 11 of AANZFTA. Notably, the Claimant has not explained how the content of the requested

	<p>documents would be relevant in assisting the Tribunal’s assessment of whether the Claimant is an investor and/or has made an investment within the meaning of Articles 2(c)-(d) of Chapter 11 of AANZFTA and whether the Respondent has validly denied the benefits of Chapter 11 of AANZFTA.</p> <p>Federal Cabinet documents referring to the Amendment Act are not relevant to the Claimant’s “submission” that “the Respondent has previously recognised and approved the Claimant as a foreign investor ... and admitted the Claimant’s investment”. There is no connection between Federal Cabinet documents referring to the Amendment Act and whether the Claimant is an investor which has made an investment for the purposes of Chapter 11 of AANZFTA. Further, the Respondent notes there is no reference to the Amendment Act in the sections of its submissions the Claimant cites to support this request.</p> <p>Nil responsive documents: In the event production is ordered, the Respondent nonetheless advises it has not identified any documents within the scope of this request.</p>
<p>Reply</p>	<p>There is no proper basis for the Respondent’s objection, and Request 4 is maintained as originally drafted.</p> <p>The Claimant notes the Respondent’s position that it has not identified any documents responsive to this request.</p> <p>Responsive Documents may well exist: The Respondent says:</p> <p><i>“In the event production is ordered, the Respondent nonetheless advises it has not identified any documents within the scope of this request”.</i></p> <p>The Tribunal should give that statement no weight whatsoever. The statement is not an objection to production at all. It is nothing more than a statement that the Respondent has not, as yet identified any Documents which fall within the scope of this request.</p> <p>There is no indication that the Respondent has, as yet searched in earnest for Documents of the kind covered by this request. If it has not yet undertaken that task, then it is utterly meaningless to say that the Respondent has not, as yet identified any Documents which fall within the scope of the request.</p> <p>Accordingly, the Respondent should be ordered to produce the Documents covered by this request.</p> <p>Whilst the Respondent states that it has not identified any documents within the scope of this Request, the Claimant invites the Tribunal to order the Respondent to confirm, during production, whether there are any responsive documents in its possession, custody, or control. Further, the Respondent’s obligation to search for and produce responsive documents is continuing in nature. The Claimant therefore invites the Tribunal also to order the</p>

	<p>Respondent to confirm that it understands that it has an ongoing obligation to produce all responsive documents that come into its possession, custody, or control at any time before the end of these proceedings.</p> <p>Relevance: For the avoidance of doubt, the Claimant does not accept the Respondent's contention that the requested Documents are not relevant or material to the outcome of the case. The basis for the Respondent's decision to deny benefits under the AANZFTA is material to the <i>bona fides</i> of the present claim. The Claimant will make submissions in due course on the impact of the fact that the Respondent has no documents responsive to this Request.</p>
Decision by the Tribunal	GRANTED

Claimant's Document Request No. 5	
Document(s) Requested	Any Communications between Mr. Quigley, Mr. McGowan, the Solicitor General (Mr. Joshua Thompson SC), the State Solicitor (Mr. Nick Egan), Mr. Lawn (Senior Parliamentary Counsel) and/or any other person in the WA Government or civil service mentioning, or in relation to, the Amendment Act, BSIOP, Domestic Arbitrations, Mineralogy, Mr Palmer or the Claimant following the SMS exchange between Mr. Quigley and Mr. McGowan on 23 May 2020 and up to and including 13 August 2020.
Relevance	<p>Reference to Submissions</p> <p>Response, paras 35, 41-43, 491, 512, 619-620, 627-629, 645(e), 673.</p> <p>SMS from Mr. Quigley to Mr. McGowan, Exh. C-432 (Response, p.216).</p> <p>Various statements by Mr. Quigley and Mr. McGowan referring to the secrecy of the Amendment Act, Exhs C-63, C-429 and C-465 (Response, pp.219-228).</p>
	<p>Comments</p> <p>Again, the Claimant's position is that the Amendment Act (including the specific provisions relevant to the claim in this arbitration) was not foreseeable at the time that the Claimant was incorporated into the Mineralogy group structure.</p> <p>This is because (<i>inter alia</i>) the Act was prepared in secret and the WA Government went to great lengths to ensure that the Claimant and its subsidiaries did not know anything about it before its enactment (see Response, p.228). In this regard, Mr. Quigley is on the record as having stated that: "<i>Such was the level of secrecy—if I can say that—or security that even the State Solicitor vacated his office and worked on this at home, so that the office would not generally know what was happening. Senior Parliamentary Counsel, Mr. Lawn, was brought into the loop, and the Premier and I.</i>" (Response, p.224; Exh. C-429, p.4820).</p> <p>The date on which the Amendment Act was conceived and the secret nature of its preparation are relevant to the Claimant's submission that it could not have foreseen the Amendment Act (or any legislation like it) when it was incorporated in 2019 (or at any point prior to its enactment in August 2020). The Communications requested are material, therefore, to the issue of whether the Claimant's claim is an abuse of process as is alleged by the Respondent.</p>

	<p>The “<i>secrecy</i>” referred to by Mr. Quigley, as set out above (and in the SMS with Mr. McGowan, at C-432), suggests that the Communications sought should be limited to a small group of individuals. The specified date range for this request is also less than three months long. As such, the requested Communications will not be burdensome for the Respondent to search for and produce.</p>
<p>Objections</p>	<p>The Respondent objects to this request.</p> <p>This is an extraordinarily broad request. It seeks <i>any</i> Communications between <i>any</i> “person in the WA Government or civil service mentioning, or in relation to, the Amendment Act, BSIOP, Domestic Arbitrations, Mineralogy, Mr Palmer or the Claimant” over a period of approximately three months.</p> <p>Not relevant and material to the outcome of the case (PO1 para. 5.2(d); IBA Rules Articles 9.2(a) and 3.3(b)): The Respondent repeats its objection in relation to Request No. 1.</p> <p>The Claimant has not explained how “Communications” between any and all unnamed persons in the WA civil service during the period from 23 May 2020 to 13 August 2020 mentioning, for example, Mr Palmer, could be relevant and material to, on the Claimant's case, the foreseeability of the Amendment Act as at the date of the Mineralogy Group Restructure. For the reasons already explained by the Respondent, such documents are not relevant to the case or material to its outcome, and the request does not comply with the requirements in PO1 para. 5.2(d). Therefore, the Tribunal should not order any such documents to be produced.</p> <p>The request seeks documents to establish a fact that is already proven by evidence on record (PO1 para. 5.7(a)): Insofar as the Claimant seeks these documents to prove “the date on which the Amendment Act was conceived and the secret nature of its preparation”, those facts are already proven by the evidence on the record. The Respondent repeats its objection in relation to Request No. 1.</p> <p>The request seeks to establish a fact for which the Respondent bears the burden of proof (PO1 para. 5.7(b)): The Respondent repeats its objection in relation to Request No. 1.</p> <p>Search would be too burdensome taking into consideration the added value of the documents (PO1 para. 5.7(c), Article 9(2)(c) IBA Rules): As the request extends to any Communications between any person in the WA Government or civil service, it would require the Respondent to make enquiries and undertake searches of documents from every WA Government department and WA civil service employee in relation to each of the six topics listed in the request. The request would capture wholly irrelevant communications mentioning or in relation to, for example, Mr Palmer.</p>

	<p>Responding to this request would be unduly burdensome, given the very large number of documents likely to be responsive to this extremely broad request. Additionally, taking into consideration the lack of any added value of the documents for the reasons set out above, the request should be denied.</p> <p>Legal professional privilege: The Respondent repeats its objection in relation to Request No. 1. If production is ordered, the Respondent anticipates making a claim for legal professional privilege over all or some of these documents, in full or in part, on the basis that the documents record communications between legal advisers for or on behalf of the State of Western Australia and the officials and personnel of the WA Government and/or civil service cited in the request, for the dominant purpose of seeking legal advice in relation to the Amendment Act, the BSIOP Proposal, the Domestic Arbitrations, Mineralogy, Mr Palmer or the Claimant, and are therefore privileged.</p> <p>Disclosure would be contrary to the Respondent's law protecting Cabinet confidences (AANZFTA, Ch 11, Article 26(5); PO1, paras. 5.6, 5.7(d); IBA Rules, Article 9(2)(f): If production is ordered, the Respondent anticipates making a claim that disclosure of some or all of these documents, in full or in part, would be contrary to Australian law protecting Cabinet confidences.</p>
<p>Reply</p>	<p>The Claimant seeks production of the relevant Documents, based on the revised Request below.</p> <p>Relevance: As to relevance and materiality, the Claimant's reply to the Respondent's objection to Request 1 above is repeated, insofar as relevant. The Respondent's assertion that the date on which the Amendment Act was conceived, and the secret nature of its preparation, are somehow "not relevant" to the foreseeability of the Amendment Act as at the date of the Mineralogy Restructure is without merit.</p> <p>The documents requested via Request 5 will establish with greater specificity the date on which the Amendment Act was conceived and the exact extent of the level of secrecy surrounding it (matters which are not already proven by evidence on record). Without prejudice to the foregoing, the Claimant again notes the Respondent's express acknowledgement of the "secret nature" of the preparation of the Amendment Act (which is, of course, inconsistent with the Respondent's position that the Claimant's claim is an abuse of process).</p> <p>Further, the Communications are relevant and material to proving that the measures imposed by the Amendment Act were not conceived of by Western Australia until well after the restructure had taken place and that they were kept completely secret. These issues are directly relevant to the foreseeability of this specific dispute. As discussed above, the foreseeability of the measures that are the subject of <u>this dispute</u> (i.e., the measures</p>

contained in the Amendment Act) is the critical issue in the Abuse of Process objection. It is the Claimant's case that those measures were not, and could not have been, foreseen by the Claimant at the time of the restructure. Documents responsive to this request will demonstrate support the facts asserted by the Claimant that the restructure was entirely unrelated to this dispute and this dispute could not have been reasonably foreseen by the Claimant, as the measures at issue had not been contemplated by the Respondent.

Burdensome: As to the Respondent's argument in respect of the burden of proof, the Claimant's reply to the Respondent's objection to Request 1 above is repeated, insofar as relevant.

This Request is not "extraordinarily broad". It seeks only communications mentioning or in relation to an exhaustive list of specific (and directly relevant) matters, over a period of less than three months. Further, and as explained in Request 5 itself, the position publicly taken by the Respondent indicates that such communications should be limited to a small group of individuals.

To the extent that the Respondent's objection to this Request relates to communications with "any other person in the WA Government or civil service", the Claimant further narrows the Request as follows:

Any Communications **to, from or copied to** Mr. Quigley, Mr. McGowan, the Solicitor General (Mr. Joshua Thompson SC), the State Solicitor (Mr. Nick Egan) and/or Mr. Lawn (Senior Parliamentary Counsel) mentioning, or in relation to, the Amendment Act, BSIOP, Domestic Arbitrations, Mineralogy, Mr Palmer or the Claimant following the SMS exchange between Mr. Quigley and Mr. McGowan on 23 May 2020 and up to and including 13 August 2020.

All such Communications between these stated individuals over this short period are likely to concern the matters at issue in this arbitration. Such a search will not be unduly burdensome as it pertains to specified persons, on specified subjects over a short three-month period.

Burden of Proof: The Claimant agrees that the Respondent bears the burden of proving its Abuse of Process objection. However, the Claimant is entitled to request documents that are relevant to its defence of this objection and which assist it in proving facts upon which it relies. "The principle that each party has the burden of proving the facts on which it relies is widely recognized and applied by international courts and tribunals (*Antonio del Valle Ruiz and Others v Kingdom of Spain*, para. 494, Exh. RLA-28).

The Claimant asserts that it did not foresee – and could not have foreseen – the present dispute, as the measures that are contained in the Amendment Act were never contemplated before May 2020. The Documents requested are relevant to the Claimant's position and are likely to be material to the outcome of the Abuse of Process objection.

	<p>Cabinet Confidences: Cabinet Confidence do not apply to these communications as they are not related to Cabinet, only two of the requested parties were ministers. The Respondent merely states that, if production is ordered, the Respondent anticipates making a claim of the relevant kind. That may be so but, in the meantime, production of the Documents should be ordered. Any such claim can be considered and determined at the appropriate time.</p> <p>Privilege: Australian law does not apply to this Arbitration. The seat of arbitration is Geneva. In respect of the production of documents it is the Swiss courts that have jurisdiction to order any further production and it is therefore Swiss law that should apply. Under Swiss law communications with in-house counsel is not protected by attorney-client privilege all the requested documents are from parties employed by the Respondent. Swiss law is the law of the seat of the Arbitration. To the extent that any privilege claim is upheld, the Claimant requests redacted versions of the communications. The Claimant anticipates many Communications (like those contained in text messages at C-432) would not in any event be privileged.</p> <p>To the extent that the Respondent considers that it should be excused from producing all relevant internal documents through the assertion of privilege and/or cabinet confidences, the Claimant considers this to be an entirely unsatisfactory and unattractive position for the Respondent to take. The Respondent has not prepared a schedule of documents over which it claims legal professional privilege. The Tribunal should order the Respondent to prepare and provide the Claimant and the Tribunal with a schedule in accordance with the Procedural Orders and order that the Respondent produce the requested documents.</p>
<p>Decision by the Tribunal</p>	<p>DENIED</p>

Claimant's Document Request No. 6	
Document(s) Requested	To the extent not covered by Request No. 5 above, any Communications between Mr. Quigley, Mr. McGowan, the Solicitor General (Mr. Joshua Thompson SC), the State Solicitor (Mr. Nick Egan), Mr. Lawn (Senior Parliamentary Counsel) and/or any other person involved in the preparation and drafting of the Amendment Act, in relation to that preparation and drafting or the introduction of the Amendment Act into the Western Australian Parliament , dated between 23 May 2020 and 13 August 2020.
Relevance	<p>Reference to Submissions</p> <p>Response, paras 35, 41-43, 491, 512, 619-620, 627-629, 645(e), 673.</p> <p>SMS from Mr. Quigley to Mr. McGowan, Exh. C-432 (Response, p.216).</p> <p>Various statements by Mr. Quigley and Mr. McGowan referring to the secrecy of the Amendment Act, Exhs C-63, C-429 and C-465 (Response, pp.219-228).</p>
	<p>Comments</p> <p>This request is made for the same reasons as set out in respect of Request No. 5 above.</p>
Objections	<p>The Respondent objects to this request.</p> <p>The Respondent repeats and relies on its objections to Request No. 5 above.</p>
Reply	<p>The Claimant seeks production of the relevant Documents, based on the revised Request below.</p> <p>The Claimant narrows the Request in a similar manner to Request No.5 as follows:</p> <p>“To the extent not covered by Request No. 5 above, any Communications <u>to, from or copied to</u> Mr. Quigley, Mr. McGowan, the Solicitor General (Mr. Joshua Thompson SC), the State Solicitor (Mr. Nick Egan) and/or Mr. Lawn (Senior Parliamentary Counsel) in relation to the preparation and drafting or the introduction of the Amendment Act into the Western Australian Parliament, dated between 23 May 2020 and 13 August 2020.</p> <p>The Claimant's reply to the Respondent's objection to Request 5 above is repeated.</p>

Decision by the Tribunal	DENIED
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Claimant’s Document Request No. 7		
Document(s) Requested	Any advice(s), memoranda, reports, briefing papers, correspondence or similar Documents prepared by or on behalf of, or provided to, the Federal Treasury that informed, or are otherwise relevant to, the Treasury’s decision to include an unquantified liability to the Claimant as a “ <i>contingent liability</i> ” in the Respondent’s Budget Papers for the financial years 2022, 2023 and 2024, including in respect of the amount of that contingent liability.	
Relevance	Reference to Submissions	Response, paras 55(e), 127-153.
	Comments	<p>The Claimant’s position is that the Respondent’s acknowledgement that the Claimant’s claim in this arbitration constitutes a “<i>contingent liability</i>” is inconsistent with its purported denial of benefits to the Claimant and argument that the Claimant’s claim is an abuse of process. In particular, the Claimant contends that “[i]f the Respondent genuinely thought that it had more than a remote possibility of successfully denying the benefits of the Treaties to Claimant, it would have been under a legal constraint not to have made the budgetary disclosure that it did” (Response, para 135).</p> <p>The Documents requested are directly relevant to the Claimant’s submission and are material, therefore, to the issues of whether (1) the Respondent is entitled to deny benefits to the Claimant; and (2) the Claimant’s claim is an abuse of process, as is alleged by the Respondent.</p> <p>The Documents sought should also be limited in number and not burdensome, therefore, for the Respondent to search for and produce.</p>
Objections	<p>The Respondent objects to this request.</p> <p>Not relevant and material to the outcome of the case (PO1 para. 5.2(d); IBA Rules Articles 9.2(a) and 3.3(b)): The Claimant has not explained which fact alleged in the dispute the requested documents are intended to prove. The requested documents as to “the Treasury’s decision to include an unquantified liability to the Claimant as a <i>contingent liability</i>” in the Respondent’s Budget Papers” are not relevant and material to determining whether or not the Respondent has denied the benefits of Chapter 11 of AANZFTA to the Claimant or whether the Mineralogy Group Restructure amounts to an abuse of process. Notably, the Claimant has failed to demonstrate why the Respondent’s Budget Papers would be material to the outcome of the jurisdictional phase of this dispute. The Respondent’s case</p>	

is that the Claimant is owned or controlled by Mr Palmer and that it has no substantive business operations in Singapore or any other territory of any AANZFTA Party, and that it has subsequently denied the benefits of Chapter 11 of AANZFTA to the Claimant (SOPO paras. 219, 259). The Respondent's case on abuse of process is set out in its objection to Request No. 1. The documents sought by the Claimant have no bearing on either preliminary objection and the request should therefore be denied.

Further, the Claimant asserts the Respondent "would have been under a legal constraint not to have made the budgetary disclosure" if the Respondent understood it would "successfully deny[...] the benefits of the Treaties" (noting that "Treaties" is not defined), however provides no explanation of how Federal budgetary disclosure obligations are relevant to the Respondent's jurisdictional objections, as described above. In any event, the Claimant's assertion does not accurately reflect the reporting criteria for Australian Government budget financial statements.¹¹ The request should also be denied on that basis.

The request seeks to establish a fact for which the Respondent bears the burden of proof (PO1 para. 5.7(b)): The Respondent bears the burden of proving that it has denied the benefits of Chapter 11 of AANZFTA to the Claimant and that the Claimant's claim is an abuse of process (SOPO paras. 22, 203 and 299). The stated purpose of the Claimant's request is to determine whether "the Respondent is entitled to deny benefits to the Claimant" and whether "the Claimant's claim is an abuse of process". Even if the documents sought are relevant (which is denied), the Respondent bears the burden of proving that it successfully denied benefits to the Claimant and that the claim is abusive. On that basis, the Claimant is not entitled to the production of the documents sought.

Search would be too burdensome taking into consideration the added value of the documents (PO1 para. 5.7(c); IBA Rules Article 9.2(c)): Taking into consideration the lack of any added value of the documents for the reasons set out above, the request should be denied because responding to this request would be unduly burdensome (noting that it covers documents prepared by anyone and provided to the Federal Treasury over a period of at least three years).

Legal professional privilege: If production is ordered, the Respondent anticipates making a claim for legal professional privilege over some or all of these documents, in full or in part, on the basis that the documents record communications between legal advisers for or on behalf of the Federal Treasury, and/or other Australian Government departments/agencies, for the

¹¹ Accounting Standard AASB 137 *Provisions, Contingent Liabilities and Contingent Assets* (6 April 2023), paras. 13(b), 26, 86.

	<p>dominant purpose of seeking legal advice in relation to the preparation of Budget Papers, and are therefore privileged.</p> <p>The relevant system of law that the Tribunal should apply in determining claims for privilege is the law in Australia. Potentially responsive documents may be subject to legal professional privilege under the relevant Australian law of legal professional privilege.</p> <p>Disclosure contrary to the Respondent's law protecting Cabinet confidences (AANZFTA, Ch 11, Article 26(5); PO1 paras. 5.6, 5.7(d); IBA Rules Article 9(2)(f): If production is ordered, the Respondent anticipates making a claim that disclosure of some or all of these documents, in full or in part, is contrary to Australian law protecting Cabinet confidences.</p>
<p>Reply</p>	<p>There is no proper basis for the Respondent's objection, and Request 7 is maintained as originally drafted.</p> <p>Relevance: The requested Documents are relevant and material to the outcome of the case.</p> <p>The Respondent's submissions under this heading suggest that the Respondent has completely misapprehended the purpose of the request, notwithstanding the clear explanation provided by the Claimant above.</p> <p>The decision to include an unquantified liability to the Claimant as a "contingent liability" in the Respondent's Budget Papers is plainly material to outcome of the jurisdictional phase of this dispute. That issue goes directly to the question of whether the jurisdictional objections now sought to be advanced by the Respondent amount to an abuse of process and whether the Respondent's previous inconsistent conduct disentitles the Respondent to raise any such objections at all.</p> <p>As explained above, the Claimant's position is that the Respondent's acknowledgement that the Claimant's claim in this arbitration constitutes a "contingent liability" is inconsistent with its purported denial of benefits to the Claimant and argument that the Claimant's claim is an abuse of process.</p> <p>Further, the relevance or otherwise of Accounting Standards in considering what weight should be given to Documents is a matter for argument at the September 2024 hearing. It is not a reason for Documents not to be produced.</p> <p>The Claimant sought and obtained expert advice in respect of the requirements of the Federal Governments national accounts, which was forwarded to the Claimant by email. A copy of that advice is set out in Exh. C-561.</p> <p>The Respondent must comply with the Australian Accounting Standards in preparing its financial statements, including Australian Accounting Standard</p>

AASB 137 (**AASB 137**). Paragraph 26 of AASB 137, inter alia states as follows:

“Aus26.1 This paragraph and paragraph Aus26.2 relate to the recognition by a local government, government department or government of a liability arising from a local government or government existing public policy, budget policy, election promise or statement of intent. The intention to make payments to other parties, whether advised in the form of a local government or government budget policy, election promise or statement of intent, does not of itself create a present obligation which is binding. A liability would be recognised only when the entity is committed in the sense that it has little or no discretion to avoid the sacrifice of future economic benefits.”

The disclosures made by the Federal Government of a contingent liability under Australian Accounting Standard AASB 137 show that:

(i) it considers that there is a possible obligation, as it has yet to be confirmed whether the entity has a present obligation that could lead to an outflow of resources embodying economic benefits (consistent with AASB 137, paragraph 13(b)(i)); and

(ii) that the possibility of any outflow in settlement is not remote, as it has made a brief description of the nature of the contingent liability and commented on the factors as required by AASB 137, paragraph 86 (see **Exh. C-561**, bottom of page 3 and top of page 4).

The Documents requested are therefore directly relevant and material and should be produced.

The requested Documents are clearly relevant to the Claimant’s defence to the Denial of Benefits objection. The Claimant asserts that the Respondent’s Denial of Benefits objection is inconsistent with the position taken in its budget (Response, para 135). While the Respondent may be embarrassed by its internally inconsistent positions, it cannot avoid document production on the basis of lack of relevance – the documents requested are clearly relevant to demonstrating the inconsistent positions taken. The Documents requested will show the Respondent’s rationale for its budget entry and, consequently, whether it considers it has properly denied benefits to the Claimant. The Documents go directly to the *bona fides* of the Denial of Benefits objection and are material to the outcome of that objection.

Burden of Proof: The Respondent clearly bears the burden of proving its Denial of Benefits objection. However, “[t]he principle that each party has the burden of proving the facts on which it relies is widely recognized and applied by international courts and tribunals (*Antonio del Valle Ruiz and Others v Kingdom of Spain* (PCA Case No 2019-17, Final Award of 13 March 2023), para. 494, Exh. RLA-28). The Claimant has asserted that the Respondent has taken inconsistent positions and that cannot be reconciled with a genuine belief that it has properly denied benefits to the Claimant. The requested

	<p>documents are, therefore, relevant to the Claimant’s defence of the Denial of Benefits objection and should be produced.</p> <p>Burdensome: The requested documents relate to a very specific topic. It should not be burdensome to run a search for appropriate key words that would identify responsive documents. The request is narrow and should not be denied on the basis of burden.</p> <p>Legal professional privilege: The Claimant repeats its reply to the Respondent’s objection in relation to Request No. 1.</p> <p>Cabinet Confidence: The Respondent’s contention that disclosure would be contrary to the Respondent’s law protecting Cabinet confidences is incorrect.</p> <p>The Claimant repeats its reply to the Respondent’s objection in relation to Request No. 3.</p> <p>Further, what the Respondent says under this heading does not amount to an objection to production.</p> <p>The Respondent merely states that, if production is ordered, the Respondent anticipates making a claim of the relevant kind. That may be so but, in the meantime, production of the Documents should be ordered. Any such claim can be considered and determined at the appropriate time.</p>
<p>Decision by the Tribunal</p>	<p>GRANTED</p>

Claimant's Document Request No. 8	
Document(s) Requested	<p>Any memoranda, minutes of meetings or conferences, file notes of meetings or conferences, reports, opinions, briefing papers, Communications, records of negotiating history, records of drafting history or other travaux préparatoires or similar Documents which:</p> <p>(a) were created in the period between 1 March 2005 and 31 August 2008; and</p> <p>(b) are in the possession, custody or control of the Australian Government's Department of Foreign Affairs and Trade; and</p> <p>(c) state, or otherwise disclose or indicate:</p> <ol style="list-style-type: none"> 1) any intention, opinion or view on the question of whether Chapter 11, Article 11 of AANZFTA is the only available mechanism under AANZFTA for resolving allegations by a host State that a claimant engaged in conduct in the nature of "treaty shopping" or "forum shopping"; or 2) that the inclusion of Chapter 11, Article 11 of AANZFTA excludes any other inquiry about alleged "treaty shopping" or "forum shopping", such as the application of an "abuse of process" or "abuse of right" doctrine.
Relevance	<p>Reference to Submissions</p> <p>Response, paras 497-501.</p>
	<p>Comments</p> <p>The correct interpretation and scope of Chapter 11, Article 11 of AANZFTA is expected to be in issue.</p> <p>The Claimant's primary position is that the presence of Chapter 11, Article 11 of AANZFTA excludes the application of any general law "abuse of process" or "abuse of right" doctrine. That is because, in circumstances where the Parties to AANZFTA specifically negotiated and agreed upon the provisions of Article 11 to address issues of alleged "treaty shopping" or "forum shopping", that express "denial of benefits" provision should be regarded as "covering the field" [See: Response, paras 498-499].</p> <p>Alternatively, if the Tribunal does not consider that the terms of Article 11 by themselves manifest a sufficiently clear intention to make that provision the sole mechanism for dealing with issues of alleged "treaty shopping" or "forum shopping", such that there is an ambiguity, then travaux préparatoires or similar Documents may assist in elucidating the intention of the drafters of AANZFTA. Article 32 of the Vienna Convention provides that, if a provision is ambiguous, the Tribunal may have recourse to such "supplementary means of interpretation".</p>

		<p>It may be, of course, that such travaux préparatoires or similar Documents contain information which confirms the correctness of the Claimant’s primary position.</p> <p>The issue is one of considerable relevance, and practical importance for the September 2024 hearing, because it will determine whether the Tribunal only needs to hear arguments about the provisions of Article 11 or whether, in addition, the Tribunal needs to hear arguments based on general law concepts of “abuse of process” or “abuse of right”.</p>
<p>Objections</p>	<p>The Respondent partially objects to this request.</p> <p>Not relevant and material to the outcome of the case (PO1 para. 5.2(d); IBA Rules Articles 9.2(a) and 3.3(b)): The Claimant’s request covers documents that are not relevant or material to the outcome of the case. The Claimant has not presented any argument in its Response that the meaning of Article 11 of AANZFTA requires the Tribunal to invoke a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention.¹² Specifically, the Claimant has not presented an argument to demonstrate how the terms of Article 11 are not “sufficiently clear” or that “an ambiguity” exists to support a position that Article 11 is “the sole mechanism for dealing with issues of alleged ‘treaty shopping’ or ‘forum shopping’”. Broadly, the Claimant has not presented an argument why recourse ought “to be had to supplementary means of interpretation” as prescribed by Article 32 of the Vienna Convention.</p> <p>Further, the Claimant seeks “[a]ny memoranda, minutes of meetings or conferences, file notes of meetings or conferences, reports, opinions, briefing papers, Communications”, over a three year period. A document is likely to constitute <i>travaux préparatoires</i> where, <i>inter alia</i>, it is available to all the negotiating parties and provides a common understanding of the parties on the meaning of treaty provisions or terms. The Claimant’s request is broad enough to cover Australian Government documents that are unlikely to constitute <i>travaux préparatoires</i>, such that the request covers documents that are not available to all the negotiating parties and/or do not necessarily reflect the common understanding of the negotiating parties on the meaning of treaty provisions.</p> <p>Nil responsive documents: In any event, if production is ordered, the Respondent advises it has not identified any documents within the scope of this request.</p>	

¹² *Vienna Convention on the Law of Treaties*, UNTS vol. 1155, p.331 (entered into force 27 January 1980).

<p>Reply</p>	<p>There is no proper basis for the Respondent’s objection, and Request 8 is maintained as originally drafted.</p> <p>Relevance: Although the Respondent states that it only “partially objects” to Request 8, it is not clear from its objection which part(s) of this Request it agrees to search for and produce responsive documents in relation to.</p> <p>PO1 para. 5.4(b) states that “...where (a Party) has an objection....provide the requesting Party with its objections to producing the requested documents” Unless the Respondent specifies which part of the Request it is answering and which part of the request it is admitting, it is impossible for the Tribunal or the Claimant to know. The Respondent should be aware of its obligations as clearly stated in para. 5.4(b) of PO1 to specify which part of the Request it is objecting to. Without such detail, the Respondent in effect, takes from the Claimant its rights for natural justice. In such circumstances where the Respondent has abused the process, the Tribunal should allow the Claimants Request in full. Without derogation from the foregoing, there is no proper basis for the Respondent’s objection, and Request 8 is maintained as originally drafted.</p> <p>Further, contrary to the Respondent’s objection, the Claimant has presented an argument as to why the Tribunal, in interpreting Article 11 of AANZFTA, should have recourse to supplementary means of interpretation as per Article 32 of the Vienna Convention. The Tribunal is referred to Request 8 itself and the paragraphs of its Response referred to therein.</p> <p>The Documents sought are relevant and material to the outcome of the case. The Respondent argues that the Claimant has not presented any argument in its Response that the meaning of Article 11 of Chapter 11 of AANZFTA requires the Tribunal to invoke a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention. The Respondent has thereby ignored the import of what the Claimant actually said in paragraphs 497 to 501 of the Claimant’s Response to the SOPO.</p> <p>In the Response, the Claimant stated that its primary position is that the presence of an express denial of benefits clause in Article 11 excludes the application of a general law abuse of process doctrine (see Response at [498]-[499]).</p> <p>However, the Response also presented an alternative argument as follows:</p> <p><i>“Alternatively, should the Tribunal consider that there is any ambiguity on this point, it is significant that the Respondent [has] not been able to point to any travaux préparatoires which might shed light on the purpose of Article 11. Such material, if it existed at all, would be in the possession of the Respondent’s Department of Foreign Affairs and Trade”</i> (see Response at [500]).</p> <p>The reason why it was necessary for the Claimant to present those two alternative arguments in its Response (the second of which does invite the</p>
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Tribunal to invoke a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention) is that the Claimant cannot yet know whether the Tribunal will accept its primary argument or, alternatively, whether the Tribunal will consider that there is ambiguity surrounding the proper interpretation of Article 11. In the latter case, the Tribunal can and should have regard to travaux préparatoires which might shed light on the purpose of Article 11. It would be presumptuous, and therefore inappropriate, for the Claimant to make any assumption about which view the Tribunal will take on that issue. That is why it was necessary for the Claimant to present these two alternative arguments in its Response.

Such material is of course not within the Claimant's possession. As the Claimant pointed out in its Response, "Such material, if it existed at all, would be in the possession of the Respondent's Department of Foreign Affairs and Trade". The Respondent has not disputed that such material, if it exists, would be held by the Respondent's Department of Foreign Affairs.

Nor has the Respondent disputed the Claimant's statement in this request that the issue is one of considerable relevance, and practical importance for the September 2024 hearing, because it will determine whether the Tribunal only needs to hear arguments about the provisions of Article 11 or whether, in addition, the Tribunal needs to hear arguments based on general law concepts of "abuse of process" or "abuse of right". Plainly, the requested Documents are of considerable relevance and practical importance.

Next, the Respondent complains that the Claimant seeks "[a]ny memoranda, minutes of meetings or conferences, file notes of meetings or conferences, reports, opinions, briefing papers, Communications", over a three-year period. Two points may be made about this.

First, this complaint mischaracterises the terms of the request. The phrase "or other travaux préparatoires or similar Documents" is important as it qualifies all of the words which appear before it. It demonstrates that the focus of the request is upon Documents which are, or are in the nature of, travaux préparatoires. This alone means that there is no room for any suggestion that the request would be unduly burdensome.

Secondly, the fact that the request covers Documents created over a three year period (between 1 March 2005 and 31 August 2008) is not objectionable and, indeed, is inevitable because of the period over which the terms of the AANZFTA were negotiated.

The start date of 1 March 2005 is explained by the fact that negotiations for the AANZFTA commenced in March 2005 (following the Joint Declaration of the Leaders of the ASEAN-Australia and New Zealand Commemorative Summit in Vientiane, Lao PDR on 30 November 2004). The precise date in March 2005 on which those negotiations commenced is not known to the Claimant, hence the start date of 1 March 2005.

	<p>The end date of 31 August 2008 is explained by the fact that the legal text of the AANZFTA was finalised in August 2008. The AANZFTA did not in fact enter into force until 1 January 2010 (for signatories including Australia, Singapore and New Zealand) but the Claimant was mindful of the need to confine its request to as narrow a time period as possible. The precise date in August 2008 on which the legal text of the AANZFTA was finalized is not known to the Claimant, hence the end date of 31 August 2008.</p> <p>The Claimant has thus been assiduous to confine the temporal scope of this request as much as possible.</p> <p>The Respondent then seeks to take a point about which Documents constitute travaux préparatoires and which do not. This point has no substance, for two reasons.</p> <p>First, as mentioned above, where, inter alia, the request contains the phrase “or other travaux préparatoires or similar Documents”, which qualifies all of the words which appear before it and demonstrates that the focus of the request is upon Documents which are, or are in the nature of, travaux préparatoires.</p> <p>Second, to the extent that there is any difference, the Claimant would be content for the Tribunal to confine the scope of the request to Documents which constitute travaux préparatoires in the commonly understood meaning of that term.</p> <p>Responsive Documents: Finally, the Respondent says:</p> <p>“In any event, if production is ordered, the Respondent advises it has not identified any documents within the scope of this request”.</p> <p>The Tribunal should give that statement no weight whatsoever. This statement cannot be reconciled with the Respondent’s apparent suggestion that the request would somehow be burdensome because it covers Documents created over a three-year period. There is no indication that the Respondent has, as yet, searched for Documents created during that three-year period. If it has not yet undertaken that task, then it is utterly meaningless to say that the Respondent has not, as yet identified any Documents which fall within the scope of this request.</p> <p>Accordingly, the Respondent should be ordered to produce the Documents covered by this request.</p>
<p>Decision by the Tribunal</p>	<p>GRANTED AS NARROWED DOWN</p> <p>Documents:</p> <ul style="list-style-type: none"> (a) created in the period between 1 March 2005 and 31 August 2008; and (b) in the possession, custody or control of the Australian Government’s Department of Foreign Affairs and Trade; and

	<p>(c) evidencing the preparatory work (<i>travaux préparatoires</i>) of Article 11 of Chapter 11 of the AANZFTA, specially with respect but not limited to:</p> <ol style="list-style-type: none">1) any intention, opinion or view on the question of whether Chapter 11, Article 11 of AANZFTA is the only available mechanism under AANZFTA for resolving allegations by a host State that a claimant engaged in conduct in the nature of “treaty shopping” or “forum shopping”; or2) that the inclusion of Chapter 11, Article 11 of AANZFTA excludes any other inquiry about alleged “treaty shopping” or “forum shopping”, such as the application of an “abuse of process” or “abuse of right” doctrine.
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**UNDER THE 2021 ARBITRATION RULES OF THE UNITED NATIONS
COMMISSION ON INTERNATIONAL TRADE LAW**

AND

**UNDER THE AGREEMENT ESTABLISHING THE ASEAN –
AUSTRALIA – NEW ZEALAND FREE TRADE AREA**

(PCA Case No. 2023-40)

ZEPH INVESTMENTS PTE LTD

Claimant

and

THE COMMONWEALTH OF AUSTRALIA

Respondent

**Respondent's Requests for Document Production
(with Claimant's Objections and Respondent's Replies – Abridged Version)**

10 May 2024

Tribunal:

Prof. Gabrielle Kaufmann-Kohler

Mr William Kirtley

Prof. Donald McRae

RESPONDENT'S REQUESTS FOR DOCUMENT PRODUCTION

Respondent's Comments

1. Pursuant to para. 5.1 of Procedural Order 1 dated 1 September 2023 (**PO1**) and the Procedural Calendar in Annex 1 to PO1 (as amended by agreement of the Parties on 12 December 2023), the Respondent hereby provides its Requests for Document Production (the **Requests**) to the Claimant.
2. The Respondent confirms that these Requests comply with para. 5 of PO1, and Article 3 of the *International Bar Association Rules on the Taking of Evidence in International Arbitration 2020 (IBA Rules)*, which may guide the Tribunal pursuant to para. 5.6 of PO1.
3. In these Requests and unless otherwise specified:
 - a. **Abuse of Process** refers to the Respondent's argument that the Claimant's claims are not within the jurisdiction conferred by the Agreement Establishing the ASEAN-Australia-New-Zealand Free Trade Area (**AANZFTA**) and/or are inadmissible because they constitute an abuse of process.
 - b. **Conferences and/or Meetings** includes both in-person and virtual (for example, held by Zoom, Microsoft Teams, WebEx or teleconference) and hybrid conferences and/or meetings.
 - c. **Consolidated Tax Group** means the Australian tax consolidated group which was formed originally with effect from 1 July 2003 with Mineralogy Pty Ltd (**Mineralogy**) as the head company, and of which Mineralogy International Limited (**MIL**) became the head company under the Tax Sharing Agreement dated 26 March 2019.
 - d. **Correspondence** includes both written and electronic correspondence (including communications sent or received via email, instant messaging applications such as WhatsApp, Facebook messenger, mobile text or short message service, or voice messaging communication services) which have been recorded by any means.
 - e. **Denial of Benefits** refers to the Respondent's argument that the Claimant is not entitled to the benefits of Chapter 11 of AANZFTA because Australia has denied the benefits of the Chapter to the Claimant and its alleged investments in accordance with Article 11 of Chapter 11 of AANZFTA.
 - f. **Document** means a written communication, image, drawing, programme or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means, and includes attachments or hosts belonging to a "family" of documents that contains at least one document that is responsive to a Request. Documents that have been altered (for example, with margin notes) shall be considered to be separate documents from the original documents.
 - g. **Mineralogy Group Restructure** means the restructure through which MIL and the Claimant were inserted into the Mineralogy Group corporate chain on 16 December 2018 and 29 January 2019 respectively, described at paras. 33 to 43 of the Respondent's Statement on Preliminary Objections dated 22 January 2024 (**SOPO**), at paras. 230 to 237 of the Claimant's Response to the Respondent's Statement on Preliminary Objections dated 14 March 2024 (**Statement of Defence on Preliminary Objections** or **SODPO**), and at paras. 16 and 109 of the [REDACTED] Witness Statement (**WS**) and Annexure A to the Notice of Intent at Exh. C-63.
 - h. **No Investment** refers to the Respondent's argument that the Claimant has not identified a relevant "investment" for the purposes of Article 2(c) of Chapter 11 of AANZFTA and is therefore not entitled to the protection of Chapter 11 or to bring a claim pursuant to Article 20 of Chapter 11.
 - i. **No Investor** refers to the Respondent's argument that the Claimant is not an "investor of a Party" within the meaning of Article 2(d) of Chapter 11 of AANZFTA.

- j. **Royalties Judgment** means the judgment issued by Kenneth Martin J of the Supreme Court of Western Australia following the Royalties Litigation (*Mineralogy Pty Ltd v Sino Iron Pty Ltd, Korean Steel Pty Ltd, and CITIC Ltd (No 16)* [2017] WASC 340, which was upheld on appeal: *Sino Iron Pty Ltd, Korean Steel Pty Ltd, and CITIC Ltd v Mineralogy Pty Ltd* [2019] WASC 80).
- k. **Waratah Coal Project** means the coal project in the Galilee Basin in Queensland proposed by Waratah Coal Pty Ltd (**Waratah Coal**), which the Claimant asserts required funding to be developed. The Claimant asserts that obtaining funding for the Waratah Coal Project was a reason for the Mineralogy Group Restructure described at paras. 6-7 and 18-19 of the [REDACTED] WS, at paras. 333-335 of the SOPO, at para. 574 of the SODPO, and at paras. 48-57 of the [REDACTED] WS.
4. In accordance with para. 5.2(c) of PO1 and Article 3.3(c)(i) of the IBA Rules, the Respondent specifies that the requested documents are not in its possession, custody or control, and that they are likely to exist and be in the possession, custody or control of the Claimant. For completeness, the Respondent confirms that documents in the possession, custody or control of Mr Palmer (the Claimant’s “main representative”)¹ are in the possession, custody or control of the Claimant. Documents in the possession, custody or control of the Claimant’s affiliates or subsidiaries to which the Requests are directed are also in the possession, custody or control of the Claimant because those affiliates or subsidiaries are owned and/or controlled by the Claimant.
5. Any Request referring or relating to the Claimant’s pleaded case as set forth in the Notice of Arbitration, as amended on 29 September 2023, and SODPO, does not connote an admission by the Respondent of the accuracy or relevance of any matter so pleaded.
6. In relation to the mechanics of document production pursuant to these Requests, the Respondent understands that: (a) the Claimant shall produce copies of documents, rather than original documents, unless otherwise requested; (b) the Claimant shall produce documents in their native electronic form, unless otherwise requested;² and (c) the Claimant shall indicate to which Request(s) the produced document(s) are responsive. The Claimant is invited to confirm its agreement with this understanding within seven days of these Requests, that is, by 15 April 2024. The Respondent will provide reciprocal undertakings in relation to the mechanics of document production pursuant to the Claimant’s Requests, upon request by the Claimant.
7. In relation to privileged or protected information and documents, pursuant to para. 5.7(d) of PO1 and Article 9.2 of the IBA Rules, the Respondent understands that:
- a. responsive documents containing privileged or otherwise protected information shall be produced by the Claimant with the information redacted;
 - b. the Claimant may withhold the production of a document only if the privileged or otherwise protected information cannot be adequately protected through redaction;
 - c. if the Claimant withholds or redacts responsive documents in accordance with subparagraph b above, the Claimant must produce to the Respondent (and to the Tribunal) a privilege log containing the following information about the document:
 - i. the title of the document or email subject line, as applicable;

¹ See Procedural Order No. 2, paras. 33-34, 45-46.

² The Respondent reserves the right to seek the original data attributes, including metadata, if present.

- ii. the date of creation;
- iii. the author(s) and recipient(s);
- iv. the privilege or protection claimed and a brief explanation of the reason the document is being withheld; and
- v. the request number to which the document is responsive.

The Respondent will provide reciprocal undertakings in relation to the mechanics of document production pursuant to the Claimant's Requests, upon request by the Claimant.

- 8. The Respondent looks forward to resolving contested document production issues as far as possible between the Parties, without the need for further directions or decisions from the Tribunal. The Respondent and its representatives confirm that they will comply with the *IBA Guidelines on Party Representation in International Arbitration 2013*, specifically Rules 12-17, and requests the Claimant and its representatives to provide the same confirmation within seven days of receipt of these Requests.
- 9. Insofar as the Claimant refuses to produce documents without legitimate explanation, the Respondent reserves the right to ask the Tribunal to draw adverse inferences against the Claimant pursuant to Article 9.6 of the IBA Rules.

CLAIMANT'S OBJECTIONS TO THE RESPONDENT'S DOCUMENT PRODUCTION REQUESTS

Claimant's Comments

The Claimant's comments have, inter alia, been set out in the Objections section of Request No.1 of the Redfern Schedule.

RESPONDENT'S REPLY TO CLAIMANT'S OBJECTIONS

1. The Claimant has structured its objections to each Request by reference to:
 - a. “**Part A**” which is styled as an “Overall Objection”, first set out at Request 1 and then repeated for each Request. The Respondent has extracted that objection below and then responds once to the Overall Objection directly following this material.
 - b. “**Part B**” (which is also repeated as “Schedule A”) which for each Request seeks to reformulate the Respondent’s request into multiple requests in Table form. Again, the Respondent will respond only once to this objection at the outset of this response.
 - c. “**Part C**” which is an objection made to a specific request. The Respondent’s responses to those itemised objections are set out in the Redfern Schedule, on a request-by-request basis.

A. THE CLAIMANT'S OVERALL OBJECTION (“PART A”)

The Overall Objection

2. The Claimant has made an Overall Objection to the document requests that was set out in response to Request No. 1, and “forms part of the Claimant’s Objections to all the Respondents [sic] purported document Requests number 1 to 22”. To assist the Tribunal and efficiently respond to the Overall Objection, it has been extracted from Request No. 1 and reproduced below and is then followed by the Respondent’s Reply to the Overall Objection:

- “4. The relevant procedural order (**PO**) which the parties must comply with in respect of document production is set out in PO1 at paragraph 5. The Claimant objects to the Respondent’s purported Document Requests. The Claimant explains below the reasons why the Respondent’s Document Requests are not made in accordance with the Tribunal’s directions on document production, as set out in PO1.

Objection: The Respondent has made 655 Document Requests

5. Because of the Respondent’s failure to make Document Requests in accordance with PO1, the Claimant must reject the Respondent’s purported Document Requests as being requests which are not made in compliance with the Procedural Orders and are therefore no valid requests and are an abuse of process for the following reasons:
 - a) Paragraph 5.1 of PO1 states (**emphasis added**):

“*The Tribunal recommends that the number of requests per Party **do not exceed 20, including sub-requests**. A Party wishing to exceed this number shall announce it two weeks before the submission of the Redfern Schedule, explaining the reasons and need for a number higher than recommended.*”
 - b) While the Respondent informed the Tribunal that it would likely have more than the recommended limit of 20 requests (including sub-requests), at no stage did it indicate that its requests would be so voluminous. So as to properly consider the Respondents request in good faith the **Claimant** has separated out the sub-requests and has **identified 655 separate requests** (see Schedule A attached to this Redfern Schedule) for documents made by the Respondent which are also **set out in Part B in the Objections in respect of each request**. The **temporal scope** for each of the 655 requests varies, with over 200 of the requests in the hundreds of days and **over 300 of the requests for over 1,000 days with many up to 2,006 days** in respect of each of the Document Requests. The Claimant respectfully invites the Tribunal to spend 10 Minutes pursuing Schedule A prior to proceeding with reading the balance of the Claimants Objections. Table A contained within Part B of each of the Claimant’s

Objections sets out in a clear concise form each of the 655 Document Requests the Respondent has made which are relevant to each specific Objection. The Respondent's Document Requests must both in the terms of the number of documents requested and temporal scope made, be one of the largest made in interlocutory proceedings in an international arbitration.

- c) The Respondent's 655 Document Requests have only specified (or provided a minimum temporal period) for 565 of their document production requests. The Respondent has not specified the temporal period for 89 of their 655 Document Requests.
- d) It is beyond belief that the Respondent is of the view that the Respondent is acting in accordance with PO1 or in good faith. Clearly it is not. The Respondent's 655 Document Requests, if taken literally and if counted individually, would require the Claimant to conduct searches covering a minimum period of six hundred and forty-six thousand four hundred and twenty-nine days (646,429 days). This figure of 646,429 days does not include the 89 Document Requests for which the Respondent has not provided a temporal period.
- e) The Claimant cannot possibly be expected to object properly to 655 Document Requests within 21 days. The Tribunal (at para. 5.1 of PO1) recommended the number of requests per Party do not exceed 20, including sub-requests. Ordinarily, this would give a party one day per 'document production request' to consider and prepare objections (if any) to each request, assuming the maximum recommended amount of 20 document production requests were made.
- f) However, the Claimant received 655 Document Requests from the Respondent, meaning the Claimant was required to consider and prepare objections, for over 31 Document Requests per day. This has meant the Claimant has had less than one (1) hour per day per Document Request to consider and prepare objections to the Respondent's 655 Document Requests. This assumes the Claimant was working 24 hours a day 7 days a week since receipt of the Respondent's Document Requests. It is worth noting that one Document Request could result in the consideration of thousands of documents as the Respondent's Document Requests are not sufficiently specific. This task is impossible and not what the Tribunal or PO1 envisaged.
- g) The Respondent's approach to document production contravenes the Tribunal's stated expectations at paragraph 5.1 of PO1 and the clear intention expressed in section 5 of PO1 that the Parties' requests **should be specific, narrow, properly justified and limited in number**. The Respondent's Document Requests are none of these things. The Respondent Document Requests are embarrassing.
- h) The Claimant is now faced with exactly the situation that the Tribunal sought to avoid with its carefully considered directions on document production. The time and resources already expended in isolating each of the Respondent's Document Requests (which are reproduced in respect of each 'request' in the Objections section of the Redfern Schedule) has been considerable. The Claimant has already produced a voluminous number of documents in the arbitration, many of which are responsive to the Respondent's Document

Requests. Should further production be ordered, the burden on the Claimant will be heavy indeed given the breadth of the purported Document Requests. This cannot be tolerated, especially when many of the purported Document Requests have not been properly justified and appear to be nothing more than a fishing expedition.

Objection: Inconsistent with good faith

6. The Claimant contends that the Respondent's approach to its Document Requests is inconsistent with good faith participation in the arbitral process and reserves its right to make costs submissions on this issue in the future. Consequently, the Claimant respectfully submits that it is not required to produce further documents to the Respondent and has not done so to date.

Objection: Abuse of Process in International Arbitration Principles of Public International Law

7. The principle that every legitimate procedural right must be exercised in good faith is the foundation of the abuse of process doctrine in public international law. This doctrine derives its recognition in international law from its acceptance as a legal principle in 'most national legal systems [which] constitute[s] a primary source of international law'. Both common law and civil law jurisdictions recognize the principle that procedural rights must be exercised in good faith. Accordingly, abuse of rights is recognized as a general principle of international law.
8. For instance, Article 2 of the Swiss Civil Code states that '[e]very person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations. The manifest abuse of a right is not protected by law'. The Swiss Civil Procedure Code, Article 52, also requires all 'those who participate in proceedings must act in good faith'. Similarly, the German Civil Code ("BGB") includes provisions regarding the requirement to exercise lawful rights in good faith. Article 226 of the BGB provides that '[t]he exercise of a right is not permitted if its only possible purpose consists in causing damage to another'. German courts have applied the abuse of rights doctrine codified in Article 226 in circumstances where the lawful right is exercised 'with no regard for the legitimate interests of the other parties' and where the exercise of rights is 'carried out maliciously'.
9. Likewise, under the French Civil Code, Article 1382 provides liability where '[a]ny act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it'. Although the French Civil Code does not include a provision on abuse of rights as directly as the Swiss Code or BGB, the courts of France have nevertheless interpreted the broad language of Article 1382 to include the abusive exercise of rights. The Court of Cassation, by way of example, held as early as 1937 that 'even the legitimate exercise of the rights of ownership will generate liability if the resulting inconvenience to third parties goes beyond the ordinary obligations toward neighbours'.
10. Of relevance, the doctrines of res judicata and collateral estoppel are examples of common law doctrines that bar the use of legitimate rights when the exercise of those rights violates the public policy goals of finality and protection from successive or abusive litigation.
11. The Respondent has brought its Document Requests in circumstances where its conduct in bringing its abuse of right objection has been shown to be an abuse itself by

virtue of the matters raised in the Preamble to the Claimant's Response to the Respondent's Statement of Preliminary Objections dated 14 March 2024. Any reliance by the Respondent upon its abuse of process ground is in itself in its Document Requests a further abuse. Furthermore, the Respondents purported Document Request cannot be made in good faith when it is made contrary to the Procedural Orders.

12. Despite the Respondent's express knowledge for example, the Respondent approved the Claimant as an "investor", admitted its investment and the Respondent did not claim any denial of benefits, the Respondent did not give notice of an alleged abuse of process until 28 April 2023, over three years later. The Respondent did not act in good faith. Accordingly, the Claimant submits that the Respondent's Statement of Preliminary Objections was an abuse of process. Once an abuse of process has been identified, it needs to be acted upon to ensure the integrity of any proceedings. It is the Claimant's submission that any application for disclosure based on an abuse of process is also an abuse.
13. The enormous number of the Respondent's Document Requests and their temporal scope is an abuse of process, and not in accordance with PO1 and does not qualify for the production of any documents by the Claimant. How is the Claimant to know which of the Respondent's Documents Requests it should address and in what order? The Respondent's lack of respect for and non-compliance with the Tribunals Procedural Orders is telling.

Objection: Documents already produced to the Respondent

14. The Claimant has already produced thousands of documents supporting its case to the Respondent. The Claimant's Notice of Intent and the Claimant's Notice of Arbitration contained over 20,000 pages of documents and the Claimant's Response to the Respondent Preliminary Objections contained over 800 footnotes supporting the Claimant's burden of proof.
15. The Respondent already has within its possession thousands of pages of documents including but not limited to inter alia tax returns, company accounts within the ATO, ASIC and the records of each of its states including their treasury and tax departments but still requests from the Claimant documents within the Respondents own possession.

Objection: Requesting documents for points which have been proven in the record

16. Without prejudice to the Overall Objection, in accordance with paragraph 5.7(a) of PO1, the Parties are not entitled to production of a document "seeking to establish a fact that is already proven by evidence on record."
17. Many of the Respondent's purported Document Requests seek documents on issues for which the Claimant has already provided ample supporting documentation to prove the point made. The Respondent has not challenged the authenticity of these supporting documents and simply ignores them in its justification for the requested documents. For example:
 - a) The Respondent requests a wide range of documents (including all correspondence to or from Mr Palmer) relating to "*retaining profits instead of paying out dividends*" (Request 3(d)). The justification for this request includes that it goes to the Respondent's "no investor" objection because "*the requested documents are likely to reveal internal deliberations pertaining to*

... the Claimant purportedly “reinvesting” Mineralogy’s retained earnings rather than receiving a dividend.” However:

- i. Chapter 11 of the AANZFTA expressly states that “returns” (as defined in Article 2(j)) reinvested in the business constitute “investments” under the AANZFTA. The Claimant has provided irrefutable evidence of Mineralogy’s retained earnings as stated in its audited financial reports, attached to [REDACTED] Witness Statement dated 15 February 2024. There can be no reasonable argument that the retained earnings do not exist. The broad range of documents requested (burdensome to produce) cannot change the proven fact that Mineralogy’s profits were retained in the business and were not paid out to the Claimant as dividends.
 - ii. Moreover, as discussed below, the Claimant bears the burden of proving it made an investment. There is no justification for such broad and burdensome requests that relate to a point that the Claimant must prove and has proven through documents already on the record. Such requests cannot be material to the outcome of the case.
- b) In purported Request 9, the Respondent similarly requests documents pertaining to the share swap for the original investment. As stated, the Claimant bears the burden of proving that an investment exists as a result of the share swap. The Claimant has provided comprehensive documentation to evidence the existence of the share swap (see, for example, the Share Purchase Agreement, relevant corporate resolutions, share transfer forms and relevant regulatory notifications of the share swap (all provided in Exh. C-63)). There can be no dispute that the share swap occurred. The documents requested – purportedly to “demonstrate what, if any, consideration was paid for the relevant shares” – are not material to the outcome of the case, given the clear proof already in the arbitral record of the share swap. The request is burdensome, irrelevant and nothing more than a fishing expedition.
- c) The Respondent requests copies of the employment or engagement contracts for the Claimant’s employees of the Claimant (Request 17(e)). The Respondent states that the documents are material to the outcome of the denial of benefits objection as “there is no documentary evidence of transfer of staff” and “employment contracts for all of the Claimant’s employees are relevant to the Respondent’s argument that “no evidence of any staff employed at the Claimant could execute on the stated purpose for creating Zeph.”

The Claimant has provided evidence that comprehensively deals with the Respondent’s unsupported suggestion that the Claimant did not employ relevant staff. For example, the documents at Exhs. C-91 to C-93 show contributions to the Singapore Government’s Central Provident Fund (“CPF”) for the Claimant’s employees in early 2019, 2020, 2021 and 2022. The CPF is a compulsory retirement savings and pension plan that employers must pay into for their staff. These documents issued by the CPF (as part of the Singapore Government) clearly list the Claimant’s employees at the relevant dates.

Additionally, the Respondent has provided evidence of COVID payments made by the Singapore Government to the Claimant over a number of years

(see Exhs C-81, C-83 and C-85). The Respondent does not refer to these documents at all in its rationale for the Document Requests.

There can be no basis on which to assert the Claimant did not employ staff in Singapore – this point has been comprehensively proven. Leaving aside the obvious privacy issues associated with providing employment contracts for individual employees and the burden of producing all these contracts, the documents can have no impact on the outcome of the arbitration as the point (that the Claimant employed staff in Singapore) has already been proven.

The Respondent's expert Professor Lys states in paragraph 216 of his Report, that "*my analysis of Zeph's contributions indicate that during 2020, the company had between 120 (December) and 132 (February) employees subject to CPF contributions*". The Respondent's expert has thus admitted that the Claimant has employed substantial staff in the relevant period.

The Respondent is acting in bad faith

18. The Respondent's persistent requests for documents relating to points for which there is ample proof in record, and which proof is not disputed or even referenced by the Respondent in its reasons for the request, is regrettable. The burden and cost on the Claimant to produce such documents is immense and not commensurate to any possible benefit in the arbitration.

In short, the Respondent has requested documents that simply would provide further proof of points which have already been proven through documents in the arbitral record. The requested documents cannot be material to the outcome of the arbitration and the Document Requests should be denied.

Objection: Document Requests do not go to Respondent's burden of proof

19. Paragraph 5.7(b) of PO1 states that a party will not be entitled to the production of documents "*seeking to establish a fact for which the other Party bears the burden of proof.*"
20. Without prejudice to the Claimant's Overall Objection, many of the Respondent's Document Requests seek documents for facts asserted and relied upon by the Claimant, and for which the Claimant bears the burden of proof.
21. For example, many of the requested documents relate to the commercial rationale advanced by the Claimant for the group restructure that took place in late 2018 and early 2019. The Respondent contends that the requested documents are relevant to its abuse of process objection. This point has no legal relevance in the proceeding. It is foreseeability of the specific Dispute at the time the Claimant offshored which is the relevant point.
22. The funding and tax rationales for the restructure are positions advanced by (and relied upon by) the Claimant. The Claimant of course bears the burden of proving the facts it asserts. The Respondent does not bear the burden of proving (or disproving) that the Claimant's assert facts, including its rationale for the restructure (or not) to obtain financing and/or for tax reasons that is not materially relevant to the legal outcome. In any event it is only the question of foreseeability which is a relevant challenge that the Respondent must meet. The Respondent's burden for its abuse of process objection is to prove that the *Amendment Act* was reasonably foreseeable in late 2018 – something that the Claimant says it simply cannot do because the *Amendment Act* was not

conceived by Mr Quigley until May 2020, as the evidence proves (Exh. C-432). The Respondent utterly fails to demonstrate that the documents requested by it are material to the outcome of this question – the foreseeability of the *Amendment Act*.

23. Similarly, the Claimant bears the burden of proving that it is an investor that has made an investment. The Respondent's requests that go to proving the investment are not properly made and should be denied on the basis that the burden for proving the existence of an investment falls on the Claimant.

Objection: Relevance

24. Without prejudice to the Claimant's Overall Objection, the Respondent's Document Requests fail to engage sufficiently or properly with the important question of relevance and materiality and / or fail to address questions of relevance and materiality in adequate detail.
25. The parties were required to set out document requests by reference to specific (as opposed to 'generic') categories of documents and also explain (per PO1 paragraph 5.2(d)) "*with specific references to the record, why the document or category of documents sought is relevant to the case and material to its outcome and, more specifically, which fact alleged in the arbitration document the document sought is intended to prove*".
26. The requirement to address relevance and materiality on that basis is consistent with the IBA Rules on the Taking of Evidence in International Arbitration (2020) which provides at Article 3(3)(b) that parties making requests for documents shall include in their requests a statement as to how the "*Documents requested are relevant to the case and material to its outcome.*" (Emphasis added)
27. In that context, the Claimant addresses further below the specific requests in turn and addresses the question of relevance and materiality in each case.
28. However, by way of overriding submissions, the Claimant notes the following deficiencies in the Respondent's approach to relevance and materiality.
29. *First*, the Document Requests have been advanced on a wide-ranging basis without adequately specifying the factual point to which they are relevant:
 - a) It is not sufficient for a requesting party simply to refer to 'headline' arguments which are being advanced (such as the 'abuse of process' argument) without referring to a discrete factual point in the record.
 - b) The very first request is a good example of this deficiency in the requests. It refers to relevance and materiality on a generic basis by reference to the 'abuse of process' argument noting simply that the requested documents are 'relevant to the Respondent's Abuse of Process objection' and are also 'material in determining the outcome of that objection' as they will assist in identifying 'the true purpose of the Mineralogy Group Restructure'. That request says nothing more than that (in the Respondent's subjective view) this category of documents is relevant and material to the outcome of a major strand of the Respondent's jurisdiction challenge which established international law does not recognise. It does not address the question of relevance by reference to detailed or discrete facts and leaves the Tribunal and Claimant to speculate about the type of document that might be captured by the search demanded by the Respondent.

- c) By way of further example, Request 9 refers to the ‘No Investor’ argument and simply states that the documents requested are relevant and material by reference to a summary of the ‘No Investor’ argument – rather than identifying a specific factual point in the context of that part of the case.
 - d) Similarly, Request 13 refers to a large number of paragraphs of the parties’ submissions and then purports to address relevance and materiality by reference to (inter alia) abuse of process. However, the only argument advanced on the question of materiality is that the documents are material to abuse of process because that objection ‘*is based on the argument that the Mineralogy Group Restructure was done for the purposes of obtaining treaty protection and that the restructure did not achieve any operational synergies*’. That summary of materiality is essentially meaningless. It could be ‘copied and pasted’ from almost any investor-state arbitration in which an abuse of process point based on alleged restructuring is advanced. It does not identify the core alleged basis for the materiality of the requested documents in this particular case.
30. *Secondly*, a failure to set out relevance and materiality on a detailed basis places the Claimant in an impossible position. Without proper and focussed requests, the Claimant is exposed to a risk in due course of being criticised for failing to produce documents, through no fault of its own. The Respondent should instead set out the precise factual point which is said to be in dispute and then explain what specific material is said to be relevant and material to that fact. The Claimant (and Tribunal) are then able properly to comment on and evaluate the request and any alleged non-compliance with the request.
31. The Claimant notes that paragraph 5.3 of PO1 states that “*if the Tribunal considers that a requests lacks sufficient specificity, it will in principle not narrow it down of its own initiative*”. The Respondent has not acted in good faith, has sought 655 requests, which is 635 requests more than the 20 requests the Tribunal, the Claimant and the Respondent itself agreed upon and if it cannot be penalised should at the very least not be rewarded for such behaviour and should not be granted any of its requests for gross non-compliance.
32. *Thirdly*, several of the requests are deficient because they are premised on inferences the Respondent is seeking to draw from the record rather than facts that the Respondent is required to prove. For example, Request 2 suggests that [REDACTED] approach to restructuring is ‘unusual’ – but that (i) ignores the test for relevance and materiality which needs to be grounded in the relevant submissions and (ii) ignores [REDACTED] evidence about his experience and decision-making process based on his years of working in the relevant sector as a highly successful businessman. Similarly, Request 8 suggests that the requests therein are relevant because the ‘basis for advice disclosed [by the Claimant] is not clear’ – but that is not a sufficiently precise or proper basis on which to make a request.
33. *Fourth*, documents sought by the Respondent in its Document Requests must be in the possession and control of the Claimant. The Respondent has not properly addressed in its request the facts on which it relies to assert that the documents are available to the Claimant. The Tribunal is unable to direct a third party not a party to the Arbitration to provide any documents to the Respondent.

34. *Fifth*, the requests are made on a speculative basis about what documents ‘might’ show – rather than identifying documents that are in fact going to be relevant and material to the outcome of the case. For example, Request 9 states that the requested material is ‘likely’ to contain evidence of the purpose for the restructure by reference to a large number of paragraphs of the Statement of Preliminary Objections and the Statement of Defence of Preliminary Objections – but does not state in terms that the points are in fact relevant and material to specific factual allegations.”

CLAIMANTS’ RESPONSE TO THE COMMENTS SET OUT IN THE DOCUMENT REQUESTS

35. The purpose of the sections below is, inter alia, to respond to the Respondent’s comment section set out in the Document Requests.

Disappointing Approach

36. One striking feature of the Document Requests is the enormous emphasis on the “Abuse of Process” argument which is the focus of most of the Document Requests. The Claimant does not concede the Respondent is entitled to run a general law abuse of process argument on top of the objections which turn on the application of Article 11 (of Chapter 11 of the AANZFTA). It is the Claimant’s position that Article 11 “covers the field”, and that the Respondent is not entitled to a “second bite at the cherry” with a general law of abuse of process argument.
37. Without prejudice to the Overall Objection, a further feature of the Document Requests is their remarkable scope. The Document Requests are manifestly excessive. The following issues, in particular, are discussed below in relation to various affected categories:
- a. the extent to which the Document Requests seek documents which are not in the Respondent’s possession, custody or control given that a number of the requested documents plainly are within the possession, custody or control of various agencies of the Respondent (including, for example, ASIC, FIRB, the ATO and State governments) and given also that a number of such documents have already been furnished by the Claimant to the Respondent in the course of this arbitration;
 - b. the extent to which the Document Requests seek documents which are alleged to be in the possession, custody or control of the Claimant (including the remarkable assertion by the Respondent that “*documents in the possession, custody or control of Mr Palmer ... are in the possession, custody or control of the Claimant*”),³ an allegation which the Claimant rejects;
 - c. in terms of paragraph 5.7(b) of PO1, many of the Document Requests seek production of documents “*seeking to establish a fact for which the other Party [here, the Claimant] bears the burden of proof*”;
 - d. in terms of paragraph 5.7(c) of PO1, many of the Document Requests seek production of documents “*whose search would be too burdensome, taking into consideration the added value of the document for the resolution of the dispute and the burden of the search efforts*”;

³ Document Requests, [4].

- e. in terms of paragraph 5.7(d) of PO1, many of the Document Requests seek production of documents that are not relevant; and
 - f. in terms of many of the Document Requests, there is an overarching relevance objection because this Dispute could not possibly have been foreseen at any time prior to 11 August 2020, which was long after (ie 19 months after) the date of the Claimant's incorporation.
38. The Claimant's Objections comply with PO1. The Claimant does not agree to vary the procedural orders or to add any additional requirements to them. The Claimant gives no consideration for any of the understandings set out in the Respondent's Document Requests nor does it acquiesce to any of such "understandings".
39. It is the Claimant's position that many of the Respondent's Document Requests relate to matters that have already been proven by the evidence filed on the record.
40. The Claimant also notes that many of the Document Requests by the Respondent have no relevance especially in response to the matters already proven by the Claimant and add no value for the resolution of the Dispute before the Tribunal. Schedule A (and Table A in Part B of each Objection) reveals that all searches would be too burdensome.
41. Further, arbitral tribunals do not have any authority to order production from non-parties if the documents sought are in the possession of third parties, accordingly the Claimant could never respond to the Document Requests in respect of documents which are not in its "possession, custody or control".
42. The Claimant is also concerned that many of the Document Requests would result in the loss or destruction of commercial or technical confidentiality.
43. Additionally, considerations of procedural economy, proportionality, fairness or equality of the Parties is compelling. This is especially so when the Claimant has provided a detailed Notice of Intent, and a Notice of Arbitration with a large amount of evidence including witness statements including 29 file boxes with its Notice of Arbitration to the Respondent. The Claimant also notes that its Response to the Respondent's Statement on Preliminary Objections dated 14 March 2024 contained over 800 footnotes and placed on the record additional evidence which proved the relevant facts that the Claimant is required to prove in respect of its entitlement to invoke the Tribunal's jurisdiction in this Arbitration.
44. The Claimant does not know and has not been informed by the Respondent what it is seeking. It is impossible to fathom the Respondent's intention or purpose behind the Document Requests.
45. For the reasons set out above the Claimant regards the Respondent as not acting in good faith and as embarking on an illegitimate fishing expedition and is inter alia seeking to delay the arbitral process. The volume and temporal timeframe demonstrate that the requests contained in the Respondent's Document Requests are an abuse of process, brought for an improper purpose in breach of the Procedural Orders and that they are not a valid request.
46. While each of the Claimant's Objections (within the Redfern Schedule) contain a proper summary of the documents the Respondent's Document Requests are actually

seeking and the number of Document Requests the Respondent has actually made, for convenience, all of the Respondent's Document Requests have been properly combined and summarised in a table as a separate document attached hereto as Schedule A to the Claimant's Objection.

Respondent's Replies to the Claimant's Overall Objection

3. The Respondent does not accept the Overall Objection put forward by the Claimant, for the reasons set out below.
4. It is worth noting that document production forms a critical part of the Respondent's response to this significant claim for AUD300 billion that the Claimant has elected to bring. Naturally, both Parties would be expected to devote considerable resources to a claim of this magnitude, including by coordinating intensive and rigorous searches for relevant documents. The Respondent's document requests, and the searches that the Claimant would need to undertake are proportionate to the size of the claim in this proceeding. Indeed, the IBA Rules that guide document production in this arbitration, as with most international arbitrations, are grounded on the core principles of proportionality, as well as fairness and equality.⁴ No claimant should be permitted to utilise the investor-State dispute settlement system to commence a claim against Australia of this magnitude, only to refuse or decline to devote the resources necessary to produce documents that a state reasonably requires to defend that claim. To deny the Respondent the documents it seeks would be to deny it access to evidence that is necessary to afford fairness to the Respondent to allow it to defend that claim.
5. The Respondent has made reasonable and targeted requests for documents and explained the relevance of those requests clearly. The Claimant's objections to those requests, for the most part, lack substance and exaggerate the burden on the Claimant while downplaying the relevance to the case. The Claimant's assertion that it has already produced sufficient evidence throughout this proceeding is plainly incorrect: the majority of such documents are neither contemporaneous nor material to the issues in dispute.

Reply to the Claimant's assertion that the Respondent has made 655 Document Requests (Overall Objection, paras. 5(a)-5(h))

6. In formulating each request, the Respondent has complied with para. 5.2 of PO1, including by specifying the "category of documents whose production is sought",⁵ and the custodian of the requested documents.⁶ It has tailored each document request to specify the exact categories of documents being requested, including by using language similar to the examples in para. 5.2(a)(i) of PO1 ("letters, emails, minutes of meetings, memoranda, notes, reports").
7. The Claimant's allegation that the Respondent has made 655 document requests is plainly wrong. In a transparent attempt to magnify the burden upon it, the Claimant has extrapolated the Respondent's 22 Requests into what is asserted to be 655 requests including by creating separate "sub-requests" for each custodian specified in the Claimant's Requests. In reality, the specific sub-categories of requested documents appropriately narrow the scope of requested documents by limiting the requests to certain types of documents. To the extent that any of the Respondent's requests may be characterised as lacking specificity, this is in direct response to the Claimant's broad and unverified factual assertions, for example the alleged tax benefits to be received

⁴ Article 9.2(g) of the *IBA Rules on the Taking of Evidence in International Arbitration 2020* refers to basic notions of proportionality, fairness and equality when assessing the production of documents.

⁵ PO1, para. 5.2(a)(i).

⁶ PO1, para. 5.2(a)(ii).

following the restructure (SODPO paras. 46, 361, 489, 575-594), which the Respondent is entitled to test.

8. As part of this aspect of the Overall Objection, the Claimant alleges that the Respondent has not specified a temporal period for 89 of 655 requests (para. 5(c)). This assertion does not consider the temporal limitation that is implied in some requests, for example where the Respondent's Requests refer to a specific document or event that is naturally limited by time.⁷ Where it was necessary to define a temporal period for a requested category the temporal period chosen has been clearly explained by the Respondent.

Reply to the good faith and abuse of process objections (Overall Objection, paras. 6-13)

9. The Claimant makes the serious allegations that the Respondent has acted contrary to good faith and that its Requests are an abuse of process. The fact that the Claimant would like its allegations and claims simply to be accepted (no matter how inherently implausible they may be), without any testing or verification, provides no basis for these allegations. The Respondent has complied with para. 5.2 of PO1 by identifying with specificity the category of documents whose production is sought, describing the subject matter in sufficient detail, and giving clear, concise and cogent explanations as to why the documents are sought by reference to the central issues in dispute.

Reply to the objection that documents have already been produced (Overall Objection, paras. 14-15)

10. The large volume of material filed with the Claimant's Notice of Arbitration and SODPO was largely irrelevant. It did not provide contemporaneous documentary evidence of key issues in dispute between the Parties in the jurisdictional phase of the dispute. The Respondent's Requests are therefore tailored to contemporaneous documents that would be probative evidence of the facts in dispute. This evidence is not currently on the record and documents within the scope of these Requests would not otherwise be accessible to the Commonwealth because they would reasonably only be in the possession, custody or control of the Claimant, including by reason of being held by the specific custodians identified in each individual request.
11. In any case, where the Requests drafted as a category inadvertently captures material that is already on the record, the Respondent reiterates that it accepts that the Claimant is not required to produce those documents.

Reply to the objection that the Respondent has requested documents for points which have been proven in the record (Overall Objection, paras. 16-18)

12. The Respondent's requests are tailored to establishing the facts necessary to resolving issues in dispute between the Parties. The Respondent is entitled to test the case brought against it to advance its defence of the claim. Where the Claimant has alleged that a specific Request is addressed by evidence already on the record as part of the Overall Objection, the Respondent has included its Reply in the Redfern Schedule below.

Reply to the objection that the Requests do not go to issues for which the Respondent holds the burden of proof (Overall Objection, paras 19-23)

13. The Respondent refutes the claim that the Requests relate to issues on which the Claimant bears the burden of proof.
14. The Claimant rightly concedes that it ultimately bears the burden of proving that it is an investor that has made an investment within the meaning of Chapter 11 of AANZFTA. The Respondent

⁷ See, eg, Request No. 3, part (c).

ultimately bears the burden of proving that the benefits of Chapter 11 have been properly denied to the Claimant, and that the Claimant's claim is an abuse of process (SOPO para. 22).

15. It was by reference to POI that each of the Respondent's requests have been justified as being relevant to either the Denial of Benefits or Abuse of Process Objection (ie matters for which the Respondent bears the ultimate burden of proof). However, where the documents are also of relevance to facts that are clearly in issue between the parties on the No Investor or No Investment objections, the Respondent has sought also to highlight this point, so as to further demonstrate the relevance and materiality of the evidence to the overall resolution of the dispute between the parties. Such additional relevance only further demonstrates why the production of the documents should be ordered in the proceedings, and is not a basis on which to deny the request.
16. Further, the Respondent submits that it would be an incorrect reading of para. 5.7(b) of POI to refuse production of documents relevant to facts asserted by the Claimant in its response to an objection on the basis that, by making the assertion, the Claimant assumes an evidentiary burden on that factual issue. Such an approach would result in the Respondent being unable to obtain relevant and material evidence on factual issues that are central to the preliminary objections on which it bears the ultimate burden. For example (as the Claimant itself raises at para. 21 of the Overall Objection), in response to the Abuse of Process objection raised by the Respondent, the Claimant has advanced and posited certain commercial rationales for the Mineralogy Group Restructure. The rationale for the Mineralogy Group Restructure is clearly a material fact in issue. The factual assertions made by the Claimant concerning the alleged rationales for the restructure (often made without reference to contemporaneous evidence) clearly need to be tested by the Respondent in order for the issues between the parties to be resolved by the Tribunal. The relevant and material evidence primarily consists of internal documents of the Mineralogy Group. The Respondent has made targeted requests for such documents to assist the Tribunal in resolving the factual issues. Unless those documents are produced, the Tribunal will have no solid foundation upon which to resolve a key factual issue. Further, and in any event, the Respondent makes a factual assertion in its case that the reason for the restructure was to gain treaty protection, and the Respondent is entitled to seek documents going to this fact (as it has done).
17. The Claimant's objection (repeated in relation to multiple Requests and in this section of the Overall Objection at para. 22) that "the Respondent utterly fails to demonstrate that the documents requested are material to the outcome of ... the foreseeability of the Amendment Act" is an impermissible attempt by Claimant to define and narrow the Respondent's Abuse of Process objection and the relevant factual issues that arise within the context of that objection. That this is the objection that the Claimant would like to meet is irrelevant, because it is not the objection that the Respondent has advanced. It is well established that the test for whether there has been an abuse of process includes determining whether the objective purpose of a corporate restructuring was to facilitate access to investment treaty protection (SOPO at paras. 281-282). Consistently with that, the Claimant's own response to this objection begins with the assertion that "the Restructuring was effected for a genuine commercial purpose" (SODPO, para. 489). The Respondent is entitled to request documents necessary to test that claim, and to advance the jurisdictional objections as it has framed them. Otherwise, the Tribunal's document production decisions would pre-empt its ruling on those objections.

Reply to the relevance objection (Overall Objection, paras. 24-34)

18. The Claimant alleges that the Respondent's Requests "have been advanced on a wide-ranging basis without adequately specifying the factual point to which they are relevant" (Overall Objection at para. 29). That is incorrect. For each request, the Respondent has explained why the request is relevant and material to the outcome of the case by referring to specific parts of the pleadings and

evidence on the record. Where the Claimant has alleged that a specific Request is not relevant as part of the Overall Objection, the Respondent has included its Reply in the Redfern Schedule below.

Reply to the Claimant’s comments on the Respondent’s alleged “Disappointing Approach” (Overall Objection, paras. 35-46)

19. The Respondent disputes the Claimant’s assertion that the Respondent is precluded from running a general law of abuse of process argument in addition to other objections which turn on the application of Article 11.8. Again, this is ultimately a legal issue to be decided by the Tribunal at the hearing on preliminary objections and will be addressed in the Respondent’s Reply on Preliminary Objections. Substantive submissions on jurisdiction are not appropriately advanced in the Redfern Schedule. For present purposes, the relevant point is that, having raised the Abuse of Process objection, the Respondent is entitled to present its case and seek documents to support this objection.

Reply to the assertion that the requested documents are within the Respondent’s possession, custody or control (Overall Objection, paras. 15 and 37(a))

20. The Claimant asserts in the Overall Objection that the Respondent has requested documents within its own possession, including “tax returns, company accounts within the ATO, ASIC and the records of each of its states including their treasury and tax departments”. This is incorrect. Under Australian law, there are strict limitations on the circumstances in which information that has been provided to the Government for one purpose may be used for other purposes. In relation to taxation information specifically, the *Taxation Administration Act 1953* (Cth) prohibits the ATO (except in certain specified circumstances) from disclosing information it has obtained about the tax affairs of an entity, and that identifies or is reasonably capable of being used to identify an entity, to other agencies and/or Departments of the Australian Government.⁹ It is an offence under Australian law for an officer of the ATO to disclose such information, unless the disclosure meets one of the limited and narrow exceptions prescribed in the Act.¹⁰ None of those exceptions apply to the disclosure by an officer of the ATO of taxation information related to the Claimant, and its associated personnel and entities, for the purposes of the conduct of these proceedings. Similarly, the Australian Securities and Investments Commission is bound by statutory confidentiality obligations.¹¹ In addition, the *Privacy Act 1988* (Cth) regulates the use and disclosure of personal information, including the sharing of such information between Australian Government agencies.

21. There is no legal basis for the Claimant’s suggestion that documents that may be held by Australian Government agencies (including by State Government agencies) can simply be used by the Respondent for the purposes of the international arbitration, even where the information was originally obtained by the agency for an unrelated purpose. These documents should be readily located by the Claimant, and produced by it so that they can be used in this proceeding without restriction.

Reply to the assertion that the Requests cannot seek documents from a third party (Overall Objection, paras. 33 and 41)

22. Ultimately, the requests to produce documents are made of the Claimant and the Respondent accepts that the orders of the Tribunal are orders for the Claimant to produce documents.

⁸ Article 11, Chapter 11 of AANZFTA.

⁹ *Taxation Administration Act 1953* (Cth), Schedule 1, Div 355.

¹⁰ *Taxation Administration Act 1953*, Schedule 1 Division 355, section 355-45 to 355-72; and see also section 355-75 which protects officers from the ATO from being compelled to disclose such information to a court or tribunal.

¹¹ *Australian Securities and Investments Commission Act 2001* (Cth), section 127.

23. The Claimant's objection that "the Tribunal is unable to direct a third party not a party to the Arbitration to provide any documents to the Respondent" therefore misses the point. The Tribunal can order the Claimant to produce documents within its "possession, custody and control" and, consistent with this fact, para. 5.2(a)(ii) of PO1 clearly contemplates that Parties may request documents held by specific custodians other than the Parties. PO1 reflects that it is common practice for tribunals to order production of documents held by a third party when such documents are in the "possession, custody or control" of the party. Indeed, production ordered by a tribunal can extend, and has extended, to documents held by other entities within a corporate group (such as subsidiaries and parent companies).¹²
24. In this case, the Respondent has identified that relevant documents may be held by or in the possession, custody or control of specific custodians that fall within these usual categories of associated entities and individuals, including:
- a. **Mineralogy**: the directly held subsidiary of the Claimant and the corporate entity that was in existence prior to the Mineralogy Group Restructure and a subject of the share swap transaction in the Mineralogy Group Restructure which is of central significance to the Respondent's preliminary objections;
 - b. **MIL**: the Claimant's direct holding company, and a subject of the share swap transaction in the Mineralogy Group Restructure which is of central significance to the Respondent's preliminary objections;
 - c. **River Crescent**: the majority direct shareholder of Mineralogy immediately prior to the Mineralogy Group Restructure and now the parent company of MIL (which is part of the Mineralogy Group);
 - d. **Closeridge**: a direct shareholder of Mineralogy immediately prior to the Mineralogy Group Restructure and now the parent company of MIL (which is part of the Mineralogy Group);
 - e. **Mr Palmer**: the ultimate beneficial owner of the Mineralogy Group, and a director and representative of the Claimant. Further, the Claimant has put at issue in many instances the role of Mr Palmer, including how the Mineralogy Group Restructure might impact on his affairs personally. Mr Palmer was the "sole director and Chief Executive Officer of Mineralogy" from his appointment on 27 February 2019 until 4 November 2020 and was "responsible for all of the commercial operations of Mineralogy during that time" (SODPO, para. 78). He made recommendations about key corporate decisions that are at the heart of the Respondent's jurisdictional objections. This includes decisions about the dividends that should be paid by Mineralogy to the Claimant, the personal tax benefits in favour of ██████████ that were allegedly sought to be achieved through the Mineralogy Group Restructure and the alleged decision to seek to obtain finance for the Waratah Coal Project (see, eg, SODPO, paras. 208, 574, 576; ██████████ WS, paras. 114 to 136, ██████████ WS, paras. 42-47, 51, 62); and
 - f. **One Kleenmatic and Kleen Venture**: Singapore-based subsidiaries of the Claimant, which entered into a Joint Venture Agreement with the Claimant on 24 January 2020 (**JVA**), and which are the primary basis upon which the Claimant asserts that it has substantive business operations in Singapore (relevantly to the denial of benefits objection).
25. All of these persons have played an integral role in the Mineralogy Group Restructure and/or the Claimant's alleged business operations in Singapore. In addition, all of these persons are referenced in submissions and/or evidence filed by the Claimant. Documents within the possession, custody

¹² See, e.g. *CME Czech Republic BV v Czech Republic* (Ad hoc Tribunal Case No IIC 62, Final Award of 14 March 2003), para 65; ICC Case No 15583 (Final Award of November 2010), para 288.

or control of these persons is therefore essential to ensure that the Respondent can test the Claimant's submissions and evidence and respond properly to the case against it.

26. The Respondent specifically refutes the Claimant's argument that documents in the possession, custody, control of Mr Palmer are not in the possession, custody or control of the Claimant, for example as suggested at para. 37(a) of the Overall Objection. As the Claimant's representative in this proceeding, Mr Palmer can plainly produce such documents. It would fundamentally undermine the authority of the Tribunal and the integrity of its proceedings for Mr Palmer to appear before the Tribunal to conduct the Claimant's defence of the Respondent's jurisdictional objections, while at the same time withholding from the Tribunal documents relevant to those objections that it is within his power to produce. It would also run counter to para. 5.2(a)(ii) of PO1, which contemplates that custodians of responsive documents may be persons other than the Claimant by requiring the Parties to specify "the author, sender, recipient, and/or custodian of the requested document or category of documents". By including the term "custodians", this paragraph envisages that there may be entities other than the Claimant who are in control or possession of the requested documents and/or that the request should specify which custodians associated with the Claimant are relevant to any search.
27. Separately, "control" over documentation is a question of fact. The Claimant has produced innumerable documents in relation to its subsidiary, Mineralogy; its parent company, MIL; and from its director, beneficial owner and representative Mr Palmer, making it "more likely than not" or "reasonably likely" that the Claimant has control over the documents the subject of the Respondent's requests.¹³

Reply to the loss or destruction of commercial or technical confidentiality objection (Overall Objection, para. 42)

28. The Claimant asserts that many of the documents requested would result in the loss or destruction of commercial or technical confidentiality. As will be addressed in the individual categories, the Claimant has not at this time properly established a basis for such claims as to the loss of confidentiality. In any event, this is not a legitimate basis to object to production of an entire category of documents. Indeed, the IBA Rules explicitly state that any exclusion from a document production for commercial or technical confidentiality must be on grounds "that the Arbitral Tribunal *determines to be compelling*" [emphasis added].¹⁴ As such, the Claimant must identify which documents responsive to the Request contain "protected information", make redactions to that information, and justify those redactions. Clearly, a privilege log would assist the Tribunal in resolving disputes about privileged or otherwise protected information, noting the requirements under PO1, para 5.7(d).

B. THE CLAIMANT'S CHARACTERISATION OF THE RESPONDENT'S ACTUAL DOCUMENT REQUESTS ("PART B")

29. In response to each of the Respondent's requests the Claimant sets out both in the Redfern Schedule, and again in a collated "Schedule A", its "reformulation" of Respondent's requests into multiple requests. As explained above at para. 7, the Respondent rejects the reformulation of its requests in this way, which seeks to distract from the real issues to be decided in relation to document production.
30. To assist the Tribunal in identifying and responding to the underlying issues in dispute, and in the interest of preserving the integrity and readability of the Respondent's Redfern Schedule, the

¹³ *Sargeant Petroleum, LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/22/1, Procedural Order No. 3 of 13 October 2023), para. 9(iii); *Huawei v. Kingdom of Sweden* (ICSID Case No. ARB/22/2, Procedural Order No. 5 of 2 February 2024), para. 15(iii).

¹⁴ IBA Rules, Art. 9.2(e).

Claimant's Table A has been removed from the Redfern Schedule and is produced separately. (For the avoidance of doubt, this is Schedule A to the Claimant's Objections to the Respondent's Document Production Requests.)

C. REPLIES TO THE CLAIMANT'S SECONDARY OBJECTIONS ("PART C")

31. The Respondent has set out the replies to the Secondary Objections which address each individual category in the Redfern Schedule below.

Respondent's Document Request No. 1	
Document(s) Requested	<p>Annual reports, management reports and/or corporate plans prepared by the following entities:</p> <p>a. for the period from 14 December 2018 to 29 January 2019, MIL;</p> <p>b. for the period from 21 January 2019 to 29 January 2019, the Claimant;</p> <p>c. for the period from 1 October 2017 to 29 January 2019, Mineralogy, held by or within the possession, custody or control of the Claimant, Mineralogy, MIL and/or Mr Palmer.</p> <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of the Claimant, Mineralogy, MIL, and/or Mr Palmer.</p>
Relevance	<p>Reference to submissions</p> <p>SOPO, para. 317, 322-323, 326. SODPO, paras. 490, 574-587, 595-596, 598. Lys Report, para. 533, 593. ██████████ WS, paras. 118-137. ██████████ WS, para. 10, 18-37.</p> <p>Comments</p> <p>Abuse of Process: The requested documents are relevant to the Respondent's Abuse of Process objection and are also material in determining the outcome of that objection (and the case) as they will assist in identifying the true purpose(s) of the Mineralogy Group Restructure in circumstances where the Claimant has not exhibited contemporaneous documentary evidence supporting the Claimant's alleged rationales for the various share swap transactions and instead relies on unsubstantiated statements made by ██████████ and ██████████. Further, Professor Lys notes that when implementing a complex restructuring, a lack of verifiable documentation is unusual and that he would expect to see the "commercial and corporate plans" described by ██████████ (see Lys Report, para. 533 and ██████████ WS, para. 10).</p> <p>Temporal scope of the request: The temporal scope for part (c) is the month prior to the Royalties Judgment being handed down until the date that the Mineralogy Group Restructure was complete. The Claimant submits that the Royalties Judgment marked the period from which ██████████ considered financing in the Waratah Coal Project and how the Mineralogy Group could take advantage of increased cash flow following the Royalties Judgment. It is following this that ██████████ sought ██████████ advice in March 2018 (see ██████████ WS, paras. 118-119). The temporal scope of parts (a) and (b) reflects this same reasoning, but the time period does not start until the relevant entity was incorporated, as annual reports, management reports or corporate plans of MIL and the Claimant could not have existed until each of those entities was incorporated.</p>
Objections	<p>The Claimant's Objection to this Request No.1 comprises Part A (the Claimants Overall Objection), Part B (comprising Table A which shows the Respondent's actual Document Requests in itemized form) and Part C (the Claimant's Secondary Objection). The Claimants Overall Objection set out in Part A of the Claimants objections to Request No. 1 forms part of the Claimants Objections to all the Respondents purported Document Requests number 1 to 22.</p> <p><u>PART A: CLAIMANT'S RESPONSE AND OVERALL OBJECTION</u></p> <p><i>[Part A overall objection has been extracted above]</i></p> <p><u>PART B: THE RESPONDENT'S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 1</u></p>

[Claimant's Table A has been removed and is produced separately]

PART C: THE CLAIMANT'S SECONDARY OBJECTIONS IN RESPECT OF PURPORTED DOCUMENT REQUEST 1

The Claimant makes its Overall Objection in respect to document production for this Request No. 1. Without prejudice to the Claimant's Overall Objection, the Respondent's Document Request No. 1 is not one (1) Document Production Request but is actually 12 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 1 to No. 12 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No.1 and is an abuse of process. Accordingly, as Document Request No. 1 is not made in accordance with the requirements, spirit or intention of PO1, the Claimant is not required to respond.

Notwithstanding, the Claimant provides the following additional grounds of objection.

- (A) **Documents Already Produced Objection:** Contrary to para 5.2(c) of PO1 which provides that "*Each request for production shall...specify that the documents requested are not in the possession, custody or control of the requesting Party (or explain why it would be unreasonably burdensome for the requesting Party to produce them)*", many responsive documents (annual reports) have already been produced by the Claimant (see, for example, C-79, C-80, C-100, C-476 and C-555) and/or are in the Respondent's possession, as they have been filed with ASIC (an agency of the Respondent), and/or are available 24 hours a day 7 days a week on public registers online via the ASIC website at www.asic.gov.au for a small fee of \$47 and/or are available from the New Zealand Companies Office (NZCO) website 24 hours a day 7 days a week for free via the NZCO) website at www.companies-register.companiesoffice.govt.nz and/or are available from ASIC which has established data transfer arrangements with the NZCO that enables electronic transfer and receipt of information and documents for MIL¹⁵
- (B) **Burden of Proof Objection:** The Respondent requests documents said to be relevant to proving the Claimant's asserted commercial rationale for the restructure. As explained above, the Respondent bears no burden for proving facts asserted by the Claimant. The burden on the Respondent regarding its Abuse of Process claim is to show that the present dispute pertaining to the *Amendment Act* was foreseeable at the time of the corporate restructure. The documents requested above bear no relevance to the foreseeability of the present dispute. They are therefore not relevant to the case or material to its outcome. They do not go to a point for which the Respondent bears the burden of proof.
- (C) **Lack of Relevance Objection:** The Claimant objects to production on the basis that the Respondent has not explained why the documents are relevant to proving its Abuse of Process objection. To prove that objection, the Respondent must demonstrate that the

¹⁵ ASIC Form 406 - https://download.asic.gov.au/media/4230101/406_20170503.pdf

	<p>dispute was (reasonably) foreseeable at the time of the restructure which it is unable to do.</p> <p>(D) <u>Not Material to the Outcome Objection</u>: The commercial rationale for the restructure cannot be determinative of the Respondent's Abuse of Process objection. To succeed in its objection, the Respondent must show that the dispute was reasonably foreseeable at the time of the restructure. The Respondent has not explained how the documents requested are relevant or material to proving that the Claimant foresaw the dispute.</p> <p>(E) <u>Overly Broad and Burdensome Objection</u>: Mineralogy's business during that period (Oct 2017-Jan 2019) is not the subject of the arbitration. Mineralogy's corporate plans or management reports bear no relevance and are commercially sensitive to the extent they discuss unrelated corporate matters. The request, therefore, is far too broad and requests information that is highly commercially sensitive and irrelevant to the arbitration. The Respondent's attempts to justify the request on the basis of Prof. Lys' views on usual corporate practice does not bear scrutiny in the context of a corporation ultimately owned by an individual shareholder, who makes a decision to restructure (see Response, para 574).</p> <p>(F) To the extent that Request 1 seeks documents from entities other than the Claimant, they are not in its possession and are outside the direct control of the Claimant.</p> <p>(G) In relation to documents sought from Mr Palmer, the request is inappropriate. The Respondent states that it "<i>confirms that documents in the possession, custody or control of Mr Palmer (the Claimant's 'main representative') are in the possession, custody or control of the Claimant</i>". On its face, this is an extraordinary statement. It is not supported by anything contained in those parts of Procedural Order No. 2 to which the Respondent makes reference.¹⁶ Mr Palmer was not even appointed as a director of the Claimant until 23 January 2019 and was only a director for 7 days of the period the Respondent has requested in this request, and the Claimant is not in the possession of any other documents other than those already supplied to the Respondent in respect of this request.</p>
<p>Reply</p>	<p>Reply to Part A and Part B</p> <p>The Respondent repeats its Reply to the Claimant's Overall Objection at paras. 3-28 above and its Reply to Part B above at paras. 29-30.</p> <p>Reply to Part C: Specific objections to Request No. 1</p> <p>Using lettering consistent with the Claimant's objections above, the Respondent replies to the objections as follows:</p> <p>(A) Documents Already Produced Objection</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at paras. 10-11 above). More specifically, the documents sought in Request No. 1 are not on the record, contrary to the Claimant's assertion. The exhibits cited by the Claimant in its objection (Exh. C-79, Exh. C-80, Exh. C-100, Exh. C-476 and Exh. C-555) are financial statements and are not "annual reports, management reports</p>

¹⁶ Document Requests, [4], referring to Procedural Order No. 2, paragraphs 33-34, 45-46.

and/or corporate plans” sought in Request No. 1. Unlike financial statements, the documents sought are likely to provide detailed insight into the key management decisions and reasoning for the Mineralogy Group Restructure.

(B) Burden of Proof Objection

The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at paras. 13-17 above). The Claimant cannot use the document production process to attempt to redefine and narrow the factual issues raised by the Respondent’s Abuse of Process objection. The Respondent is entitled to request documents necessary to resolving the objections it has raised and to advance its defence of the claim, including by addressing the asserted responses made by the Claimant to the objection.

(C) Lack of Relevance Objection

The Respondent has already explained why the requested categories of documents in Request No. 1 are relevant with specific reference to pleadings and evidence on the record. The requested documents would likely identify the true purpose(s) of the Mineralogy Group Restructure, which is clearly a material issue in dispute between the parties in relation to the Abuse of Process objection. The requested documents are therefore directed to the purpose of the Mineralogy Group Restructure, rather than the foreseeability of the dispute, as asserted by the Claimant.

(D) Not Material to the Outcome Objection

The Respondent has already explained why the requested categories of documents are material to the outcome of the case. The requested annual reports, management reports and/or corporate plans prepared by the Claimant, MIL and Mineralogy are probative contemporaneous evidence of a company’s key decisions and corporate planning in relation to the Mineralogy Group Restructure. The purpose of the Mineralogy Group Restructure will necessarily be an issue of fact to be determined by the Tribunal in resolving the Abuse of Process Objection.

(E) Overly Broad and Burdensome Objection

The Respondent submits that the request is a narrow, specific category of corporate documents created over a defined period of time for only three entities within the Mineralogy Group. The Respondent repeats its Reply to the relevance objection (see Reply to the Overall Objection at para. 18 above) and commercial sensitivity objection (see Reply to the Overall Objection at para. 28 above).

(F) – (G) Documents are not in the possession and are outside the direct control of the Claimant Objections

The custodians identified within this request (other than Mr Palmer) are entities within the Mineralogy Group. The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at paras. 22-27 above) and draws particular attention to the arguments made as to why the documents of members of the corporate group are within the “possession, custody or control” of the Claimant.

In relation to Mr Palmer, this position is also addressed in the Reply to the Overall Objection at para. 24(e). Mr Palmer’s control of the Claimant is demonstrated through the Claimant’s own wording of its objection (E) to Request No. 1: “a corporation ultimately owned by an **individual**

	<p>shareholder, who makes a decision to restructure (see Response, para 574)". In addition, the Respondent is entitled to request documents of Mr Palmer because the Claimant has put in issue Mr Palmer's role in the Mineralogy Group Restructure.¹⁷</p> <p>The Respondent also refutes the Claimant's use of the language "direct control" which is not used in the description of "possession, custody or control" in the IBA Rules.¹⁸</p>
Decision by the Tribunal	GRANTED

¹⁷ For example, para. 574 of the SODPO also refers to [REDACTED] commercial rationale and motivation for the Claimant being incorporated in Singapore.

¹⁸ IBA Rules, Art. 3.3(c).

Respondent’s Document Request No. 2

<p>Document(s) Requested</p>	<p>Documents recording draft or final:</p> <ul style="list-style-type: none"> (i) tax advice; (ii) legal advice and/or approach to any lawyer; (iii) corporate and business advice; (iv) investment advice; and (v) strategic advice, <p>in relation to the consideration of, or reasons for:</p> <ol style="list-style-type: none"> 1. for the period from 1 October 2017 to 29 January 2019, the Mineralogy Group Restructure proposal and its implementation; 2. for the period from 1 October 2017 to 29 January 2019, any corporate restructure contemplated as an alternative to the final form of the Mineralogy Group Restructure; 3. for the period from 1 October 2017 to 29 March 2023, potential investor-state arbitration or treaty protection of the rights or interests of the Claimant, MIL or Mineralogy arising from actual or proposed mining projects in Western Australia; 4. for the period from 1 October 2017 to 29 March 2023, any approach to any lawyer (including counsel), law firm or non-legal advisor relating to advice in relation to a potential investor-State arbitration arising from actual or proposed mining projects in Western Australia, <p>held by or within the possession, custody or control of the Claimant, Mineralogy, MIL, Closeridge Pty Ltd (Closeridge), River Crescent Pty Ltd (River Crescent), Waratah Coal and/or Mr Palmer.</p> <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of the Claimant, Mineralogy, MIL, Closeridge, River Crescent, Waratah Coal and/or Mr Palmer.</p>				
<p>Relevance</p>	<table border="1"> <tr> <td data-bbox="362 1122 536 1330"> <p>Reference to submissions</p> </td> <td data-bbox="544 1122 1394 1330"> <p>SOPO, paras. 164-177, 285-299, 317-348. SODPO, paras. 358-363, 489, 548-554, 574-594. Lys Report, paras. 59-66, 529. ██████████ WS, paras. 118-137. ██████████ WS, paras. 8-9, 70. ██████████ WS, paras. 18-37. Notice of Intent (Exh. C-63) Annexure A.</p> </td> </tr> <tr> <td data-bbox="362 1337 536 2022"> <p>Comments</p> </td> <td data-bbox="544 1337 1394 2022"> <p>Abuse of Process: The Respondent repeats the reasoning in Request No. 1.</p> <p>More specifically, the requested documents are relevant to determining whether the Claimant and the Mineralogy Group were aware, prior to the Claimant’s incorporation, that Mineralogy faced a significant risk of government action that would adversely affect its rights under the State Agreement. While the ██████████ WS states that ██████████ did not consider “investment treaty issues”, there is contradictory evidence that MIL and the Claimant were incorporated to obtain treaty benefits (see, for example, SOPO at paras. 287-299). Further, ██████████ was aware of “the operation of free trade agreements (and especially aware of free trade agreements affecting the Asia-Pacific region)” as early as 2002 (██████████ WS, para. 9).</p> <p>The Claimant discloses advice that was provided in the ██████████ WS, ██████████ WS, ██████████ WS, ██████████ WS and SODPO. However, the basis for the advice disclosed is not clear, and the requested documents are material to the basis on which the advice was requested and how the advisors arrived at the recommendations they provided to the Claimant. Further, in relation to tax advice specifically, it is unusual that ██████████ would have restructured the Mineralogy Group to obtain alleged tax advantages without receiving any form of advice or analysis from a tax expert (see Lys Report, para. 529).</p> </td> </tr> </table>	<p>Reference to submissions</p>	<p>SOPO, paras. 164-177, 285-299, 317-348. SODPO, paras. 358-363, 489, 548-554, 574-594. Lys Report, paras. 59-66, 529. ██████████ WS, paras. 118-137. ██████████ WS, paras. 8-9, 70. ██████████ WS, paras. 18-37. Notice of Intent (Exh. C-63) Annexure A.</p>	<p>Comments</p>	<p>Abuse of Process: The Respondent repeats the reasoning in Request No. 1.</p> <p>More specifically, the requested documents are relevant to determining whether the Claimant and the Mineralogy Group were aware, prior to the Claimant’s incorporation, that Mineralogy faced a significant risk of government action that would adversely affect its rights under the State Agreement. While the ██████████ WS states that ██████████ did not consider “investment treaty issues”, there is contradictory evidence that MIL and the Claimant were incorporated to obtain treaty benefits (see, for example, SOPO at paras. 287-299). Further, ██████████ was aware of “the operation of free trade agreements (and especially aware of free trade agreements affecting the Asia-Pacific region)” as early as 2002 (██████████ WS, para. 9).</p> <p>The Claimant discloses advice that was provided in the ██████████ WS, ██████████ WS, ██████████ WS, ██████████ WS and SODPO. However, the basis for the advice disclosed is not clear, and the requested documents are material to the basis on which the advice was requested and how the advisors arrived at the recommendations they provided to the Claimant. Further, in relation to tax advice specifically, it is unusual that ██████████ would have restructured the Mineralogy Group to obtain alleged tax advantages without receiving any form of advice or analysis from a tax expert (see Lys Report, para. 529).</p>
<p>Reference to submissions</p>	<p>SOPO, paras. 164-177, 285-299, 317-348. SODPO, paras. 358-363, 489, 548-554, 574-594. Lys Report, paras. 59-66, 529. ██████████ WS, paras. 118-137. ██████████ WS, paras. 8-9, 70. ██████████ WS, paras. 18-37. Notice of Intent (Exh. C-63) Annexure A.</p>				
<p>Comments</p>	<p>Abuse of Process: The Respondent repeats the reasoning in Request No. 1.</p> <p>More specifically, the requested documents are relevant to determining whether the Claimant and the Mineralogy Group were aware, prior to the Claimant’s incorporation, that Mineralogy faced a significant risk of government action that would adversely affect its rights under the State Agreement. While the ██████████ WS states that ██████████ did not consider “investment treaty issues”, there is contradictory evidence that MIL and the Claimant were incorporated to obtain treaty benefits (see, for example, SOPO at paras. 287-299). Further, ██████████ was aware of “the operation of free trade agreements (and especially aware of free trade agreements affecting the Asia-Pacific region)” as early as 2002 (██████████ WS, para. 9).</p> <p>The Claimant discloses advice that was provided in the ██████████ WS, ██████████ WS, ██████████ WS, ██████████ WS and SODPO. However, the basis for the advice disclosed is not clear, and the requested documents are material to the basis on which the advice was requested and how the advisors arrived at the recommendations they provided to the Claimant. Further, in relation to tax advice specifically, it is unusual that ██████████ would have restructured the Mineralogy Group to obtain alleged tax advantages without receiving any form of advice or analysis from a tax expert (see Lys Report, para. 529).</p>				

	<p>No Investment: These documents are relevant to the Respondent’s No Investment objection, and material to the outcome of that objection (and the case) because they will assist in identifying what, if any, consideration was paid for the relevant shares, the actual cost, if any, of the Claimant’s alleged investment, and what “risk”, if any, was associated with the transactions. The documents are also material to the outcome of the case because the No Investment objection is based on the assertion that no contribution was made and no risk was adopted in relation to the alleged investment, and therefore essential characteristics implied into the meaning of Article 2(c) are not established.</p> <p>No Investor: The requested documents are also relevant to the Respondent’s No Investor objection, and they are material to the outcome of that objection (and the case) because they will assist in confirming whether the Claimant actively “made an investment” within the meaning of Article 2(d) by making a meaningful contribution for the shares in Mineralogy.</p> <p>Temporal scope for the request: The temporal scope for parts (1) and (2) of the request is from one month before the Royalties Judgment was handed down until the date that the Mineralogy Group Restructure was complete. The Respondent repeats the reasoning in Request No. 1.</p> <p>The temporal scope for parts (3) and (4) of the request is the date from the month prior to the Royalties Judgment being handed down until the date that the Claimant filed its Notice of Arbitration. This is the likely period during which members of the Mineralogy Group are likely to have received advice in relation to investor-State arbitration relating to actual or proposed mining projects in Western Australia.</p>
<p>Objections</p>	<p>The Claimant’s Objection to this Request No.2 comprises Part A (the Claimants Response and Overall Objection), Part B (comprising Table A which shows the Respondent’s actual Document Requests in itemized form) and Part C (the Claimant’s Secondary Objections).</p> <p><u>PART A: CLAIMANT’S RESPONSE AND OVERALL OBJECTION</u></p> <p>The Claimant refers to and relies upon Part A of the Claimant’s Objection to Request No.1 and inter alia adopts such objection as part of the Claimant’s Objection to Request No.2.</p> <p><u>PART B: THE RESPONDENT’S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 2</u></p> <p><i>[Claimant’s Table A has been removed and is produced separately]</i></p> <p><u>PART C: THE CLAIMANT’S SECONDARY OBJECTIONS</u></p> <p>All of the Objections contained within this Part C are made without prejudice to the objection in Part A and Table A, being the Claimant’s Objection to the Respondent’s Request No.2. The Claimant relies upon its Objections set out in Part A as its primary response and the responses set out in this Part C are set out in the alternative.</p> <p>The Claimant makes its Overall Objection in respect to document production for this Request No. 2. Without prejudice to the Claimant’s Overall Objection, the Respondent’s Document Request No. 2 is not one (1) Document Production Request but is actually 140 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 13 to No.</p>

	<p>152 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No.1 and is an abuse of process. Accordingly, as Document Request No. 2 is not made in accordance with the requirements, spirit or intention of PO1, the Claimant is not required to respond.</p> <p>Notwithstanding, the Claimant provides the following additional grounds of objection.</p> <p>(A) <u>Documents Already Produced Objection</u>: Contrary to para 5.2(c) of PO1 which provides that “<i>Each request for production shall...specify that the documents requested are not in the possession, custody or control of the requesting Party (or explain why it would be unreasonably burdensome for the requesting Party to produce them)</i>”, many responsive documents have already been produced by the Claimant (see, for example, Exh’s. C-63 (Annexure A), C-63 (Annexure A, Exhibits 4, 5, 6, 7, 12, 13, 15, 17, 18 and 19), C-163, C-164, C-165, C-166, C-167, C-168, C-472, C-474, C-495, C-496, ██████████ WS (para’s 118-139), ██████████ WS (para’s 48-72), ██████████ WS (para’s 10-37) and ██████████ WS (paras 8-24).</p> <p>(B) <u>Overly Broad and Burdensome Objection</u>: This objection barely requires any explanation, given the huge number of requests included (or disguised) within Request 2. The request seeks documents over a 5.5-year period and would be enormously time consuming and costly to undertake.</p> <p>To the extent that the Request seeks documents relating to a potential investor-State arbitration, it is entirely inappropriate as it would cover all documents relating to this arbitration up to commencement, as well as to the coal-related arbitrations that have been commenced since this arbitration. There can be no basis for requesting documents relating to the Claimant’s preparations for this arbitration (or the coal-related arbitration that have also been commenced).</p> <p>(C) <u>Burden of Proof Objection</u>: The Respondent requests documents that are said to be relevant to proving the Respondent’s “No Investment” and “No Investor” objections which are said to support this request. Such request is not relevant because the Claimant bears the burden of proving that it is an “investor” and has “made an investment”.</p> <p>(D) <u>Commercial Sensitivity Objection</u>: Many of the documents requested are highly commercially sensitive, including those (if any) that relate to personal tax advice.</p> <p>Should document production be ordered despite the above objections, the Claimant reserves its right to claim legal professional privilege in respect of the documents the subject of this request.</p>
<p>Reply</p>	<p>Reply to Part A and Part B</p> <p>The Respondent repeats its Reply to the Claimant’s Overall Objection at paras. 3-28 above and its Reply to Part B above at paras. 29-30.</p> <p>Reply to Part C: Specific objections to Request No. 2</p>

	<p>Using lettering consistent with the Claimant’s objections above, the Respondent replies to the objections as follows:</p> <p>(A) Documents Already Produced Objection</p> <p>The documents sought in the Respondent’s Request No. 2 are not on the record and the exhibits cited by the Claimant do not record or relate to the subject matter set out in Request No. 2. For example, the Claimant cites Exh. C-63 (Annexure A, Exhibit 12), which is the record of resolution to appoint Mr Palmer and Mr Mashayanyaika as representatives of MIL. This is clearly not responsive to Request No. 2, which seeks tax, legal, corporate, investment and strategic advice in relation to specifically targeted topics. Unlike the exhibits cited by the Claimant, the documents sought are likely to provide detailed insight into the key management decisions and reasoning for the Mineralogy Group Restructure.</p> <p>(B) Overly Broad and Burdensome Objection</p> <p>The Respondent does not consider this request to be burdensome. Request No. 2 seeks advice on specific issues held by a narrow, specific category of closely related entities within the Mineralogy Group, which should be easily identifiable using targeted searches.</p> <p>(C) Burden of Proof Objection</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at paras. 13-17 above). The Respondent is entitled to request documents necessary to resolving the contested issues and to advance the jurisdictional objections as characterised by the Respondent. The Respondent is entitled to test the case brought against it to advance its defence of the claim by way of its preliminary objections.</p> <p>(D) Commercial Sensitivity Objection</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at para. 28 above).</p> <p>The Claimant asserts at para. 32 of its Overall Objection that Request No. 2 is not relevant and material. The Respondent repeats its “Comments” on relevance and materiality above.</p> <p>The Respondent notes that the Claimant has reserved the right to claim legal professional privilege. The Claimant has not properly articulated the overall basis of that claim with any detail as is required under PO1, para 5.7(d), rather than simply reserving its rights. If production of this category is ordered and Claimant makes a privilege claim with respect to specific documents or parts of documents, it should identify with precision the documents the subject of privilege in a privilege log and explain the basis for those claims.</p>
<p>Decision by the Tribunal</p>	<p>GRANTED AS NARROWED DOWN</p> <p>Documents recording draft or final:</p> <p>(i) legal advice and/or instructions given to any lawyer; and</p> <p>(ii) investment advice,</p> <p>in relation to the consideration of, or reasons for:</p> <ol style="list-style-type: none"> 1. for the period from 1 October 2017 to 29 January 2019, the Mineralogy Group Restructure proposal and its implementation; 2. for the period from 1 October 2017 to 29 January 2019, any approach to any lawyer (including counsel), law firm or non-legal advisor relating to

	<p>advice in relation to a potential investor-State arbitration arising from actual or proposed mining projects in Western Australia, held by or within the possession, custody or control of the Claimant, Mineralogy, MIL, Closeridge Pty Ltd (Closeridge), River Crescent Pty Ltd (River Crescent), Waratah Coal and/or Mr Palmer.</p>
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Respondent's Document Request No. 3	
Document(s) Requested	<p>In relation to the Mineralogy Group Restructure:</p> <p>(i) Correspondence between members of the Board of Directors of Mineralogy and MIL;</p> <p>(ii) Correspondence sent from or received by Mr Palmer; and</p> <p>(iii) draft and final minutes, agendas, notes, papers and resolutions of the Board of Directors of the Claimant, Mineralogy and MIL;</p> <p>recording or relating to:</p> <p>a. for the period from 1 October 2017 to 29 January 2019, discussions, decisions, analyses and planning of the Mineralogy Group Restructure and its implementation or any corporate restructure contemplated as an alternative to the final form of the Mineralogy Group Restructure;</p> <p>b. for the period from 1 October 2017 to 29 January 2019, any cost-benefit analysis and/or SWOT (Strengths, Weaknesses, Opportunities, Threats) analysis (or equivalent) of the Mineralogy Group Restructure or any corporate restructure contemplated as an alternative to the final form of the Mineralogy Group Restructure;</p> <p>c. the loan from Mineralogy to the Claimant, as referred to at para. 244 of the SODPO;</p> <p>d. for the period from 21 January 2019 until 30 June 2020, Mineralogy retaining profits instead of paying out dividends;</p> <p>e. for the period from 1 October 2017 to 29 March 2023 potential investor-state arbitration or investment treaty protection arising from actual or proposed mining projects in Western Australia, held by or within the possession, custody or control of the Claimant, Mineralogy, MIL, Mr Palmer and/or the Claimant's Chief Investment Officer Bernard Wong.</p> <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of the Claimant, Mineralogy, MIL, Mr Palmer and/or the Claimant's Chief Investment Officer, Bernard Wong.</p>
Relevance	<p>Reference to submissions</p> <p>SOPD, paras. 176, 180, 225, 240-242, 317-348. SODPO, paras. 74, 244-247, 489, 548-554, 574-594. Lys Report, paras. 36, 45, 84-94, 184, Section IV. ██████████ WS, paras. 118-137. ██████████ WS, paras. 18-37. ██████████, pp. 30, 42, 47-50. Expert Report of ██████████ dated 14 February 2024 ("██████████"), paras. 6.1-6.6.</p> <p>Comments</p> <p>Abuse of Process: The requested documents are relevant to the Respondent's Abuse of Process objection and material to the outcome of that objection (and the case) because it will assist in identifying the true purpose(s) of the Mineralogy Group Restructure, and in this respect the Respondent repeats the reasoning in Request No. 1. More specifically:</p> <ul style="list-style-type: none"> in relation to part (a), Board documents, correspondence sent or received by Mr Palmer and correspondence between members of the Board of Directors relating to the Mineralogy Group Restructure are likely to contain evidence of the purpose of that restructure; in relation to part (b), any SWOT analyses (however named) and Board documents and correspondence between members of the Board of Directors related to the analyses requested are likely to demonstrate whether treaty protection, obtaining financing for the Waratah Coal Project or tax advantages were benefits considered when planning and implementing the Mineralogy Group Restructure; in relation to parts (c) and (d), Board documents, correspondence sent or received by Mr Palmer and correspondence between members of the

		<p>Board of Directors relating to the funding arrangements between the companies are relevant to the purpose of the Mineralogy Group Restructure;</p> <ul style="list-style-type: none"> • in relation to part (e), Board documents, correspondence sent or received by Mr Palmer and correspondence between members of the Board of Directors are likely to contain relevant records of key decisions and discussions relating to whether the Board considered that the Mineralogy Group Restructure would result in treaty protection and the extent of the Mineralogy Group’s actual or constructive knowledge of a dispute with the WA Government at the time the Claimant was incorporated in Singapore on 21 January 2019; • Mr Palmer alleges that he was the key decision maker of the Claimant, but also that control over the affairs of the Claimant is exercised by the Board of Directors. There is no evidence about the extent to which Mr Palmer alone or the Board of Directors was involved in the decision to undertake the Mineralogy Group Restructure; • The Board of Directors materials of the Claimant are highly relevant in determining the tax residency as they demonstrate whether officers, executives or directors travelled to Singapore, New Zealand or Australia to attend Board meetings. <p>No Investment: These documents are relevant to the Respondent’s No Investment objection, and material to the outcome of that objection (and the case). The Respondent repeats the reasoning in Request No. 2. More specifically, the requested documents are likely to reveal internal deliberations pertaining to the share swap, specifically the contribution, duration and risk of the purported “investment”, as well as the Claimant purportedly “reinvesting” Mineralogy’s retained earnings rather than receiving a dividend.</p> <p>No Investor: These documents are in part relevant to the Respondent’s No Investor objection, and material to the outcome of that objection (and the case). At para. 244 of the SODPO, the Claimant acknowledges the loan from Mineralogy to the Claimant, but does not provide details of the terms of that loan (such as whether, because of the loan, the Claimant’s reported cost of investment came from Mineralogy). The request seeks the terms and conditions of the loan, which are relevant to determining whether the Claimant made any real contribution for the Mineralogy shares. The Respondent repeats its comments as to the materiality of the request made in Request No. 2.</p> <p>Temporal scope of request:</p> <ul style="list-style-type: none"> • The temporal scope of parts (a) and (b) is from the month prior to the Royalties Judgment being handed down until the date that the Mineralogy Group Restructure was complete. The Respondent repeats the reasoning in Request No. 1. • The temporal scope of part (c) is linked to the timing of the loan from Mineralogy to the Claimant recorded in the Claimant’s financial statements for the reporting period from 21 January 2019 to 30 June 2019 (Exh. C-79). • The temporal scope of part (d) is from the date that the Claimant was incorporated until the latest date at which ██████████ analysed Mineralogy’s retained profits. This is the likely period during which evidence relating to the decision to retain profits rather than issuing dividends is likely to exist. • The temporal scope of part (e) is the date from the month before the Royalties Judgment was handed down until the date that the Claimant filed its Notice of Arbitration. The Respondent repeats the reasoning in Request No. 1.
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	<p>For completeness, the Respondent notes that the Claimant has already provided the Mineralogy International Pte Ltd (MIPL) minutes of Directors meeting on 29 January 2019 about MIPL acquiring shares in Mineralogy (Exhibit 15 to Annexure A to NoI, Exh. C-63) and the MIPL minutes recording the share resolution dated 29 January 2019 relating to the purchase of 1 ordinary share (Exhibit 19 to Annexure A to NoI, Exh. C-63). The Respondent does not expect that these documents be re-produced by the Claimant.</p>
<p>Objections</p>	<p>The Claimant’s Objection to this Request No.3 comprises Part A (the Claimants Response and Overall Objection), Part B (comprising Table A which shows the Respondent’s actual Document Requests in itemized form) and Part C (the Claimant’s Secondary Objections).</p> <p><u>PART A: CLAIMANT’S RESPONSE AND OVERALL OBJECTION</u></p> <p>The Claimant refers to and relies upon Part A of the Claimant’s Objection to Request No.1 and inter alia adopts such objection as part of the Claimant’s Objection to Request No.3.</p> <p><u>PART B: THE RESPONDENT’S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 3</u></p> <p><i>[Claimant’s Table A has been removed and is produced separately]</i></p> <p><u>PART C: THE CLAIMANT’S SECONDARY OBJECTIONS</u></p> <p>All of the Objections contained within this Part C are made without prejudice to the objection in Part A and Table A, being the Claimant’s Objection to the Respondent’s Request No.3. The Claimant relies upon its Objections set out in Part A as its primary response and the responses set out in this Part C are set out in the alternative.</p> <p>The Claimant makes its Overall Objection in respect to document production for this Request No. 3. Without prejudice to the Claimant’s Overall Objection, the Respondent’s Document Request No. 3 is not one (1) Document Production Request but is actually 75 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 153 to No. 227 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No.1 and is an abuse of process. Accordingly, as Document Request No. 3 is not made in accordance with the requirements, spirit or intention of PO1, the Claimant is not required to respond.</p> <p>Notwithstanding, the Claimant provides the following additional grounds of objection.</p> <p>(A) <u>Documents Already Produced Objection</u>: Contrary to para 5.2(c) of PO1 which provides that “<i>Each request for production shall...specify that the documents requested are not in the possession, custody or control of the requesting Party (or explain why it would be unreasonably burdensome for the requesting Party to produce them)</i>”, many responsive documents have already been produced by the Claimant (see, for example, Exh’s. C-63 (Annexure A, Exhibits 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18 and 19), C-79, C-80, C-476, C-539, C-540 and C-555).</p>

(B) Overly Broad and Burdensome Objection: This objection barely requires any explanation, given the huge number of requests included (or disguised) within Request 3. The request seeks documents over a 5.5-year period and would be enormously time consuming and costly to undertake.

To the extent that the Request seeks documents relating to a potential investor-State arbitration, it is entirely inappropriate as it would cover all documents relating to this arbitration up to commencement, as well as to the coal-related arbitrations that have been commenced since this arbitration. There can be no basis for requesting documents relating to the Claimant's preparations for this arbitration (or the coal-related arbitration that have also been commenced). The request would also require production of thousands of documents which would be incredibly costly and burdensome.

The temporal scope of the Request is also overly broad. Part (e) of the purported Request No. 3 covers the period from 1 October 2017 to 29 March 2023, which is manifestly excessive and for which no justification has been provided. The Claimant objects on the basis that time period covered by this request is inappropriate, excessive and would make searches for documents "too burdensome" having regard to the criteria referred to in paragraph 5.7(c) of PO1.

(C) Documents Already Produced Objection: Some responsive documents have already been produced by the Claimant (see, for example, C-63 (exhibits 5-7 and 12-19), C-539, C-540).

(D) Burden of Proof Objection: The Respondent requests documents said to be relevant to proving the Claimant's asserted commercial rationale for the restructure which is not relevant to foreseeability. The commercial rationale for the restructure is supported by evidence by the Claimant. Consequently, the Claimant has accepted the burden of proof for its asserted commercial rationale – not the Respondent. Similarly, the Claimant bears the burden of proving it is an "investor" and has "made an investment" under the AANZFTA. The Claimant bears the burden of proving it is an "investor" and has "made an investment" under the AANZFTA.

(E) Lack of Relevance/Materiality Objection: The Claimant objects to production on the basis that the Respondent has not explained why the documents are relevant to proving its Abuse of Process objection. To prove that objection, the Respondent must demonstrate that the dispute was (reasonably) foreseeable at the time of the restructure. The commercial rationale for the restructure cannot be determinative of the Respondent's Abuse of Process objection – the sole factor relevant to the Respondent's position is the foreseeability of the dispute. The Respondent has not explained how the documents requested are relevant or material to proving that the Claimant foresaw the dispute. The breadth of the request suggests that it is simply a fishing expedition.

(F) To the extent that Request 3 seeks documents from Mr Palmer, it is inappropriate. The Respondent states that it "*confirms that documents in the possession, custody or control of Mr Palmer (the*

	<p><i>Claimant's 'main representative') are in the possession, custody or control of the Claimant". On its face, this is an extraordinary statement. It is not supported by anything contained in those parts of Procedural Order No. 2 to which the Respondent makes reference.¹⁹ Mr Palmer was not even appointed as a director of the Claimant until 23 January 2019 and was only a director for 7 days of the period the Respondent has requested in this request.</i></p>
<p>Reply</p>	<p>Reply to Part A and Part B</p> <p>The Respondent repeats its Reply to the Claimant's Overall Objection at paras. 3-28 above and its Reply to Part B above at paras. 29-30.</p> <p>Reply to Part C: Specific objections to Request No. 3</p> <p>Using lettering consistent with the Claimant's objections above, the Respondent replies to the objections as follows:</p> <p>(A) and (C) Documents Already Produced Objection</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at paras. 10-11 above). More specifically, the documents sought in Request No. 3 are not on the record, contrary to the Claimant's assertion. The exhibits cited by the Claimant (Exh's. C-63 (Annexure A, Exhibits 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18 and 19), C-79, C-80, C-476, C-539, C-540 and C-555) are not responsive to Request No. 3. They include, for example, financial statements (Exh. C-80) and declarations of dividends (Exh. C-539) which are not the correspondence, minutes, agendas, notes, papers or resolutions relating to the subject matter identified in Request No. 3. Unlike the exhibits cited by the Claimant, the documents sought are likely to provide detailed insight into the key management decisions and reasoning for the Mineralogy Group Restructure.</p> <p>(B) Overly Broad and Burdensome Objection</p> <p>Request No. 3 is not overly broad or burdensome. The Respondent submits that the request sets out specific documents which would reasonably be likely to exist when Mineralogy and Mr Palmer were contemplating the Mineralogy Group Restructure.</p> <p>(D) Burden of Proof Objection</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at paras. 13-17 above). The Respondent also repeats the response given on this issue in relation to Request 2 above.</p> <p>(E) Lack of Relevance/Materiality Objection</p> <p>The Respondent has already explained with a sufficient degree of specificity why the requested categories of documents in Request No. 3 are relevant to the issues in dispute with specific reference to pleadings and evidence on the record. Specifically, such documents would assist in identifying the true purpose(s) of the Mineralogy Group Restructure, an issue that must be resolved in the Abuse of Process Objection, and are also relevant to facts in issue between the parties as to whether the Claimant is an investor which has made an investment within the meaning of Chapter 11 of AANZFTA.</p>

¹⁹ Document Requests, [4], referring to Procedural Order No. 2, paragraphs 33-34, 45-46.

	The Respondent repeats its Reply to the Overall Objection at para. 24(e), (F)-(G) above in response to the Claimant's assertion "To the extent that Request 3 seeks documents from Mr Palmer, it is inappropriate."
Decision by the Tribunal	GRANTED

Respondent's Document Request No. 4	
Document(s) Requested	<p>For the period from 1 October 2017 to 29 March 2023,</p> <ul style="list-style-type: none"> (i) Correspondence between any of the directors or management of the Claimant, Mineralogy and/or MIL; (ii) Correspondence between any of the Claimant, Mineralogy, MIL, Waratah Coal and/or Mr Palmer and financial advisors or financiers; and (iii) Documents, <p>recording or relating to:</p> <ul style="list-style-type: none"> a. due diligence carried out in relation to establishing Singaporean bank accounts or acquiring loans from Singaporean banks for the purposes of obtaining financing for coal projects located in Australia; b. establishing Singaporean bank accounts or acquiring loans from Singaporean banks for the purposes of obtaining financing for coal projects located in Australia; c. the ability of the Claimant to obtain financing for coal projects located in Australia; d. the need to obtain “the finance [the Claimant] needed to build and operate the [Waratah Coal] coal projects”, as described at para. 120 of the [REDACTED] WS; e. risk assessments, feasibility studies and reports relating to financing for the Waratah Coal Project and/or demonstrating how the Waratah Coal Project had progressed, <p>held by or within the possession, custody or control of the Claimant, MIL, Mineralogy, Waratah Coal and/or Mr Palmer.</p> <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of the Claimant, MIL, Mineralogy, Waratah Coal and/or Mr Palmer.</p>
Relevance	<p>Reference to submissions</p> <p>SOPO, paras. 234-241, 333-335. SODPO, paras. 398, 405, 479, 574. Lys Report, paras. 356, 523-533, 540-542, 567-572. Rogers Report, paras. E.1.1.1-E.1.1.8, F.10.1.1-F.10.1.3, G.3.2.2-G.3.2.3, G.5.2.1. [REDACTED], p. 47-50. [REDACTED] WS, paras. 120-124, 126-127. [REDACTED] WS, para. 29(f). [REDACTED] WS, paras. 11-23. [REDACTED] WS, paras. 7, 15-26, 29-31, 35-38.</p>
	<p>Comments</p> <p>Abuse of Process: The requested documents are relevant to the Respondent's Abuse of Process objection, and material to the outcome of that objection (and the case) since the Claimant has argued that one of the alleged purposes for the Mineralogy Group Restructure was to obtain finance for the Waratah Coal Project that was not otherwise available from Australian banks. The Respondent however contends that the determinative purpose of the restructure was not to obtain financing for the Waratah Coal Project, rather to obtain treaty protection. There is no documentary evidence demonstrating why it was necessary to restructure into Singapore in order to obtain financing for new coal projects (see SOPO, para. 335(a)), and the requested documents would demonstrate the extent to which Singaporean banks provided advice or funding to the Claimant relating to the Mineralogy mining projects. The Claimant asserts in the SODPO that it has bank accounts, but has not provided any documentary evidence of bank accounts, due diligence or feasibility studies being considered.</p> <p>In support of its argument, the Claimant relies on the Expert Report of [REDACTED], who was instructed that “you [REDACTED] shall have unrestricted access to all financial and other documentation and records (including banking records of Mineralogy and the Claimant)”. For the</p>

	<p>Respondent to appropriately test [REDACTED] evidence, it is necessary to review the material to which [REDACTED] had access.</p> <p>Denial of Benefits: The documents requested in parts (a) and (b) are also relevant to the Respondent’s Denial of Benefits objection, and are material to the outcome of that objection, since the existence of bank accounts in Singapore is a relevant factor to consider when determining whether the Claimant had “substantive business operations” in Singapore.</p> <p>Temporal scope of the request: The temporal scope of this request covers the period from the month prior to the Royalties Judgment being handed down until the date that the Claimant filed its Notice of Arbitration, being the period for which evidence of considering and approaching coal financiers is likely to exist. As to the relevance of the Royalties Judgment, the Respondent repeats the reasoning at Request No. 1.</p>
<p>Objections</p>	<p>The Claimant’s Objection to this Request No.4 comprises Part A (the Claimant’s Response and Overall Objection), Part B (comprising Table A which shows the Respondent’s actual Document Requests in itemized form) and Part C (the Claimant’s Secondary Objections).</p> <p><u>PART A: CLAIMANT’S RESPONSE AND OVERALL OBJECTION</u></p> <p>The Claimant refers to and relies upon Part A of the Claimant’s Objection to Request No.1 and inter alia adopts such objection as part of the Claimant’s Objection to Request No.4.</p> <p><u>PART B: THE RESPONDENT’S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 4</u></p> <p><i>[Claimant’s Table A has been removed and is produced separately]</i></p> <p><u>PART C: THE CLAIMANT’S SECONDARY OBJECTIONS</u></p> <p>All of the Objections contained within this Part C are made without prejudice to the objection in Part A and Table A, being the Claimant’s Objection to the Respondent’s Request No. 4. The Claimant relies upon its Objections set out in Part A as its primary response and the responses set out in this Part C are set out in the alternative.</p> <p>The Claimant makes its Overall Objection in respect to document production for this Request No. 4. Without prejudice to the Claimant’s Overall Objection, the Respondent’s Document Request No. 4 is not one (1) Document Production Request but is actually 75 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 228 to No. 302 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No.1 and is an abuse of process. Accordingly, as Document Request No. 4 is not made in accordance with the requirements, spirit or intention of PO1, the Claimant is not required to respond.</p> <p>Notwithstanding, the Claimant provides the following additional grounds of objection.</p> <p>(A) <u>Documents Already Produced Objection:</u> Contrary to para 5.2(c) of PO1 which provides that “<i>Each request for production shall...specify that the documents requested are not in the possession, custody or control of the requesting Party (or explain why it would be unreasonably burdensome for the requesting Party</i></p>

to produce them)”, many responsive documents have already been produced by the Claimant (see, for example, Exh’s. C-163, C-164, C-165, C-166, C-167, C-168, C-472, C-474, [REDACTED] WS (para’s 118-139), [REDACTED] WS (para’s 48-72), [REDACTED] WS (para’s 10-37) and [REDACTED] WS (paras 8-24).

- (B) Overly Broad and Burdensome Objection: The temporal period over which this request is made (5.5 years) is inappropriate as the Respondent is aware that the Claimant did not seek to finance new Queensland coal projects for the reasons set out in [REDACTED] WS paras 131, 137-138 (primarily that the Claimant was waiting for the award in the third domestic arbitration). The projects themselves did not occur and are now the subject of separate investor-State arbitrations between the Claimant and the Respondent.

Conducting searches over a time period that spans 5.5 years and multiple entities/persons is burdensome when both parties are aware that responsive documents, relevant to the issues in this arbitration, are unlikely to exist.

Searching for these documents would be time consuming and costly, disproportionate to their relevance or materiality.

- (C) Burden of Proof Objection: As explained above, the burden on the Respondent regarding its Abuse of Process claim is to show that the present dispute pertaining to the *Amendment Act* was foreseeable at the time of the corporate restructure. The documents requested above bear no relevance at all to the foreseeability of the present dispute. They are therefore not relevant to the case or material to its outcome. They do not go to a point which the Respondent bears the burden.

- (D) Point Proven Objection: The Claimant has provided considerable evidence of its business activities in Singapore – far in excess of what is required to prove a substantive business according to the case authorities (including financing documents, such as C-472 to C-475 [REDACTED]). Having to produce further documents in relation to bank accounts to prove a point already proven in the record is a waste of time and resources.

- (E) Lack of Materiality Objection: The documents requested in Request 4 are not dispositive of any issue on which the Respondent bears the burden of proof, rather they are a quintessential “fishing expedition” undertaken in the hope of locating a document for use in responding to the Claimant’s asserted case. This is not a proper purpose for document production.

In relation to its Denial of Benefits justification, the Respondent does not explain why the existence of a bank account for coal financing is relevant or material to the determination of the denial of benefits claim. This is especially so in light of all of the evidence that the Claimant has provided regarding the turnover, assets, employees, and government payments made and received by the Claimant in Singapore. The Respondent does not explain why the existence (or otherwise) of a specific bank account for coal

	<p>financing would be determinative of whether the Claimant had a substantive business in Singapore. Clearly, it would not.</p>
<p>Reply</p>	<p>Reply to Part A and Part B</p> <p>The Respondent repeats its Reply to the Claimant’s Overall Objection at paras. 3-28 above and its Reply to Part B above at paras. 29-30.</p> <p>Reply to Part C: Specific objections to Request No. 4</p> <p>Using lettering consistent with the Claimant’s objections above, the Respondent replies to the objections as follows:</p> <p>(A) Documents Already Produced Objection</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at paras. 10-11 above). More specifically, the documents sought in Request No. 4 are not all on the record, contrary to the Claimant’s assertion. For example, Exh. C-163 is a Bill prepared for the Australian Parliament and clearly falls outside the scope of requested documents. Unlike the exhibits cited by the Claimant, the documents sought are likely to provide detailed insight into the key management decisions and reasoning for the Mineralogy Group Restructure and are also likely to provide detailed insight into steps taken by the Claimant to seek funding for coal projects in Australia, as it has asserted.</p> <p>(B) Overly Broad and Burdensome Objection</p> <p>The Respondent does not consider this request to be burdensome. Request No. 4 seeks correspondence and documents on specific issues held by closely related entities and associated individuals within the Mineralogy Group, which should be easily identifiable using targeted searches. The Claimant asserts that a purpose for the Mineralogy Group Restructure was to obtain finance for the Waratah Coal Project, where such finance arrangements were delayed until the award in the third domestic arbitration was delivered (SOPO, paras. 333-335, SODPO, paras. 608-620, in particular para. 618). Notwithstanding the Claimant asserting that obtaining finance for the Waratah Coal Project should be postponed until after the award in the Third BSIOP Arbitration, the Claimant also asserts it first obtained advice in respect of loans for a Queensland coal project as early as 2008 (see ██████████ WS, paras. 49-50; Exh. C-491 and SODPO paras. 553-554). Regardless, the Claimant should identify whether the documents in fact exist, and not whether they are likely to exist.</p> <p>(C) Burden of Proof Objection</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at paras. 13-17 above). The Respondent is entitled to request documents necessary to resolving the contested issues and to advance the jurisdictional objections as characterised by the Respondent. The Respondent is entitled to test the case brought against it to advance its defence of the claim.</p> <p>(D) Point Proven Objection</p> <p>The requested documents are relevant to resolving the issues in dispute. As explained above, the requested documents are relevant to the Respondent’s Abuse of Process objection, and material to the outcome of that objection and the case, since the Claimant has asserted that one of the alleged purposes for the Mineralogy Group Restructure was to obtain finance for the Waratah Coal Project that was not otherwise available from Australian banks. The</p>

	<p>Respondent is entitled to test that assertion by reference to documents that are likely to provide probative contemporaneous evidence. The Claimant’s assertion that it has “provided considerable evidence of its business activities in Singapore” relates to an entirely different issue in dispute.</p> <p>(E) Lack of Materiality Objection</p> <p>The Respondent has already explained why the requested categories of documents in Request No. 4 are relevant and material to the issues in dispute with specific reference to pleadings and evidence on the record. Specifically, the requested documents would assist in testing the Claimant’s claim that one of the alleged purposes for the Mineralogy Group Restructure was to obtain finance for the Waratah Coal Project that was not otherwise available from Australian banks, in a context where the Respondent advances the alternative proposition that the objective purpose for the Mineralogy Group Restructure was the Claimant seeking access to treaty protection.</p>
Decision by the Tribunal	GRANTED

Respondent's Document Request No. 5	
Document(s) Requested	<p>Advice, emails, notes, minutes, meeting invites and agendas relating to the Claimant's ability to finance new coal projects received from:</p> <ul style="list-style-type: none"> a. [REDACTED] from 28 June 2019 to 29 March 2023; b. [REDACTED] from 14 May 2020 to 29 March 2023; c. [REDACTED] since 30 November 2018 to 29 March 2023; d. [REDACTED] from 18 August 2020 to 29 March 2023; e. [REDACTED] from 5 December 2022 to 29 March 2023; f. [REDACTED] from 6 October 2022 to 29 March 2023; g. [REDACTED] from the earlier of the date that Mineralogy became a client of [REDACTED] and 21 January 2019 to 29 March 2023; h. [REDACTED] from 30 November 2018 to 29 March 2023; i. [REDACTED] from 16 August 2019 to 29 March 2023; and j. [REDACTED] from 12 December 2018 to 29 March 2023, <p>held by or in the possession, custody or control of the Claimant, Mineralogy, MIL or Mr Palmer.</p> <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of the Claimant, Mineralogy, MIL, and/or Mr Palmer.</p>
Relevance	<p>Reference to submissions</p> <p>SODPO, paras. 235, 395, 423-424, 594-604. [REDACTED] WS, para. 82. [REDACTED] WS, paras. 62, 82, 111, 113, 122, 128. Exh. C-96. Exh. C-495. Exh. C-502.</p> <p>Comments</p> <p>Abuse of Process: The requested documents are relevant to the Respondent's Abuse of Process objection and to determining whether the purpose of the Mineralogy Group Restructure was to obtain financing for the Waratah Coal Project. While the SODPO and the [REDACTED] WS outline advice sought in relation to obtaining financing in Singapore, the discussions and advice involving [REDACTED] and [REDACTED] fail to explain whether banks or other financial institutions in Singapore were approached to provide funding, why Singapore is the "closest and strongest" financial market for new coal mines, or why it would be useful to restructure into Singapore (see, for example, [REDACTED] WS, para. 12). The requested documents would likely provide evidence to address this issue.</p> <p>The requested documents are material to the outcome of the case because the Abuse of Process objection is based on the argument that the purpose of the Mineralogy Group Restructure was to obtain treaty protection rather than the obtain financing for coal projects in Australia.</p> <p>Temporal scope of the request: The temporal scope of this request covers the period from when the relevant professional services firm is stated to have been engaged until the date that the Notice of Arbitration was filed, as this is the relevant period during which to consider the Claimant's engagement with the relevant firms. Where the Claimant has provided inconsistent evidence about when these firms were engaged, the Respondent has used the earliest date at which there is evidence of the relevant firm being engaged.</p>
Objections	<p>The Claimant's Objection to this Request No.5 comprises Part A (the Claimant's Response and Overall Objection), Part B (comprising Table A</p>

which shows the Respondent's actual Document Requests in itemized form) and Part C (the Claimant's Secondary Objections).

PART A: CLAIMANT'S RESPONSE AND OVERALL OBJECTION

The Claimant refers to and relies upon Part A of the Claimant's Objection to Request No. 1 and inter alia adopts such objection as part of the Claimant's Objection to Request No.5.

PART B: THE RESPONDENT'S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 5

[Claimant's Table A has been removed and is produced separately]

PART C: THE CLAIMANT'S SECONDARY OBJECTIONS

All of the Objections contained within this Part C are made without prejudice to the objection in Part A and Table A, being the Claimant's Objection to the Respondent's Request No. 5. The Claimant relies upon its Objections set out in Part A as its primary response and the responses set out in this Part C are set out in the alternative.

The Claimant makes its Overall Objection in respect to document production for this Request No. 5. Without prejudice to the Claimant's Overall Objection, the Respondent's Document Request No. 5 is not one (1) Document Production Request but is actually 40 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 303 to No. 342 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No.1 and is an abuse of process. Accordingly, as Document Request No. 5 is not made in accordance with the requirements, spirit or intention of PO1, the Claimant is not required to respond.

Notwithstanding, the Claimant provides the following additional grounds of objection.

- (A) Overly Broad and Burdensome Objection: The temporal period over which this request is made (i.e., to 29 March 2023) is inappropriate as the Respondent is aware that the Claimant did not seek to finance new Queensland coal projects for the reasons set out in [REDACTED] WS paras 131, 137-138 (primarily that the Claimant was waiting for the award in the third domestic arbitration). The projects themselves did not occur and are now the subject of separate investor-State arbitrations between the Claimant and the Respondent.

Conducting searches over a time period that spans 3-5 years and multiple entities/persons is burdensome when both parties are aware that responsive documents, relevant to the issues in this arbitration, are unlikely to exist.

- (B) Burden of Proof Objection: As explained above, the Respondent bears no burden for proving facts asserted by the Claimant. The burden on the Respondent regarding its Abuse of Process claim is to show that the present dispute pertaining to the *Amendment Act* was foreseeable at the time of the corporate restructure. The documents

	<p>requested above bear no relevance to the foreseeability of the present dispute. They are therefore not relevant to the case or material to its outcome. They do not go to a point for which the Respondent bears the burden of proof. Similarly, the Claimant bears the burden of proving it is an “investor” and has “made an investment” under the AANZFTA.</p> <p>(C) <u>Lack of Relevance Objection</u>: There is also an overarching relevance objection because these documents are not relevant to the Respondent’s abuse of process objection, which requires the Respondent to prove that the dispute was reasonably foreseeable.</p> <p>(D) <u>Commercial Sensitivity Objection</u>: Documents relating to the ability of the Claimant (or related entities) to finance large coal scale projects are commercially sensitive.</p> <p>Should document production be ordered despite the above objections, the Claimant reserves its right to claim legal professional privilege in respect of the documents the subject of this request.</p>
<p>Reply</p>	<p>Reply to Part A and Part B</p> <p>The Respondent repeats its Reply to the Claimant’s Overall Objection at paras. 3-28 above and its Reply to Part B above at paras. 29-30.</p> <p>Reply to Part C: Specific objections to Request No. 5</p> <p>Using lettering consistent with the Claimant’s objections above, the Respondent replies to the objections as follows:</p> <p>(A) Overly Broad and Burdensome Objection</p> <p>Request No. 5 is not overly broad or burdensome, as it sets out specific documents which would reasonably be likely to exist when Mineralogy and Mr Palmer were contemplating the Mineralogy Group Restructure. The Respondent repeats its reply on this issue in relation to Request No. 4 above. The documents requested relate to contemporaneous services (including the provision of advice) provided by persons engaged by the Claimant since its incorporation (██████████ WS para. 82 and Exh. C-96).</p> <p>In addition, if the Claimant’s coal funding rationale is genuine, the temporal scope of the request as up to the date of the Claimant’s Notice of Arbitration is entirely appropriate.</p> <p>(B) Burden of Proof Objection</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to Overall Objection at paras. 13-17 above). The Respondent is entitled to request documents necessary to resolving the contested issues and to advance the jurisdictional objections as characterised by the Respondent. The Respondent is entitled to test the case brought against it to advance its defence of the claim.</p> <p>(C) Lack of Relevance Objection</p> <p>The Respondent has already explained why, with requisite specificity, the requested categories of documents in Request No. 5 are relevant to the issues in dispute with specific reference to pleadings and evidence on the record.</p>

	<p>Specifically, the documents are evidence that will assist the Tribunal in identifying the true purpose(s) of the Mineralogy Group Restructure.</p> <p>(D) Commercial Sensitivity Objection</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to Overall Objection at para. 28 above).</p> <p>The Respondent repeats its expectations as to claiming legal professional privilege as set out in its Reply to Request No. 2.</p> <p>Without any prejudice as to the nature of the initial request, in the interests of good faith and meaningfully engaging in the document production phase of the dispute, the Respondent is willing to narrow the requested documents by not pursuing the request for “emails”. This is identified in strikethrough above. The Respondent otherwise presses all other aspects of the Request.</p>
Decision by the Tribunal	DENIED

Respondent's Document Request No. 6	
Document(s) Requested	<p>For the period from 1 October 2017 to 30 September 2019, Correspondence and advice relating to:</p> <ol style="list-style-type: none"> reports prepared by ██████████ referred to in Exh. C-472 and C-474; scoping, pre-feasibility and feasibility studies and data for the Waratah Coal project and circulated to banks, held by or in the possession, custody or control of Mr Palmer, the Claimant, Mineralogy or Waratah Coal. <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of Mr Palmer, the Claimant, Mineralogy or Waratah Coal.</p>
Relevance	<p>Reference to submissions</p> <p>SODPO, para 574(b)(xi). SOPO, paras. 334-335. Rogers Report, paras. E.1.1.1-E.1.1.8, F.10.1.1-F.10.1.3, G.3.1.2-G.3.2.3, G.5.2.1. ██████████ (Exh. C-472 and Exh. C-474). ██████████ WS, paras. 11, 13-17.</p>
	<p>Comments</p> <p>Abuse of Process: This request is relevant to the Respondent's Abuse of Process objection, as the Claimant asserts at para. 574(b)(xi) of the SODPO that one of the purposes of the Mineralogy Group Restructure was to obtain funding for the Waratah Coal Project in Singapore. The ██████████ reports and feasibility studies are relevant to assessing the Claimant's allegation of the steps taken to obtain financing for the Waratah Coal Project. Specifically, the Claimant relies on the ██████████ (which, in turn, rely on the ██████████ report) for its stated commercial rationale for incorporating and inserting the Claimant into the Mineralogy corporate chain. These documents are material to the outcome of the Abuse of Process objection (and the case) because they will enable the Respondent to verify the rationale provided by the Claimant for undertaking the Mineralogy Group Restructure.</p> <p>Temporal scope of request: The temporal scope of this request covers the period from the month prior to the Royalties Judgment being handed down until 12 months after the ██████████ were prepared. The Respondent repeats the reasoning in Request No. 1 and further notes that the 12 months after the ██████████ were prepared is the likely period in which any steps taken in response to the ██████████ would have occurred.</p>
Objections	<p>The Claimant's Objection to this Request No.6 comprises Part A (the Claimant's Response and Overall Objection), Part B (comprising Table A which shows the Respondent's actual Document Requests in itemized form) and Part C (the Claimant's Secondary Objections).</p> <p><u>PART A: CLAIMANT'S RESPONSE AND OVERALL OBJECTION</u></p> <p>The Claimant refers to and relies upon Part A of the Claimant's Objection to Request No. 1 and inter alia adopts such objection as part of the Claimant's Objection to Request No. 6.</p> <p><u>PART B: THE RESPONDENT'S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 6</u></p> <p><i>[Claimant's Table A has been removed and is produced separately]</i></p> <p><u>PART C: THE CLAIMANT'S SECONDARY OBJECTIONS</u></p>

	<p>All of the Objections contained within this Part C are made without prejudice to the objection in Part A and Table A, being the Claimant’s Objection to the Respondent’s Request No.6. The Claimant relies upon its Objections set out in Part A as its primary response and the responses set out in this Part C are set out in the alternative.</p> <p>The Claimant makes its Overall Objection in respect to document production for this Request No. 6. Without prejudice to the Claimant’s Overall Objection, the Respondent’s Document Request No. 6 is not one (1) Document Production Request but is actually 8 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 342 to No. 350 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No.1 and is an abuse of process. Accordingly, as Document Request No. 6 is not made in accordance with the requirements, spirit or intention of PO1, the Claimant is not required to respond.</p> <p>Notwithstanding, the Claimant provides the following additional grounds of objection.</p> <p>(A) <u>No documents</u>: For the period from 1 October 2017 to 30 September 2019, the Claimant has no Correspondence or advice relating to reports in its possession, custody or control prepared by [REDACTED] referred to in Exh. C-472 and C-474.</p> <p>As explained in Request 5 above, no documents were “Circulated to banks” for the reasons given in the [REDACTED] WS.</p> <p>Even if documents existed, the Claimant would have object on the basis of:</p> <p>(B) <u>Burden of Proof Objection</u>: As explained above, the Respondent bears no burden for proving facts asserted by the Claimant. The burden on the Respondent regarding its Abuse of Process claim is to show that the present dispute pertaining to the <i>Amendment Act</i> was foreseeable at the time of the corporate restructure. The documents requested above bear no relevance to the foreseeability of the present dispute. They are therefore not relevant to the case or material to its outcome. They do not go to a point for which the Respondent bears the burden of proof. Similarly, the Claimant bears the burden of proving it is an “investor” and has “made an investment” under the AANZFTA.</p> <p>(C) <u>Lack of Relevance Objection</u>: There is also an overarching relevance objection because these documents are not relevant to the Respondent’s abuse of process objection, which requires the Respondent to prove that the dispute was reasonably foreseeable.</p>
Reply	The Respondent accepts the Claimant’s assertion that the requested documents do not exist.
Decision by the Tribunal	NO DECISION REQUIRED

Respondent's Document Request No. 7	
Document(s) Requested	<p>a. Advice, emails, file notes, meeting minutes and meeting invites relating to the meeting held in Singapore in September 2008 at which the possibility of incorporation in Singapore was first considered (described at para. 553 of the SODPO);</p> <p>b. Copies of any presentations (including slides, PowerPoint presentations, speaking notes and handouts) given at the meeting held in Singapore in September 2008 at which the possibility of incorporation in Singapore was first considered (described at para. 553 of the SODPO), held by or in the possession, custody or control of Mineralogy and/or Mr Palmer.</p> <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of Mineralogy and/or Mr Palmer.</p>
Relevance	Reference to submissions
	Comments
Objections	

SODPO, para. 553.
 [REDACTED] WS, paras. 49-50.
 Exh. C-491.

Abuse of Process: The requested documents are relevant to the Respondent's Abuse of Process objection. The Claimant at para. 553 of the SODPO asserts the possibility of incorporation in Singapore was first considered during 2008, but there is no documentary evidence to support this assertion. While the Claimant has provided the agenda for this meeting (Exh. C-491), the agenda does not state that the possibility of incorporation was discussed at this meeting. The requested documents are relevant to determine whether a Singaporean restructure was contemplated in 2008. The requested documents in part (b) would be relevant as they provide contemporaneous documentary evidence of the issues discussed at the September 2008 meeting.

The Claimant asserts at Section VI subsection K of the SODPO that there was a "clear commercial basis" for undertaking the Mineralogy Group Restructure. The requested documents are material to determining the outcome of the Respondent's Abuse of Process objection (and the case), including the asserted "clear commercial basis" for the Mineralogy Group Restructure which was not realised until 11 years after the idea was allegedly first considered.

The Claimant's Objection to this Request No. 7 comprises Part A (the Claimant's Response and Overall Objection), Part B (comprising Table A which shows the Respondent's actual Document Requests in itemized form) and Part C (the Claimant's Secondary Objections).

PART A: CLAIMANT'S RESPONSE AND OVERALL OBJECTION

The Claimant refers to and relies upon Part A of the Claimant's Objection to Request No. 1 and inter alia adopts such objection as part of the Claimant's Objection to Request No. 7.

PART B: THE RESPONDENT'S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 7

[Claimant's Table A has been removed and is produced separately]

PART C: THE CLAIMANT'S SECONDARY OBJECTIONS

All of the Objections contained within this Part C are made without prejudice to the objection in Part A and Table A, being the Claimant's Objection to the Respondent's Request No.7. The Claimant relies upon its Objections set out

	<p>in Part A as its primary response and the responses set out in this Part C are set out in the alternative.</p> <p>The Claimant makes its Overall Objection in respect to document production for this Request No. 7. Without prejudice to the Claimant’s Overall Objection, the Respondent’s Document Request No. 7 is not one (1) Document Production Request but is actually 4 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 351 to No. 354 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No.1 and is an abuse of process. Accordingly, as Document Request No. 7 is not made in accordance with the requirements, spirit or intention of PO1, the Claimant is not required to respond.</p> <p>Notwithstanding, the Claimant provides the following additional grounds of objection.</p> <p>(A) <u>Burdensome</u>: The documents requested relate to a meeting that occurred 16 years ago. Searching for such old documents would be difficult and time consuming.</p> <p>(B) <u>Burden of Proof Objection</u>: As explained above, the Respondent bears no burden for proving facts asserted by the Claimant. The burden on the Respondent regarding its Abuse of Process claim is to show that the present dispute pertaining to the <i>Amendment Act</i> was foreseeable at the time of the corporate restructure. The documents requested above bear no relevance to the foreseeability of the present dispute. They are therefore not relevant to the case or material to its outcome. They do not go to a point for which the Respondent bears the burden of proof. Similarly, the Claimant bears the burden of proving it is an “investor” and has “made an investment” under the AANZFTA.</p> <p>(C) <u>Lack of Relevance/Materiality Objection</u>: The Claimant objects to production on the basis that the Respondent has not explained why the documents are relevant to proving its Abuse of Process objection. To prove that objection, the Respondent must demonstrate that the dispute was (reasonably) foreseeable at the time of the restructure which it is unable to do.</p> <p>The commercial rationale for the restructure cannot be determinative of the Respondent’s Abuse of Process objection. To succeed in its objection, the Respondent must show that the dispute was reasonably foreseeable at the time of the restructure. The Respondent has not explained how the documents requested are relevant or material to proving that the Claimant foresaw the dispute.</p> <p>Should document production be ordered despite the above objections, the Claimant reserves its right to claim legal professional privilege in respect of the documents the subject of this request.</p>
<p>Reply</p>	<p>Reply to Part A and Part B</p> <p>The Respondent repeats its Reply to the Claimant’s Overall Objection at paras. 3-28 above and its Reply to Part B above at paras. 29-30.</p> <p>Reply to Part C: Specific objections to Request No. 7</p>

	<p>Using lettering consistent with the Claimant’s objections above, the Respondent replies to the objections as follows:</p> <p>(A) Burdensome Objection</p> <p>The Respondent does not consider this request to be burdensome. The Claimant has asserted that the Mineralogy Group Restructure was first considered in 2008 and has put on the record a document it claims is related to the 2008 meeting (Exh. C-491). Request No. 7 sets out specific documents which would be expected to exist and be readily located just as Exh. C-491 could be located by the Claimant. Further, the request is limited to a very specific temporal scope.</p> <p>(B) Burden of Proof Objection</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to Overall Objection at paras. 13-17 above). The Respondent is entitled to request documents necessary to resolving the contested issues and to advance the jurisdictional objections as characterised by the Respondent. The Respondent is entitled to test the case brought against it to advance its defence of the claim.</p> <p>(C) Lack of Relevance/Materiality Objection</p> <p>The Respondent has already explained why the requested categories of documents in Request No. 7 are relevant and material to the issues in dispute with specific reference to pleadings and evidence on the record. The Claimant has only put one document (Exh. C-491) on the record which it claims is evidence that a Singaporean restructure was contemplated in 2008. Exh. C-491 does not support that factual assertion and the Respondent seeks evidence that would be material in testing this assertion of fact.</p> <p>The Respondent repeats its request as to claiming legal professional privilege, as set out in Reply to Request No. 2.</p>
Decision by the Tribunal	GRANTED

Respondent's Document Request No. 8		
Document(s) Requested	<p>For the period from 1 July 2018 to 29 March 2023, advice, notes and Correspondence relating to seeking or obtaining funding in Singapore for Waratah Coal:</p> <ol style="list-style-type: none"> sent between ██████████ and Mr Palmer; sent between ██████████ and the Claimant; sent between any of ██████████, Mr Palmer, the Claimant or other representatives of the Claimant and ██████████; sent by the individuals listed in para. 18 of the ██████████ WS, being ██████████ ██████████ ██████████; and sent by any 'Singapore arranger' not referred to above, which the Claimant refers to at para. 574(d) of the SODPO, held by the Claimant, Mr Palmer or ██████████. <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of the Claimant, Mr Palmer and/or ██████████.</p>	
Relevance	Reference to submissions	<p>SODPO, paras. 574(b)-(d), 595-604, 609, 611. ██████████ WS, paras. 82, 120-122, 124, 126-127. ██████████ WS, paras. 51-59. ██████████ WS, paras. 11-13, 16, 18, 21.</p>
	Comments	<p>Abuse of Process: The request is relevant to the Respondent's Abuse of Process objection. The Claimant's evidence suggests that one of the purposes for the Mineralogy Group Restructure was to obtain financing for the Waratah Coal Project. While the SODPO and the ██████████ WS outline advice sought in relation to obtaining financing in Singapore, the discussions and advice involving ██████████ and ██████████ do not explain whether banks or other financial institutions in Singapore were approached to provide funding, why Singapore is the "closest and strongest" financial market for new coal mines, or why it would be useful to restructure into Singapore (see, for example, ██████████ WS, para. 12). The requested documents are relevant as they would likely provide evidence to address this.</p> <p>In general, the Claimant discloses advice that was provided in the ██████████ ██████████ WS, ██████████ WS, ██████████ WS, ██████████ WS and SODPO. However, the basis for the advice disclosed is not clear, and the requested documents are material to the outcome of the Abuse of Process objection (and the case) as they will verify how the advisors arrived at the recommendations they provided to the Claimant.</p> <p>Temporal scope of the request: The temporal scope of this request covers the period from when ██████████ is stated to have started providing advice until the date that the Notice of Arbitration was filed, as this is the relevant period during which to consider the advice and issues discussed by ██████████</p>
Objections	<p>The Claimant's Objection to this Request No. 8 comprises Part A (the Claimant's Response and Overall Objection), Part B (comprising Table A which shows the Respondent's actual Document Requests in itemized form) and Part C (the Claimant's Secondary Objections).</p> <p><u>PART A: CLAIMANT'S RESPONSE AND OVERALL OBJECTION</u></p> <p>The Claimant refers to and relies upon Part A of the Claimant's Objection to Request No. 1 and inter alia adopts such objection as part of the Claimant's Objection to Request No. 8.</p>	

PART B: THE RESPONDENT'S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 8

[Claimant's Table A has been removed and is produced separately]

PART C: THE CLAIMANT'S SECONDARY OBJECTIONS

All of the Objections contained within this Part C are made without prejudice to the objection in Part A and Table A, being the Claimant's Objection to the Respondent's Request No. 8. The Claimant relies upon its Objections set out in Part A as its primary response and the responses set out in this Part C are set out in the alternative.

The Claimant makes its Overall Objection in respect to document production for this Request No. 8. Without prejudice to the Claimant's Overall Objection, the Respondent's Document Request No. 8 is not one (1) Document Production Request but is actually 15 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 355 to No. 369 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No.1 and is an abuse of process. Accordingly, as Document Request No. 8 is not made in accordance with the requirements, spirit or intention of PO1, the Claimant is not required to respond.

Notwithstanding, the Claimant provides the following additional grounds of objection.

- (A) Overly Broad and Burdensome Objection: The temporal period over which this request is made (i.e., to 29 March 2023) is inappropriate as the Respondent is aware that the Claimant did not seek to finance new Queensland coal projects for the reasons set out in [REDACTED] WS paras 131, 137-138 (primarily that the Claimant was waiting for the award in the third domestic arbitration). The projects themselves did not occur and are now the subject of separate investor-State arbitrations between the Claimant and the Respondent.

Conducting searches over a time period that spans 3-5 years and multiple entities/persons is burdensome when both parties are aware that responsive documents, relevant to the issues in this arbitration, are unlikely to exist.

- (B) Burden of Proof Objection: As explained above, the Respondent bears no burden for proving facts asserted by the Claimant. The burden on the Respondent regarding its Abuse of Process claim is to show that the present dispute pertaining to the *Amendment Act* was foreseeable at the time of the corporate restructure. The documents requested above bear no relevance to the foreseeability of the present dispute. They are therefore not relevant to the case or material to its outcome. They do not go to a point for which the Respondent bears the burden of proof. Similarly, the Claimant bears the burden of proving it is an "investor" and has "made an investment" under the AANZFTA.

- (C) Lack of Relevance/Materiality Objection: The Claimant objects to production on the basis that the Respondent has not explained why the documents are relevant to proving its Abuse of Process

	<p>objection. To prove that objection, the Respondent must demonstrate that the dispute was (reasonably) foreseeable at the time of the restructure which it is unable to do.</p> <p>The commercial rationale for the restructure cannot be determinative of the Respondent’s Abuse of Process objection. To succeed in its objection, the Respondent must show that the dispute was reasonably foreseeable at the time of the restructure. The Respondent has not explained how the documents requested are relevant or material to proving that the Claimant foresaw the dispute.</p>
<p>Reply</p>	<p>Reply to Part A and Part B</p> <p>The Respondent repeats its Reply to the Claimant’s Overall Objection at paras. 3-28 above and its Reply to Part B above at paras. 29-30.</p> <p>Reply to Part C: Specific objections to Request No. 8</p> <p>Using lettering consistent with the Claimant’s objections above, the Respondent replies to the objections as follows:</p> <p>(A) Overly Broad and Burdensome Objection</p> <p>Request No. 8 is not overly broad or burdensome. The Respondent submits that the request sets out specific documents which would reasonably be likely to exist when Mineralogy and Mr Palmer were contemplating the Mineralogy Group Restructure to obtain financing in Singapore for Waratah Coal. Request No. 8 seeks advice, notes and correspondence on a narrow, specific category of entities within, and individuals working for, the Mineralogy Group, which should be easily identifiable using targeted searches.</p> <p>(B) Burden of Proof Objection</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at paras. 13-17 above). The Respondent is entitled to request documents necessary to resolving the contested issues and to advance the jurisdictional objections as characterised by the Respondent. The Respondent is entitled to test the case brought against it to advance its defence of the claim.</p> <p>(C) Lack of Relevance/Materiality Objection</p> <p>The Respondent has already explained why the requested categories of documents in Request No. 8 are relevant and material to the issues in dispute with specific reference to pleadings and evidence on the record. Specifically, they would assist in identifying the true purpose(s) of the Mineralogy Group Restructure, and in particular, whether the Claimant’s assertions as to the coal funding rationale can be substantiated by reference to contemporaneous documents.</p>
<p>Decision by the Tribunal</p>	<p>DENIED</p>

Respondent's Document Request No. 9		
Document(s) Requested	<p>For each of the transactions by which (i) MIL obtained shares in Mineralogy on 16 December 2018; (ii) the Claimant obtained shares in Mineralogy on 29 January 2019; and (iii) MIL obtained shares in the Claimant on 29 January 2019, the following Documents:</p> <ol style="list-style-type: none"> a. share certificates, share purchase or transfer agreements and memoranda, and shareholder agreements and memoranda, setting out the terms and conditions for the sale and purchase of shares and otherwise recording the transactions; b. minutes of meetings of the Board of Directors of MIL, the Claimant, or Mineralogy relating to each transaction (including approval of each transaction); c. minutes of any committees of the Board of MIL, Claimant or Mineralogy, including any risk committees, relating to each transaction (including approval of each transaction); d. Correspondence between any of MIL, Claimant, Mineralogy and Mr Palmer in relation to each transaction, <p>held by or within the possession, custody or control of the Claimant, Mineralogy, MIL, Closeridge, River Crescent and/or Mr Palmer.</p> <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of the Claimant, Mineralogy, MIL, Closeridge, River Crescent and/or Mr Palmer.</p>	
Relevance	Reference to submissions	<p>SOPO paras. 164-177, 317-348. SODPO paras. 280-283, 358-363, 489. Lys Report, paras. 59-66. ██████████ WS, paras. 118-137. ██████████ WS, paras. 18-37 Notice of Intent (Exh. C-63), Annexure A.</p>
	Comments	<p>Abuse of Process: The requested documents are relevant to the Respondent's Abuse of Process objection, as they are relevant to determining the true purpose(s) of the Mineralogy Group Restructure in the context where the Claimant has not exhibited contemporaneous documentary evidence supporting the Claimant's alleged rationales for the various share swap transactions and instead relies on unsubstantiated statements made by ██████████ and ██████████. Documents prepared by or considered by the Board of Directors and communications between members of the Board of Directors relating to the Mineralogy Group Restructure are likely to contain evidence of the purpose for that restructure. As noted at para. 336 of the SOPO, the Claimant has not put forward relevant minutes of Board of Directors' meetings or reports.</p> <p>The requested documents are material to the outcome of the Respondent's Abuse of Process objection (and the case) because the objection is based on the argument that the Mineralogy Group Restructure was done for the purposes of obtaining treaty protection and with knowledge and/or foreseeability of the dispute.</p> <p>No Investment: These documents are relevant to the Respondent's No Investment objection, as they will demonstrate what, if any, consideration was paid for the relevant shares, the actual cost, if any, of the Claimant's alleged investment, and what "risk", if any, was associated with the transactions. This is material to the outcome of the case because the No Investment objection is based on the assertion that no contribution was made and no risk was adopted in relation to the alleged investment, and therefore essential characteristics implied into the meaning of Article 2(c) are not established.</p>

	<p>No Investor: The requested documents are also relevant to the Respondent’s No Investor objection, as they are relevant to whether the Claimant actively “made an investment” within the meaning of Article 2(d) by making a meaningful contribution for the shares in Mineralogy. They are material to the outcome of the case because the No Investor objection is based on the assertion that the Claimant did not actively “make” an investment”.</p> <p>Temporal scope of the request: The temporal scope of the request is linked to 16 December 2018 and 29 January 2019, as these are the relevant dates on which the transactions that constituted the Mineralogy Group Restructure occurred.</p> <p>For completeness, the Respondent notes that the Claimant does not need to reproduce the Share Purchase Agreement dated 16 December 2018 (Exhibit 8 to Annexure A to NoI), the Share Purchase Agreement between MIL and MIPL (the Claimant) (Exhibit 20 to Annexure A to NoI), the minutes of Directors’ meeting of MIPL (the Claimant) on 29 January 2019 relation to MIPL acquiring shares in Mineralogy (Exhibit 15 to Annexure A to NoI) or the minutes recording the resolution of MIPL (the Claimant) relating to the purchase of 1 ordinary share (Exhibit 19 to Annexure A to NoI), which are already on the record as Exh. C-63.</p>
<p>Objections</p>	<p>The Claimant’s Objection to this Request No. 9 comprises Part A (the Claimant’s Response and Overall Objection), Part B (comprising Table A which shows the Respondent’s actual Document Requests in itemized form) and Part C (the Claimant’s Secondary Objections).</p> <p><u>PART A: CLAIMANT’S RESPONSE AND OVERALL OBJECTION</u></p> <p>The Claimant refers to and relies upon Part A of the Claimant’s Objection to Request No. 1 and inter alia adopts such objection as part of the Claimant’s Objection to Request No. 9.</p> <p><u>PART B: THE RESPONDENT’S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 9</u></p> <p><i>[Claimant’s Table A has been removed and is produced separately]</i></p> <p><u>PART C: THE CLAIMANT’S SECONDARY OBJECTIONS</u></p> <p>All of the Objections contained within this Part C are made without prejudice to the objection in Part A and Table A, being the Claimant’s Objection to the Respondent’s Request No. 9. The Claimant relies upon its Objections set out in Part A as its primary response and the responses set out in this Part C are set out in the alternative.</p> <p>The Claimant makes its Overall Objection in respect to document production for this Request No. 9. Without prejudice to the Claimant’s Overall Objection, the Respondent’s Document Request No. 9 is not one (1) Document Production Request but is actually 72 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 370 to No. 441 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No.1 and is an abuse of process. Accordingly, as Document Request No. 9 is not made in accordance with the requirements, spirit or intention of PO1, the Claimant is not required to respond.</p> <p>Notwithstanding, the Claimant provides the following additional grounds of objection.</p>

	<p>(A) <u>Documents Already Produced Objection</u>: Contrary to para 5.2(c) of PO1 which provides that “<i>Each request for production shall...specify that the documents requested are not in the possession, custody or control of the requesting Party (or explain why it would be unreasonably burdensome for the requesting Party to produce them)</i>”, many responsive documents have already been produced by the Claimant (see, for example, Exh’s. C-63 (Annexure A, Exhibits 5, 6, 7, 8, 9, 15, 20 and 21).</p> <p>Moreover, there is no dispute between the parties regarding the consideration paid for the share transfers – this is a point that has been comprehensively proven by the above documents.</p> <p>(B) <u>Overly Broad and Burdensome Objection</u>: The Request is not temporally confined. Searching for such a wide range of documents (72 requests) over an unspecified period of time is burdensome and disproportionate to the value, especially given the share transactions have been proven.</p> <p>(C) <u>Burden of Proof Objection</u>: As explained above, the Respondent bears no burden for proving facts asserted by the Claimant. The burden on the Respondent regarding its Abuse of Process claim is to show that the present dispute pertaining to the <i>Amendment Act</i> was foreseeable at the time of the corporate restructure. The documents requested above bear no relevance to the foreseeability of the present dispute. They are therefore not relevant to the case or material to its outcome. They do not go to a point for which the Respondent bears the burden of proof. Similarly, the Claimant bears the burden of proving it is an “investor” and has “made an investment” under the AANZFTA.</p> <p>(D) <u>Lack of Relevance/Materiality Objection</u>: The Claimant objects to production on the basis that the Respondent has not explained why the documents are relevant to proving its Abuse of Process objection. To prove that objection, the Respondent must demonstrate that the dispute was (reasonably) foreseeable at the time of the restructure. The commercial rationale for the restructure cannot be determinative of the Respondent’s Abuse of Process objection – the sole factor relevant to the Respondent’s position is the foreseeability of the dispute. The Respondent has not explained how the documents requested are relevant or material to proving that the Claimant foresaw the dispute. The breadth of the request suggests that it is simply a fishing expedition.</p>
<p>Reply</p>	<p>Reply to Part A and Part B</p> <p>The Respondent repeats its Reply to the Claimant’s Overall Objection at paras. 3-28 above and its Reply to Part B above at paras. 29-30.</p> <p>Reply to Part C: Specific objections to Request No. 9</p> <p>Using lettering consistent with the Claimant’s objections above, the Respondent replies to the objections as follows:</p> <p>(A) Documents Already Produced Objection</p>

	<p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at paras. 10-11 above). More specifically, the documents sought in Request No. 9 are not on the record, contrary to the Claimant’s assertion. The exhibits cited by the Claimant are not responsive to Request No. 9 and include, for example, directors’ authorisations for the share swap – which are not the minutes and correspondence relating to the subject matter identified in Request No. 9. Unlike the exhibits cited by the Claimant, the documents sought are likely to provide contemporaneous evidence for the reasoning for the Mineralogy Group Restructure.</p> <p>(B) Overly Broad and Burdensome Objection</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at paras. 6-8 above). The temporal limitation is implied into the request because the request is targeted to a specific document or event that is naturally limited by time and therefore is not overly burdensome. The Respondent has referred to documents with necessary particulars to enable the Claimant to carry out an effective search.</p> <p>(C) Burden of Proof Objection</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at paras. 13-17 above). The Respondent is entitled to request documents necessary to resolving the contested issues and to advance the jurisdictional objections as characterised by the Respondent. The Respondent is entitled to test the case brought against it to advance its defence of the claim, including the purpose of the Mineralogy Group Restructure where the Claimant has not substantiated its assertion for the share swap with contemporaneous documentary evidence.</p> <p>(D) Lack of Relevance/Materiality Objection</p> <p>The Respondent has already explained why the requested categories of documents in Request No. 9 are relevant and material with specific reference to pleadings and evidence on the record. The requested documents would likely assist in identifying the true purpose(s) of the Mineralogy Group Restructure, an issue clearly in dispute between the parties in relation to the Abuse of Process objection. The requested documents are therefore directed to the purpose of the Mineralogy Group Restructure, rather than the foreseeability of the dispute, as asserted by the Claimant.</p>
<p>Decision by the Tribunal</p>	<p>DENIED</p>

Respondent's Document Request No. 10	
Document(s) Requested	<p>For the period from 1 October 2017 to 13 August 2020, Correspondence between ██████████ and Mr Palmer, meeting minutes, file notes, advice, internal briefings and presentations relating to and recording discussions between ██████████ and Mr Palmer regarding the proposed and actual incorporation, structure and business operations of the Claimant (including the proposed locations for the incorporation of the Claimant) and its Singaporean subsidiaries, held by or in the possession, custody or control of Mr Palmer, ██████████ and/or the Claimant.</p> <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of the Claimant, Mr Palmer and/or ██████████.</p>
Relevance	<p>Reference to submissions</p> <p>SOPO, paras.335(e)-335(g), 337, 340-343. SODPO, paras. 450, 574, 595-604, 608-618. Rogers Report, para. G.5.4.1. Lys Report, paras. 523-525, 529-533. ██████████ WS, paras. 119, 130-135, 138. ██████████ WS, paras. 51-54, 110-118. ██████████ WS, paras. 12, 15-37.</p>
	<p>Comments</p> <p>Abuse of Process: The Respondent repeats the reasoning in Request No. 9, and particularly notes that the ██████████ WS, ██████████ WS and SODPO at para.574 state that there were a series of discussions from 2018 about why it was necessary to incorporate a new company, including for both financing and tax purposes. Further, ██████████ states that “in 2015 and through to the end of 2020 I was directly and almost daily in contact with ██████████ and executives of the Mineralogy group” (██████████ WS, para. 12).</p> <p>Denial of Benefits: The requested documents are also relevant to the Denial of Benefits objection, as the records of discussions between Mr Palmer and ██████████ are relevant to the real business logic for acquiring local businesses in Singapore, particularly as it is unusual to rely on a single advisor when contemplating a transaction of this size and complexity (see Lys Report, para. 532). The requested documents are material to the outcome of the Denial of Benefits objection (and the case) because the absence of business logic of the Claimant acquiring business operations in Singapore would support the Respondent's factual proposition that there are no synergies between the Claimant's subsidiaries in Singapore and Mineralogy and would suggest that the acquisition of those Singaporean subsidiaries and the subsequent business operations were not “genuine” but were for the purpose of obtaining treaty protection.</p> <p>Temporal scope of the request: The temporal scope for the request starts from the month prior to the Royalties Judgment being handed down. The Respondent repeats the reasoning in Request No. 1. The temporal scope ends on the date that the Claimant states is relevant for assessing “substantive business operations”, being the latest date on which discussions about the Claimant's business operations in Singapore would be relevant (see SODPO para. 450).</p>
Objections	<p>The Claimant's Objection to this Request No.10 comprises Part A (the Claimant's Response and Overall Objection), Part B (comprising Table A which shows the Respondent's actual Document Requests in itemized form) and Part C (the Claimant's Secondary Objections).</p> <p><u>PART A: CLAIMANT'S RESPONSE AND OVERALL OBJECTION</u></p>

The Claimant refers to and relies upon Part A of the Claimant's Objection to Request No. 1 and inter alia adopts such objection as part of the Claimant's Objection to Request No. 10.

PART B: THE RESPONDENT'S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 10

[Claimant's Table A has been removed and is produced separately]

PART C: THE CLAIMANT'S SECONDARY OBJECTIONS

All of the Objections contained within this Part C are made without prejudice to the objection in Part A and Table A, being the Claimant's Objection to the Respondent's Request No. 10. The Claimant relies upon its Objections set out in Part A as its primary response and the responses set out in this Part C are set out in the alternative.

The Claimant makes its Overall Objection in respect to document production for this Request No. 10. Without prejudice to the Claimant's Overall Objection, the Respondent's Document Request No. 10 is not one (1) Document Production Request but is actually 3 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 442 to No. 444 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No.1 and is an abuse of process. Accordingly, as Document Request No. 10 is not made in accordance with the requirements, spirit or intention of PO1, the Claimant is not required to respond.

Notwithstanding, the Claimant provides the following additional grounds of objection.

- (A) **Burden of Proof Objection:** As explained above, the Respondent bears no burden for proving facts asserted by the Claimant. The burden on the Respondent regarding its Abuse of Process claim is to show that the present dispute pertaining to the *Amendment Act* was foreseeable at the time of the corporate restructure. The documents requested above bear no relevance to the foreseeability of the present dispute. They are therefore not relevant to the case or material to its outcome. They do not go to a point for which the Respondent bears the burden of proof. This is evident from the Respondent's "comments" section where it states it is seeking the documents because the Claimant has made "*unsubstantiated statements.*" It is not for the Respondent to prove up these alleged unsubstantiated statements. Similarly, the Claimant bears the burden of proving it is an "investor" and has "made an investment" under the AANZFTA.

- (B) **Lack of Relevance/Materiality Objection:** The Claimant objects to production on the basis that the Respondent has not explained why the documents are relevant to proving its Abuse of Process objection. To prove that objection, the Respondent must demonstrate that the dispute was (reasonably) foreseeable at the time of the restructure. The commercial rationale for the restructure cannot be determinative of the Respondent's Abuse of Process objection – the sole factor relevant to the Respondent's position is the foreseeability of the dispute. The Respondent has not explained

	<p>how the documents requested are relevant or material to proving that the Claimant foresaw the dispute. The breadth of the request suggests that it is simply a fishing expedition.</p> <p>(C) To the extent that Request 10 seeks documents from Mr Martino, it appears to be inappropriate as these documents are not in the control of the Claimant. ██████████ is not an officer of the Claimant; he is an adviser to Mr Palmer (including in Mr Palmer’s personal capacity). It is entirely unclear how it is suggested that documents held by an adviser such as ██████████ can be required to be produced.</p>
<p>Reply</p>	<p>Reply to Part A and Part B</p> <p>The Respondent repeats its Reply to the Claimant’s Overall Objection at paras. 3-28 above and its Reply to Part B above at paras. 29-30.</p> <p>Reply to Part C: Specific objections to Request No. 10</p> <p>Using lettering consistent with the Claimant’s objections above, the Respondent replies to the objections as follows:</p> <p>(A) Burden of Proof Objection</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to Overall Objection at paras. 13-17 above). The Respondent is entitled to request documents necessary to resolving the contested issues and to advance the jurisdictional objections as characterised by the Respondent. The Respondent is entitled to test the case brought against it to advance its defence of the claim.</p> <p>(B) Lack of Relevance/Materiality Objection</p> <p>The Respondent has already explained why the requested categories of documents in Request No. 10 are relevant and material with specific reference to pleadings and evidence on the record. The requested documents are relevant to identifying the purpose of the Mineralogy Group Restructure, an issue clearly in dispute between the parties in relation to the Abuse of Process objection, rather than the foreseeability of the dispute, as asserted by the Claimant.</p> <p>(C) Possession, Custody or Control</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to Overall Objection at paras. 22-27 above). The Respondent also repeats the response given on this issue in relation to Request No. 1 above. More specifically, ██████████ (i) is a corporate adviser to Mineralogy, Mr Palmer and the Claimant, (ii) was appointed director of Mineralogy on 9 November 2020 (see Exh. C-74) and (iii) has provided a witness statement filed by the Claimant in these proceedings. Moreover, by Claimant’s own submission, “Mineralogy is controlled by the Claimant” (SODPO, para 50(a)). As such, the documents are within the possession, custody or control of the Claimant.</p>
<p>Decision by the Tribunal</p>	<p>GRANTED AS NARROWED DOWN</p> <p>For the period from 1 October 2017 to 29 January 2019, correspondence between ██████████ and Mr Palmer, meeting minutes, file notes, advice, internal briefings and presentations relating to and recording discussions between ██████████ and Mr Palmer regarding the proposed and actual incorporation (including the proposed locations for the incorporation of the</p>

	Claimant), held by or in the possession, custody or control of Mr Palmer, ■■■■■ ■■■■■ and/or the Claimant
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Respondent’s Document Request No. 11

<p>Document(s) Requested</p>	<p>For the period from 14 December 2018 to 29 March 2023 and for all applicable jurisdictions (Australia, New Zealand, and/or Singapore):</p> <ul style="list-style-type: none"> a. certificates of tax residency or equivalent Document for the Claimant, MIL, Mineralogy and Mr Palmer; b. Correspondence between MIL and New Zealand Inland Revenue relating to place of effective management for the purposes of the Convention between Australia and New Zealand for the Avoidance of Double Taxation with respect to Taxes on Income and Fringe Benefits and the Prevention of Fiscal Evasion; c. the competent authority determination obtained from either the Australian Taxation Office or New Zealand Inland Revenue determining MIL’s residency for the purposes of the <i>Convention between Australia and New Zealand for the Avoidance of Double Taxation with respect to Taxes on Income and Fringe Benefits and the Prevention of Fiscal Evasion</i>; d. Correspondence between the Claimant and/or MIL and the Australian Taxation Office relating to MIL’s status as a member of the Consolidated Tax Group; e. records of tax sharing agreements and tax funding agreements between the Claimant and MIL, and MIL and Mineralogy; f. Correspondence relating to any deeds of accession entered into by the Claimant; g. Correspondence demonstrating that MIL became the head entity of the Consolidated Tax Group; h. Goods and Services Tax or Value Added Tax or equivalent Document returns of each of the Claimant, MIL, Mineralogy and Mr Palmer; i. tax returns of the Claimant, MIL, Mineralogy and Mr Palmer (individual and/or consolidated and/or combined); j. records of annual accounting income, income and total value of assets for the Claimant, MIL, Mineralogy and Mr Palmer; <p>held by or within the possession, custody or control of the Claimant, MIL, Mineralogy, and/or Mr Palmer.</p> <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of the Claimant, MIL, Mineralogy, and/or Mr Palmer.</p>
<p>Relevance</p>	<p>Reference to submissions</p> <p>SOPO, paras. 336-343. SODPO, paras. 575-594. Notice of Intent (Exh. C-63), Annexure A. Lys Report, paras. 596-604. ██████████ WS, paras. 128-135. ██████████ WS, paras. 46, 60-69. ██████████ WS, paras. 27-36. Exh. C-495.</p>
	<p>Comments</p> <p>Abuse of Process: The requested documents are relevant to the Respondent’s Abuse of Process objection, because the Claimant at paras. 576-587 of the SODPO contends that a reason for the Mineralogy Group Restructure was to obtain tax advantages, including reducing ██████████ personal income tax rate and liability in Singapore on dividends paid to Mr Palmer. The Claimant states that the tax benefits “remain ongoing” (see ██████████ WS, para. 46), but it is not clear that these benefits have been materialised at all, let alone continue to be ongoing. The Respondent contests that this was a reason for the Mineralogy Group Restructure.</p> <p>The requested documents are material to the Abuse of Process objection (and the case) as they would reveal the alleged tax benefits received on dividends paid out from the Claimant and would assist in determining</p>

	<p>whether this was a determinative reason for the Mineralogy Group Restructure. The existence of tax advantages turns on the tax residency of each of the Claimant, MIL, Mineralogy and Mr Palmer, and the requested documents (particularly certificates of tax residency, tax returns, records of the flow of dividends, details of income and assets, contracts with Singapore and New Zealand entities, and any competent authority determination about tax residency) are relevant as they are necessary to determine the tax residency of each individual or entity.</p> <p>Temporal scope of the request: The temporal scope of this request covers the period from the date that MIL was incorporated until the date that the Claimant filed its Notice of Arbitration. The Respondent notes that the Claimant was not yet incorporated at the beginning of this period, and therefore documents from that entity will only be available from the time of incorporation.</p>
<p>Objections</p>	<p>The Claimant's Objection to this Request No. 11 comprises Part A (the Claimant's Response and Overall Objection), Part B (comprising Table A which shows the Respondent's actual Document Requests in itemized form) and Part C (the Claimant's Secondary Objections).</p> <p><u>PART A: CLAIMANT'S RESPONSE AND OVERALL OBJECTION</u></p> <p>The Claimant refers to and relies upon Part A of the Claimant's Objection to Request No. 1 and inter alia adopts such objection as part of the Claimant's Objection to Request No. 11.</p> <p><u>PART B: THE RESPONDENT'S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 11</u></p> <p><i>[Claimant's Table A has been removed and is produced separately]</i></p> <p><u>PART C: THE CLAIMANT'S SECONDARY OBJECTIONS</u></p> <p>All of the Objections contained within this Part C are made without prejudice to the objection in Part A and Table A, being the Claimant's Objection to the Respondent's Request No. 11. The Claimant relies upon its Objections set out in Part A as its primary response and the responses set out in this Part C are set out in the alternative.</p> <p>The Claimant makes its Overall Objection in respect to document production for this Request No. 11. Without prejudice to the Claimant's Overall Objection, the Respondent's Document Request No. 11 is not one (1) Document Production Request but is actually 40 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 445 to No. 484 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No.1 and is an abuse of process. Accordingly, as Document Request No. 11 is not made in accordance with the requirements, spirit or intention of PO1, the Claimant is not required to respond.</p> <p>Notwithstanding, the Claimant provides the following additional grounds of objection.</p> <p>(A) <u>Possession Objection</u>: Many of the requested documents are already in the possession, custody or control of the Respondent.</p>

	<p>They are documents held by its relevant agencies, the Australian Taxation Office and ASIC.</p> <p>(B) <u>Overly Broad and Burdensome Objection</u>: The Request pertains to a large volume of documents which would be time consuming and burdensome to search for and gather, given that the Respondent already has access to the documents and their lack of relevance as explained below.</p> <p>(C) <u>Lack of Relevance/Materiality Objection</u>: The Respondent’s alleged justification (in the Comments above) for this Request shows it is nothing but a fishing expedition and should be rejected outright.</p> <p>Overall, many of the documents sought by this request are simply not relevant for the reasons they are asserted by the Respondent to be relevant. Indeed, this request is bizarre and illogical in its terms and its broad scope. The fact that the Claimant contends that a reason for the Mineralogy Group Restructure was to obtain tax advantages does not justify a wide-ranging request for the production of documents such as certificates of tax residency, GST returns (and similar documents), tax returns and “records of annual accounting income, income and total value of assets” for a range of entities and individuals. This is especially so when the Respondent is the Commonwealth of Australia which is the repository under Australian Law of all such documents.</p> <p>(D) <u>Burden of Proof Objection</u>: The Respondent requests documents said to be relevant to proving the Claimant’s asserted commercial rationale for the restructure. The commercial rationale for the restructure is a fact asserted by the Claimant. Consequently, the Claimant bears the burden of proof for its asserted commercial rationale – not the Respondent. The Respondent bears the burden of proving that the dispute was reasonably foreseeable. None of the above requested documents are relevant or material to fulfilling this burden.</p>
<p>Reply</p>	<p>Reply to Part A and Part B</p> <p>The Respondent repeats its Reply to the Claimant’s Overall Objection at paras. 3-28 above and its Reply to Part B above at paras. 29-30.</p> <p>Reply to Part C: Specific objections to Request No. 11</p> <p>Using lettering consistent with the Claimant’s objections above, the Respondent replies to the objections as follows:</p> <p>(A) <u>Possession Objection</u></p> <p>The Respondent does not have in its possession, custody or control the documents requested. In particular, it notes many requested documents exist only in relation to the tax authorities of New Zealand or Singapore. The Respondent repeats its Reply to the Claimant’s Overall Objection at paras. 20 to 21.</p> <p>(B) <u>Overly Broad and Burdensome Objection</u></p>

	<p>The request is not overly broad or burdensome. The Respondent's requests are targeted, precise and straightforward, allowing the Claimant to conduct specific and targeted searches.</p> <p>(C) Lack of Relevance/Materiality Objection</p> <p>The Respondent has explained why the requested categories of documents in Request No. 11 are relevant and material to the issues in dispute with specific reference to pleadings and evidence on the record. The requested documents are relevant and material to the outcome of the Abuse of Process argument, for which the purpose of the Mineralogy Group Restructure will necessarily be an issue of fact to be determined by the Tribunal. The Claimant has asserted various tax rationales for the Mineralogy Group Restructure without putting into evidence contemporaneous tax records to support its assertions or to allow any interrogation of those claims, in a context where the Respondent's case is that, in fact, the objective purpose of the Mineralogy Group Restructure was to gain treaty protection.</p> <p>(D) Burden of Proof Objection</p> <p>The Respondent repeats its Reply to the Overall Objection at paras. 13-17 above. The Respondent is entitled to request documents necessary to resolving the objections it has raised, including abuse of process, and to advance its defence of the claim.</p> <p>Without any prejudice as to the nature of the initial request, in the interests of good faith and to meaningfully engage in the document production phase of the dispute, the Respondent is willing to narrow the scope of the request by not pressing its requests for parts (b), (e), (f), (g), (h) and (j) of the request. This is identified in strikethrough above.</p>
Decision by the Tribunal	DENIED

Respondent's Document Request No. 12	
Document(s) Requested	<p>For the period from 1 October 2017 to 29 March 2023 and for all applicable jurisdictions (Australia, New Zealand, and/or Singapore) records of dividends issued to the Claimant, MIL, and/or Mr Palmer by Mineralogy, the Claimant or MIL, including bank records or dividend distribution statements or equivalent Documents, held by or in the possession, custody or control of the Claimant, MIL, Mineralogy and/or Mr Palmer.</p> <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of the Claimant, MIL, Mineralogy, and/or Mr Palmer.</p>
Relevance	<p>Reference to submissions</p> <p>SOPO, paras. 336-343. SODPO, paras. 575-594. Notice of Intent (Exh. C-63), Annexure A. Lys Report, paras. 596-604. ██████████ WS, paras. 128-135. ██████████ WS, paras. 46, 60-69. ██████████ WS, paras. 27-36. Exh. C-495.</p>
	<p>Comments</p> <p>Abuse of Process: The requested documents are relevant to the Respondent's Abuse of Process objection, because the Claimant at paras. 576-587 of the SODPO contends that a reason for the Mineralogy Group Restructure was to obtain tax advantages, including reducing ██████████ personal income tax rate and liability in Singapore on dividends paid to Mr Palmer. The Respondent contests that this was a reason for the Mineralogy Group Restructure. The Claimant states that the tax benefits "remain ongoing" (see ██████████ WS, para. 46), but it is not clear that these benefits have been materialised at all, let alone continue to be ongoing. The requested documents are relevant as they will establish a record of the dividends that have been paid within the group both before and after the Mineralogy Group Restructure. Additionally, the requested documents are material as they would reveal the alleged tax benefits received on dividends paid out from the Claimant and would assist in determining whether this was a determinative reason for the Mineralogy Group Restructure.</p> <p>No Investor: The requested documents are also relevant to whether the Claimant actively "made an investment" within the meaning of Article 2(d) by making a meaningful contribution for the shares in Mineralogy, or whether it was simply a pass-through entity through which dividends were funnelled. They are material to the outcome of the case because the No Investor objection is based on the assertion that the Claimant did not actively "make an investment" and is therefore not entitled to treaty protection.</p> <p>No Investment: These documents are relevant to the Respondent's No Investment objection, as they will demonstrate what, if any, consideration was paid for the relevant shares, the actual cost, if any, of the Claimant's alleged investment, and what "risk", if any, was associated with the transactions. This is material to the outcome of the case because the No Investment objection is based on the assertion that no contribution was made and no risk was adopted in relation to the alleged investment, and therefore essential characteristics implied into the meaning of Article 2(c) are not established.</p> <p>Temporal scope of the request: The temporal scope of this request covers the period from the month prior to the Royalties Judgment being handed down until the date that the Claimant filed its Notice of Arbitration. It is relevant to the above issues to understand the flow of dividend in a period before and after the Mineralogy Group Restructure occurred. As to the relevance of the Royalties Judgment, the Respondent repeats the reasoning at Request No. 1. The Respondent notes that the Claimant and MIL were not yet</p>

	<p>incorporated at the beginning of this period, and therefore the documents for those entities will only be available from the time of incorporation.</p>
<p>Objections</p>	<p>The Claimant's Objection to this Request No.12 comprises Part A (the Claimants Response and Overall Objection), Part B (comprising Table A which shows the Respondent's actual Document Requests in itemized form) and Part C (the Claimant's Secondary Objections).</p> <p><u>PART A: CLAIMANT'S RESPONSE AND OVERALL OBJECTION</u></p> <p>The Claimant refers to and relies upon Part A of the Claimant's Objection to Request No.1 and inter alia adopts such objection as part of the Claimant's Objection to Request No.12.</p> <p><u>PART B: THE RESPONDENT'S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 12</u></p> <p><i>[Claimant's Table A has been removed and is produced separately]</i></p> <p><u>PART C: THE CLAIMANT'S SECONDARY OBJECTIONS</u></p> <p>All of the Objections contained within this Part C are made without prejudice to the objection in Part A and Table A, being the Claimant's Objection to the Respondent's Request No. 12. The Claimant relies upon its Objections set out in Part A as its primary response and the responses set out in this Part C are set out in the alternative.</p> <p>The Claimant makes its Overall Objection in respect to document production for this Request No. 12. Without prejudice to the Claimant's Overall Objection, the Respondent's Document Request No. 12 is not one (1) Document Production Request but is actually 12 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 485 to No. 496 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No. 1 and is an abuse of process. Accordingly, as Document Request No. 12 is not made in accordance with the requirements, spirit or intention of the relevant procedural order, the Claimant is not required to respond.</p> <p>Notwithstanding, the Claimant provides the following additional grounds of objection.</p> <p>(A) <u>Documents Already Produced Objection:</u> Contrary to para 5.2(c) of PO1 which provides that “<i>Each request for production shall...specify that the documents requested are not in the possession, custody or control of the requesting Party (or explain why it would be unreasonably burdensome for the requesting Party to produce them)</i>”, many responsive documents have already been produced by the Claimant (see, for example, Exh's. C-79, C-81, C-82, C-83, C-84, C-85, C-86, C-476, C-477, C-485, C-486, C-487, C-488, C-497, C-539, C-540 and C-555 and/or are in the Respondent's possession, as they have been filed with ASIC (an agency of the Respondent), and/or are available 24 hours a day 7 days a week on public registers online via the ASIC website at www.asic.gov.au for a small fee of \$47 and/or are available from the New Zealand Companies Office (NZCO) website 24 hours a day 7 days a week for free at www.companies-register.companiesoffice.govt.nz and/or are available from ASIC</p>

	<p>which has established data transfer arrangements with the NZCO that enables electronic transfer and receipt of information and documents for MIL²⁰</p> <p>(B) <u>Burden of Proof Objection</u>: The Respondent requests documents said to be relevant to proving the Claimant’s asserted commercial rationale for the restructure which is not relevant to foreseeability. The commercial rationale for the restructure is supported by evidence by the Claimant. Consequently, the Claimant has accepted the burden of proof for its asserted commercial rationale – not the Respondent. Similarly, the Claimant bears the burden of proving it is an “investor” and has “made an investment” under the AANZFTA.</p> <p>(C) <u>Lack of Relevance/Materiality Objection</u>: The Claimant objects to production on the basis that the Respondent has not explained why the documents are relevant to proving its Abuse of Process objection. To prove that objection, the Respondent must demonstrate that the dispute was (reasonably) foreseeable at the time of the restructure. The commercial rationale for the restructure cannot be determinative of the Respondent’s Abuse of Process objection for which the Respondent must prove the foreseeability of the dispute. The Respondent has not explained how the documents requested are relevant or material to proving that the Claimant foresaw the dispute.</p>
<p>Reply</p>	<p>Reply to Part A and Part B</p> <p>The Respondent repeats its Reply to the Claimant’s Overall Objection at paras. 3-28 above and its Reply to Part B above at paras. 29-30.</p> <p>Reply to Part C: Specific objections to Request No. 12</p> <p>Using lettering consistent with the Claimant’s objections above, the Respondent replies to the objections as follows:</p> <p>(A) Documents Already Produced Objection</p> <p>The Respondent acknowledges that the Claimant has already produced Minutes of a Director’s Meeting of Mineralogy for 2020, which contain a reference to a Declaration of Dividend from Mineralogy (Exh’s. C-539, C-540). The Claimant is not required to re-produce these documents. However, the documents already on the record do not provide complete evidence of the dividends declared by Mineralogy.</p> <p>The exhibits cited by the Claimant in its objection (Exh’s. C-79, C-81, C-82, C-83, C-84, C-85, C-86, C-476, C-477, C-485, C-486, C-487, C-488, C-497, and C-555) are financial statements and while they may contain dividend information, they are not individual “records of dividends issued to the Claimant, MIL, and/or Mr Palmer by Mineralogy, the Claimant or MIL, including bank records or dividend distribution statements” as sought by this request. The specific records the subject of Request No. 12 are necessary for the Respondent to respond properly to the Claimant’s assertions relating to dividends that were declared and decisions to retain earnings in circumstances where the financial statements provided by the Claimant are “cryptic” (see</p>

²⁰ ASIC Form 406 - https://download.asic.gov.au/media/4230101/406_20170503.pdf

	<p>Lys Report, para. 36 and accompanying footnote 7, paras. 109, 185). Further, unlike financial statements, the documents requested are likely to provide detailed insight into the alleged tax rationale for the Mineralogy Group Restructure. The documents that the Claimant alleges would be available online for a small fee are not responsive to this Request.</p> <p>(B) Burden of Proof Objection</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at paras. 13-17 above). The Respondent is entitled to request documents necessary to resolving the contested issues and to advance the jurisdictional objections as characterised by the Respondent. The Respondent is entitled to test the case brought against it to advance its defence of the claim.</p> <p>(C) Lack of Relevance/Materiality Objection</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at para. 18 above). The Respondent has already explained why the requested categories of documents in Request No. 12 are relevant and material to the issues in dispute with specific reference to pleadings and evidence on the record. The requested documents are material to the outcome of the Abuse of Process argument, for which the purpose of the Mineralogy Group Restructure will necessarily be an issue of fact to be determined by the Tribunal. As the request is targeting specifically to the Claimant’s asserted treatment of dividends, the requested documents are also clearly relevant to the Claimant’s assertion that it “made an investment” in conformity with AANZFTA Article 2(c), for reasons described herein.</p>
<p>Decision by the Tribunal</p>	<p>DENIED</p>

Respondent's Document Request No. 13	
Document(s) Requested	<p>For the period from 29 January 2019 to 29 March 2023, minutes, agendas and notes of meetings of, draft and final resolutions of and draft and final Board papers and reports prepared for the Boards of Directors of the Claimant and Mineralogy, containing discussions, decisions, due diligence and risk analyses evidencing the Claimant's engagement in day-to-day operations of Mineralogy, held by or within the possession, custody or control of Mineralogy, the Claimant and/or Mr Palmer.</p> <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of Mineralogy, the Claimant and/or Mr Palmer.</p>
Relevance	<p>Reference to submissions</p> <p>SOPO, paras. 179-181. SODPO, paras. 82, 303, 359. Lys Report, paras. 142-150, 527. ██████████ WS, paras. 38-39, 45-48.</p>
	<p>Comments</p> <p>Abuse of Process: The requested documents are relevant to the Respondent's Abuse of Process objection as they concern the purpose for incorporating and inserting the Claimant into the Mineralogy corporate chain, and whether there were any operational synergies between the Claimant and the broader Mineralogy Group. Professor Lys notes that "a critical motivation for such transactions are operational synergies. And in this case, there simply is no hint of any overlap between the marine engineering and cleaning businesses in Singapore, and the Claimant's mining operations in Australian and New Zealand." (see Lys Report, para. 527).</p> <p>The requested documents are material to the outcome of the Respondent's objection (and the case) because the Respondent's Abuse of Process objection is based on the argument that the Mineralogy Group Restructure was done for the purposes of obtaining treaty protection and that the restructure did not achieve any operational synergies.</p> <p>No Investor: The Claimant alleges that it made contributions through its initial investment and ongoing management of Mineralogy. The category of documents is relevant to whether there is a level of coordination and active management between the directors of Mineralogy and the Claimant to manage the Claimant's purported "contribution" in Mineralogy. The requested documents are material to the outcome of the case because the No investor objection is based on the assertion that the Claimant did not actively "make" an investment in that it did not contribute to Mineralogy.</p> <p>Temporal scope of the request: The temporal scope of this request covers the period from the date of the incorporation of the Claimant until the date that the Claimant filed its Notice of Arbitration, as this is the period during which the Claimant asserted that it has "made" an investment in Mineralogy.</p>
Objections	<p>The Claimant's Objection to this Request No. 13 comprises Part A (the Claimant's Response and Overall Objection), Part B (comprising Table A which shows the Respondent's actual Document Requests in itemized form) and Part C (the Claimant's Secondary Objections).</p> <p><u>PART A: CLAIMANT'S RESPONSE AND OVERALL OBJECTION</u></p> <p>The Claimant refers to and relies upon Part A of the Claimant's Objection to Request No. 1 and inter alia adopts such objection as part of the Claimant's Objection to Request No. 13.</p>

PART B: THE RESPONDENT'S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 13

[Claimant's Table A has been removed and is produced separately]

PART C: THE CLAIMANT'S SECONDARY OBJECTIONS

All of the Objections contained within this Part C are made without prejudice to the objection in Part A and Table A, being the Claimant's Objection to the Respondent's Request No. 13. The Claimant relies upon its Objections set out in Part A as its primary response and the responses set out in this Part C are set out in the alternative.

The Claimant makes its Overall Objection in respect to document production for this Request No. 13. Without prejudice to the Claimant's Overall Objection, the Respondent's Document Request No. 13 is not one (1) Document Production Request but is actually 3 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 497 to No. 499 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No.1 and is an abuse of process. Accordingly, as Document Request No. 13 is not made in accordance with the requirements, spirit or intention of PO1, the Claimant is not required to respond.

Notwithstanding, the Claimant provides the following additional grounds of objection.

- (A) Documents Already Produced Objection: Contrary to para 5.2(c) of PO1 which provides that “*Each request for production shall...specify that the documents requested are not in the possession, custody or control of the requesting Party (or explain why it would be unreasonably burdensome for the requesting Party to produce them)*”, responsive documents have already been produced by the Claimant (see, for example, Exh. C-480).
- (B) Overly Broad and Burdensome Objection: The broad temporal scope (from 29 January 2019 to 29 March 2023) and wide-ranging nature of the request means that it is likely searching for such documents will be a time consuming and costly exercise, disproportionate to the relevance and materiality of the documents.
- (C) Burden of Proof Objection: The Respondent requests documents said to be relevant to proving the Claimant's asserted commercial rationale for the restructure which is not relevant to foreseeability. The commercial rationale for the restructure is supported by evidence by the Claimant. Consequently, the Claimant has accepted the burden of proof for its asserted commercial rationale – not the Respondent. Similarly, the Claimant bears the burden of proving it is an “investor” and has “made an investment” under the AANZFTA.

Similarly, the Claimant bears the burden of proving it is an “investor” and has “made an investment” under the AANZFTA.

- (D) Lack of Relevance/Materiality Objection: The Claimant objects to production on the basis that the Respondent has not explained why

	<p>the documents are relevant to proving its Abuse of Process objection. To prove that objection, the Respondent must demonstrate that the dispute was (reasonably) foreseeable at the time of the restructure. The commercial rationale for the restructure cannot be determinative of the Respondent’s Abuse of Process objection for which the Respondent must prove the foreseeability of the dispute. The Respondent has not explained how the documents requested are relevant or material to proving that the Claimant foresaw the dispute.</p> <p>Moreover, the Respondent relies on Prof Lys’ asserted rationale for restructures generally being for “operational synergies”. This is not a rationale advanced by the Claimant for the present restructure. The relevance of operational synergies is not explained by the Respondent.</p> <p>The Request appears to be a fishing expedition.</p>
<p>Reply</p>	<p>Reply to Part A and Part B</p> <p>The Respondent repeats its Reply to the Claimant’s Overall Objection at paras. 3-28 above and its Reply to Part B above at paras. 29-30.</p> <p>Reply to Part C: Specific objections to Request No. 13</p> <p>Using lettering consistent with the Claimant’s objections above, the Respondent replies to the objections as follows:</p> <p>(A) Documents Already Produced Objection</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at paras. 10-11 above). More specifically, the documents sought in Request No. 13 are not on the record, contrary to the Claimant’s assertion. The exhibit cited by the Claimant in its objection (Exh. C-480) is merely one example of minutes from a general meeting of Mineralogy, however, it does not contain “discussions, decisions, due diligence and risk analyses evidencing the Claimant’s engagement in day-to-day operations of Mineralogy” as requested in Request No. 13.</p> <p>(B) Overly Broad and Burdensome Objection</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at paras. 6-8 above). The request is a narrow and specific category of the official records of Board meetings of two entities over less than a four-year period. It is a discrete search for a clearly defined set of corporate documents relating to limited subject matter.</p> <p>(C) Burden of Proof Objection</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at paras. 13-17 above). The Respondent is entitled to request documents necessary to resolving its jurisdictional objections, and to advance its defence of the claim, including unresolved facts in dispute such as the Claimant’s purported management “contribution” in Mineralogy, which has been put into issue by the Claimant.</p> <p>(D) Lack of Relevance/Materiality Objection</p>

	<p>The Respondent has already explained why the requested categories of documents in Request No. 13 are relevant and material to the issues in dispute with specific reference to pleadings and evidence on the record. These are central corporate decision-making documents and will provide a contemporaneous record of the reasons for the Mineralogy Group Restructure and the ongoing operation of the Mineralogy Group and will assist the Tribunal to resolve the dispute as to the purpose of the Mineralogy Group Restructure.</p>
Decision by the Tribunal	DENIED

Respondent's Document Request No. 14		
Document(s) Requested	<p>For the period from 21 January 2019 to 4 August 2022 due diligence reports, business valuations, and Correspondence between company directors of the Claimant relating to the actual or proposed acquisition by the Claimant of:</p> <ol style="list-style-type: none"> One Kleenmatic Pte Ltd (One Kleenmatic); Kleen Venture Pte Ltd (Kleen Venture); Visco Engineering Pte Ltd; Visco Offshore Engineering Pte Ltd; GCS Engineering Service Pte Ltd; other local companies or businesses in Singapore that the Claimant considered acquiring, <p>held by or in the possession, custody or control of the Claimant, One Kleenmatic, Kleen Venture and/or Mr Palmer.</p> <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of the Claimant, One Kleenmatic, Kleen Venture and/or Mr Palmer.</p>	
Relevance	Reference to submissions	<p>SOPO, paras 256-257. Lys Report, paras. 37-38. [REDACTED] WS, para. 32.</p>
	Comments	<p>Denial of Benefits: These documents are relevant to support the Respondent's Denial of Benefits objection, including the proposition that the Claimant's acquisition of its subsidiaries in Singapore did not have any apparent rationale or business logic, and therefore it lacks "substantive business operations" in the genuine sense. The [REDACTED] WS states that [REDACTED] recommended that "Joint Ventures, acquisition of local companies or businesses should be considered" but the basis for this advice has not been demonstrated or supported by evidence. The requested documents are material to the Tribunal's determination of whether the Claimant operates as an active holding company that makes genuine acquisitions in Singapore.</p> <p>Abuse of Process: Failure to produce business valuations or due diligence is also relevant to the Respondent's Abuse of Process objection: the Respondent's position is that the Mineralogy Group Restructure was carried out in order for the Claimant to create a façade of business operations in Singapore by acquiring Singaporean businesses and entering the Joint Venture Agreement dated 24 January 2020 (JVA).</p> <p>Temporal scope of the request: The temporal scope of this request is from the date that the Claimant was incorporated until it acquired the shares in One Kleenmatic and Kleen Venture, as this is the period during which evidence of the Claimant's reasoning for engaging with One Kleenmatic and Kleen Venture and acquiring GCS Engineering Service Pte Ltd, Visco Engineering Pte Ltd, and Visco Offshore Engineering Pte Ltd would have been considered.</p>
Objections	<p>The Claimant's Objection to this Request No. 14 comprises Part A (the Claimant's Response and Overall Objection), Part B (comprising Table A which shows the Respondent's actual Document Requests in itemized form) and Part C (the Claimant's Secondary Objections).</p> <p><u>PART A: CLAIMANT'S RESPONSE AND OVERALL OBJECTION</u></p> <p>The Claimant refers to and relies upon Part A of the Claimant's Objection to Request No. 1 and inter alia adopts such objection as part of the Claimant's Objection to Request No. 14.</p>	

PART B: THE RESPONDENT'S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 14

[Claimant's Table A has been removed and is produced separately]

PART C: THE CLAIMANT'S SECONDARY OBJECTIONS

All of the Objections contained within this Part C are made without prejudice to the objection in Part A and Table A, being the Claimant's Objection to the Respondent's Request No. 14. The Claimant relies upon its Objections set out in Part A as its primary response and the responses set out in this Part C are set out in the alternative.

The Claimant makes its Overall Objection in respect to document production for this Request No. 14. Without prejudice to the Claimant's Overall Objection, the Respondent's Document Request No. 14 is not one (1) Document Production Request but is actually 24 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 500 to No. 523 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No.1 and is an abuse of process. Accordingly, as Document Request No. 14 is not made in accordance with the requirements, spirit or intention of PO1, the Claimant is not required to respond.

Notwithstanding, the Claimant provides the following additional grounds of objection.

- (A) Overly Broad and Burdensome Objection: The request has a broad temporal scope (from 21 January 2019 to 4 August 2022) and relates to the actual or proposed acquisition by the Claimant of an unspecified number of business entities. The wide-ranging nature of the Request means that it is likely that searching for such documents will be a time consuming and costly exercise, disproportionate to the relevance and materiality of the documents.
- (B) Burden of Proof Objection: The Respondent requests documents said to be relevant to proving the Claimant's asserted commercial rationale for the restructure which is not relevant to foreseeability. The commercial rationale for the restructure is supported by evidence by the Claimant. Consequently, the Claimant has accepted the burden of proof for its asserted commercial rationale – not the Respondent. Similarly, the Claimant bears the burden of proving it is an "investor" and has "made an investment" under the AANZFTA.
- (C) Lack of Relevance/Materiality Objection: The Claimant objects to production on the basis that the Respondent has not explained why the documents are relevant to proving its Abuse of Process objection. The Respondent is on a fishing expedition for evidence to support its bald assertion that the business conducted by the Claimant in Singapore was a "façade". The Claimant has provided a large volume of evidence as to its Singapore operations. Document production should not be used as a fishing expedition to search for evidence to support assertions made without any basis and for which contrary evidence has been provided. In any case, it is not clear how the documents requested go to the Respondent's burden of proof for

	<p>its Abuse of Process objection that the dispute was (reasonably) foreseeable at the time of the restructure.</p> <p>The documents are also said to be relevant to the Respondent’s “denial of benefits” objection. However, denial of benefits cannot be asserted on the basis that the Respondent does not consider that the Claimant’s substantive business has “<i>business logic</i>” – that is not the test in the AANZFTA. Documents requested must go to the Respondent’s burden to prove that no substantive business operations exist in Singapore. These documents do not prove whether substantive business operations exist and therefore cannot be material to the outcome of the case.</p>
<p>Reply</p>	<p>Reply to Part A and Part B</p> <p>The Respondent repeats its Reply to the Claimant’s Overall Objection at paras. 3-28 above and its Reply to Part B above at paras. 29-30.</p> <p>Reply to Part C: Specific objections to Request No. 14</p> <p>Using lettering consistent with the Claimant’s objections above, the Respondent replies to the objections as follows:</p> <p>(A) Overly Broad and Burdensome Objection:</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at paras. 6-8 above), including its response on the temporal objection set out above at para. 8. The request is a narrow, specific category of the official records of business records, and correspondence relating to a limited subject matter, for entities over less than a four-year period.</p> <p>(B) Burden of Proof Objection</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at paras. 13-17 above). The Respondent is entitled to request documents necessary to resolving its jurisdictional objections, and to advance its defence of the claim, including unresolved facts in dispute such as the extent of, and reasons for the Claimant’s purported business activities in Singapore.</p> <p>(C) Lack of Relevance/Materiality Objection</p> <p>The Respondent has already explained why the requested categories of documents in Request No. 14 are relevant and material to the issues in dispute with specific reference to pleadings and evidence on the record. The requested documents are contemporaneous corporate records which will evidence any preparatory steps taken prior to the Claimant’s acquisition of the relevant companies in Singapore and will assist the Tribunal determine if the relevant companies are more than a mere façade of business operations in Singapore for the Claimant. As such, these documents are clearly of central relevance to this dispute.</p> <p>Without any prejudice as to the nature of the initial request, in the interests of good faith and to meaningfully engage in the document production phase of the dispute, the Respondent is willing to narrow the scope of the request by not pressing its requests for part (f) of the request. This is identified in strikethrough above.</p>
<p>Decision by the Tribunal</p>	<p>DENIED</p>

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Respondent's Document Request No. 15	
Document(s) Requested	<p>For the period from 21 January 2019 to 13 August 2020:</p> <p>(i) minutes, agendas and notes of meetings of the Boards of Directors of the Claimant;</p> <p>(ii) draft and final resolutions of the Boards of Directors of the Claimant;</p> <p>(iii) draft and final Board papers and reports prepared for meetings of the Boards of Directors of the Claimant;</p> <p>containing discussions, decisions, due diligence and risk analyses relating to the entry into, and terms of, the JVA, the Option Agreement (as defined in the JVA) and any share purchase agreement between the Claimant, One Kleenmatic and Kleen Venture;</p> <p>held by or within the possession, custody or control of the Claimant, One Kleenmatic, Kleen Venture.</p> <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of the Claimant, One Kleenmatic, and/or Kleen Venture.</p>
Relevance	Reference to submissions
	Comments
	<p>SOPO, paras. 240-242, 250-259. SODPO, paras. 387-389, 410-418, 450, 476-479. ██████████ WS, paras. 64-65. ██████████ WS, paras. 89-108. Lys Report, paras. 38, 355-363. Exh. C469.</p> <p>Denial of Benefits: These documents are relevant to the Respondent's Denial of Benefits objection as they are relevant to determining whether the business operations of the Joint Venture (JV) are those of the Claimant's subsidiaries or those of the Claimant itself. The documents would also clarify the extent to which the Claimant's Board of Directors makes decisions about the JV, noting that the day-to-day control of the Claimant's operations in Singapore is exercised by only two of the Claimant's seven directors (see, e.g. ██████████ WS, para. 37 and SODPO, para. 479). Other investor-State Tribunals have accepted that minutes of meetings of the Board of Directors (held in the country of incorporation of the relevant entity) and discussions of major investment decisions at these meetings are relevant in determining substantive business operations/substantial business activities.²¹ The requested documents are material to the outcome of the case because the Denial of Benefits objection turns on whether the Claimant had "substantive business operations".</p> <p>Temporal scope of the request: The temporal scope of this request covers the period from the date of the incorporation of the Claimant until the date of the alleged breach, which the Claimant asserts is the relevant date at which substantive business operations should be assessed.</p>
Objections	<p>The Claimant's Objection to this Request No. 15 comprises Part A (the Claimant's Response and Overall Objection), Part B (comprising Table A which shows the Respondent's actual Document Requests in itemized form) and Part C (the Claimant's Secondary Objections).</p> <p><u>PART A: CLAIMANT'S RESPONSE AND OVERALL OBJECTION</u></p>

²¹ *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain* (ICSID Case No ARB/14/1, Award of 16 May 2018), Exh. RLA-81; *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain* (ICSID Case No ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles of 12 March 2019), Exh, RLA-74.

The Claimant refers to and relies upon Part A of the Claimant's Objection to Request No. 1 and inter alia adopts such objection as part of the Claimant's Objection to Request No. 15.

PART B: THE RESPONDENT'S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 15

[Claimant's Table A has been removed and is produced separately]

PART C: THE CLAIMANT'S SECONDARY OBJECTIONS

All of the Objections contained within this Part C are made without prejudice to the objection in Part A and Table A, being the Claimant's Objection to the Respondent's Request No. 15. The Claimant relies upon its Objections set out in Part A as its primary response and the responses set out in this Part C are set out in the alternative.

The Claimant makes its Overall Objection in respect to document production for this Request No. 15. Without prejudice to the Claimant's Overall Objection, the Respondent's Document Request No. 15 is not one (1) Document Production Request but is actually 27 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 524 to No. 550 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No.1 and is an abuse of process. Accordingly, as Document Request No. 15 is not made in accordance with the requirements, spirit or intention of PO1, the Claimant is not required to respond.

Notwithstanding, the Claimant provides the following additional grounds of objection.

- (A) Lack of Relevance/Materiality Objection: The documents are said to be relevant to the Respondent's "denial of benefits" objection. The Respondent does not explain why documents discussing entry into (or the terms of) the JVA are relevant to proving that the Claimant did not operate a substantive business. The terms of the JVA are clear regarding the role of the Claimant and prior discussion of those terms is irrelevant.

The documents requested concern entry into the JVA and exercise of the Option Agreement and would not demonstrate whether a substantive business exists.

The Respondent relies on the *Masdar* case in its reasons for this Request. While the Tribunal did find it relevant that the company's Board meet in the country of incorporation, this was in the context of a company that had no employees and was simply a holding company for the investment. The tribunal in *Masdar* still found that it was an entity of substance. In the present case, the Claimant has provided evidence of business operations in Singapore far beyond simply being a holding company of the Mineralogy shares. It has demonstrated beyond all doubt that it has a substantive business and the Requests that are said to go to the denial of benefits objection cannot affect the outcome of the case, because the evidence of a substantive business is overwhelming.

	<p>Similarly, in <i>NextEra</i>, the Tribunal considered the employment of permanent staff to be a key factor in determining whether a substantive business existed. The Claimant has provided clear evidence of the employment of permanent staff. In <i>NextEra</i>, the Tribunal noted it was important that the company had a board of directors (recalling that in <i>PacRim</i> there was no board of directors) (at 236).</p>
<p>Reply</p>	<p>Reply to Part A and Part B</p> <p>The Respondent repeats its Reply to the Claimant’s Overall Objection at paras. 3-28 above and its Reply to Part B above at paras. 29-30.</p> <p>Reply to Part C: Specific objections to Request No. 15</p> <p>Using lettering consistent with the Claimant’s objections above, the Respondent replies to the objections as follows:</p> <p style="padding-left: 40px;">(A) Lack of Relevance/Materiality Objection</p> <p>The Respondent has already explained why the requested categories of documents in Request No. 15 are relevant and material to the issues in dispute with specific reference to pleadings and evidence on the record. At the heart of the disputed issue of the Claimant’s asserted substantive business operations in Singapore is the JVA and its implementation and operation. The Claimant’s asserted business in Singapore is largely made up of its role in the JVA. However, it appears from evidence that the Respondent has been able to gather from publicly available sources that the Kleenmatic business continued to operate as it had prior to entry into the JVA and there is no evidence that the parties to the JVA carried out their obligations under that agreement. The requested documents are relevant to the Respondent’s argument that the “substantive business operations” of the Claimant are nothing more than the business operations of other companies (SOPO, para. 242). Therefore, the requested documents are necessary for the Tribunal to determine this issue clearly in dispute between the parties in relation to the Denial of Benefits objection.</p> <p>The Respondent further submits that the Claimant’s comments on <i>Masdar</i> and <i>NextEra</i> have no bearing on the request as formulated by Australia.</p>
<p>Decision by the Tribunal</p>	<p>GRANTED</p>

Respondent's Document Request No. 16	
Document(s) Requested	<p>During the period from 14 December 2018 to 13 August 2020;</p> <p>a. contracts (including pro forma contracts and joint ventures) between the Claimant and other Singaporean entities for the provision of goods or services in Singapore;</p> <p>b. contracts (including pro forma contracts and joint ventures) between MIL and other New Zealand entities for the provision of goods or services in New Zealand,</p> <p>held by or in the possession, custody or control of the Claimant, MIL, One Kleenmatic, Kleen Venture and/or Mr Palmer.</p> <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of the Claimant, MIL, One Kleenmatic, Kleen Venture and/or Mr Palmer.</p>
Relevance	<p>Reference to submissions</p> <p>SOPPO, paras. 242, 336-343. SODPO, paras. 450, 574-602. Notice of Intent (Exh. C-63), Annexure A. Lys Report, paras. 596-604. Vickers WS, paras. 124-125. ██████████ WS, paras. 128-136. ██████████ WS, paras. 46, 60-69, 83, 85, 134. ██████████ WS, paras. 27-36.</p>
	<p>Comments</p> <p>Denial of Benefits: The requested documents in part (a) are relevant to whether the Claimant had substantive business operations in Singapore; namely, relevant to determine the level of involvement and control the Claimant exercised over the operations of One Kleenmatic and Kleen Venture, including whether it is actively involved in the day-to-day business of those subsidiaries by entry into contracts relevant to the running of the JVA and the Kleenmatic businesses. This is material to the outcome of the case because the Denial of Benefits objection turns on whether the Claimant had genuine “substantive business operations” of its own, rather than relying upon the activities of subsidiaries.</p> <p>Abuse of Process: The requested documents in part (b) are relevant to the Respondent's Abuse of Process objection as they concern the purpose of incorporating the Claimant and the Mineralogy Group Restructure, and to determine the tax residency of MIL and the Claimant. They are also material to the outcome of that objection (and the case).</p> <p>Temporal scope of the request: The temporal scope of this request covers the period from the date of MIL's incorporation in New Zealand. This is the relevant starting point at which contracts between MIL and New Zealand entities are likely to have been entered, until the date of the alleged breach, which the Claimant asserts is the relevant date at which substantive business operations should be assessed.</p>
Objections	<p>The Claimant's Objection to this Request No. 16 comprises Part A (the Claimant's Response and Overall Objection), Part B (comprising Table A which shows the Respondent's actual Document Requests in itemized form) and Part C (the Claimant's Secondary Objections).</p> <p><u>PART A: CLAIMANT'S RESPONSE AND OVERALL OBJECTION</u></p> <p>The Claimant refers to and relies upon Part A of the Claimant's Objection to Request No. 1 and inter alia adopts such objection as part of the Claimant's Objection to Request No. 16.</p>

PART B: THE RESPONDENT'S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 16

[Claimant's Table A has been removed and is produced separately]

PART C: THE CLAIMANT'S SECONDARY OBJECTIONS

All of the Objections contained within this Part C are made without prejudice to the objection in Part A and Table A, being the Claimant's Objection to the Respondent's Request No. 16. The Claimant relies upon its Objections set out in Part A as its primary response and the responses set out in this Part C are set out in the alternative.

The Claimant makes its Overall Objection in respect to document production for this Request No. 16. Without prejudice to the Claimant's Overall Objection, the Respondent's Document Request No. 16 is not one (1) Document Production Request but is actually 10 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 551 to No. 560 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No.1 and is an abuse of process. Accordingly, as Document Request No. 16 is not made in accordance with the requirements, spirit or intention of PO1, the Claimant is not required to respond.

Notwithstanding, the Claimant provides the following additional grounds of objection.

- (A) Overly Broad and Burdensome Objection: This Request is overly broad and burdensome. The Claimant is being asked to produce contracts of every description over a (almost) two-year period. It will require considerable time and resources to locate and produce all such contracts. This is disproportionate to the relevance and materiality of the documents.
- (B) Documents Already Produced Objection: Contrary to para 5.2(c) of PO1 which provides that “*Each request for production shall...specify that the documents requested are not in the possession, custody or control of the requesting Party (or explain why it would be unreasonably burdensome for the requesting Party to produce them)*”, many responsive documents have already been produced by the Claimant (see, for example, Exh C-96, including engagement letters with five professional service providers. At a broader level, the Claimant has provided considerable evidence of its business activities in Singapore – far in excess of what is required to prove a substantive business according to the case authorities. Having to produce further documents that relate to a point already proven in the record is a waste of time and resources.
- (C) Burden of Proof Objection: The Respondent states that the documents requested are relevant to proving its Abuse of Process objection because they go to the tax residency of MIL and the Claimant. The Respondent makes no attempt to explain why the tax residency of these companies is relevant to discharging its burden of proving that the dispute was reasonably foreseeable at the time of the restructure. The tax residency of the Claimant is not an issue upon which the Respondent bears the burden of proof.

	<p>(D) <u>Lack of Relevance/Materiality Objection</u>: The Claimant objects to production on the basis that the Respondent has not explained why the documents are relevant to proving its Abuse of Process objection. To prove that objection, the Respondent must demonstrate that the dispute was (reasonably) foreseeable at the time of the restructure. The commercial rationale for the restructure cannot be determinative of the Respondent's Abuse of Process objection for which the Respondent must prove the foreseeability of the dispute. The Respondent has not explained how the documents requested (and in particular the tax status of MIL) are relevant or material to proving that the Claimant foresaw the dispute.</p>
Reply	<i>In the spirit of narrowing the requests and focusing on the most important issues, the Respondent agrees to withdraw this request.</i>
Decision by the Tribunal	NO DECISION REQUIRED

Respondent's Document Request No. 17		
Document(s) Requested	<p>For the period from 24 January 2020 to 13 August 2020, the following Documents relating to the Claimant's implementation of the JV:</p> <ol style="list-style-type: none"> a. minutes, calendar invites, resolutions or decisions and agendas of meetings held by the Joint Venture Committee ("Committee"), as defined in the "Definitions" section of the JVA; b. Documents recording directions or requests made by the Manager pursuant to clauses 3.1(b), 6, 10.2 and 21 of the JVA; c. Documents recording transfers of interests in property between the Claimant, One Kleenmatic and Kleen Venture; d. contracts entered by the Claimant for the transfer, purchase, sale or lease of goods and equipment; e. employment or engagement contracts for employees or contractors of the Claimant; f. records of transfer of employment or engagement contracts from One Kleenmatic and Kleen Venture to the Claimant pursuant to cl 24 of the JVA; g. the Option Agreement (as defined in the JVA); h. any share purchase agreement between the Claimant, One Kleenmatic and Kleen Venture; i. annual business plans and budgets prepared by the Claimant pursuant to clause 6 of the JVA, and Correspondence relating to annual business plans and budgets; j. bank account statements and records of transactions for business bank accounts opened and/or operated by the Claimant for the JV; k. Correspondence between company executives and directors of One Kleenmatic, Kleen Venture and the Claimant evidencing discussions pertaining to the entry into and negotiation of the JVA and the Option Agreement (as defined in the JVA). <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of the Claimant, One Kleenmatic, Kleen Venture and/or Mr Palmer.</p>	
Relevance	Reference to submissions	<p>SOPO, paras. 255-257. SODPO, para. 450. Vickers WS, paras. 45-51, 96. ██████████ WS, paras. 48, 64-79. ██████████ WS, paras. 89-105, 141-142. JVA, cll 2, 3.1(b), 6, 10.2, 11.2, 12, 13, 14, 16, 21, 24 (Exh. C-469). ██████████ Declaration, para. 12 (Exh. C-154, p. 9).</p>
	Comments	<p>Denial of Benefits: The requested documents are relevant to the Respondent's Denial of Benefits objection as they concern the Claimant's business activities in Singapore, and would demonstrate whether the Claimant has its own business activities or merely relies on the activities of its subsidiaries to meet the threshold for "substantive business operations" for denial of benefits.²² The Claimant states that it entered into the JVA, which imposes certain obligations on the Claimant, One Kleenmatic and Kleen Venture, but has not provided documentary evidence supporting the extent to which these obligations were carried out in practice. In particular, there is no documentary evidence of transfer of staff or assets between the Claimant, One Kleenmatic and Kleen Venture, directions given by the Manager under the JVA, meetings or decisions of the Committee, the Claimant's involvement in the day-to-day business, or management expertise offered by the Claimant. Whether the One Kleenmatic or Kleen Venture operate in the same way as before the JVA was entered into is directly relevant to whether the Claimant</p>

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Pac Rim Cayman LLC v Republic of El Salvador (ICSID Case No ARB/09/12, Decision on Jurisdiction of 1 June 2012), paras. 4.64-5.

	<p>carries on business activities of its own, and no documentary evidence has been provided to demonstrate that such operations have changed. The requested documents are material to the outcome of the case because the Denial of Benefits objection turns on whether the Claimant had “substantive business operations” in Singapore.</p> <p>Further, employment contracts for all of the Claimant’s employees are relevant to the Respondent’s argument that “no evidence of any staff employed at the Claimant could execute on the stated purpose for creating Zeph” (SOPO, para. 240).</p> <p>Temporal scope of the request: The temporal scope for this request is from the date that the JVA was entered into until the date of the alleged breach, which the Claimant asserts is the relevant date at which substantive business operations should be assessed. This is the period during which evidence of the Claimant’s alleged business operations arising from the JVA could be relevant.</p>
<p>Objections</p>	<p>The Claimant’s Objection to this Request No. 17 comprises Part A (the Claimant’s Response and Overall Objection), Part B (comprising Table A which shows the Respondent’s actual Document Requests in itemized form) and Part C (the Claimant’s Secondary Objections).</p> <p><u>PART A: CLAIMANT’S RESPONSE AND OVERALL OBJECTION</u></p> <p>The Claimant refers to and relies upon Part A of the Claimant’s Objection to Request No. 1 and inter alia adopts such objection as part of the Claimant’s Objection to Request No. 17.</p> <p><u>PART B: THE RESPONDENT’S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 17</u></p> <p><i>[Claimant’s Table A has been removed and is produced separately]</i></p> <p><u>PART C: THE CLAIMANT’S SECONDARY OBJECTIONS</u></p> <p>All of the Objections contained within this Part C are made without prejudice to the objection in Part A and Table A, being the Claimant’s Objection to the Respondent’s Request No. 17. The Claimant relies upon its Objections set out in Part A as its primary response and the responses set out in this Part C are set out in the alternative.</p> <p>The Claimant makes its Overall Objection in respect to document production for this Request No. 17. Without prejudice to the Claimant’s Overall Objection, the Respondent’s Document Request No. 17 is not one (1) Document Production Request but is actually 44 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 561 to No. 604 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No.1 and is an abuse of process. Accordingly, as Document Request No. 17 is not made in accordance with the requirements, spirit or intention of PO1, the Claimant is not required to respond.</p> <p>Notwithstanding, the Claimant provides the following additional grounds of objection.</p>

	<p>(A) <u>Overly Broad and Burdensome Objection</u>: This Request is overly broad, burdensome and is a fishing expedition. While defined in temporal scope, the Respondent is asking for a broad range of documents that have no obvious connection to the points for it bears the burden of proof. For example, sub-request (b) seeks “<i>documents recording directions</i>”. The Tribunal directed the parties not to ask for “<i>documents</i>”, but to be specific as the type of document being requested. A similar objection applies at the very least to sub-requests (d), (j) and (k). Effectively the Respondent is requesting every document that evidences the running of the business for an eight-month period. The broad scope and multiple elements to this Request means that there are likely to be thousands of responsive documents. It will be a time consuming and costly exercise to search and produce these documents, disproportionate to the relevance and materiality of the documents.</p> <p>(B) <u>Documents Already Produced / Point Proven Objection</u>: Responsive documents have already been produced proving a number of the elements requested. The example of the evidence of the Claimant’s employees is provided in the Claimant’s submission. At a broader level, the Claimant has provided considerable evidence of its business activities in Singapore – far in excess of what is required to prove a substantive business according to the case authorities. Having to produce thousands of documents that relate to a point already proven in the record is a waste of time and resources.</p>
<p>Reply</p>	<p>Reply to Part A and Part B</p> <p>The Respondent repeats its Reply to the Claimant’s Overall Objection at paras. 3-28 above and its Reply to Part B above at paras. 29-30.</p> <p>Reply to Part C: Specific objections to Request No. 17</p> <p>Using lettering consistent with the Claimant’s objections above, the Respondent replies to the objections as follows:</p> <p>(A) Overly Broad and Burdensome Objection</p> <p>The Claimant makes the serious allegation at para. 17(c) of its Overall Objection that this request is contrary to good faith. The Respondent repeats its Reply to the Overall Objection at para. 9 and notes that Request No. 17 contains specific references and particulars to the underlying JVA and is restricted to a period of eight months to enable the Claimant to carry out effective searches. For example, the Claimant has not provided evidence to substantiate the Claimant’s alleged active day-to-day involvement toward employees, other than providing evidence of the payment of Central Provident Fund (CPF) Board contributions made on behalf of employees (Exh. C-91). The Respondent notes that under Singaporean law it is possible for a related company of the employer (e.g. a parent or subsidiary) to make CPF contributions on behalf of the employer. Therefore, evidence of payment of CPF contributions does not in itself prove that Zeph was the employer of individuals who received those payments. The requested documents are required to enable the Tribunal to determine whether the Claimant in fact has employees of its own for the purposes of determining the Denial of Benefits objection. Similarly, the other documents requested are sufficiently particularized to test the implementation of the JVA and verify whether the Claimant genuine business operations in Singapore.</p>

	<p style="text-align: center;">(B) Documents Already Produced / Point Proven Objection</p> <p>The Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at paras. 10-11 above). More specifically, the documents sought in Request No. 17 are not on the record, contrary to the Claimant’s assertion. The Claimant has not provided the key documents relating to the implementation of the JVA, for example the Option Agreement. Without this evidence, the Respondent is at a significant disadvantage, particularly as the Claimant has made specific reference in the SODPO to the implementation of the JVA (para. 414) but has not provided evidence to substantiate these assertions aside from the JVA itself.²³ It is not clear whether the obligations under the JVA were carried out in practice and the documents sought are relevant and material to determining these factual questions.</p>
Decision by the Tribunal	GRANTED

²³ For example, in para. 414(f) SODPO, the Claimant asserts that it was “responsible for creating an annual business plan and budget for the Joint Venture” but has not provided any documents evidencing annual business plans and budgets prepared for the Joint Venture.

Respondent's Document Request No. 18		
Document(s) Requested	<p>For the period from 24 January 2020 to 13 August 2020, records of transactions made or authorised by the Claimant specifically:</p> <ol style="list-style-type: none"> general ledgers for the Claimant; general ledgers for the JVA; bank statements showing the payment or receipt of \$700,000 referred to in cl 5 of the JVA; payment authorisations issued by the Claimant. <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of the Claimant, One Kleenmatic, Kleen Venture and/or Mr Palmer.</p>	
Relevance	Reference to submissions	<p>SOPO, paras. 243. Lys Report, para. 36 and footnote 7, paras. 109, 185, 205(b) and 358. JVA, cll 3, 5 and 11. (Exh. C-469).</p>
	Comments	<p>Denial of Benefits: The requested category of documents is relevant to the Respondent's Denial of Benefits objection, and its position that the Claimant does not have "genuine" substantive business operations in Singapore. The requested documents are material to the outcome of the objection (and the case) as they are determinative of the Claimant's financial operations and the extent to which the Claimant is involved in the financial operations of One Kleenmatic and Kleen Venture. In particular, general ledgers, bank statements and transaction records are necessary to understand the Claimant's financial statements in circumstances where the financial statements provided by the Claimant are "cryptic" (see Lys Report, paras. 36 footnote 7, 109 and 185).</p> <p>While the JVA states that the Claimant was obliged to contribute SGD 700,000 in the JV, there is no contemporaneous documentary evidence demonstrating that this amount was paid. These documents are material to the Respondent's case that the Claimant does not meet the threshold of substantive business operations.</p> <p>Temporal scope of the request: The temporal scope for this request is from the date that JVA was entered into until the date of the alleged breach, which the Claimant asserts is the relevant date at which substantive business operations should be assessed. This is the period during which evidence of the Claimant's alleged business operations arising from the JVA could be relevant.</p>
Objections	<p>The Claimant's Objection to this Request No. 18 comprises Part A (the Claimant's Response and Overall Objection), Part B (comprising Table A which shows the Respondent's actual Document Requests in itemized form) and Part C (the Claimant's Secondary Objections).</p> <p><u>PART A: CLAIMANT'S RESPONSE AND OVERALL OBJECTION</u></p> <p>The Claimant refers to and relies upon Part A of the Claimant's Objection to Request No. 1 and inter alia adopts such objection as part of the Claimant's Objection to Request No. 18.</p> <p><u>PART B: THE RESPONDENT'S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 18</u></p> <p><i>[Claimant's Table A has been removed and is produced separately]</i></p> <p><u>PART C: THE CLAIMANT'S SECONDARY OBJECTIONS</u></p>	

	<p>All of the Objections contained within this Part C are made without prejudice to the objection in Part A and Table A, being the Claimant’s Objection to the Respondent’s Request No. 18. The Claimant relies upon its Objections set out in Part A as its primary response and the responses set out in this Part C are set out in the alternative.</p> <p>The Claimant makes its Overall Objection in respect to document production for this Request No. 18. Without prejudice to the Claimant’s Overall Objection, the Respondent’s Document Request No. 18 is not one (1) Document Production Request but is actually 16 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 605 to No. 620 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No.1 and is an abuse of process. Accordingly, as Document Request No. 18 is not made in accordance with the requirements, spirit or intention of PO1, the Claimant is not required to respond.</p> <p>Notwithstanding, the Claimant provides the following additional grounds of objection.</p> <p>(A) <u>Point Proven Objection</u>: The Claimant has provided considerable evidence of its business activities in Singapore – far in excess of what is required to prove a substantive business according to the case authorities. Having to produce a wide range of documents (such as all payment authorisations) that relate to a point already proven in the record is a waste of time and resources. Further, the JVA is subject to confidentiality provisions.</p>
<p>Reply</p>	<p>Reply to Part A and Part B</p> <p>The Respondent repeats its Reply to the Claimant’s Overall Objection at paras. 3-28 above and its Reply to Part B above at paras. 29-30.</p> <p>Reply to Part C: Specific objections to Request No. 18</p> <p>Using lettering consistent with the Claimant’s objections above, the Respondent replies to the objections as follows:</p> <p>(A) Point Proven Objection</p> <p>The Respondent has already explained why the requested categories of documents, including “general ledgers” are necessary. The Claimant has not provided probative documentary evidence that its business operations in Singapore are “genuine”. These general ledgers are particularly necessary where the evidence provided by the Claimant, such as financial statements, are “cryptic” and inconclusive (see Lys Report, paras. 36 footnote 7, 109 and 185). The Claimant states that “the JVA is subject to confidentiality provisions” but has not identified any specific documents that contain protected information or explained the relevant confidentiality provisions, including by identifying whether the responsive documents are covered by those provisions.</p> <p>Without any prejudice as to the nature of the initial request, in the interests of good faith and to meaningfully engage in the document production phase of the dispute, the Respondent is willing to narrow its request to delete the inclusion of sub-request (d), as identified in strikethrough above.</p>

Decision by the Tribunal	GRANTED AS NARROWED DOWN (by the Respondent)
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Respondent's Document Request No. 19	
Document(s) Requested	<p>For the period from 1 May 2019 to 18 February 2022,</p> <p>(i) Correspondence; and</p> <p>(ii) Board minutes of any of the Claimant, One Kleenmatic or Kleen Venture,</p> <p>relating to the reason for filing:</p> <p>a. the amended financial statements of Kleen Venture and One Kleenmatic for the period ended 30 June 2020;</p> <p>b. the Notices of Error filed with Accounting and Corporate Regulatory Authority on 18 February 2022,</p> <p>held by or in the possession, custody or control of the Claimant, One Kleenmatic and/or Kleen Venture.</p> <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of the Claimant, One Kleenmatic and/or Kleen Venture.</p>
Relevance	Reference to submissions
	Comments
	<p>SOPO, paras. 254-256.</p> <p>Lys Report, paras. 350-353.</p> <p>One Kleenmatic revised financial statement for the period ending 30 June 2020 (Exh. R-413).</p> <p>Kleen Venture revised financial statement for the period ending 30 June 2020 (Exh. R-414).</p> <p>Denial of Benefits: The requested documents are relevant to the Respondent's Denial of Benefits objection, and establishing whether the Claimant has its own business operations or whether its operations are those of its subsidiaries, as financial statements are relevant to determining whether an entity has "substantive business operations". Both Kleen Venture and One Kleenmatic filed revised financial statements in the year ended 30 June 2020, being the year that the JVA was entered and there is no evidence of why the financial statements were revised. The requested documents are material to the outcome of the case because the Denial of Benefits objection relies on the assertion that the Claimant does not have genuine substantive business operations.</p> <p>Temporal scope of the request: The temporal scope of this request covers the period from the start of the period accounted for in the financial statements of One Kleenmatic and Kleen Venture for the period ended 30 June 2020, until the date the Notices of Error were filed with the Accounting and Corporate Regulatory Authority, as this is the likely period during which the reasons for filing these documents were discussed.</p>
Objections	<p>The Claimant's Objection to this Request No. 19 comprises Part A (the Claimant's Response and Overall Objection), Part B (comprising Table A which shows the Respondent's actual Document Requests in itemized form) and Part C (the Claimant's Secondary Objections).</p> <p><u>PART A: CLAIMANT'S RESPONSE AND OVERALL OBJECTION</u></p> <p>The Claimant refers to and relies upon Part A of the Claimant's Objection to Request No. 1 and inter alia adopts such objection as part of the Claimant's Objection to Request No. 19</p> <p><u>PART B: THE RESPONDENT'S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 19</u></p> <p><i>[Claimant's Table A has been removed and is produced separately]</i></p>

	<p><u>PART C: THE CLAIMANT’S SECONDARY OBJECTIONS</u></p> <p>All of the Objections contained within this Part C are made without prejudice to the objection in Part A and Table A, being the Claimant’s Objection to the Respondent’s Request No. 19. The Claimant relies upon its Objections set out in Part A as its primary response and the responses set out in this Part C are set out in the alternative.</p> <p>The Claimant makes its Overall Objection in respect to document production for this Request No. 19. Without prejudice to the Claimant’s Overall Objection, the Respondent’s Document Request No. 19 is not one (1) Document Production Request but is actually 12 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 621 to No. 632 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No.1 and is an abuse of process. Accordingly, as Document Request No. 19 is not made in accordance with the requirements, spirit or intention of PO1, the Claimant is not required to respond.</p> <p>Notwithstanding, the Claimant provides the following additional grounds of objection.</p> <p>(A) <u>Lack of Relevance/Materiality Objection</u>: It is entirely unclear how or why the documents requested are relevant to the case or material to its outcome. The Respondent simply states that there is no evidence of why the financial statements were revised and that the Denial of Benefits objection relies on the assertion that the Claimant does not have genuine substantive business operations. How the requested documents (related to the amendment of accounts) will show that no substantive business exists is not explained at all. It appears that the request is simply a fishing expedition.</p> <p>(B) <u>Point Proven Objection</u>: The Claimant has provided considerable evidence of its business activities in Singapore – far in excess of what is required to prove a substantive business according to the case authorities. Having to produce a wide range of documents (such as all payment authorisations) that relate to a point already proven in the record is a waste of time and resources.</p>
<p>Reply</p>	<p>Reply to Part A and Part B</p> <p>The Respondent repeats its Reply to the Claimant’s Overall Objection at paras. 3-28 above and its Reply to Part B above at paras. 29-30.</p> <p>Reply to Part C: Specific objections to Request No. 19</p> <p>Using lettering consistent with the Claimant’s objections above, the Respondent replies to the objections as follows:</p> <p>(A) <u>Lack of Relevance/Materiality Objection</u></p> <p>The Respondent has already explained why the requested categories of documents in Request No. 19 are relevant and material to the issues in dispute with specific reference to pleadings and evidence on the record. The original financial statements treat One Kleenmatic and Kleen Venture as separate entities from the JVA, whereas the revised financial statements treat the entities as part of the JVA. The decision to revise the financial statements after the fact is relevant to determining the extent of the Claimant’s business operations in Singapore. The Respondent is entitled to request documents</p>

	<p>necessary to resolving the arguments and objections it has raised, including unresolved facts in dispute such as whether the Claimant has “genuine substantive business operations”, or whether the “amended financial statements” contribute to a business façade in Singapore.</p> <p>(B) Point Proven Objection</p> <p>The Respondent submits that the Claimant’s objection does not appear to be relevant, as Request No. 19 does not request “payment authorisations”. In any event, on this issue generally, the Respondent repeats its Reply to this issue as raised in the Overall Objection (see Reply to the Overall Objection at para. 12 above).</p>
<p>Decision by the Tribunal</p>	<p>DENIED</p>

Respondent's Document Request No. 20	
Document(s) Requested	<p>a. For the period from 21 January 2019 to 13 August 2020, records of real property interests in Singapore held by the Claimant, specifically certificates of title, transfer forms, property title records, title searches recording registration of interests in property, leases and deeds of transfer of interest in property.</p> <p>b. For the period from 24 January 2020 until 29 March 2023 13 August 2020, records of real property interests in Singapore held by One Kleenmatic and/or Kleen Venture, specifically certificates of title, transfer forms, property title records, title searches recording registration of interests in property, leases and deeds of transfer of interest in property.</p> <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of Mineralogy, the Claimant, One Kleenmatic, Kleen Venture, and/or Mr Palmer.</p>
Relevance	Reference to submissions
	Comments
Objections	<p>SOPO, para. 238, 250. Vickers WS, paras. 34-40. JVA, cl 9 (Exh. C-469).</p> <p>Denial of Benefits: The requested documents are relevant to determining whether the Claimant has “genuine” substantive business operations and the manner in which the JVA operated in practice as property interests held by each entity may be relevant to this question. The requested documents are material because the Denial of Benefits relies on the assertion that the Claimant does not have genuine substantive business operations.</p> <p>Abuse of Process: The requested documents are also relevant and material to the primary purpose for the Mineralogy Group Restructure. The Respondent repeats the reasoning in Request No. 1.</p> <p>Temporal scope of the request: The temporal scope of part (a) covers the period from the Claimant’s incorporation until the date the Claimant asserts is the relevant date for assessing “substantive business operations”.</p> <p>The temporal scope of part (b) covers the period from the date the JVA was entered into until the date the Claimant asserts is the relevant date for assessing “substantive business operations”.</p> <p>The Claimant’s Objection to this Request No.20 comprises Part A (the Claimant’s Response and Overall Objection), Part B (comprising Table A which shows the Respondent’s actual Document Requests in itemized form) and Part C (the Claimant’s Secondary Objections).</p> <p><u>PART A: CLAIMANT’S RESPONSE AND OVERALL OBJECTION</u></p> <p>The Claimant refers to and relies upon Part A of the Claimant’s Objection to Request No. 1 and inter alia adopts such objection as part of the Claimant’s Objection to Request No. 20.</p> <p><u>PART B: THE RESPONDENT’S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 20</u></p> <p><i>[Claimant’s Table A has been removed and is produced separately]</i></p> <p><u>PART C: THE CLAIMANT’S SECONDARY OBJECTIONS</u></p> <p>All of the Objections contained within this Part C are made without prejudice to the objection in Part A and Table A, being the Claimant’s Objection to the</p>

	<p>Respondent’s Request No. 20. The Claimant relies upon its Objections set out in Part A as its primary response and the responses set out in this Part C are set out in the alternative.</p> <p>The Claimant makes its Overall Objection in respect to document production for this Request No. 20. Without prejudice to the Claimant’s Overall Objection, the Respondent’s Document Request No. 20 is not one (1) Document Production Request but is actually 10 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 633 to No. 642 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No.1 and is an abuse of process. Accordingly, as Document Request No. 20 is not made in accordance with the requirements, spirit or intention of PO1, the Claimant is not required to respond.</p> <p>Notwithstanding, the Claimant provides the following additional grounds of objection.</p> <p>(A) <u>Overly Burdensome Objection</u>: This Request appears repetitive of above Requests 17 and 18. The Claimant should not be required to produce documents twice. In addition, to the extent the Request seeks title searches, it is obvious that the Claimant is not required to carry out title searches in response to a document production request. The request must be confined to documents that already exist.</p> <p>(B) <u>Lack of Relevance/Materiality Objection</u>: It is entirely unclear how or why the documents requested are relevant to the case or material to its outcome. The Respondent simply states that property interests held by each entity may be relevant to whether a substantive business exists. This is not a sufficient justification – the Respondent does not explain why the holding of real estate interests is necessarily germane to the question of whether the Claimant has substantive business operations. It appears that the request is simply a fishing expedition.</p> <p>(C) <u>Point Proven Objection</u>: The Claimant has provided considerable evidence of its business activities in Singapore – far in excess of what is required to prove a substantive business according to the case authorities. Having to produce a wide range of documents (such as all payment authorisations) that relate to a point already proven in the record is a waste of time and resources.</p>
<p>Reply</p>	<p>Reply to Part A and Part B</p> <p>The Respondent repeats its Reply to the Claimant’s Overall Objection at paras. 3-28 above and its Reply to Part B above at paras. 29-30.</p> <p>Reply to Part C: Specific objections to Request No. 20</p> <p>Using lettering consistent with the Claimant’s objections above, the Respondent replies to the objections as follows:</p> <p>(A) <u>Overly Burdensome Objection</u></p> <p>In response to the Claimant’s assertion that a document request must be “confined to documents that already exist”, the Respondent invites the Claimant to confirm that none of the documents sought in Request No. 20 in</p>

	<p>fact exist. The Respondent notes that Request No. 20 requests specific property records which are likely to be in the possession, custody or control of the Claimant. The request is further restricted to a specific time period. It is not burdensome to conduct a targeted search of company property records for responsive documents.</p> <p>(B) Lack of Relevance/Materiality Objection</p> <p>The Respondent has already explained why the requested categories of documents in Request No. 20 are relevant and material to the issues in dispute with specific reference to pleadings and evidence on the record. The requested documents sought have high probative value in assessing whether the Claimant has genuine substantive business operations (see, for explanation, SOPO, paras. 226-234) and are therefore both relevant and material to the outcome of the case.</p> <p>(C) Point Proven Objection</p> <p>The Respondent notes there is no evidence of the Claimant’s property interests in Singapore between the requested dates on the record. This fact should be disclosed for the reasons set out by the Respondent above to assist the Tribunal determine the genuineness of the Claimant’s purported business activities, which is in issue for the Respondent’s Denial of Benefits objection.</p> <p>Without any prejudice as to the nature of the initial request, in the interests of good faith, the Respondent no longer presses its claim for title searches recording registration of interests in property in either (a) or (b) and narrows the temporal scope of sub-request (b) to 24 January 2020 until 13 August 2020. This has been identified in strikethrough above.</p>
Decision by the Tribunal	GRANTED AS NARROWED DOWN (by the Respondent)

Respondent's Document Request No. 21	
Document(s) Requested	<p>For the period from 12 February 2021 to 29 March 2023:</p> <ul style="list-style-type: none"> (i) minutes, agendas and notes of meetings of the Boards of Directors of the Claimant and Mineralogy; (ii) draft and final resolutions of the Board of Directors of the Claimant and Mineralogy; (iii) draft and final Board papers and reports prepared for meetings of the Board of Directors of the Claimant and Mineralogy, <p>recording discussions, decisions, due diligence and risk analyses relating to the appointment and role of Bernard Wong as Chief Investment Officer of the Claimant and Chief Financial Officer of Mineralogy, held by or within the possession, custody or control of Mineralogy, the Claimant and/or Mr Palmer.</p> <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of Mineralogy, the Claimant and/or Mr Palmer.</p>
Relevance	<p>Reference to submissions</p> <p>SODPO paras. 74(b), 77, 82, 249. [REDACTED] WS, para. 29(b).</p>
	<p>Comments</p> <p>No Investor: The documents are also relevant to the Respondent's No Investor objection. Specifically, the documents relate directly to the nature of the Claimant's involvement in, and directing of, its Australian subsidiaries, to assist the Tribunal's determination of whether the Claimant made an active investment in the Mineralogy shares. The Claimant at para. 249 of the SODPO asserts that its directors are "intricately involved in the management and operations of Mineralogy... [and] Mr Wong ensures the investments are properly managed" and this involvement is indicative of having made an investment. The requested documents are highly relevant to the scope of Mr Wong's role as the Chief Investment Officer and are material to the outcome of the objection (and the case) in demonstrating the extent to which the Claimant manages its Australian subsidiary.</p> <p>Denial of Benefits: The requested documents are relevant to the Respondent's Denial of Benefits objection. In this respect, the Claimant asserts at para. 404 of the SODPO that its current business operations include actively managing its purported investments in Australia. The documents are material to the outcome of the objection (and the case) given the Claimant asserts that half of its business operations are the management of its Australian subsidiary without demonstrating any level of management, or any management from Singapore.</p> <p>Temporal scope of the request: The temporal scope of this request covers the period from the date that Mr Mashayanyika ceased as Chief Investment Officer of the Claimant until the date the Claimant filed its Notice of Arbitration, as this is the period during which documents relating to Mr Wong's appointment and the scope of his role are likely to exist.</p>
Objections	<p>The Claimant's Objection to this Request No.21 comprises Part A (the Claimant's Response and Overall Objection), Part B (comprising Table A which shows the Respondent's actual Document Requests in itemized form) and Part C (the Claimant's Secondary Objections).</p> <p><u>PART A: CLAIMANT'S RESPONSE AND OVERALL OBJECTION</u></p> <p>The Claimant refers to and relies upon Part A of the Claimant's Objection to Request No. 1 and inter alia adopts such objection as part of the Claimant's Objection to Request No. 21.</p>

	<p><u>PART B: THE RESPONDENT’S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 21</u></p> <p><i>[Claimant’s Table A has been removed and is produced separately]</i></p> <p><u>PART C: THE CLAIMANT’S SECONDARY OBJECTIONS</u></p> <p>All of the Objections contained within this Part C are made without prejudice to the objection in Part A and Table A, being the Claimant’s Objection to the Respondent’s Request No. 21. The Claimant relies upon its Objections set out in Part A as its primary response and the responses set out in this Part C are set out in the alternative.</p> <p>The Claimant makes its Overall Objection in respect to document production for this Request No. 21. Without prejudice to the Claimant’s Overall Objection, the Respondent’s Document Request No. 21 is not one (1) Document Production Request but is actually 9 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 643 to No. 651 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No.1 and is an abuse of process. Accordingly, as Document Request No. 21 is not made in accordance with the requirements, spirit or intention of PO1, the Claimant is not required to respond.</p> <p>Notwithstanding, the Claimant provides the following additional grounds of objection.</p> <p>As this is the second to last Document Request of the Respondent, and given the temporal period of 776 days, in light of the earlier Document Requests, this request is an abuse of process.</p>
Reply	<p>Reply to Part A and Part B</p> <p>The Respondent repeats its Reply to the Claimant’s Overall Objection at paras. 3-28 above and its Reply to Part B above at paras. 29-30.</p> <p>Reply to Part C: Specific objections to Request No. 21</p> <p>The Respondent repeats its Reply at para. 8 above in response to the Claimant’s assertion that document Request No. 21 is a temporal period of 776 days. The requested documents are narrowly defined, over a discrete time period, and pertain to a single individual. As such, the requested documents should be easily searchable and the request is not overly burdensome or an abuse of process.</p>
Decision by the Tribunal	DENIED

Respondent's Document Request No. 22	
Document(s) Requested	<p>For the period from the earlier of the date that Mineralogy became a client of [REDACTED] and 20 October 2022, to 14 March 2024, letters of engagement and letters of instruction sent from the Claimant, Mineralogy, and/or any other entity in the Mineralogy Group or individual connected to that Group, to [REDACTED] including Mr [REDACTED]</p> <p>The requested documents are not in the possession, custody or control of the Respondent, and these documents are likely to exist and be in the possession, custody or control of the Claimant, Mineralogy, MIL, the Claimant, and/or Mr Palmer.</p>
Relevance	<p>Reference to submissions</p> <p>[REDACTED], paras. 1.9-1.13 and Appendix C, APES 215, para. 3.9. SODPO, para. 574.</p>
	<p>Comments</p> <p>Abuse of Process: The requested documents are relevant to the Respondent's Abuse of Process objection, the scope of [REDACTED]'s role and the weight that should be accorded to the expert evidence adduced by the Claimant which purports to support its rationale for the Mineralogy Group Restructure. There is evidence to suggest that the Claimant's expert evidence is not independent. For example, the [REDACTED] states that [REDACTED] is "independent" yet acknowledges that "Mineralogy is an existing client of [REDACTED]" and has been provided "litigation support, valuation and tax services", as is evidence by Exh. C-495. The requested documents would enable the Tribunal to appropriately consider the weight that should be accorded to the evidence based on communications with the witnesses that demonstrate the nature of the witnesses' relationships with the Claimant. Additionally, the requested documents are material as, where there is inconsistent expert evidence, the requested documents would assist the Tribunal in determining which independent evidence should be preferred.</p> <p>No Investment: The Claimant asserts at paras. 238-243 of the SODPO it has made an investment in the form of Mineralogy retaining returns in itself and relies on the evidence of [REDACTED] as evidence of that. The requested documents are relevant in determining whether the Claimant's evidence is "independent" and is material in determining the appropriate weight to be given to the evidence. The requested documents are necessary to afford the Respondent the opportunity to challenge the Claimant's evidence on the "No Investment" and "No Investor" objections, for which the Claimant holds the burden of proof.</p> <p>Temporal scope of the request: The temporal scope for this request commences on the earlier of when Mineralogy became a client of [REDACTED] and when the Notice of Intent was filed, as the date that Mineralogy became a client of [REDACTED] is solely within the Claimant's knowledge. The period ends on the date the SODPO was filed. This is the likely period during which the Claimant engaged expert witnesses for the purpose of this arbitration.</p> <p>For completeness, the Respondent notes that the Claimant has already provided the letter of instruction for the preparation of the [REDACTED]. The Respondent does not expect this document be re-produced by the Claimant.</p>
Objections	<p>The Claimant's Objection to this Request No. 22 comprises Part A (the Claimant's Response and Overall Objection), Part B (comprising Table A which shows the Respondent's actual Document Requests in itemized form) and Part C (the Claimant's Secondary Objections).</p> <p><u>PART A: CLAIMANT'S RESPONSE AND OVERALL OBJECTION</u></p>

	<p>The Claimant refers to and relies upon Part A of the Claimant’s Objection to Request No. 1 and inter alia adopts such objection as part of the Claimant’s Objection to Request No. 22.</p> <p><u>PART B: THE RESPONDENT’S ACTUAL DOCUMENT REQUESTS – ITEMISED IN RESPECT OF DOCUMENT REQUEST 22</u></p> <p><i>[Claimant’s Table A has been removed and is produced separately]</i></p> <p><u>PART C: THE CLAIMANT’S SECONDARY OBJECTIONS</u></p> <p>All of the Objections contained within this Part C are made without prejudice to the objection in Part A and Table A, being the Claimant’s Objection to the Respondent’s Request No. 22. The Claimant relies upon its Objections set out in Part A as its primary response and the responses set out in this Part C are set out in the alternative.</p> <p>The Claimant makes its Overall Objection in respect to document production for this Request No. 22. Without prejudice to the Claimant’s Overall Objection, the Respondent’s Document Request No. 22 is not one (1) Document Production Request but is actually 4 Document Production Requests as shown in Table A of this Objection (see above), being Requests No. 652 to No. 655 and it is not made in accordance with the requirements, spirit or intention of Procedural Order No.1 and is an abuse of process. Accordingly, as Document Request No. 22 is not made in accordance with the requirements, spirit or intention of PO1, the Claimant is not required to respond.</p> <p>Notwithstanding, the Claimant provides the following additional grounds of objection.</p> <p>(A) Point Proven Objection: ██████ states that para 1.12 of his Report that “Mineralogy is an existing client of ██████ and we have provided litigation support, valuation and tax services.” ██████ acted as liquidators for the Engineering companies (SOPO, para 245(b)). Disclosure of underlying engagement letters which may contain commercially sensitive material, is not warranted and could have no effect on the outcome of the case, given the disclosures already made. Moreover, ██████ Report simply confirms the position stated in the annual accounts. The Respondent is able to provide contrary evidence if it considers that ██████ interpretation is incorrect.</p>
<p>Reply</p>	<p>Reply to Part A and Part B</p> <p>The Respondent repeats its Reply to the Claimant’s Overall Objection at paras. 3-28 above and its Reply to Part B above at paras. 29-30.</p> <p>Reply to Part C: Specific objections to Request No. 22</p> <p>Using lettering consistent with the Claimant’s objections above, the Respondent replies to the objections as follows:</p> <p>(A) Point Proven Objection</p> <p>The Respondent notes there is no evidence as to the date at which Mineralogy became a client of ██████ on the record and this fact has not been disclosed by the Claimant or ██████ in his evidence. This fact is uniquely within the</p>

	<p>control of the Claimant and should be disclosed for the reasons set out by the Respondent above and to assist the Tribunal determine the probative value to be given to the evidence of [REDACTED] and [REDACTED].</p> <p>Insofar as the Claimant suggests the documents sought may contain commercially sensitive information, the Respondent repeats its Reply to the Overall Objection at para. 28.</p>
Decision by the Tribunal	DENIED

**ANNEX C
Privilege Log Template**

Entry No.	Document request number(s)	Document ID (or other identifier)	Author or Sender	Recipient(s) or Addressee(s), including persons/entities copied	Document Type	Date	Subject matter description	Type of privilege claimed, including applicable law and legal basis, and the reason why the privilege applies to the document at issue	Document withheld in whole or part	[Claimant's/ Respondent's] Objections	[Claimant's / Respondent's Replies]
[1]	[e.g., Request 2(ii)(2)]	[e.g., ZEPH.XXX.XXX.XXX]			[e.g., email, letter, minutes of meeting, notes, memoranda, report, etc.]	[dd.mm.yyy]	[e.g., legal opinion on validity of contract of [date] between X and Y for [subject matter of contract]]		[Eg Whole document / Part of document: redactions applied at page X, Y, Z]		
TRIBUNAL'S DECISION											