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

ZEPH INVESTMENTS PTE LTD
Claimant

and

THE COMMONWEALTH OF AUSTRALIA
Respondent

AUSTRALIA'S STATEMENT ON

PRELIMINARY OBJECTIONS

22 January 2024

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LIST OF ABBREVIATIONS

Abbreviation	Full Form or Description
AANZFTA	Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area
ACRA	Accounting and Corporate Regulatory Authority of Singapore
Additional Project Proposals	Project Proposals submitted pursuant to clause 8 of the State Agreement, which provides for submission of proposals seeking to modify, expand or vary existing proposals that have already been submitted and approved.
Agreement Act	*Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA)
Alleged Coal Funding Rationale	[redacted] asserted rationale for the incorporation of Zeph and its insertion into the chain of ownership of Mineralogy, i.e., to assist in securing funding for developing Waratah Coal's coal holdings in Queensland
Alleged Lithium Rationale	[redacted] asserted rationale for the incorporation of MIL and its insertion into the chain of ownership of Mineralogy, i.e. that MIL was incorporated and inserted into the chain of ownership of Mineralogy because Mr Palmer wanted to undertake "lithium exploration" projects in New Zealand
Alleged Risk and Exposure Rationale	Mineralogy's asserted rationale for the incorporation of Zeph and its insertion into the chain of ownership of Mineralogy, i.e., to protect existing assets from risks and exposures in Australia
Alleged Tax Rationale	[redacted] asserted rationale for the incorporation of Zeph and its insertion into the chain of ownership of Mineralogy, i.e. that this course of action would yield some tax advantages
Amendment Act	*Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA)
ASIC	The Australian Securities and Investments Commission
AUD	Australian dollars
Australia or Respondent	The Commonwealth of Australia, the Respondent in this arbitration
BIT	Bilateral investment treaty
BSIOP	Balmoral South Iron Ore Project
BSIOP Dispute	Dispute between Mineralogy and the WA Government concerning the BSIOP Proposal, pre-dating this arbitration
BSIOP Proposal	8 August 2012 proposal in respect of the Balmoral South Iron Ore Project

Abbreviation	Full Form or Description
CAFTA-DR	Dominican Republic–Central America Free Trade Agreement, opened for signature 5 August 2004 (entered into force for all States Parties 1 January 2009)
CBC	Commercial Bank Cameroon
CEPA	Comprehensive Economic Partnership Agreement
CFHL	Capital Financial Holdings Luxembourg SA
China	People's Republic of China
CITIC	CITIC Ltd
CITIC Dispute	Dispute between Mineralogy, the CITIC Parties, and the WA Government concerning the Sino Iron and Korean Steel Projects, pre-dating this arbitration
CITIC Pacific	CITIC Pacific Ltd
CITIC Pacific Mining Management	CITIC Pacific Mining Management Pty Ltd, a wholly-owned subsidiary of CITIC Limited
CITIC Parties	CITIC Pacific Ltd, CITIC Pacific Mining Management Pty Ltd, CITIC Ltd, Sino Iron Pty Ltd and Korean Steel Pty Ltd
Claimant or "Zeph"	Zeph Investments Pte Ltd
Closeridge	Closeridge Pty Ltd
Commercial Arbitration Act	*Commercial Arbitration Act 1985* (WA)
Co-Proponents	Companies with which Mineralogy had granted rights in relation to certain tenements through agreements subsidiary to the State Agreement, including Austeel Pty Ltd, Balmoral Iron Pty Ltd; Bellswater Pty Ltd (later known as Sino Iron Pty Ltd); Brunei Steel Pty Ltd; International Minerals; Korean Steel Pty Ltd
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
ECT	Energy Charter Treaty
Engineering Companies	GCS Engineering Service Pte Ltd, Visco Engineering Pte Ltd, and Visco Offshore Engineering Pte Ltd
FCA	Federal Court of Australia
FCAFC	Full Court of the Federal Court of Australia

Abbreviation	Full Form or Description
Finality Issue	The argument during the Second BSIOP Arbitration as to whether the right to recover damages was determined in the First BSIOP Arbitration
FIRB	Foreign Investment Review Board
First BSIOP Arbitration	2013 arbitration between Mineralogy, International Minerals and WA in relation to the WA Government's rejection of the BSIOP Proposal
First Damages Claim	Claim to recover damages in the First BSIOP Arbitration
[redacted] WS	Witness Statement of [redacted] dated 13 February 2023
[redacted] WS	First Witness Statement of [redacted] dated 13 January 2023
First McHugh Award	Mr Michael McHugh's Arbitral Award of 20 May 2014
[redacted] WS	First Witness Statement of [redacted] dated 22 March 2023
HCA	High Court of Australia, Australia's apex court
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
International Minerals	International Minerals Pty Ltd
IPO	Initial public offering
JVA	Joint venture agreement
Kleenmatic Companies	Kleen Venture Pte Ltd and One Kleenmatic Pte Ltd
Korean Steel	Korean Steel Pty Ltd
Korean Steel Project	Project Proposal submitted by Mineralogy Pty Ltd and Korean Steel Pty Ltd under Clause 6 of the State Agreement, approved on 11 June 2009. Once approved this project has become known by this name
Kalderimis Report	Expert Report of Mr Daniel Kalderimis, Barrister, Thorndon Chambers, Wellington, New Zealand, dated 20 January 2024
Lys Report	Expert Report of Professor Thomas Lys, Eric L Kohler Professor Emeritus at the Kellogg School of Management, Northwestern University, in Evanston, Illinois, United States of America, dated 20 January 2024
MCPs	Draft Mine Continuation Proposals provided by the CITIC Parties to Mineralogy for the Sino Iron Project and Korean Steel Project

Abbreviation	Full Form or Description
MIL	Mineralogy International Ltd (the company incorporated in New Zealand on 14 December 2018)
MIL Share Swap	16 December 2018 transaction leading to the insertion of the newly incorporated New Zealand company, MIL, into the corporate chain as the direct owner of Mineralogy
Mineralogy	Mineralogy Pty Ltd
Mineralogy Group	Mineralogy Pty Ltd and its subsidiary companies, owned and controlled by Mr Palmer
Mineralogy Restructure Memorandum	Annexure A to Notice of Intent dated 20 October 2022 titled 'Mineralogy Group Restructure – December 2018/January 2019'
Minister Marmion	The Honourable Bill Marmion, former Minister for State Development in the WA Government
MIPL	Mineralogy International Pte Ltd
Mr Palmer	Mr Clive Palmer
MRSLAs	Mining Right and Site Lease Agreements
NZD	New Zealand dollars
PCA	Permanent Court of Arbitration
PO1	The Tribunal's Procedural Order No. 1 dated 1 September 2023
Port Litigation	2013 litigation in which Mineralogy commenced proceedings in the Federal Court seeking, *inter alia*, a declaration that it has an entitlement to possession and control regarding the port facilities at Port Preston
Premier Barnett	Mr Colin Barnett, former Premier of WA 23 September 2008 – 17 March 2017
Premier McGowan	Mr Mark McGowan, former Premier of WA 17 March 2017 – 8 June 2023
Projects	The three types of projects which were defined and provided for in the State Agreement
Project Proposals	Proposals for Projects that Mineralogy was entitled to submit to the WA Government pursuant to clause 6(1) of the State Agreement. Mineralogy could submit these Project Proposals either alone or with a Co-Proponent
Protocol on Investment to the ANZCERTA	Protocol on Investment to the Australia and New Zealand Closer Economic Relations Trade Agreement signed 16 February 2011, [2013] ATS 10 (entered into force 1 March 2013)

Abbreviation	Full Form or Description
Respondent or Australia	The Commonwealth of Australia
River Crescent	River Crescent Pty Ltd
Rogers Report	Expert Report of Mr George Rogers, of Rockface Capital Advisors Ltd, London, United Kingdom, dated 20 January 2024
Royalties Litigation	2013 litigation in which Mineralogy commenced domestic court proceedings under the MRSLAs it had entered into with the CITIC Parties concerning certain royalty payments which Mineralogy claimed were owed to it
Royalties Judgment	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)
SAFTA	*Singapore-Australia Free Trade Agreement*, signed 17 February 2003, I-40221 UNTS 2257 (entered into force 28 July 2003), as amended by Agreement to Amend SAFTA, signed on 13 October 2016 (entered into force 1 December 2017).
Second BSIOP Arbitration	2019 arbitration between Mineralogy, International Minerals and WA in relation to the WA Government's rejection of the BSIOP Proposal and the companies' right to recover damages resulting from the First McHugh Award
Second McHugh Award	Mr McHugh's Arbitral Award of 11 October 2019
Section 25 Issue	The argument during the Second BSIOP Arbitration as to whether the First Damages Claim has been determined and if not, whether WA should be able to apply to the Supreme Court of Western Australia to terminate the arbitration
Section 46 Issue	The argument during the Second BSIOP Arbitration as to whether there was inordinate or inexcusable delay in conducting another damages claim
SGD	Singaporean dollars
Share Purchase Agreement	Share Purchase Agreement between MIL and MIPL (Zeph) [Exhibit 20 to Annexure A to Notice of Intent dated 20 October 2022]
Singapore	Republic of Singapore
Sino Iron	Sino Iron Pty Ltd
Sino Iron Pellet Proposal	Sino Iron Pellet Proposal (Proposal 7), a Project Proposal submitted by Mineralogy and Sino Iron under Clause 6 of the State Agreement, and it was approved on 2 May 2008

Abbreviation	Full Form or Description
Sino Iron Project	Name by which the Sino Iron Pellet Proposal was known once approved
SOPO	Statement on Preliminary Objections
State Agreement	Iron Ore Processing (Mineralogy) Agreement
State Solicitor's Office	WA Government State Solicitor's Office
State Solicitor	WA Government's State Solicitor
Third BSIOP Arbitration	2020 arbitration between Mineralogy, International Minerals and WA in relation to the WA Government's rejection of the BSIOP Proposal
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	2021 Arbitration Rules of the United Nations Commission on International Trade Law
USD	United States dollars
Vienna Convention	*Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980)
Vickers WS	Witness Statement of Mr Bruno Vickers, of JS Held LLC, Singapore, dated 19 January 2024
WA	The state of Western Australia
WA Government	Government of the state of Western Australia, including the relevant ministers and decision-makers
WA Parliament	The Western Australian Parliament
WA Premier	The leader of the WA Government
WASCA	Court of Appeal of the Supreme Court of Western Australia. This is the highest court in WA; the sole court with greater authority in WA is the HCA, Australia's apex court
Waratah Coal	Waratah Coal Pty Ltd, a subsidiary of Mineralogy
Zeph Consolidated	Zeph's corporate group per its consolidated financial statements, i.e. Mineralogy
Zeph Share Swap	29 January 2019 transaction leading to the insertion of the newly incorporated Singaporean company, Zeph (then known as MIPL), into the corporate chain as the direct owner of Mineralogy

I. INTRODUCTION

A. INTRODUCTION TO THE DISPUTE

1. The Commonwealth of Australia ("**Australia**" or "**the Respondent**") provides this Statement on Preliminary Objections ("**SOPO**"), which is filed in accordance with the procedural calendar annexed to the Tribunal's Procedural Order No. 1, as amended by agreement and as subsequently confirmed by the Tribunal by its email dated 12 December 2023.

2. The Claimant, Zeph Investments Pte Ltd ("**Zeph**" or "**the Claimant**"), is a Singaporean company. Zeph's ultimate beneficial owner is Mr Clive Palmer ("**Mr Palmer**"), who is an Australian national, businessman, lifelong resident, and billionaire mining magnate with a high public profile in Australia. Mr Palmer was a Member of the Australian Parliament between 2013 and 2016, as a member of the "Palmer United Party", a party he founded. The Palmer United Party is now known as the "United Australia Party", which deploys "Make Australia Great" and "Save Australia" slogans.[1] Mr Palmer regularly engages with and advocates positions on matters of national interest, and is active in public life.[2] The Claimant makes much of Mr Palmer's substantial connections with Australia in the materials accompanying the Amended Notice of Arbitration, including Mr Palmer's nomination by members of the Australian public as a "National Living Treasure" of the National Trust of Australia (NSW).[3] Mr Palmer's connections to Australia include having shareholdings and

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1 E.g., United Australia Party website, at https://www.unitedaustraliaparty.org.au/ (last accessed 5 January 2024), **Exh. R-36**; see also United Australia Party website (archived version), available at https://web.archive.org/web/20210117164105/https://www.unitedaustraliaparty.org.au/ (last accessed 11 January 2024), **Exh. R-37**; and this United Australia Party pamphlet, https://www.unitedaustraliaparty.org.au/wp-content/uploads/2019/04/QLD-RYAN.pdf (last accessed 11 January 2024), **Exh. R-38**.

2 For instance, Mr Palmer has recently been involved in the referendum held in Australia on a potential constitutional amendment: see, e.g., Josh Butler, 'Clive Palmer to launch million-dollar ad blitz for no vote in Voice referendum', *The Guardian* (29 September 2023), available at https://www.theguardian.com/australia-news/2023/sep/29/indigenous-voice-to-parliament-referendum-clive-palmer-no-campaign-ads-spending-south-australia-tasmania (last accessed 15 January 2024), **Exh. R-39**.

3 Letter from National Trust to Mr Clive F Palmer re: National Living Treasure Award to Mr Palmer dated 15 March 2012, **Exh. C-66**.

directorships in numerous private and public companies,[4] an extensive real estate portfolio,[5] as well as personal ties. Mr Palmer also owns a superyacht, which he has called "Australia".[6]

3. By its Amended Notice of Arbitration, which is also its Statement of Claim,[7] Zeph has presented a claim under Chapter 11 of the Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area ("**AANZFTA**") for USD 198,202,414,285.00. This figure is unprecedented in investment treaty arbitration, and is constituted by a number of wholly speculative claims in respect of (for instance) sovereign risk for unspecified and unidentified future mining projects.

4. The claim is the latest chapter in a long-running dispute between the Government of Western Australia (a regional government of Australia) ("**WA Government**") and two Australian companies owned by Mr Palmer, Mineralogy Pty Ltd ("**Mineralogy**") and International Minerals Pty Ltd ("**International Minerals**"):

   (a) In 2012, Mineralogy and International Minerals submitted to the WA Government a proposal regarding the Balmoral South Iron Ore Project ("**BSIOP**" and "**BSIOP Proposal**"). Those companies intended to develop the BSIOP under the Iron Ore Processing (Mineralogy Pty Ltd) Agreement which Mineralogy, International Minerals, and other affiliated companies had entered into with the WA Government on 5 December 2001 ("**State Agreement**").[8] A dispute arose concerning the WA Government's decisions with respect to the BSIOP Proposal, and this dispute was submitted by Mineralogy and International Minerals to domestic commercial arbitration seated in Perth, WA, before Mr Michael McHugh AC QC (as he then was),

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4 During Mr Palmer's term as a Member of the Australian House of Representatives (2013-2016), he reported shareholdings in Mineralogy Pty Ltd ("**Mineralogy**") (along with its 40 subsidiaries), Nickel Consolidated Pty Ltd, Nickel Processing Pty Ltd, Nickel House Pty Ltd (along with eight subsidiaries), Palmer Leisure Coolum Pty Ltd (along with four subsidiaries), Palmer Leisure Australia Pty Ltd, and Resourcehouse Pty Ltd, and 26 other private companies, as well as "other companies that [he is] a shareholder in from time to time listed with ASIC": Register of Members' Interests: Statement of Members' Interests as at 7 September 2013, **Exh. R-40**, pp. 1-3.

5 Register of Members' Interests: Statement of Members' Interests as at 10 December 2013, **Exh. R-40**, pp. 1-3, 5-6.

6 Brett Lackey, 'Inside Clive Palmer's new $40 million superyacht 'Australia' complete with hot tub, VIP suite and outdoor bar', *The Daily Mail* (20 October 2021), available at https://www.dailymail.co.uk/news/article-10107557/Inside-mining-tycoon-Clive-Palmers-new-40million-superyacht-Australia.html (last accessed 15 January 2024), **Exh. R-41**.

7 Amended Notice of Arbitration ("**NoA**"), para. 44.

8 The State Agreement is scheduled to the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) ("***Agreement Act***"), sch 1, **Exh. CLA-2**.

a former justice of the High Court of Australia ("**HCA**") (Australia's apex court in both state and federal jurisdiction). In 2020, the WA Parliament enacted legislation (the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) ("**Amendment Act**")) which, inter alia, brought an end to the arbitration proceedings.[9] Mr Palmer and/or his companies have commenced multiple proceedings in respect of the Amendment Act before the Australian courts, which were either determined adversely to Mr Palmer and/or his companies or discontinued.[10]

(b) During the same period as the dispute summarised above, Mineralogy was also a party to disputes before the Australian courts with several of its commercial partners in relation to other, but overlapping, mining projects under the State Agreement. Those partners most notably included Sino Iron Pty Ltd ("**Sino Iron**") and Korean Steel Pty Ltd ("**Korean Steel**"), which were owned by CITIC Pacific Ltd ("**CITIC Pacific**"), and which are now owned by the Chinese State-owned company CITIC Ltd ("**CITIC**") (together the "**CITIC Parties**"). As a result of these disputes, the WA Government came to consider that it might be necessary for it to amend the State Agreement. This led Mineralogy to form the view that the WA Government was hostile to Mineralogy's interests.

5. Pausing here, it bears emphasis that for many years these disputes were litigated on the domestic plane, i.e. within a domestic arbitration seated in Australia and before Australian courts, specifically the Supreme Court of Western Australia and the Federal Court of Australia ("**FCA**").

6. However, from late 2018, Mr Palmer and Mineralogy sought to internationalise these disputes through the incorporation of affiliated companies outside Australia, with a view to obtaining investment treaty protection for Mr Palmer's existing Australian assets.

7. Mr Palmer's first step was to incorporate a New Zealand company, Mineralogy International Ltd ("**MIL**"), which acquired 100% of Mineralogy's shares in a share swap in December

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9 *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA), **Exh. CLA-3**.

10 E.g., *Mineralogy Pty Ltd & International Minerals Pty Ltd v Western Australia* [2021] HCA 30 (ruling in favour of WA), **Exh. CLA-9**; *Palmer v Western Australia* [2021] HCA 31 (ruling in favour of WA), **Exh. CLA-158**; *Zeph Investments Pte Ltd v Western Australia* (High Court of Australia, B57/2020) (discontinued), **Exh. R-42**; *Zeph Investments Pte Ltd v Western Australia* (Federal Court of Australia, NSD 708/2022) (discontinued), **Exh. R-43**; Notice of Discontinuance, *Clive Frederick Palmer v State of Western Australia & Anor* (Federal Court of Australia, NSD 905/2022) (discontinued), **Exh. R-3.**

2018 ("**MIL Share Swap**"). Only a few weeks later, on 18 January 2019, MIL wrote letters to the WA Government and Australia in which it invoked international legal rights, including under Chapter 11 of AANZFTA, asserting that any attempt by the WA Government to amend the State Agreement would result in "expropriation or measures equivalent to expropriation".[11] The letters further put WA and Australia "on notice of MIL's claim *inter alia* under AANZFTA", including "for prompt, adequate and effective compensation", should WA "take any steps to expropriate, either directly or indirectly, Mineralogy's interests or rights in Western Australia".[12]

8. The incorporation of MIL in New Zealand was seemingly undertaken in the belief that Chapter 11 of AANZFTA and/or the Protocol on Investment to the Australia and New Zealand Closer Economic Relations Trade Agreement ("**Protocol on Investment to the ANZCERTA**")[13] provided for investor-State dispute settlement as between Australia and New Zealand. As was reported in *The Australian* newspaper (one of Australia's leading broadsheet newspapers):

> "Mr Palmer said the move offshore meant Mineralogy would be able to claim compensation from the Australian government under the investor protection provisions of the Australia-NZ free trade agreement. He vowed to launch a damages claim if West Australian premier Mark McGowan carries through with his threat to legislate in favour of Chinese giant CITIC's interests in the $US10bn Sino Iron project in the Pilbara."[14]

9. In fact, however, neither Chapter 11 of AANZFTA, nor the Protocol on Investment to the ANZCERTA, provides for investor-State dispute settlement in respect of Australian investors in New Zealand, or New Zealand investors in Australia.

10. Apparently realising his mistake, Mr Palmer's second step was to establish a Singaporean company, Mineralogy International Pte Ltd ("**MIPL**"), which was later renamed as Zeph

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11 Letter from MIL to Premier McGowan dated 18 January 2019, **Exh. R-44**, p. 2; Letter from MIL to the Minister for Energy in the Commonwealth Government dated 18 January 2019, **Exh. R-45**.

12 Letter from MIL to Premier McGowan dated 18 January 2019, **Exh. R-44**, p. 6; Letter dated 18 January 2019 from MIL to the Minister for Energy in the Commonwealth Government, **Exh. R-45**.

13 Protocol on Investment to the Australia and New Zealand Closer Economic Relations Trade Agreement, signed 16 February 2011, [2013] ATS 10 (entered into force 1 March 2013), **Exh. RLA-27**.

14 Andrew Burrell, 'Kiwi Flight: Palmer 'to make Australia great' from NZ', *The Australian* (22 January 2019), **Exh. R-46**.

Investments Pte Ltd ("**Zeph**").[15] MIPL was incorporated on 21 January 2019.[16] Just over a week later, on 29 January 2019, this entity was inserted into the chain of ownership of Mineralogy and International Minerals.[17] This was effected by way of a cashless "share swap", to which the new Singaporean entity contributed nothing.[18]

11. At no point has Zeph made any investment in Australia, as that term is used in AANZFTA. To the contrary, it has extracted funds from its Australian subsidiary Mineralogy.[19] Separately, but importantly, it has remained as a form of corporate façade with no substantive business operations of its own in Singapore. It was created to be, and is currently being used as, a vehicle for allowing Mr Palmer to attempt to internationalise domestic disputes involving his companies.

12. As follows from this basic fact pattern, the Tribunal lacks jurisdiction in this case, and/or Zeph's claims are inadmissible, for four separate reasons.

13. First, Zeph is not an "investor" of Singapore which has "made an investment" in the territory of Australia, as required by Article 2(d) of Chapter 11 of AANZFTA. It is accordingly not entitled to submit a claim under Article 21 of Chapter 11 of AANZFTA. This objection is developed in **Section III** below.

14. Second, Zeph has not identified a relevant "investment" for the purposes of Article 2(c) of Chapter 11 of AANZFTA, with the result that its claim is outside the scope of protection of Chapter 11 of AANZFTA. This objection is developed in **Section IV** below.

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15 MIPL's name was changed to Zeph Investments Pte Ltd on 4 December 2019: MIPL's (Zeph's) Application for New Company Name lodged on 21 January 2019, **Exh. R-47**; Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2020, **Exh. C-82**, p. 3; Notice of Special Resolution for Change of Name, 4 December 2019, **Exh. R-48**.

16 MIPL's (Zeph's) Application for New Company Name lodged on 21 January 2019, **Exh. R-47**; Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2020, **Exh. C-82**, p. 3; Notice of Special Resolution for Change of Name, 4 December 2019, **Exh. R-48**.

17 See the diagram under heading "Ownership Post Restructure" in Mineralogy Group Restructure – December 2018/January 2019 (Annexure A to Notice of Intent dated 20 October 2022 ("**NoI**")), **Exh. C-63**, pp. 3, 43; Australian Securities & Investments Commission ("**ASIC**"), Current & Historical Company Extract for Mineralogy Pty Ltd dated 9 February 2023, **Exh. C-74**, pp. 12-13; Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2019, **Exh. C-80**; First Witness Statement of [redacted] dated 14 February 2023, Annexure 13C to Amended NoA, p. 3.

18 Share Purchase Agreement between MIL and MIPL (Zeph) (Exhibit 20 to Annexure A to NoI), **Exh. C-63**, p. 168; MIPL Resolution of Directors dated 29 January 2019 (Exhibit 17 to Annexure A to NoI), **Exh. C-63**, p. 163; MIPL minutes of directors meeting on 29 January 2019 (Exhibit 16 to Annexure A to NoI), **Exh. C-63**, p. 158.

19 See further discussion at, e.g., paras. 144, (fn 194), 176(a), 197 and 225.

15. Third, Zeph is not entitled to the benefits of Chapter 11 of AANZFTA, and Australia was entitled to deny, and has denied, the benefits of Chapter 11 to Zeph and its alleged investments in accordance with Article 11 of Chapter 11. As explained further in **Section V** below:

    (a) In an attempt to create the appearance of a genuine commercial presence in Singapore, Zeph acquired three failing engineering companies (GCS Engineering Service Pte Ltd, Visco Engineering Pte Ltd, and Visco Offshore Engineering Pte Ltd ("**Engineering Companies**"), which have since been liquidated and deregistered), and entered into a joint venture agreement ("**JVA**") with two local cleaning companies, One Kleenmatic Pte Ltd and Kleen Venture Pte Ltd ("**Kleenmatic Companies**");

    (b) Zeph argues that the façade created by the activities of these companies is sufficient for it to be entitled to the benefits of Chapter 11 of AANZFTA. It is not. Zeph has artificially assumed the pre-existing business operations of certain Singaporean companies, and those companies have either become deregistered (in the case of the Engineering Companies) or carry on the same local cleaning business that they have had for 20 years which has nothing to do with the mining or other operations of Mineralogy (in the case of the Kleenmatic Companies). Zeph is essentially a mere "pass-through" entity which does nothing other than receive dividends from Mineralogy and pass them to MIL, its New Zealand parent company. Those dividends are then passed to Mr Palmer and two Australian nominee companies owned and controlled by him.

16. Fourth and finally, Zeph's claims are not within the jurisdiction conferred by AANZFTA and/or are inadmissible because they constitute an abuse of process, with the abusive conduct consisting of Zeph's incorporation in Singapore in January 2019 and its acquisition of shares in Mineralogy, after the point in time at which a dispute with Australia with respect to the BSIOP Proposal had arisen and/or had become foreseeable, followed by its commencement of a claim pursuant to AANZFTA. As further explained in **Section VI** below:

    (a) By the time of the incorporation of Zeph and the share swap which led to it becoming the parent company of Mineralogy, at least two inter-related disputes between Mineralogy and WA had crystallised or were foreseeable. The first dispute concerned the legality of the WA Government's conduct in relation to the BSIOP Proposal ("**BSIOP Dispute**"). The second dispute concerned the legality of any unilateral modification on the part of WA of Mineralogy's rights under the State Agreement,

including to address the dispute between Mineralogy and the CITIC Parties ("**CITIC Dispute**"). The only credible explanation for the incorporation of MIL, and then Zeph, is that Mr Palmer and Mineralogy were seeking investment treaty protection in respect of these actual and foreseeable disputes with the WA Government and Australia. That being so, this claim is an abuse of process.

(b) In this arbitration, [redacted] asserts that he had other reasons for the incorporation of MIL in December 2018 and Zeph in January 2019: first, that it would enable the "**Mineralogy Group**" (which consists of Mineralogy and its subsidiary companies, owned and controlled by Mr Palmer) to pursue lithium exploration in New Zealand; second, that it would be easier for the Mineralogy Group to secure financing from Singapore for coal mining projects; and third, that it was in the Mineralogy Group's interest to establish "international operations" in Singapore, including for tax reasons.[20] These reasons do not withstand scrutiny. Further, they are unsupported by the contemporaneous documentary evidence from banks, business and tax advisers that would undoubtedly exist if these reasons were genuine.[21]

17. For each of the reasons summarised above (any one of which is sufficient), the Tribunal should dismiss the Claimant's claims and reject its claim for relief, with costs.

B. BURDEN AND STANDARD OF PROOF

18. It is convenient to set out briefly in this Introduction the relevant principles on the burden and standard of proof. Australia considers that these principles should be uncontroversial.

19. Chapter 11 of AANZFTA is silent with respect to the burden and standard of proof that will apply to arbitral proceedings filed under Chapter 11.

20. The Claimant has submitted its claim under the 2021 Arbitration Rules of the United Nations Commission on International Trade Law ("**UNCITRAL Rules**"). Pursuant to Article 27(1) of those rules, "[e]ach party shall have the burden of proving the facts relied on to support its claim or defence". Article 27(4) confirms the Tribunal's general discretion over

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[20] Witness Statement of [redacted] dated 22 March 2023 (Annexure 2C to Amended NoA) ("[redacted] **WS**"), paras. 120-121, 126-127, 130. See also Witness Statement of [redacted] dated 13 January 2023 (Annexure 3C to Amended NoA) ("[redacted] **WS**"), paras. 18-36.

[21] Lys Report, paras. Sections IV.B.2.a, IV.B.2.c. See also Rogers Report, paras. G.8.1.1 – G.8.1.2.

evidentiary matters: "The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered."

21. Multiple arbitral tribunals have accepted that Article 27(1) of the UNCITRAL Rules reflects a "widely accepted" or "general principle" of law. As the tribunal in *Antonio del Valle Ruiz and Others v Kingdom of Spain* observed:

> "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. The International Court of Justice as well as investment treaty tribunals have characterized this rule as a general principle of law. Article 27(1) of the UNCITRAL Rules also provides that each party has the burden of proving the facts on which it relies in support of its claim or defense. Thus, the Claimants bear the burden of proof."[22]

22. It is therefore for the Claimant to establish that it satisfies the jurisdictional requirements of Chapter 11 of AANZFTA,[23] including that it is an "investor of a Party" within the meaning of Article 2(d) of Chapter 11, and that it can identify an "investment" within the meaning of Article 2(c) of Chapter 11. By contrast, the burden lies on the Respondent to establish that the benefits of Chapter 11 have been properly denied to the Claimant, and that the Claimant's claim is an abuse of process. Importantly, however, while the Respondent seeks in this SOPO to discharge that burden in part by setting out its understanding of the Claimant's corporate structure and financial position based on available documents, much of the information going to these matters is within the Claimant's possession, custody and control, and will be the subject of the Respondent's document production requests in accordance with the Tribunal's Procedural Order No. 1 dated 1 September 2023 ("**PO1**"). Where relevant information is held by the Claimant, the evidential burden is "readily shifted" to the Claimant,[24] as discussed at para. 210 below.

23. As to the applicable standard of proof, arbitral tribunals have frequently applied the "balance of probabilities" standard, although there may be different ways in which this standard is

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22 *Antonio del Valle Ruiz and Others v Kingdom of Spain* (PCA Case No 2019-17, Final Award of 13 March 2023), para. 494 (internal footnote omitted), **Exh. RLA-28**.

23 This is recognised, for example, in the quote from the *Carlos Sastre v United Mexican States* (ICSID Case No. UNCT/20/2, Award of 21 November 2022) tribunal in paragraph 23 below, **Exh. RLA-29**.

24 *Bridgestone Licensing Services, Inc v Panama* (ICSID Case No. ARB/16/34, Decision on Expedited Objections of 13 December 2017), para. 289, **Exh. RLA-30**.

expressed (such as the "preponderance of the evidence").[25] As recently explained by the *Carlos Sastre* tribunal:

> "This standard requires an evaluation by the Tribunal of all the evidence produced by Claimants and Respondent on the issues at hand to determine which party's claims are more likely to be true. Thus, Claimants must present persuasive evidence of the facts to establish jurisdiction for the Tribunal to be satisfied that the burden of proof has been discharged. … Respondent, in turn, must provide persuasive evidence of the facts that make out its objections to jurisdiction."[26]

C. STRUCTURE OF THE SOPO

24. This SOPO is structured as follows:

(a) In **Section II**, Australia provides a detailed statement of the facts relevant to the Respondent's objections. In addition, a more complete chronology is included as Annexure A to the SOPO;

(b) In **Section III**, Australia demonstrates that Zeph is not an "investor of a Party" within the meaning of Article 2(d) 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;

(c) In **Section IV**, Australia demonstrates that Zeph 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 of AANZFTA;

(d) In **Section V**, Australia demonstrates that Zeph is not entitled to the benefits of Chapter 11 of AANZFTA because Australia has denied the benefits of the Chapter to Zeph and its alleged investments in accordance with Article 11 of Chapter 11 of AANZFTA;

(e) In **Section VI**, Australia demonstrates that Zeph's claims are not within the jurisdiction conferred by AANZFTA and/or are inadmissible because they constitute an abuse of process; and

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[25] E.g. *Antonio del Valle Ruiz and Others v Kingdom of Spain* (PCA Case No. 2019-17, Final Award of 13 March 2023), para. 495, **Exh. RLA-28**; *Churchill Mining and Planet Mining v Indonesia* (ICSID Case No. ARB/12/14 and ARB/12/40, Decision on Annulment of 18 March 2019), para. 215, **Exh. RLA-31** (and *Churchill Mining and Planet Mining v Indonesia* (ICSID Case Nos. ARB/12/14 and ARB/12/40, Award of 6 December 2016), paras. 240, 244), **Exh. RLA-32**; *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12, Decision on Jurisdiction of 1 June 2012), para. 2.10, **Exh. RLA-33**; *Sergei Viktorovich Pugachev v Russia* (Award on Jurisdiction of 18 June 2020), para. 256, **Exh. RLA-34**.

[26] *Carlos Sastre v United Mexican States* (ICSID Case No. UNCT/20/2, Award of 21 November 2022), para. 147, **Exh. RLA-29**.

(f) In **Section VII**, Australia sets out its request for relief.

25. Appended to this SOPO are the following annexures:

(a) Annexure A is a detailed chronology; and

(b) Annexure B provides a diagram of the corporate structure of relevant parts of the Mineralogy Group.

26. In accordance with PO1, Australia's SOPO is accompanied by:

(a) The Expert Report of Professor Thomas Lys, Eric L Kohler Professor Emeritus at the Kellogg School of Management, Northwestern University, in Evanston, Illinois, United States of America, dated 20 January 2024 ("**Lys Report**"), which addresses the source of the Claimant's alleged investment, business operations in Singapore and purported reasons for its corporate restructure;

(b) The Expert Report of Mr George Rogers, of Rockface Capital Advisors Ltd, London, United Kingdom, dated 20 January 2024 ("**Rogers Report**"), which addresses the purported reasons for the Claimant's corporate restructure relating to financing a large-scale coal project;

(c) The Expert Report of Mr Daniel Kalderimis, Barrister, Thorndon Chambers, Wellington, New Zealand, dated 20 January 2024 ("**Kalderimis Report**"), which addresses the purported reasons for the Claimant's corporate restructure relating to lithium mining in New Zealand;

(d) The Witness Statement of Mr Bruno Vickers, of JS Held LLC, Singapore, dated 19 January 2024 ("**Vickers WS**"), which discusses the Claimant's business operations in Singapore; and

(e) fact exhibits and legal authorities.[27]

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[27] In accordance with PO1, and following on from the interim measures phase, the Respondent's fact exhibits begin at **Exh. R-36** and the Respondent's legal authorities begin at **Exh. RLA-27**.

II. STATEMENT OF FACTS

27. In this Section, the Respondent sets out the factual background relevant to the Respondent's preliminary objections. This Section is structured as follows:

    (a) **Subsection A** introduces the Parties to the dispute;

    (b) **Subsection B** sets out changes in the Mineralogy Group structure over time that are relevant to this dispute, and the facts relevant to understanding the extent of Zeph's presence in Singapore;

    (c) **Subsection C** introduces the State Agreement between the WA Government and Mineralogy; and

    (d) **Subsection D** sets out the factual background against which the incorporation of Zeph and its acquisition of shares in Mineralogy took place and the immediate aftermath of the corporate restructuring.

A. THE PARTIES

28. The Respondent to this Arbitration is the Commonwealth of Australia. The Commonwealth of Australia is a federation, with a Federal Parliament and executive government, and six states which each have their own parliament and executive government. Power is divided between the Commonwealth and the states by a federal constitution. Each government operates according to the Westminster system, with Ministers drawn from, and responsible to, the relevant Parliament. One of the six states is Western Australia ("**WA**"). It is the largest state by area, and it is rich in natural resources. The Western Australian Parliament ("**WA Parliament**") has two houses (a lower and upper house). The WA Premier is a Member of the WA Parliament and leads the WA Government. In addition to holding the office of Premier, the Premier may also hold the office of Minister for a particular portfolio in the WA Government.

29. The Claimant is Zeph, which was incorporated in Singapore on 21 January 2019 under the name of Mineralogy International Pte Ltd (i.e. MIPL).[28] MIPL changed its name to Zeph Investments Pte Ltd (i.e. Zeph) on 4 December 2019.[29]

30. As set out above, Zeph's ultimate beneficial owner is Mr Palmer, an Australian national, lifelong resident, former Member of the Australian Parliament, and mining magnate. Mr Palmer is very much the face (and reality) of Zeph. As Australia noted in its Response to the Notice of Arbitration:

(a) Mr Palmer is an Australian national, born in Melbourne in 1954, who appears to reside in the Australian state of Queensland;[30]

(b) Mr Palmer's name appears twice on the front page of the Amended Notice of Arbitration (where he is identified as the "Claimant's representative"), as well as in the contact details of the Claimant (as the "Claimant's director and representative") at paras. 53, 54, and 55 of the Amended Notice of Arbitration;

(c) The Claimant's address for service of "communications, correspondence and documents" in this arbitration is not a Singapore address, but rather the address of Mineralogy, one of Mr Palmer's Australian mining companies. This address is identified on the front page and at para. 55(c) of the Amended Notice of Arbitration as being "[redacted]

(d) Mr Palmer was a Member of the House of Representatives in the Australian Parliament from 2013 to 2016, representing the "Palmer United Party" for the seat of Fairfax, on the Sunshine Coast in Queensland;[31] and

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28 Audited Financial Statements of Zeph Investments Pte Ltd for the reporting period from 21 January 2019 (Date of Incorporation) to 30 June 2019, p. 14, **Exh. C-79**; Accounting and Corporate Regulatory Authority of Singapore ("**ACRA**"), Business profile of Zeph Investments Pte Ltd dated 19 January 2021, **Exh. C-71**.

29 MIPL's (Zeph's) Application for New Company Name lodged on 21 January 2019, **Exh. R-47**; Zeph Investments Pte Ltd, Consolidated Financial Reports for the Year ended 30 June 2020, **Exh. C-82**, p. 3; Notice of Special Resolution for Change of Name, 4 December 2019, **Exh. R-48**.

30 ASIC, Current & Historical Company Extract for Mineralogy dated 9 February 2023, **Exh. C-74**, p. 6.

31 [redacted] WS, paras. 8, 11–13; "Mr Clive Palmer", *Parliament of Australia,* available at https://www.aph.gov.au/Senators_and_Members/Parliamentarian?MPID=LQR (last accessed 6 January 2024), **Exh. R-49**.

(e) Mr Palmer once included "litigation" as one of his hobbies in his entry in "Who's Who",[32] and has been described by a Justice of the Federal Court of Australia as an "indefatigable litigant".[33]

B. MINERALOGY GROUP CORPORATE STRUCTURE AND ZEPH'S OPERATIONS IN SINGAPORE

31. This claim concerns an alleged investment in Australia in January 2019 by the Claimant, Zeph, in Mineralogy and one of its subsidiaries, International Minerals.

32. As already noted, Mineralogy is an Australian company. It has a number of subsidiaries and has held various subsidiaries over time. For present purposes, it is only necessary to consider particular branches of the corporate structure of the Mineralogy Group (which has operated in Australia since 1985).[34]

33. In the period immediately preceding 16 December 2018, Mineralogy was owned by Mr Palmer (25,400 shares), an Australian company River Crescent Pty Ltd (5,928,988 shares) ("**River Crescent**") and another Australian company Closeridge Pty Ltd (48,508 shares) ("**Closeridge**").[35] Mr Palmer owned all of the issued shares in River Crescent and 5,798 of

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32 Michael Pelly, 'The 'burden' of being Clive Palmer, QC', *The Australian Financial Review* (20 May 2021), **Exh. R-50**.

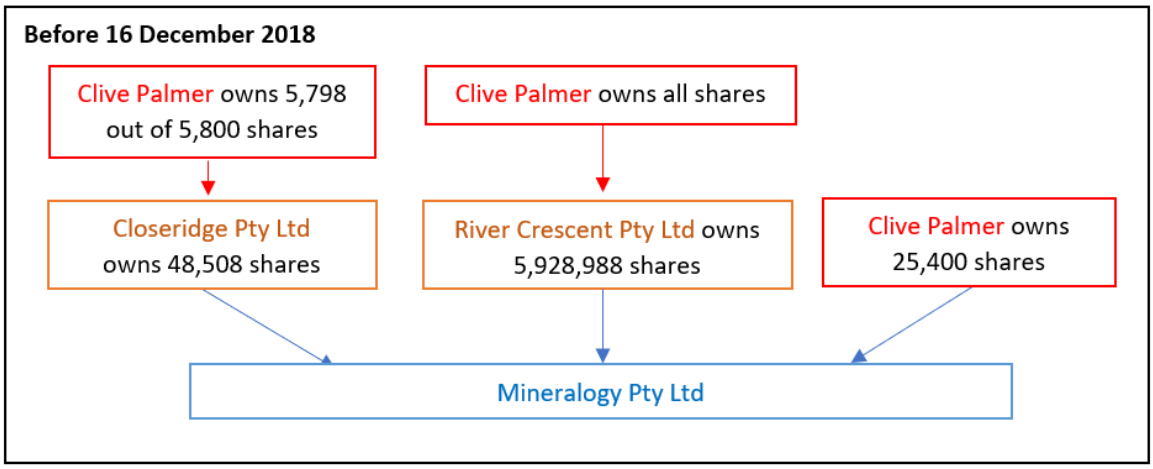
33 *Palmer v McGowan (No 5)* [2022] FCA 893, para. 122 (Lee J), **Exh. R-51**. Australian courts have also observed that Mr Palmer and/or the corporate entities that he controls have sought to "use the Court's processes as a weapon and to achieve a purpose other than that for which the proceedings are properly designed and exist". Judgment of the Federal Court of Australia (the superior court at the federal level with jurisdiction over almost all civil matters arising under Australian federal law) in *International Minerals Pty Ltd v State of Western Australia* [2022] FCA 938, **Exh. R-52**, paras. 49−52.

34 ASIC, Current & Historical Company Extract for Mineralogy dated 9 February 2023, **Exh. C-74**, p. 3; *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 16)* [2017] WASC 340, para. 159, **Exh. CLA-5**.

35 [redacted] WS, paras. 92-93; New Zealand Companies Office, Company Extract for MIL dated 25 July 2022, **Exh. C-99**; ASIC, Company Extract for River Crescent Pty Ltd dated 30 October 2020, **Exh. R-53**; ASIC, Company Extract for River Crescent dated 30 September 2022, **Exh. R-54**; ASIC, Company Extract for Closeridge Pty Ltd dated 30 October 2020, **Exh. R-55**; ASIC, Company Extract for Closeridge dated 30 September 2022, **Exh. R-56**; ASIC, Company Extract for Elect The President Pty Ltd dated 30 October 2020, **Exh. R-57**.

the 5,800 issued shares in Closeridge.[36] Further, River Crescent and Closeridge held their shares as nominee or on trust for Mr Palmer.[37]

34. The Mineralogy Group's corporate structure at this time was as follows:



35. On 14 December 2018, a New Zealand entity, MIL was incorporated.[38] At the time of incorporation, Mr Palmer was MIL's sole shareholder with one share and share capital of NZD $1.[39]

36. Two days later, on 16 December 2018, MIL acquired all the shares in Mineralogy via a Share Purchase Agreement whereby Mr Palmer, River Crescent, and Closeridge transferred their shares in Mineralogy to MIL.[40] In return, MIL issued a corresponding number of new

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36 [redacted] WS, para. 93. The remaining two Closeridge Pty Ltd shares are held by River Crescent Pty Ltd (1 share) and Elect the President Pty Ltd (1 share): see New Zealand Companies Office, Company Extract for MIL dated 25 July 2022, **Exh. C-99**; ASIC, Company Extract for River Crescent Pty Ltd dated 30 October 2020, **Exh. R-53**; ASIC, Company Extract for River Crescent dated 30 September 2022, **Exh. R-54**; ASIC, Company Extract for Closeridge Pty Ltd dated 30 October 2020, **Exh. R-55**; ASIC, Company Extract for Closeridge dated 30 September 2022, **Exh. R-56**; ASIC, Company Extract for Elect The President Pty Ltd dated 30 October 2020, **Exh. R-57**.

37 Mineralogy Group Restructure – December 2018/January 2019 (Annexure A to NoI), **Exh. C-63**, p. 41.

38 New Zealand Companies Office, Company Extract for MIL dated 25 July 2022, **Exh. C-99**.

39 New Zealand Companies Office, New Company Incorporation Filing for MIL registered 14 December 2018, **Exh. R-58**.

40 [redacted]

ordinary shares in itself and delivered them in equal proportion to the previous owners of Mineralogy (being the MIL Share Swap).[41] (Although labelled as a "Share Purchase Agreement", there was no cash exchanged in this stock-for-stock transfer.) As identified by Professor Lys, "Mr. Palmer's original one MIL share was redeemed and canceled and the NZD $1 in capital was returned to him."[42]

37. MIL has 6,002,896 issued shares which, from 16 December 2018, have been owned by Mr Palmer (25,400 shares), River Crescent (5,928,988 shares), and Closeridge (48,508 shares shares).[43] The transaction did not alter Mr Palmer's ownership of all of the issued shares in River Crescent and 5,798 of the 5,800 issued shares in Closeridge.[44] The corporate structure following the insertion of MIL into the corporate chain was as follows:

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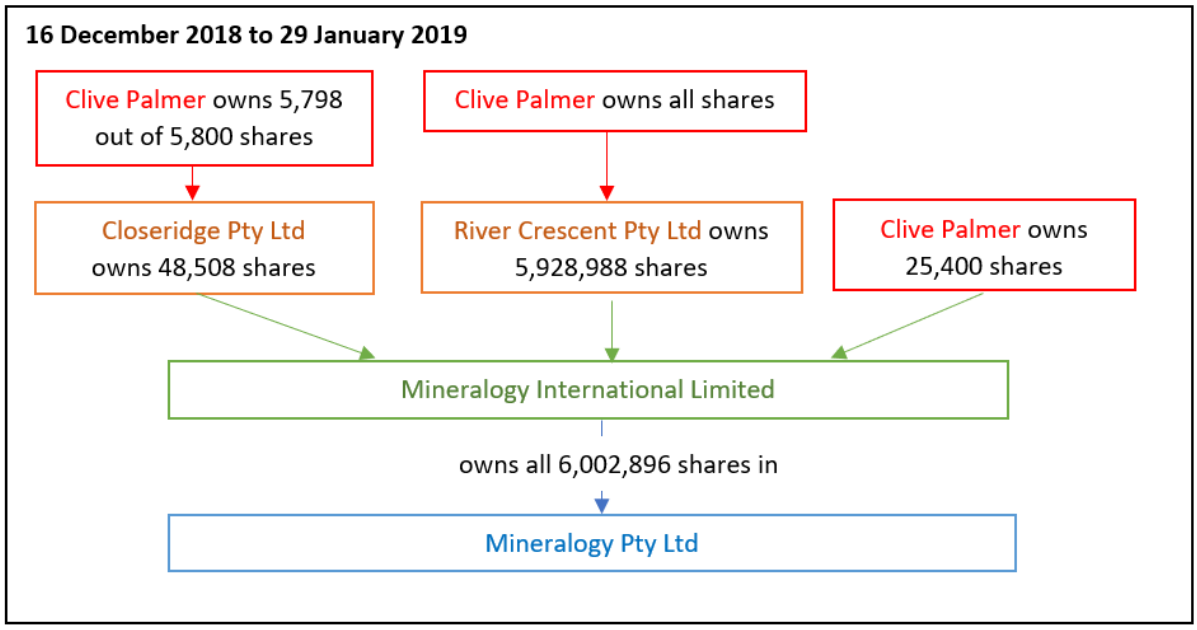
41 [redacted]

42 Lys Report, para. 60; see also letter from PricewaterhouseCoopers to Queensland Commissioner of State Revenue dated 27 August 2019 (Exhibit 22 to Annexure A to NoI) citing "Record of Resolution of Sole Director of MIL dated 16 December 2018", **Exh. C-63**, p. 184.

43 Mineralogy Group Restructure – December 2018/January 2019 (Annexure A to NoI), **Exh. C-63**, p. 41; New Zealand Companies Office, Company Extract for MIL dated 25 July 2022, **Exh. C-99**; ASIC, Company Extract for River Crescent Pty Ltd dated 30 October 2020, **Exh. R-53**; ASIC, Company Extract for River Crescent dated 30 September 2022, **Exh. R-54**; ASIC, Company Extract for Closeridge Pty Ltd dated 30 October 2020, **Exh. R-55**; ASIC, Company Extract for Closeridge dated 30 September 2022, **Exh. R-56**; ASIC, Company Extract for Elect The President Pty Ltd dated 30 October 2020, **Exh. R-57**.

44 [redacted] WS, p. 61; New Zealand Companies Office, Company Extract for MIL dated 25 July 2022, **Exh. C-99**; ASIC, Company Extract for River Crescent Pty Ltd dated 30 October 2020, **Exh. R-53**; ASIC, Company Extract for River Crescent dated 30 September 2022, **Exh. R-54**; ASIC, Company Extract for Closeridge Pty Ltd dated 30 October 2020, **Exh. R-55**; ASIC, Company Extract for Closeridge dated 30 September 2022, **Exh. R-56**; ASIC, Company Extract for Elect The President Pty Ltd dated 30 October 2020, **Exh. R-57**.



38. MIL remained the direct owner of Mineralogy for only a very brief period – approximately five weeks.

39. On 21 January 2019, MIPL, which subsequently changed its name to Zeph,[45] was incorporated in Singapore.[46] At the time MIPL (Zeph) was incorporated, its primary activity was listed as "other holding companies".[47] MIL was its sole shareholder with one share and share capital of SGD $1.00.[48]

40. On 29 January 2019, MIPL (Zeph) was inserted into the Mineralogy corporate chain through a transfer of 100% of the shares in Mineralogy from MIL to MIPL (Zeph), in return for newly issued shares in MIPL (Zeph) ("**Zeph Share Swap**").[49] MIPL (Zeph) thus became the direct

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45 MIPL's (Zeph's) Application for New Company Name lodged on 21 January 2019, **Exh. R-47**; Zeph Investments Pte Ltd, Consolidated Financial Reports for the Year ended 30 June 2020, **Exh. C-82**, p. 3; Notice of Special Resolution for Change of Name, 4 December 2019, **Exh. R-48.**

46 Audited Financial Statements of Zeph Investments Pte Ltd for the reporting period from 21 January 2019 (Date of Incorporation) to 30 June 2019, **Exh. C-79**, p. 14; ACRA, Business profile of Zeph Investments Pte Ltd dated 19 January 2021, **Exh. C-71**.

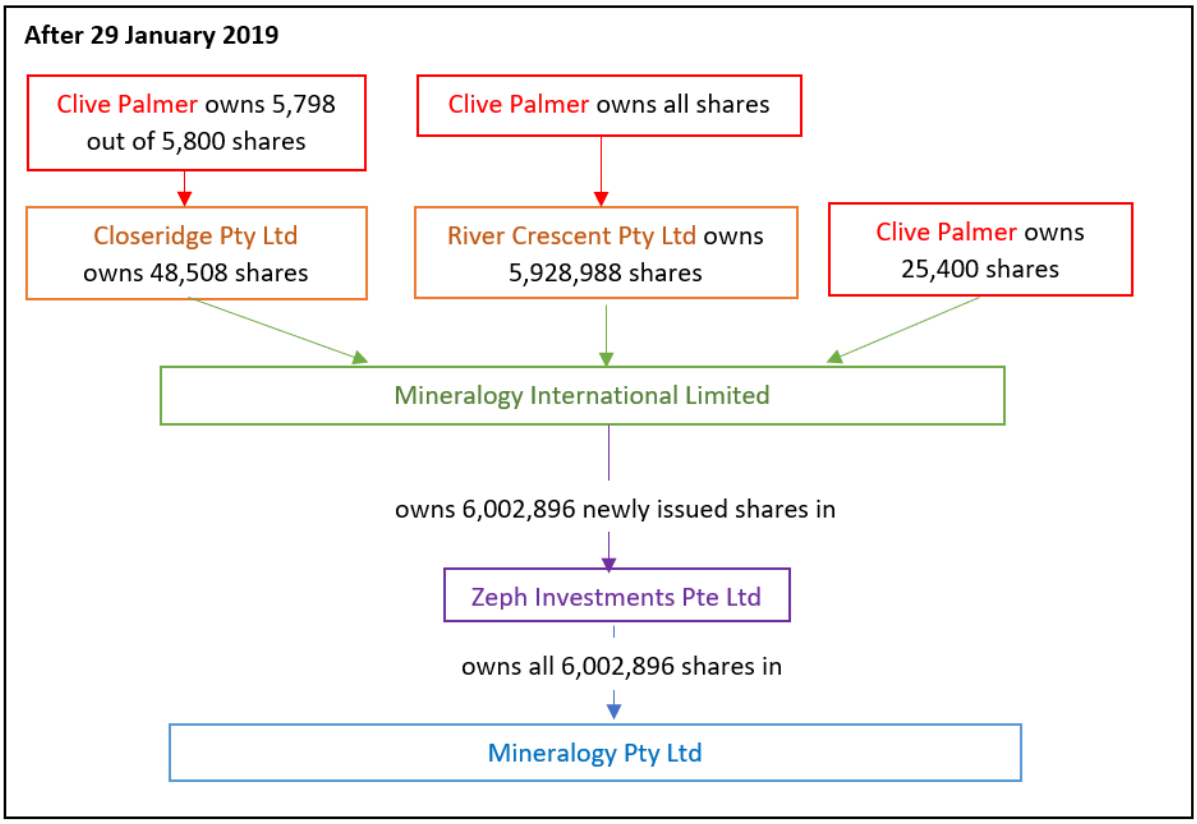
47 ACRA, People Profile – Zeph Investments Pte Ltd dated 31 August 2020, **Exh. R-59**; Zeph's Application for New Company Name lodged on 21 January 2019, **Exh. R-47**.

48 ASIC, Current & Historical Company Extract for Mineralogy dated 9 February 2023, **Exh. C-74**, pp. 12-13.

49 See the diagram under heading "Ownership Structure" in Mineralogy Group Restructure – December 2018/January 2019 (Annexure A to NoI), **Exh. C-63**, p. 42; ASIC, Current & Historical Company Extract for Mineralogy dated 9 February 2023, **Exh. C-74**; Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2019, **Exh. C-80**; First Witness Statement of [redacted] dated 14 February 2023 (Annexure 13C to Amended NoA), para. 7.

owner of Mineralogy, and MIL became the direct owner of MIPL (Zeph). Zeph has 6,002,896 issued shares, the same number as Mineralogy and MIL.[50] MIL's original subscriber shares in MIPL (Zeph) was cancelled at this time.[51]

41. The corporate structure following the insertion of MIPL (Zeph) into the corporate chain from 29 January 2019 was as follows:



42. A diagram showing the overall change in the corporate structure of the relevant part of the Mineralogy Group is at **Annexure B** to this SOPO.

43. As was the case before the MIL Share Swap and the Zeph Share Swap occurred, the corporate chain starts and ends with Australian companies which are owned and controlled by an Australian national, Mr Palmer. Thus, notwithstanding the insertion of Zeph into the corporate chain, ownership of the various mining rights and property held by the Mineralogy

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50 ACRA, Business profile of Zeph Investments Pte Ltd dated 19 January 2021, **Exh. C-71**, p. 2.

51 Share Purchase Agreement between MIL and MIPL (Zeph) (Exhibit 20 to Annexure A to NoI), **Exh. C-63**, p. 168; MIPL minutes of directors meeting on 29 January 2019 (Exhibit 16 to Annexure A to NoI), **Exh. C-63**, p. 161.

Group (discussed further below) did not change. These rights and property continued to be held by Mineralogy, and ultimately owned by Mr Palmer.

44. The factual background against which the above corporate restructuring took place is central to Australia's preliminary objections. The key facts are summarised in Subsection D, sub-headings (vi) and (vii) below, and are set out in further detail in the chronology at **Annexure A**.

45. Since its incorporation on 21 January 2019, Zeph has not engaged in any substantive business operations in Singapore, including any activity relating to mining or resources exploitation in Singapore.

46. In January 2019 (i.e. immediately after its incorporation), Zeph acquired the Engineering Companies.[52] There is no evidence to suggest that Zeph played any role in the Engineering Companies beyond holding shares. Following Zeph's acquisition of the shares, the Engineering Companies did not have any significant operations in Singapore. In the first half of 2019, the revenue of the Engineering Companies was negligible.[53] On 12 October 2020,

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52 Audited Financial Statements of Zeph Investments Pte Ltd for the reporting period from 21 January 2019 (Date of Incorporation) to 30 June 2019, **Exh. C-79**; Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2019, **Exh. C-80**, p. 26; ACRA, Business profile for GCS Engineering Service Pte Ltd dated 1 September 2020, **Exh. R-60**, p. 1; ACRA, Business profile for GCS Engineering Service Pte Ltd dated 9 November 2020, **Exh. R-61**; ACRA, Business profile for Visco Engineering Pte Ltd dated 1 September 2020, **Exh. R-62**, p. 1.

53 GCS Engineering Service Pte Ltd financial statement for year ended 30 June 2019, **Exh. R-63**, p. 25; Visco Engineering Pte Ltd financial statement for year ended 30 June 2019, **Exh. R-64**, p. 26; Visco Offshore Engineering Pte Ltd financial statement for year ended 30 June 2019, **Exh. R-65**, p. 28; Corporate Compliance and Financial Profile for GCS Engineering Service Pte Ltd, **Exh. R-66**, p. 2; Corporate Compliance and Financial Profile for Visco Offshore Engineering Pte Ltd, **Exh. R-67**, p. 2; Corporate Compliance and Financial Profile for Visco Engineering Pte Ltd, **Exh. R-68**, p. 2.

liquidators were appointed to the Engineering Companies.[54] On 28 December 2022, the Engineering Companies were deregistered.[55]

47. On 11 October 2019, Mineralogy acquired the remaining 50% of International Minerals that it did not already directly own.[56]

48. On 3 December 2019, MIPL changed its name to Zeph Investments Pte Ltd.[57]

49. About a year after its incorporation, Zeph entered into a JVA dated 24 January 2020 with the Kleenmatic Companies, under which the Kleenmatic Companies conducted cleaning businesses in Singapore.[58] On 4 August 2022, Zeph acquired the shares in the Kleenmatic Companies.[59]

50. Notwithstanding its acquisition of the Engineering Companies and the Kleenmatic JVA, Zeph has not engaged in substantive business operations in Singapore. The relevant facts are addressed in more detail in Section V (in relation to Australia's denial of the benefits of Chapter 11 of AANZFTA to Zeph).

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54 ACRA, Business profile for GCS Engineering Service Pte Ltd dated 26 September 2022, **Exh. R-69**; ACRA, Business profile for Visco Engineering Pte Ltd dated 9 November 2020, **Exh. R-70**; ACRA, Business profile for Visco Offshore Engineering Pte Ltd dated 26 September 2022, **Exh. R-71**; Notice of Resolution for GCS Engineering Service Pte Ltd dated 12 October 2020, **Exh. R-72**; Special Resolution (Winding Up) for GCS Engineering Service Pte Ltd dated 12 October 2020, **Exh. R-73**; Ordinary Resolution (Appointment of Liquidator) for GCS Engineering Service Pte Ltd dated 12 October 2020, **Exh. R-74**; Notice of Appointment of a Liquidator for GCS Engineering Pte Ltd dated 12 October 2020, **Exh. R-75**; Notice of Resolution for Visco Engineering Pte Ltd dated 12 October 2020, **Exh. R-76**; Special Resolution (Winding Up) for Visco Engineering Pte Ltd dated 12 October 2020, **Exh. R-77**; Notice of Appointment of Liquidator for Visco Engineering Pte Ltd dated 12 October 2020, **Exh. R-78**; Ordinary Resolution (Appointment of Liquidator) for Visco Engineering Pte Ltd dated 12 October 2020, **Exh. R-79**; Notice of Resolution for Visco Offshore Engineering Pte Ltd dated 12 October 2020, **Exh. R-80**; Special Resolution (Winding Up) for Visco Offshore Engineering Pte Ltd dated 12 October 2020, **Exh. R-81**; Notice of Appointment of Liquidator for Visco Offshore Engineering Pte Ltd dated 12 October 2020, **Exh. R-82**; Ordinary Resolution (Appointment of Liquidator) for Visco Offshore Engineering Pte Ltd dated 12 October 2020, **Exh. R-83**.

55 ACRA, Business profile for GCS Engineering Service Pte Ltd dated 26 October 2023, **Exh. R-84**; ACRA, Business profile for Visco Engineering Pte Ltd dated 26 October 2023, **Exh. R-85**; ACRA, Business profile for Visco Offshore Engineering Pte Ltd dated 26 October 2023, **Exh. R-86**.

56 Lys Report, para. 56.

57 MIPL's (Zeph's) Application for New Company Name lodged on 21 January 2019, **Exh. R-47**.

58 Joint Venture Agreement ("**JVA**") dated 24 January 2020, **Exh. C-469**; One Kleenmatic Pte Ltd financial statements for year ended 30 June 2020, **Exh. R-87**, p. 18; Kleen Venture Pte Ltd financial statements for year ended 30 June 2020, **Exh. R-88**, p. 15.

59 One Kleenmatic Pte Ltd financial statements for year ended 30 June 2021, **Exh. R-89**, p. 54; Kleen Venture Pte Ltd financial statements for year ended 30 June 2021, **Exh. R-90**, p. 42; Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2022, **Exh. C-86**, p. 38; Consolidated financial reports for MIL for the year ended 30 June 2022, **Exh. C-103**, p. 38.

C. THE "STATE AGREEMENT" AND ASSOCIATED PROJECT PROPOSALS

51. State Agreements are a form of contractual agreement that the WA Government may choose to enter into with resource companies or joint ventures. They are ratified and implemented by the WA Parliament through legislation. State Agreements have been used since 1952 to facilitate development of major mineral and energy resource projects in WA, particularly in the Pilbara region through the development of iron ore mining, transportation, facilities and export.[60]

52. The Pilbara region is located in the north of WA. It is thinly populated and known for its vast deposits of minerals, including iron ore. Mineralogy is the holder of various mining projects in the Pilbara region. These mining projects are carried out under permits or leases to mine on the land, which do not involve ownership of the land.

53. On 5 December 2001, the WA Government entered into the State Agreement with Mineralogy and various "**Co-Proponents**" (being companies with which Mineralogy was granted rights in relation to certain tenements through subsidiary agreements as set out in the First Schedule to the State Agreement), which included:

    (a) Austeel Pty Ltd;

    (b) Balmoral Iron Pty Ltd;

    (c) Bellswater Pty Ltd (later known as Sino Iron);

    (d) Brunei Steel Pty Ltd;

    (e) International Minerals; and

    (f) Korean Steel.

54. The Co-Proponents were all subsidiaries of Mineralogy at the time that the State Agreement was entered into by the parties, although not all of the Co-Proponents have remained subsidiaries of Mineralogy.

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60 See Premier Barnett, "State Agreements" (1996) 15 *Australian Mining and Petroleum Law Journal* 314, **Exh. C-104**, p. 315.

55. On 24 September 2002, the WA Parliament ratified the State Agreement by its enactment of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) ("**Agreement Act**").[61] The State Agreement came into force when it was ratified by the WA Parliament.

56. As described in the Agreement Act, the State Agreement related to the "mining and processing of iron ore, predominantly as magnetite, and the transporting of processed iron ore in the Pilbara region, and the establishment of new port facilities in the Pilbara region and the shipping of processed iron ore through those facilities".[62] When first entered into, the State Agreement provided for three types of defined projects agreement ("**Projects**").[63]

57. Under clause 6(1) of the State Agreement, Mineralogy is entitled to submit to the WA Government "**Project Proposals**" related to the Projects that form the subject of the State Agreement, either alone or with a "Co-Proponent". Mineralogy was thus required to be party to any submission of a proposal under the State Agreement. Following the making of such a submission, and pursuant to clause 7(1) of the State Agreement, the Minister may:

    (a) Approve the Project Proposal without qualification or reservation;

    (b) Defer consideration of or a decision on the Project Proposal until the Project Proponents submit a further Project Proposal in respect of some of the matters mentioned in clause 6(2) which are not covered by the Proposal;[64] or

    (c) Require as a condition precedent to granting approval that the Project Proponents make certain alterations or comply with certain conditions, provided that no such alteration or condition could require the Project Proponents to grant access to their mineral resources to any third party. In exercising this power, the Minister must "disclose his reasons for such alteration or conditions".

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61 The State Agreement is at Schedule 1 to the Agreement Act, **Exh. CLA-2**.

62 The Agreement Act, p. 1, **Exh. CLA-2**.

63 These are defined in the State Agreement as "Project 1" (Project(s) for the production of high grade iron ore pellets within WA), "Project 2" (Project(s) for the production of direct reduced iron within WA) and "Project 3" (Project(s) for the production of steel within WA): State Agreement, cl. 1.

64 Clause 6(2) sets out the information that is required to be submitted with any Project Proposal, **Exh. CLA-2**.

58. Clause 8 of the State Agreement provides for the submission of proposals seeking to modify, expand or vary existing Project Proposals that have already been submitted and approved ("**Additional Project Proposals**").

59. Project Proposals submitted under the State Agreement are considered by a Minister in the WA Government. From at least 2006, the relevant Minister was the "Minister for State Development", who at least at certain times was also the WA Premier.

60. Mineralogy, in conjunction with certain Co-Proponents, has submitted a total of 14 Project Proposals (including Additional Project Proposals) under the State Agreement.[65] Of that total, five Project Proposals have been approved. The other proposals either lapsed, were withdrawn, were considered not to constitute a valid "Project Proposal" within the meaning of clause 6 of the State Agreement (and thus unable to be considered by the Minister pursuant to clause 7), or resulted in litigation.[66]

61. In 2008, following the domestic litigation referred to immediately above (which in part concerned whether the State Agreement permitted Proposals to be made concerning the

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65 See e.g. Within Indexed bundle of documents referred to in the Applicant's Statement of Issues, Facts and Contentions: Letter from Mineralogy to Minister for State Development dated 26 November 2006 **Exh. C-196**, p. 7133; Letter from Clive Brown, Minister for State Development to Mineralogy dated 25 February 2008, **Exh. C-196**, pp. 7420-7421; Letter from Mineralogy and Sino Iron to Eric Ripper, Deputy Premier of WA Government (also Minister for State Development) dated 19 November 2007, **Exh. C-196**, p. 7422; Letter from Eric Ripper, Deputy Premier of WA Government (also Minister for State Development) to Sino Iron dated 4 January 2008, **Exh. C-196**, p. 7423; Letter from Mineralogy to Eric Ripper, Deputy Premier of WA Government (also Minister for State Development) dated 11 January 2008, **Exh. C-196**, p. 7424; Letter from Clive Brown, Minister for State Development to International Minerals dated 29 September 2004, **Exh. C-196**, p. 7430; Letter from Clive Brown, Minister for State Development to Mineralogy dated 25 February 2005, **Exh. C-196**, p. 7431; Letter from Premier Barnett to Mineralogy dated 6 January 2010, **Exh. C-196**, p. 7591; Letter from Premier Barnett to Sino Iron dated 11 June 2009, **Exh. C-196**, p. 7626; Korean Steel Project: Additional Project Proposal – Second Korean Steel Concentrate Proposal dated November 2009, **Exh. C-196**, pp. 7627, 7650; *In the matter of an arbitration between Mineralogy Pty Ltd & International Minerals Pty Ltd v Western Australia v Western Australia,* Statement of Agreed Facts and Issues dated 9 April 2014, **Exh. C-196**, pp. 7668-7674; First Witness Statement of [redacted] dated 13 February 2023 (amended on 29 September 2023) (Annexure 12C to Amended NoA) ("[redacted] **WS**").

66 *Mineralogy Pty Ltd v State of Western Australia* [2005] WASCA 69, **Exh. CLA-4**. This litigation concerned whether or not Mineralogy could submit, and the Minister was required to consider, the Proposals concerning the production of iron ore concentrates. However, these Proposals did not fit within the "Project Types" contemplated by the State Agreement. The litigation also concerned whether or not clause 8 of the State Agreement (which permits variations of activities carried on under the State Agreement in relation to a project) permitted a variation of the State Agreement to allow different *types* of projects other than those contemplated. The Court of Appeal held it did not, thereby dismissing the appeal.

production of iron ore concentrates), Mineralogy, the other Co-Proponents,[67] and the WA Government entered into a variation of the State Agreement, which records that the parties wished to:[68]

(a) Allow Mineralogy and Co-Proponents to produce iron ore concentrates for sale within Australia or for export overseas;

(b) Amend the description of certain geographical areas in the State Agreement; and

(c) Provide for the relinquishment by Mineralogy of land to WA "to facilitate the future development of multi user port facilities at Cape Preston".

62. For reasons that will become apparent, a brief outline of the history of projects approved and undertaken under the State Agreement and related events from 2006 onwards is necessary factual background to Australia's preliminary objections.

(i) The Sino Iron and Korean Steel Project Proposals

63. On 21 March 2006, Mineralogy entered into Mining Right and Site Lease Agreements ("**MRSLAs**") with two of its then subsidiaries, Sino Iron and Korean Steel, providing contractual mining rights and so-called sublease rights over certain of Mineralogy's mining tenements and establishing Mineralogy's rights to royalty payments from Sino Iron and Korean Steel. [69]

64. On or around 11 July 2006, the Mineralogy Group sold Sino Iron to CITIC Pacific.[70]

65. Notwithstanding that Sino Iron was no longer a subsidiary of Mineralogy, Mineralogy and Sino Iron jointly submitted the "**Sino Iron Pellet Proposal**" for approval,[71] first on 19

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67 The Co-Proponents are listed in the variation agreement as being Austeel Pty Ltd, Balmoral Iron Pty Ltd, Anshan Resources Pty Ltd, International Minerals Pty Ltd, Korean Steel Pty Ltd, and Sino Iron Pty Ltd – see Agreement Act, Schedule 2, **Exh. CLA-2**.

68 Agreement Act, Schedule 2, **Exh. CLA-2**.

69 MRSLA between Sino Iron and Mineralogy, **Exh. C-172**, p. 91; MRSLA between Korean Steel and Mineralogy, **Exh. C-172**, p. 149.

70 According to the judgment of Edelman J, who was then a justice of the Federal Court of Australia, the Sino Iron Takeover Agreement was entered into on 31 March 2006 and was completed on 6 July 2006: see *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825, paras. 107-109, **Exh. R-91**.

71 "Proposal 7" (formerly "Proposal 5"): Proposal dated February 2008 amending Sino Iron Pellet Project: Project Proposal (Project 1) dated November 2007 (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, p. 7431; Submitted on 29 February 2008 and approved on 2 May 2008: See letter from Eric Ripper, Deputy Premier of WA Government dated 2 May

November 2007, and in varied form on 29 February 2008.[72] It was approved on 2 May 2008, becoming the first Project Proposal that was approved under the State Agreement.[73] Mineralogy and Sino Iron submitted an Additional Project Proposal under clause 8 of the State Agreement in relation to the Sino Iron Pellet Proposal, which was approved on 22 June 2009.[74] Mineralogy and Sino Iron submitted a further Additional Project Proposal under clause 8 of the State Agreement, which was approved on 6 January 2010.[75] The Sino Iron Pellet Proposal, together with the two related Additional Project Proposals that were subsequently approved, have come to be referred to as the "**Sino Iron Project**".[76]

66. By November 2008, the Mineralogy Group had sold Korean Steel to CITIC Pacific.[77] As noted above, for convenience, CITIC, CITIC Pacific, Sino Iron and Korean Steel are referred to collectively as the CITIC Parties.[78]

67. Again, notwithstanding that Korean Steel was no longer a subsidiary of Mineralogy, Mineralogy and Korean Steel jointly submitted a Project Proposal that was approved on 11

2008 to Mineralogy and Sino Iron (Indexed bundle of documents referred to in Applicant's Statement of Issues Facts, and Contentions), **Exh. C-196**, p. 7512.

72 Proposal dated February 2008 amending Sino Iron Pellet Project: Project Proposal (Project 1) dated November 2007 (Indexed bundle of documents referred to in the Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, p. 7431; Letter from Eric Ripper, Deputy Premier of WA Government dated 2 May 2008 to Mineralogy and Sino Iron (Indexed bundle of documents referred to in the Applicant's Statement of Issues Facts and Contentions), **Exh. C-196**, p. 7512.

73 Letter from Eric Ripper, Deputy Premier of WA Government to Mineralogy and Sino Iron dated 2 May 2008 (Indexed bundle of documents referred to in Applicant's Statement of Issues Facts, and Contentions), **Exh. C-196**, p. 7512.

74 "Proposal 10": Additional Project Proposal – Second Sino Iron Concentrate Proposal, dated November 2009 (Indexed bundle of documents referred to in Applicant's Statement of Issues Facts and Contentions), **Exh. C-196**, p. 7555; Decision in letter from Premier Barnett to Sino Iron dated 22 June 2009 (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, p. 7554.

75 Additional Project Proposal – Second Sino Iron Concentrate Proposal dated November 2009 (Indexed bundle of documents referred to in Applicant's Statement of Issues Facts and Contentions), **Exh. C-196**, p 7555; Decision in letter from Premier Barnett to Mineralogy dated 6 January 2010 (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, p. 7591.

76 The variation agreement to the State Agreement defines the "Sino Iron Project" as meaning "the project of the type of Project 1 the subject of proposals submitted by Sino Iron and the Company [Mineralogy] on 29 February 2008 and approved by the Minister under Clause 7 as modified, expanded or otherwise varied from time to time in accordance with this Agreement." 'Project 1' is defined by the State Agreement as a project for the production of high grade iron ore pellets. See Agreement Act, Schedule 2, cl 4(1)(a), Schedule 1, cl 1(1) **Exh. CLA-2.**

77 According to the judgment of Edelman J, Mr Palmer, Mineralogy, Balmoral Iron Holdings Pty Ltd, Korean Steel, CITIC Pacific and Sino Iron entered into a takeover agreement on 1 November 2007 by which Balmoral Iron Holdings Pty Ltd agreed to acquire all the shares in Korean Steel. This was completed on 22 October 2008: see *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825, paras. 111-121, **Exh. R-91**.

78 *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 16)* [2017] WASC 340, paras. 6, 153, **Exh. CLA-5**.

June 2009.[79] Mineralogy and Korean Steel submitted an Additional Project Proposal under clause 8 of the State Agreement in relation to the Korean Steel Project which was approved on 6 January 2010 (and corrected on 15 February 2010).[80] This Proposal and the related Additional Project Proposal have come to be referred to as the "**Korean Steel Project**".

68. The Korean Steel Project was approved on the basis that Korean Steel would use the infrastructure facilities developed by Sino Iron for the Sino Iron Project.[81] Most relevantly, the Sino Iron Project approvals provided for construction of, *inter alia*, a causeway to Preston Island, a jetty, a wharf on the jetty,[82] shipping berths and a breakwater.[83] By August 2012, Sino Iron had constructed a causeway to Preston Island and a breakwater at Preston Island and associated facilities.[84]

(ii) The Balmoral South Iron Ore Project Proposal

69. On 8 August 2012, Mineralogy and International Minerals submitted the BSIOP Proposal to the WA Government pursuant to clause 6 of the State Agreement.[85] The BSIOP Proposal proposed the construction and operation of a magnetite iron ore mine, processing facility and

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79 Korean Steel Concentrate Project – Project Proposal dated February 2009 (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, p. 7592; Decision in letter from Premier Barnett to CITIC Pacific dated 11 June 2009 (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, p. 7626.

80 Korean Steel Project: Additional Project Proposal – Second Korean Steel Concentrate Proposal dated November 2009 (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, p. 7627; Decision in letter from Premier Barnett to Mineralogy dated 6 January 2010 (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, p. 7591; Letter from Premier Barnett to CITIC Pacific dated 15 February 2010, **Exh. R-92**.

81 Decision in letter from Premier Barnett to CITIC Pacific dated 11 June 2009 (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, p. 7626; Korean Steel Project – Second Korean Steel Concrete Proposal (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, p. 7628.

82 Proposal dated February 2008 amending Sino Iron Pellet Project: Project Proposal (Project 1) dated November 2007 (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, pp. 7457-7458; Submitted on 29 February 2008 and approved on 2 May 2008: see letter from Eric Ripper, Deputy Premier of WA Government dated 2 May 2008 to Mineralogy and Sino Iron (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, p. 7512.

83 Sino Iron Project: Additional Project Proposal - Sino Iron Concentrate Proposal dated February 2009 (Indexed bundle of documents referred to in Applicant's Statement of Issues Facts and Contentions), **Exh. C-196**, pp. 7514, 7534; Approved 22 June 2009: see letter from Premier Barnett to Sino Iron dated 22 June 2009 (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions) **Exh. C-196**, p. 7554.

84 BSIOP Proposal dated 8 August 2012, **Exh. C-410**, p. 235; see also map at **Exh. C-410**, p. 123.

85 Letter from Mineralogy and International Minerals to Premier Barnett dated 8 August 2012, **Exh. C-410**, p. 18.

associated infrastructure in the Cape Preston region of the Pilbara to produce and export 24 million tonnes per annum of iron ore concentrates.

70. On 4 September 2012, Mr Colin Barnett, the then WA Premier ("**Premier Barnett**") (who was also the Minister for State Development and therefore the relevant Minister for the purposes of the State Agreement) wrote on behalf of the WA Government informing Mineralogy and International Minerals that WA was unable to accept the BSIOP Proposal as a valid proposal under the State Agreement because it proposed actions that were already approved under the Sino Iron Proposal, including "the dredging and construction of a shipping channel, berths and a trestle jetty".[86] The letter further foreshadowed that the Department of State Development would write to "separately address areas within the document(s) that lack detail, clarity and firm commitments".[87]

71. On 12 September 2012, Mr Wood, the Director General of the WA Department of State Development, wrote to Mineralogy as had been foreshadowed and provided a list of issues which were to be addressed with the BSIOP Proposal in an effort to assist Mineralogy and International Minerals to develop a valid proposal.[88]

72. On 6 November 2012, Mineralogy and International Minerals wrote to Premier Barnett notifying the WA Government that because of the WA Government's decision not to consider the BSIOP Proposal, the companies considered that a dispute had arisen in relation to the BSIOP Proposal with the WA Government and they were initiating an arbitration process under the State Agreement and the *Commercial Arbitration Act 1985* (WA) ("***Commercial Arbitration Act***").[89]

73. On 16 November 2012, Premier Barnett wrote to Mineralogy and International Minerals reiterating that the BSIOP Proposal was "deemed invalid" on the basis that it included the undertaking of certain port works already approved for the Sino Iron Project.[90]

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86 Letter from Premier Barnett to Mineralogy dated 4 September 2012, **Exh. C-410**, p. 125.

87 *Ibid*.

88 Letter from Mr Wood, Director General of the Department of State Development of WA, to Mineralogy (International Minerals copied) dated 12 September 2012, **Exh. R-93.**

89 Letter from International Minerals to Premier Barnett dated 6 November 2012 (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, p. 7829; Letter from Mineralogy to Premier Barnett dated 6 November 2012 (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, p. 7830.

90 Letter from Premier Barnett to International Minerals dated 16 November 2012 (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, p. 8196;

D. DISPUTES CONCERNING STATE AGREEMENT PROPOSALS AND PROJECTS

74. From 2012, Mineralogy repeatedly contested the conduct of the WA Government and third parties in relation to each of the BSIOP, the Sino Iron Project and the Korean Steel Project, all of which is relevant to understanding the reasons for the incorporation of Zeph and its insertion into the Mineralogy Group's corporate structure in January 2019.

(i) Non-approval of the BSIOP Proposal is referred to arbitration

75. As noted above, on 6 November 2012, Mineralogy and International Minerals wrote to Premier Barnett notifying the WA Government that, because of the WA Government's decision not to consider the BSIOP Proposal, they were initiating an arbitration process under the State Agreement and the *Commercial Arbitration Act*.[91]

76. On 22 February 2013, Mineralogy issued an originating summons requesting the WA Supreme Court to appoint an arbitrator and, on 19 March 2013, the Hon Michael McHugh AC QC (as he was then) was appointed as arbitrator ("**First BSIOP Arbitration**").[92]

77. The principal issue in the First BSIOP Arbitration was:

> "…whether [the BSIOP Proposal] … was a 'proposal submitted pursuant to Clause 6' of the *Iron Ore Processing Mineralogy Agreement* … made between the Applicants, other companies and the State of Western Australia. If it was a proposal for the purpose of that Agreement, clause 7 of the Agreement required the Minister to deal with it. In very general terms, the Minister could defer consideration of the proposal until certain matters were remedied or he could impose conditions before approving the proposal. However, he had no power to reject the proposal if it was a proposal for the purpose of Clause 7."[93]

78. There were various procedural delays in the conduct of the First BSIOP Arbitration, including due to Mineralogy's disputes with third parties. In May 2013, for example, Mineralogy sought suspension of the First BSIOP Arbitration while domestic court

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Letter from Premier Barnett to Mineralogy dated 16 November 2012 (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, p. 8199.

91 Letter from International Minerals to Premier Barnett dated 6 November 2012 (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, p. 7829; Letter from Mineralogy to Premier Barnett dated 6 November 2012 (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, p. 7830.

92 See Originating summons in *Mineralogy Pty Ltd and International Minerals Pty Ltd v The State of Western Australia, Supreme Court of Western Australia*, ARB No. 3 of 2013, **Exh. CLA-31**.

93 First McHugh Award, para. 1, **Exh. C-442**.

proceedings that Mineralogy had commenced against the CITIC Parties were on foot (those proceedings are discussed further below at Section II.D(ii)).[94]

79. An award was issued in the First BSIOP Arbitration on 20 May 2014 ("**First McHugh Award**").

80. In the First McHugh Award, Mr McHugh held that the BSIOP Proposal "was a proposal submitted pursuant to clause 6 of the State Agreement with which the Minister was required to deal under clause 7(1) of the Agreement".[95] In reaching that finding, Mr McHugh held:

> "…when Project Proponents tender a proposal that does not deal with all the matters mentioned in Clause 6(2), the Minister has no power to reject the proposal. He may in fact approve the proposal with or without qualification or reservation despite its defects. Or he may defer consideration of or decision upon the proposal until the Proponents submit a further proposal or proposals. Or he may require the Proponents to make such alteration to the proposal or impose such conditions as he thinks reasonable before approving the proposal. If he chooses either of the latter courses, he must consult with the Project Proponents in accordance with Clause 7(3)."[96]

81. The issue of damages was only addressed briefly in the First McHugh Award. After finding that the Minister had to give a decision within two months, the First McHugh Award stated "[t]he failure of the Minister to give a decision within that time means that he is in breach of the State Agreement and is liable in damages for any damage that [Mineralogy and International Minerals] may have suffered as a result of the breach".[97] The First McHugh Award then went on to state:

> "[Mineralogy and International Minerals] foreshadowed a potential claim for damages by reason the [sic] Minister's breach in failing to deal with the August 2012 submission under clause 7(1). However, [Mineralogy and International Minerals] tendered no evidence in support of such a claim for damages, and it is not appropriate for me to make any Order in respect of it…".[98]

82. On 11 June 2014, shortly after the First McHugh Award was issued, Mineralogy wrote to the WA Government's State Solicitor ("**State Solicitor**") asserting that Mineralogy and International Minerals had "suffered substantial damages", requesting a without prejudice

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94 Letter from Mineralogy to the WA Government State Solicitor's Office dated 15 May 2013, **Exh. R-94**.
95 First McHugh Award, p. 51, **Exh. C-442**.
96 *Id*., para. 49.
97 *Id*., para. 67.
98 *Id*., para. 70.

meeting, and threatening to "proceed to take other measures" if no response was received within seven days.[99]

83. On 17 June 2014, the State Solicitor wrote to Mineralogy, on behalf of the WA Government, rejecting Mineralogy and International Minerals' position on damages. He indicated that the WA Government did not consider that either Mineralogy or International Minerals were entitled to damages following the First McHugh Award, and that the WA Government's primary position was that the First McHugh Award had already decided the question of damages and had made no order for damages.[100]

84. On 8 July 2014, Mineralogy again wrote to the State Solicitor reiterating its position on damages and rejecting the WA Government's position that the First McHugh Award was final with respect to the question of damages.[101]

85. On 22 July 2014, Premier Barnett (being the relevant Minister for the purposes of the State Agreement) wrote to Mineralogy stating that he was exercising his power under clause 7(1)(c) of the State Agreement to require alterations to the BSIOP Proposal and comply with 46 conditions precedent. Premier Barnett further "repeat[ed] my invitation for you to consult with the Department of State Development in respect of the BSIOP Proposal and as contemplated by clause 7(3) of the State Agreement".[102]

86. On 12 August 2014, International Minerals wrote to Premier Barnett expressly in response to the letter of 22 July 2014 requesting consultations under the State Agreement.[103]

87. A week later, on 18 August 2014, the State Solicitor replied indicating that Premier Barnett was prepared to hold consultations with International Minerals and its Co-Proponent, Mineralogy, if certain details as to the scope of the consultations were provided.[104]

88. On 26 September 2014, Mineralogy wrote to Mr McHugh in relation to the damages claim in the First BSIOP Arbitration.[105] Mineralogy noted that the companies intended to progress

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99 Letter from Mineralogy to State Solicitor dated 11 June 2014, **Exh. R-95**.
100 Letter from State Solicitor to Mineralogy dated 17 June 2014, **Exh. R-96**.
101 Letter from Mineralogy to State Solicitor dated 8 July 2014, **Exh. R-97**.
102 Letter from Premier Barnett to Mineralogy dated 22 July 2014 (Indexed bundle of documents referred to in the Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, p. 9337.
103 Letter from International Minerals to Premier Barnett dated 12 August 2014, **Exh. R-98**.
104 Letter from State Solicitor to International Minerals dated 18 August 2014, **Exh. R-99**.
105 Letter from Mineralogy to Mr McHugh dated 26 September 2014, **Exh. R-100**.

the claim and that International Minerals might present separate damages to Mineralogy. Mineralogy also sought to preserve its and International Minerals' rights to "submit for arbitration" the imposition of 46 conditions precedent on the approval of the BSIOP Proposal and also contended that the imposition of the conditions precedent exacerbated the damages claim.[106]

89. On 9 October 2014, the State Solicitor's Office wrote to Mineralogy and International Minerals, noting that the companies had indicated in correspondence that they were willing to organise a meeting with the State Solicitor's Office and the Premier's Department concerning their claim for damages and the conditions precedent, but that Mineralogy and International Minerals had not sought to make any contact about those issues.[107]

90. On 13 February 2015, Mineralogy and International Minerals wrote to the State Solicitor's Office stating that they were still assessing their damages claim and expressly reserving all of their rights with respect thereto.[108]

91. On 29 December 2016, legal representatives for Mineralogy and Australasian Resources Limited (a then part-owner of International Minerals) wrote to the State Solicitor's Office in relation to the First BSIOP Arbitration, asserting that the companies had been seeking to mitigate their losses in respect of the damages claim and noting that Mineralogy was involved in proceedings before the Supreme Court of Western Australia involving Sino Iron and Korean Steel (discussed below).[109] The letter stated that Mineralogy and Australasian Resources Limited would await the outcome of those proceedings before deciding whether to pursue their damages claim against the WA Government in relation to the BSIOP Proposal and the First BSIOP Arbitration.[110]

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106 *Ibid*.

107 Letter from WA Government State Solicitor's Office ("**State Solicitor's Office**") to Mineralogy dated 9 October 2014, **Exh. R-101**; Second McHugh Award, para. 58, **Exh. C-443**.

108 Letter from Mineralogy, on behalf of itself and International Minerals, to State Solicitor's Office dated 13 February 2015, **Exh. R-102**; Second McHugh Award, para. 59, **Exh. C-443**.

109 Letter from Alexander Law, on behalf of Mineralogy and Australasian Resources Limited, to State Solicitor's Office dated 29 December 2016, **Exh. R-103.**

110 Letter from Alexander Law, on behalf of Mineralogy and Australasian Resources Limited, to State Solicitor's Office dated 29 December 2016, **Exh. R-103**; Second McHugh Award, paras. 60, 100, **Exh. C-443**.

92. On 11 March 2017, an election was held in WA, which resulted in a change in government. On 17 March 2017, Mr McGowan was sworn in as the Premier of WA ("**Premier McGowan**").

93. On 16 August 2017, Premier McGowan (as the relevant Minister) wrote to Mineralogy and International Minerals referring to the Minister's decision of 22 July 2014 concerning the conditions precedent applicable to the BSIOP Proposal, noting that Mineralogy and International Minerals had failed to submit an amended proposal, and accordingly notifying them that the WA Government was treating the BSIOP Proposal as having lapsed.[111]

(ii) Deterioration of the commercial relationship between Mineralogy and the CITIC Parties

94. Simultaneously to these developments in relation to the BSIOP Proposal, the commercial relationship between Mineralogy and its Co-Proponents on the Sino Iron and Korean Steel Projects began to deteriorate. This led, from 2013 onwards, to numerous proceedings in Australian courts. Most relevantly:

(a) By 2013, Mineralogy had commenced domestic court proceedings under the MRSLAs between Mineralogy and certain of the CITIC Parties concerning certain royalty payments which Mineralogy claimed were owed to it ("**Royalties Litigation**");[112]

(b) In 2013, Mineralogy commenced proceedings in the Federal Court of Australia seeking, *inter alia*, a declaration that it had an entitlement to possession and control regarding the port facilities at Port Preston ("**Port Litigation**"). In 2015, the Federal Court held that Mineralogy did not have rights to possess or control the port at Port Preston, a decision later affirmed on appeal;[113] and

(c) In March 2016, certain of the CITIC Parties also commenced domestic court proceedings against Mineralogy seeking specific performance of the "China Project

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111 Letter from Premier McGowan to Mineralogy dated 16 August 2017, **Exh. C-196**, p. 9375; Letter from Premier McGowan to International Minerals dated 16 August 2017, **Exh. C-196**, p. 9376; Second McHugh Award, para. 61, **Exh. C-443**.

112 *Mineralogy Pty Ltd v Sino Iron Pty Ltd, Korean Steel Pty Ltd and CITIC Ltd (No 16)* [2017] WASC 340, **Exh. CLA-5**. Further background to the Mining Right and Site Lease Agreements is at the Chronology of Events at **Annexure A**.

113 *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825, **Exh. R-91**. The decision was affirmed on appeal, *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2017] FCAFC 55, **Exh. R-104**.

Option Agreement".[114] This was an agreement separate to the Sino Iron Project and the Korean Steel Project that granted CITIC the option to procure an additional 1 billion tonnes of iron ore from tenements held by Mineralogy.

95. Notwithstanding this domestic litigation, the CITIC Parties wished to expand the Sino Iron and Korean Steel Projects so that the operating lives of both projects could be extended. The CITIC Parties also needed more space for the Sino Iron and Korean Steel Projects, including for a larger tailings dam.[115]

96. To that end, on 9 December 2016, the CITIC Parties provided Mineralogy with draft Mine Continuation Proposals ("**MCPs**") in an attempt to secure Mineralogy's cooperation in obtaining the necessary approvals for the continued operation of the Sino Iron and Korean Steel Projects under the State Agreement.[116] The MCPs were Additional Project Proposals to be submitted pursuant to clause 8 of the State Agreement. As a result, because under the State Agreement Mineralogy had to be a Proponent to all Proposals, the CITIC Parties were reliant on Mineralogy to submit the MCPs to the WA Government for the necessary approvals.[117] That presented an issue because the enlarged Sino Iron and Korean Steel Projects would affect and overlap with areas that were part of the BSIOP Proposal, as well as possibly other tenements of Mineralogy.

97. The CITIC Parties had copied their correspondence to Mineralogy of 9 December 2016 (which enclosed the draft proposals) to the Honourable Bill Marmion ("**Minister Marmion**"), who was then the Minister for State Development in the WA Government, and to Mr Stephen Wood, the Director General of the WA Department of State Development.[118]

98. On 12 December 2016, Mineralogy responded to the CITIC Parties' attempt to draw the WA Government into the disagreement over the MCPs by writing directly to Minister Marmion to confirm that Mineralogy had not submitted the draft MCPs to the WA Government for

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114 See Chronology of Events at **Annexure A**; *CITIC Ltd v Mineralogy Pty Ltd (No 5)* [2021] WASC 89, **Exh. R-105**.

115 Letter from CITIC Pacific Mining Management on behalf of Sino Iron and Korean Steel to Mineralogy (Minister Marmion and Mr Wood, Director General of the Department of State Development of WA, copied) dated 9 December 2016, **Exh. R-106**.

116 *Ibid*.

117 *Id*., p. 2.

118 *Ibid*.

approval and to express the firm view that WA should not interfere with any commercial negotiations between the parties.[119]

99. By 21 January 2017, media reports noted that CITIC could be forced to close down the Sino Iron mine because "former MP Clive Palmer refused to sign off on expansion approvals for the project".[120]

100. On 23 January 2017, Mineralogy formally indicated in writing to the CITIC Parties that it did not agree to the enlarged Sino Iron Project nor the enlarged Korean Steel Project on the basis that the enlarged Sino Iron Project would affect areas that were part of the BSIOP Proposal.[121] Mineralogy provided copies of this correspondence to the WA Government.

101. Throughout 2017, domestic Australian litigation between Mineralogy and the CITIC Parties continued, with progress of those matters reported in the Australian press (including by reference to the impasse between the companies with respect to the MCPs).[122]

102. On 24 November 2017, judgment was delivered in the Royalties Litigation.[123] Justice Kenneth Martin of the Supreme Court of Western Australia held that Sino Iron and Korean Steel collectively owed Mineralogy approximately AUD 150,000,000 of royalties for the period 31 December 2013 to 31 March 2017.[124]

103. On 18 December 2017, following the judgment in the Royalties Litigation, CITIC Pacific Mining Management wrote to Mr Palmer (as the Chairman of Mineralogy) to provide revised MCPs for Mineralogy's consideration, and again requested support for the MCPs.[125] The correspondence was copied to Mr Wood as the Director-General of the relevant Department in the WA Government.

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119 Letter from Mineralogy to Minister Marmion dated 12 December 2016, **Exh. R-107**, p. 3.

120 Paul Garvey, 'Palmer could close mine: Citic', *The Australian* (21 January 2017), **Exh. R-108**.

121 Letter from Mineralogy to CITIC Pacific Mining Management dated 23 January 2017, **Exh. R-109**.

122 Paul Garvey, 'Palmer row pushes Citic to eye closure', *The Australian* (27 June 2017) **Exh. R-110**; and Stuart McKinnon, 'Trust lacking before Sino deal', *The West Australian* (29 June 2017) **Exh. R-111**.

123 *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 16)* [2017] WASC 340, **Exh. CLA-5**.

124 *Id*., para. 841. Kenneth Martin J's judgment was largely upheld on a subsequent appeal, with the final orders of the Supreme Court of Western Australia's Court of Appeal being that Sino Iron Pty Ltd, Korean Steel Pty Ltd and CITIC Ltd pay Mineralogy AUD 326,838,432 plus costs: *Sino Iron Pty Ltd & Ors v Mineralogy Pty Ltd* [2019] WASCA 80, **CLA-6**.

125 Letter from CITIC Pacific Mining Management to Mineralogy (Mr Wood, Director General of the Department of Jobs, Tourism, Science and Innovation, copied) dated 18 December 2017, **Exh. R-112**; Mine Continuation Proposal for Sino Iron Project dated December 2017, **Exh. R-113**; Mine Continuation Proposal for Korean Steel Project dated December 2017, **Exh. R-114**.

104. On 21 December 2017, the WA Government (Mr Wood as the Director-General of the relevant Department) wrote to Mr Palmer (as the Chairman of Mineralogy), confirming that the CITIC Parties had provided it with a copy of the revised MCPs and that the WA Government considered the revised MCPs provided sufficient detail to meet the requirements of the State Agreement.[126] The correspondence asked Mineralogy to give careful consideration to submitting the Proposals with its Co-Proponents under the State Agreement.

105. On 28 December 2017, Mineralogy wrote to Premier McGowan seeking a meeting between the Premier and Mr Palmer on the basis that the judgment in the Royalties Litigation had given rise to "a number of matters that Mr Palmer, Mineralogy's Chairman, would like to brief [the Premier] on and discuss with [the Premier] in respect of Mineralogy projects in the Pilbara Region".[127]

(iii) The issue of damages in relation to the First BSIOP Arbitration is referred to arbitration

106. On 29 December 2017, Mineralogy wrote to Mr Wood, as the Director-General of the relevant Department, noting that Mineralogy and Australasian Resources (as then part owner of International Minerals) were still considering their position in respect of the First McHugh Award.[128] The letter also noted there has been no agreement with Sino Iron or Korean Steel in respect of any lands set out in the MCPs and that Mineralogy did not consent to their submissions as a Project Proposal under the State Agreement.[129]

107. After another long hiatus with respect to the damages claim, on 2 July 2018, Mr Palmer, in his capacity as director of Mineralogy and International Minerals, wrote a letter to Premier McGowan.[130] The letter asserted that both companies were in a dispute with the WA Government in connection with the damages arising out of the First BSIOP Arbitration and that the companies were referring that dispute to domestic arbitration as provided for under the State Agreement ("**First Damages Claim**").

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126 Letter from Mr Wood, Director General of the Department of Jobs, Tourism, Science and Innovation to Mineralogy (CITIC Pacific Mining Management copied) dated 21 December 2017, **Exh. R-115**.

127 Letter from Mineralogy to Premier McGowan dated 28 December 2017, **Exh. R-116**.

128 Letter from Mineralogy to Mr Wood, Director General of the Department of Jobs, Tourism, Science and Innovation, dated 29 December 2017, **Exh. R-117**, p. 2.

129 *Ibid*.

130 Letter from Mineralogy and International Minerals to Premier McGowan dated 2 July 2018, **Exh. C-184**, p. 345.

108. On 27 July 2018, Premier McGowan responded to Mr Palmer's letter of 2 July 2018 by reiterating the WA Government's position (as set out in a letter dated 17 June 2014) that WA did not accept that there was a dispute that could be referred to arbitration.[131]

109. In the first half of August 2018, the parties discussed the scope of the matters that Mineralogy was purporting to refer to arbitration and how the matter should proceed.[132] Ultimately, on 24 August 2018, Mineralogy and International Minerals wrote to Mr McHugh (copied to the State Solicitor's Office) indicating that there was a dispute between WA and the companies about WA's liability to pay damages following the First McHugh Award, and asking Mr McHugh to determine whether he had jurisdiction to decide the issue.[133] On 28 August 2018, the State Solicitor's Office agreed in correspondence to this course of action.[134]

110. On 14 December 2018, the State Solicitor's Office on behalf of the WA Government wrote to Mineralogy and International Minerals and noted that Mineralogy now claimed to have three matters referred to Mr McHugh for resolution through domestic arbitration.[135] Those three matters are set out in paragraph 126 below. WA agreed to Mr McHugh determining those matters, as well as a preliminary application by the WA Government for the dismissal of those claims ("**Second BSIOP Arbitration**").

111. By 20 December 2018, Mr McHugh had issued proposed directions in relation to the Second BSIOP Arbitration.[136]

(iv) Further developments in relation to the Sino Iron and Korean Steel Projects and the increasing involvement of the WA Government

112. By mid-2018, the commercial disagreements between the CITIC Parties and Mineralogy, including in relation to the Sino Iron Project, the Korean Steel Project and the MCPs, had escalated further. Increasingly, Mr Palmer, Mineralogy and the CITIC Parties all sought to

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131 Letter from Premier McGowan to Mineralogy and International Minerals dated 27 July 2018, **Exh. R-118**.

132 Letter from Mineralogy and International Minerals to Premier McGowan dated 2 August 2018, **Exh. R-119**; Letter from Mineralogy and International Minerals to Premier McGowan dated 6 August 2018, **Exh. R-120**; Letter from State Solicitor's Office to Mineralogy dated 9 August 2018, **Exh. R-121**.

133 Letter from Mineralogy and International Minerals to Mr McHugh (State Solicitor's Office copied) dated 24 August 2018, **Exh. R-122**.

134 Letter from State Solicitor's Office to Mineralogy dated 28 August 2018, **Exh. R-123**.

135 Letter from State Solicitor's Office to Mineralogy dated 14 December 2018, **Exh. C-413**.

136 Letter from Mineralogy and International Minerals to State Solicitor's Office dated 30 October 2018, **Exh. C-412**, p. 4; *Western Australia v Mineralogy Pty Ltd* [2020] WASC 58, **Exh. CLA-8**, para. 51.

raise the profile of the dispute. The details of the actions taken by the parties are set out in the chronology in Annexure A, with the key developments summarised as follows.

(a) On 23 July 2018, Mineralogy wrote to the CITIC Parties stating that their attempts to involve the WA Government in a commercial dispute were "deplorable".[137]

(b) On 9 August 2018, CITIC Pacific Mining Management wrote to Mineralogy and copied in Premier McGowan and various WA Government officials, seeking to justify CITIC's involvement of the WA Government in the dispute between the private parties.[138]

(c) On 28 September 2018, CITIC Pacific Mining Management wrote directly to Premier McGowan (copied to Mineralogy) unilaterally seeking a five-year extension to the time for construction of the pellet plant under the Sino Iron Pellet Proposal, explaining that it had done everything in its power to obtain Mineralogy's consent.[139]

(d) On 12 October 2018, Mineralogy wrote to Premier McGowan in response to CITIC Pacific Mining Management's letter of 28 September 2018. It asserted that Mineralogy had offered to work with CITIC and that the CITIC Parties had breached the State Agreement. The letter also noted the ongoing litigation in the Supreme Court of Western Australia.[140]

(e) On 19 October 2018, the CITIC Parties commenced further proceedings in the Federal Court of Australia against Mineralogy, seeking orders that Mineralogy submit the MCPs to the WA Government for approval under the State Agreement. The WA Government was named as a defendant to these proceedings because of its role in the State Agreement.[141] Those proceedings were subsequently transferred to the Supreme Court of WA (on 17 May 2019).

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137 Letter from Mineralogy to CITIC Pacific Mining Management dated 23 July 2018, **Exh. R-124**.

138 Letter from CITIC Pacific Mining Management to Mineralogy (Premier McGowan copied) dated 9 August 2018, **Exh. R-125**.

139 Letter from CITIC Pacific Mining Management to Premier McGowan dated 28 September 2018, **Exh. R-126**.

140 Letter from Mineralogy to Premier McGowan (CITIC Pacific Mining copied) dated 12 October 2018, **Exh. R-127**.

141 *Sino Iron Pty Ltd v Mineralogy Pty Ltd* [2019] FCA 675, **Exh. R-128**.

(f) On 31 October 2018, Mr Palmer stated publicly (by use of his account on Twitter, now known as X) "[t]he problem is the Chinese don't want to pay for anything. They want the WA Government to take land for free from Australian companies and individuals despite the fact that there is a State Agreement in place #sovereignty #Australia".[142]

(g) On 3 November 2018, *The West Australian* newspaper (a newspaper with distribution online and in print in WA) published an article noting comments from Premier McGowan urging Mr Palmer and Mineralogy to resolve the issue with CITIC. The comments made by Premier McGowan foreshadowed that the WA Government might consider amending the State Agreement unless there was a resolution. Premier McGowan was quoted in the article as saying "I urge Mr Palmer to resolve the issues with CITIC as soon as possible to ensure CITIC can continue to operate. The State is considering its options".[143] The then leader of the opposition in WA was also quoted as saying "… it is important that the Government does all it can to sustain the project including altering the State Agreement".[144]

(h) On 5 November 2018, Mr Palmer wrote to Premier McGowan directly, enclosing the article from *The West Australian* newspaper of 3 November 2018, restating Mineralogy's commitments to the Sino Iron Project, and requesting a meeting with Premier McGowan.[145]

(i) On 6 November 2018, Mr Palmer (on behalf of Mineralogy) again wrote directly to Premier McGowan seeking an appointment to discuss the Sino Iron Project between Mineralogy and CITIC. Mineralogy specifically requested to be consulted on any potential changes to the State Agreement.[146]

(j) On 29 November 2018, Premier McGowan made the following statement in Question Time on the floor of the WA Parliament:

> "State agreements are an important instrument. They are a privileged instrument for the companies that are party to them, and by their very nature they are there to ensure the state's best interests are looked after, but there is a responsibility on the beneficiary, Mineralogy, to do the right

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142 Screenshot of Tweet by Mr Palmer posted on 31 October 2018, **Exh. R-129**.
143 Ben Harvey, 'State set to protect Sino Iron', *The West Australian* (3 November 2018), **Exh. R-130**.
144 *Ibid*.
145 Letter from Mineralogy to Premier McGowan dated 5 November 2018, **Exh. R-131**.
146 Letter from Mineralogy to Premier McGowan dated 6 November 2018, **Exh. R-132**.

> thing. I noted the recent comments of the opposition leader and his offer to help the government do all he can to sustain the project including altering the state agreement. I thank the opposition leader for this commitment. It appears we are as one on this issue, which is good to know. I am pleased we both agree that this issue needs to be resolved. Clive Palmer and Mineralogy are now on notice. At the end of the day, this government will do what is in the best interests of Western Australia and the 3 000 hardworking Australians who work in CITIC's operations".[147]

(k) On 30 November 2018, Mineralogy sent a letter to Premier McGowan, in which it noted Mineralogy's concerns that the proposed WA Government action in relation to altering the State Agreement to allow approval of the MCPs submitted by CITIC would "sterilise the prime tailing location for the remaining Balmoral North Project and greatly diminish its value to a prospective purchaser". [148]

(l) On 2 December 2018, *The Australian Financial Review* published an article noting, in reference to the Premier's statement on 29 November 2018, that:

> "Mr McGowan gave the strongest indication yet that his Labor government is willing to alter a state agreement covering the project to clear the way for expansion CITIC maintains is vital to the future of Sino Iron. … Any attempt to change a state agreement, essentially a contract set out by an act of parliament, runs the risk of a protracted legal battle with Mr Palmer."[149]

(m) Also on 2 December 2018, Mineralogy wrote to Premier McGowan noting that Mineralogy had "religiously complied" with the State Agreement and emphasised that WA should not amend it.[150] Mineralogy asserted that Sino Iron and Korean Steel had to apply for the approval of the Australian Foreign Investment Review Board ("**FIRB**") for their proposed expansion plans. On 3 December 2018, Mineralogy caused the same letter to be published in *The West Australian* newspaper.[151]

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147 WA, *Parliamentary Debates*, Legislative Assembly (29 November 2018), **Exh. R-133**, p. 8981.

148 Letter from Mineralogy to Premier McGowan dated 30 November 2018, **Exh R-134**.

149 Brad Thompson, 'CITIC: Clive Palmer raises China security concern in letter to WA Premier', *The Australian Financial Review* (2 December 2018), **Exh R-135**.

150 Letter from Mineralogy to Premier McGowan dated 2 December 2018, **Exh. R-136**, p. 2.

151 Full page advertisement in *The West Australian*, 'Clive Palmer letter to the WA Premier' (3 December 2018), **Exh. R-137**, pp. 13-14.

(v) MIL is incorporated and inserted into the Mineralogy corporate chain and immediately invokes alleged treaty protections under AANZFTA

113. It was against this backdrop that, on 14 December 2018, MIL was incorporated in New Zealand. The transaction by which MIL briefly became the direct owner of 100% of Mineralogy occurred on 16 December 2018 (see Subsection B of Section II above for the details of the transaction).

114. On 18 January 2019, very shortly before the Claimant was incorporated, and during the time MIL was briefly the owner of Mineralogy, MIL wrote to Premier McGowan.[152] MIL asserted – notwithstanding the fact that it had come into existence only one month ago – that it "engages in substantive business operations in New Zealand and … has an active and continuous link with that country's economy", and that as such it was "entitled to the protections … under the [AANZFTA]".[153] MIL then asserted that:

> "Amongst other things, AANZFTA protects investors of one party (in this case New Zealand) against unfavourable treatment by another party (Australia) relative to local investments and expropriation or nationalisation of the investment, either directly or indirectly, without prompt, adequate and effective compensation. AANZFTA requires compensation equivalent to the fair market value of an expropriated investment at the time of expropriation, with interest….
>
> The expansion proposals of Sino Iron Pty Ltd (Sino Iron) and Korean Steel Pty Ltd (Korean Steel) contain [sic] the acquisition of new rights and property. Mineralogy has previously put you on notice, including by their letter of 2 December 2018, that both Sino Iron and Korean Steel are Chinese State-owned companies. The proposals involve the further acquisition of rights over land and critical infrastructure including the port at Cape Preston….
>
> If your Government alters by legislation the terms of the State Agreement as you have foreshadowed to Parliament, Mineralogy inter alia will have lost its royalty income under existing agreements and court judgements [sic] and the benefit of the exclusive tenure it currently enjoys….
>
> If this matter cannot be resolved prior to the recommencement of the Western Australian State Parliament I intend copying [sic] this letter to all Members of the Western Australian Parliament. So [sic] that they may be aware that if they seek to commit a misfeasance (to act beyond the power of the Parliament) as foreshadowed they will be on notice from our company and Mineralogy of the legal action, we will take against them personally and be aware of the potential claims against them….

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152 Letter from Mineralogy to Premier McGowan dated 18 January 2019, **Exh. R-44**, p. 2.
153 *Ibid*.

> If your Government proceeds with amending legislation, MIL will immediately make a claim for $45Bn against the Commonwealth. You should expect that the payment the Commonwealth is forced to make as a result of your action will be taken into account in future GST calculations."[154]

115. Also on 18 January 2019, MIL sent a copy of the above letter to Mr Angus Taylor MP (the then Minister for Energy in the Commonwealth Government) noting that Premier McGowan had "threatened to unilaterally repudiate certain rights of Mineralogy" which would result in a major loss of MIL's investment and which would amount to "many billions of dollars which under the terms of AANZFTA would immediately become due and payable by the Commonwealth of Australia".[155]

116. On 19 January 2019, MIL sent a further letter to Premier McGowan, which stated that it was entitled to the protections of the Protocol on Investment to the ANZCERTA.[156] The letter was otherwise identical to the letter dated 18 January 2019.

117. On 22 January 2019, *The Australian* newspaper reported the following statements made by Mr Palmer:

> "Mr Palmer said the move offshore meant Mineralogy would be able to claim compensation from the Australian government under the investor protection provisions of the Australia-NZ free trade agreement. He vowed to launch a damages claim if West Australian premier Mark McGowan carries through with his threat to legislate in favour of Chinese giant CITIC's interests in the $US10bn Sino Iron project in the Pilbara."[157]

118. On 23 January 2019, *The West Australian* reported on the letter of 19 January 2019 to Premier McGowan noting that "documents relating to free-trade deals with New Zealand, on the Department of Foreign Affairs website, suggest Mr Palmer would be banned from launching [an investor-State] action".[158]

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154 Letter from Mineralogy to Premier McGowan dated 18 January 2019, **Exh. R-44**, pp. 1-6.

155 Letter from MIL to Minister for Energy in the Commonwealth Government dated 18 January 2019, **Exh. R-45**.

156 Letter from MIL to Premier McGowan dated 19 January 2019, **Exh. R-139**, p. 2.

157 Andrew Burrell, 'Kiwi Flight: Palmer 'to make Australia great' from NZ', *The Australian* (22 January 2019), **Exh. R-46**.

158 Nick Evans, 'Palmer's NZ move looks like a flop', *The West Australian* (23 January 2019), **Exh. R-140**.

(vi) Zeph is incorporated and inserted into the Mineralogy corporate chain and invocation of alleged treaty protections continue

119. It was against this background that, on 21 January 2019, the Claimant (MIPL, later known as Zeph) was incorporated in Singapore.[159]

120. Two days later, on 23 January 2019, Mr Palmer became a director of the Claimant.[160]

121. Then, on 29 January 2019, the transaction by which the Claimant (MIPL, later known as Zeph) was inserted into the corporate structure took place (see above at Subsection B of Section II).

122. On 4 February 2019, MIL wrote to Premier McGowan, noting that MIL's interest in Mineralogy was held by the Claimant (MIPL), which (it alleged) engaged in substantive business operations in Singapore. The letter then suggested that MIPL was entitled to the protections of the Singapore–Australia Free Trade Agreement ("**SAFTA**").[161] The Respondent does not, of course, accept that the Claimant had any substantive business operations in Singapore (see Section V below).[162]

123. On 13 February 2019, *The Australian* newspaper reported that in December 2018 Mr Palmer had "moved control of much of his business empire" to New Zealand "in the hope that it could allow him to potentially claim compensation from the federal government under investor protections of the Australia-NZ free-trade agreement".[163] This newspaper article noted that this "move was short-lived" as that treaty did not provide for investor-State arbitration and that Mr Palmer had "shift[ed] his corporate headquarters from New Zealand to Singapore, as he seeks to revive his threat to sue Australian taxpayers for $45 billion".[164]

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159 Audited Financial Statements of Zeph Investments Pte Ltd for the reporting period from 21 January 2019 (Date of Incorporation) to 30 June 2019, **Exh. C-79**, p. 14; ACRA, Business profile of Zeph Investments Pte Ltd dated 19 January 2021, **Exh. C-71**.

160 ACRA, Register of Directors of Zeph Investments Pte Ltd, 2 February 2023, p. 2. **Exh. C-73**.

161 Chapter 8 of the *Singapore-Australia Free Trade Agreement,* signed 17 February 2003, I-40221 UNTS 2257 (entered into force 28 July 2003), as amended by Agreement to Amend SAFTA, signed on 13 October 2016 (entered into force 1 December 2017), **Exh. RLA-75**; Letter from MIL to Premier McGowan dated 4 February 2019, **Exh. R-141.**

162 See Section V below.

163 Andrew Burrell, 'Palmer shifts HQ from NZ to Singapore', *The Australian* (13 February 2019), **Exh. R-142**.

164 *Ibid*.

124. On 15 May 2019, Mineralogy again wrote to Premier McGowan with the reference "Mineralogy State Agreement" and expressly stated its position that "[t]he Western Australia Parliament does not have the power to change our company's rights which are protected by our parent company['s] investment in Mineralogy under the relevant Free Trade Agreement".[165]

125. On 20 May 2019, the Claimant wrote to Premier McGowan, noting that Mineralogy's involvement was required to submit a Project Proposal relating to the MCPs and warning that "the result" (presumably of any unilateral amendment to the State Agreement) would be arbitration under existing free trade agreements. The letter states (emphasis added):

> "… If your government purported to act to remove the requirement for the Chinese parties to have our consent [to submit a proposal under the State Agreement], they would in effect obtain rights which they currently do not enjoy (e.g. by mining ore on Mineralogy leases and rights of occupation which are not subject to the Judgement [sic] of Martin J) and hence they would not pay Mineralogy any royalty. This is their real agenda. In such circumstances the value of Mineralogy's exclusive rights would be Zero [sic] and Mineralogy would have sustained substantial damages, as would its parent company.
>
> The result would be an arbitration in Washington under existing Free Trade Agreements, which would result in the award of damages against the Australian Government. The Chinese parties would be, as the President of the Western Australian Court of Appeal McClure J said on the 24 March 2016, 'laughing all the way to the bank'. To think that the Western Australian Government would in essence expose the Australian Taxpayer to in effect paying for one of China's largest conglomerate's commercial rights and resources is beyond belief."[166]

(vii) Arbitration proceedings in relation to the BSIOP Proposal continue

126. In parallel with the above events, the Second BSIOP Arbitration progressed throughout 2019. The issues in dispute in that arbitration, as explained in Mr McHugh's Award of 11 October 2019 ("**Second McHugh Award**") were:[167]

(a) Whether the First Damages Claim was heard and determined in the First McHugh Award and whether they [i.e. Mineralogy and International Minerals] were now precluded from pursuing that claim ("**Finality Issue**");

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165 Letter from Mineralogy to Premier McGowan dated 15 May 2019, **Exh. R-143**, p. 4.
166 Letter from MIPL to Premier McGowan dated 20 May 2019, **Exh. R-144**, p. 2.
167 Second McHugh Award, **Exh. C-443**, para. 2.

(b) Alternatively, if the First Damages Claim was not determined in the First McHugh Award and remains to be determined in the First BSIOP Arbitration, whether the Second BSIOP Arbitration proceedings should be adjourned to allow the WA Government to apply to the Supreme Court of Western Australia under section 46 of the *Commercial Arbitration Act* to terminate the arbitration ("**Section 46 Issue**"); and

(c) Whether there was inordinate and inexcusable delay on the part of Mineralogy and International Minerals in pursuing claims in respect of damages and the 46 conditions precedent, and, if there had been such delay, whether those claims should be dismissed under section 25(2) of the *Commercial Arbitration Act 2012* (WA) ("**Section 25 Issue**").

127. The Second McHugh Award was issued on 11 October 2019. In that award:

(a) On the "Finality Issue", Mr McHugh held that it was "not unreasonable" for Mineralogy and International Minerals "not to pursue a claim for general damages in the First Arbitration even if there was a connection between the two causes of action";[168]

(b) On the "Section 46 Issue", Mr McHugh held that the First McHugh Award was a final award and that he was *functus officio* in respect of that dispute, and that he could therefore not adjourn the arbitration proceedings;[169] and

(c) On the "Section 25 Issue", Mr McHugh held that there had not been inordinate and inexcusable delay in pursuing the claim, and that it was necessary for the litigation between Mineralogy, International Minerals and the CITIC Parties to be resolved since that litigation concerned, amongst other things, which parties were entitled to possession and control of the port facilities, and without certainty concerning access to the port facilities, the BSIOP Project may not have proceeded (this was a reference to the Port Litigation). Further to this, Mr McHugh held that the claim was brought within the relevant limitation period.[170]

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168 Second McHugh Award, **Exh. C-443**, para. 103.
169 *Id*., para. 105.
170 *Id*., paras. 114-120.

128. Just four days after the Second McHugh Award, on 15 October 2019, Mineralogy wrote to the Western Australian Attorney-General referring to the Second McHugh Award and noting that "[b]oth MIPL and Mineralogy and [International Minerals] are concerned that the State does not act in any way which would affect their rights to pursue their claim for damages as set out in the Award".[171] The letter specifically invokes the protections of SAFTA, including asserting that "[a]ny interference in the rights of Mineralogy and [International Minerals] under the State Agreement will cause loss and damage to Mineralogy and [International Minerals] and the investors in Mineralogy and [International Minerals] (namely MIPL)".[172]

129. On 31 October 2019, the WA Government sought to appeal the Second McHugh Award in the Supreme Court of Western Australia on the basis of section 38(4)(b) of the *Commercial Arbitration Act*. This appeal was ultimately unsuccessful.[173]

130. On 25 November 2019, Mineralogy again wrote to Premier McGowan, again invoking the protections of SAFTA.[174]

131. On 4 December 2019, the WA Government sought to have the Second McHugh Award set aside, on the basis of section 34 of the *Commercial Arbitration Act 2012* (WA).[175] This application was ultimately discontinued.[176]

132. On 26 June 2020, Mr McHugh issued procedural directions for a third phase of the arbitral proceedings.[177] On 8 July 2010, Mineralogy, International Minerals, the WA Government and Mr McHugh entered into an agreement for the arbitration of, *inter alia*, claims of damages due to the Minister's refusal to accept the BSIOP Proposal and the Minister subsequently purporting to require alterations to, and to impose conditions precedent to the approval of, the BSIOP Proposal ("**Third BSIOP Arbitration**").[178]

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171 Letter from Mineralogy to WA Attorney-General dated 15 October 2019, **Exh. R-145**, p. 1

172 *Id*., p. 2.

173 *Western Australia v Mineralogy Pty Ltd* [2020] WASC 58, **Exh. CLA-8**.

174 Letter from Mineralogy to Premier McGowan dated 25 November 2019, **Exh. R-146**, p. 2.

175 Originating summons to set aside award in ARB 9 of 2019, dated 4 December 2019, **Exh. C-214**.

176 Discontinuation order made by Kenneth Martin J in ARB 9 of 2019, **Exh. C-218**.

177 Email from Mr McHugh to Claimant's Subsidiaries and WA Government with its enclosure: signed minute of directions, 26 June 2020, **Exh. C-384**.

178 Email from Mr McHugh to Claimant's Subsidiaries and WA Government with enclosures (executed counterparts of the arbitration agreement), 17 July 2020, **Exh. C-242**; Letter from Premier Barnett to Mineralogy dated 22 July 2014 (Indexed bundle of documents referred to in the Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, p. 9337.

133. On 13 August 2020, the WA Parliament enacted the Amendment Act.[179] As a result of that Act, on 14 August 2020, the State Solicitor's Office wrote to Mr McHugh informing him that the Third BSIOP Arbitration had been terminated by the Amendment Act.[180]

(viii) Procedural steps in the present arbitration

134. On 14 October 2020, the Claimant gave notice of a dispute to Australia and sent written requests for consultations under Chapter 8 of SAFTA, Article 9.18 the Comprehensive and Progressive Agreement on Trans-Pacific Partnership ("**CPTPP**") and Chapter 11 of AANZFTA.[181]

135. On 21 December 2020, a consultation meeting was held between representatives of the Claimant and the Respondent.[182]

136. On 22 December 2020, the Respondent provided notice of its intention to deny the benefits of AANZFTA to the Claimant.[183] It also provided this notice to the Government of Singapore.[184]

137. On 24 June 2021, the Respondent denied the benefits of AANZFTA to the Claimant.[185]

138. On 20 October 2022, the Claimant sent its Notice of Intent to Submit a Dispute to Arbitration under AANZFTA to the Respondent.[186]

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179 Amendment Act, **Exh. C-1**.
180 Letter from State Solicitor's Office to Mr McHugh dated 14 August 2020, **Exh. C-404**.
181 Letters from Volterra Fietta to the Minister for Foreign Affairs dated 14 October 2020, **Exhs. C-148**, **R-147**, **R-148**.
182 Email from the Office of International Law of the Attorney-General's Department of Australia to Volterra Fietta dated 18 December 2020, **Exh. C-152**.
183 *Ibid*.
184 Letter from the Office of International Law of the Attorney-General's Department of Australia to the Ministry of Trade and Industry of Singapore dated 22 December 2020, **Exh. R-149**.
185 Letter from the Office of International Law of the Attorney-General's Department of Australia to Volterra Fietta (Denial of Benefits) dated 24 June 2021, **Exh. C-155**.
186 Notice of Intent dated 20 October 2022, **Exh. C-63**.

III. ZEPH IS NOT AN "INVESTOR OF A PARTY" UNDER ARTICLE 2(d) OF CHAPTER 11 OF AANZFTA

139. In order for this Tribunal to have jurisdiction, the Claimant must establish that it qualifies as an "investor of a party" under Chapter 11 of AANZFTA. It cannot discharge that burden. Its claims are therefore outside the Tribunal's jurisdiction.

140. Under Article 21 of Chapter 11 of AANZFTA, only a "disputing investor" may submit a claim to arbitration. Article 18(4)(e) of Chapter 11 defines a "disputing investor" as "an investor of a Party that makes a claim against another Party on its own behalf under this Section, and where relevant includes an investor of a Party that makes a claim on behalf of a juridical person of the disputing Party that the investor owns or controls". Zeph purports to bring its claims against Australia on its own behalf. It follows that Zeph can be a "disputing investor" only if it establishes that it is "an investor of a Party" to AANZFTA other than Australia.

141. Article 2(d) of Chapter 11 of AANZFTA defines "investor of a Party" as follows:

> "investor of a Party means a natural person of a Party or a juridical person of a Party that seeks to make[4], is making, or has made an investment in the territory of another Party".[187]

142. Zeph asserted in its Notice of Intent that it "has made investments in the Commonwealth in the form of its shareholding in and ownership of Mineralogy Pty Ltd … and Mineralogy's subsidiary International Minerals Pty Ltd … and in the form of the contractual and property rights owned by the Zeph Subsidiaries".[188] In its Amended Notice of Arbitration, it again asserted that it qualifies as "a juridical person of Singapore that '*seeks to make, is making or has made an investment in the territory of another Party*'".[189]

143. Notwithstanding the above assertions, at no point has Zeph established, or even attempted to establish, that it has "made" any investment in Australia. It relies solely on the fact that it

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187 Footnote 4 within Art 2(d) states: "For greater certainty, the Parties understand that an investor that 'seeks to make' an investment refers to an investor of another Party that has taken active steps to make an investment. Where a notification or approval process is required for making an investment, an investor that 'seeks to make' an investment refers to an investor of another Party that has initiated such notification or approval process."

188 Notice of Intent dated 20 October 2022, **Exh. C-63**, p. 7, lines 113-117.

189 Addendum: Legal Principles – Operation of AANZFTA (Annexure 6C to Amended NoA), para. 25 (emphasis in original).

holds shares in Mineralogy and (indirectly) in International Minerals.[190] However, it is not sufficient that Zeph (allegedly) "ha[s]" an investment,[191] nor that purported investments may be "owned or controlled" by it,[192] nor that Zeph "directly or indirectly acquired" assets in Australia[193] (which it did through a cash-less share swap with an affiliate).

144. What Article 2(d) requires is the "making" of an investment by a putative investor. The requirement of having "made an investment" in the territory of (in this case) Australia entails that there has been some form of active investment, whether by way of a contribution of capital or otherwise. Yet Zeph acquired its shares in Mineralogy merely as a result of a share swap with its New Zealand parent company, MIL. That did not involve an active investment. All that happened when Zeph acquired its shares in Mineralogy from MIL was that Zeph issued the same number of its own shares to MIL, thereby inserting it into the chain of corporate ownership above Mineralogy. In that transaction, Zeph expended nothing, and contributed nothing to Mineralogy.[194] A transaction of that kind does not qualify as Zeph having "made" an investment, as required by Article 2(d).

145. In this section, Australia: (i) sets out the correct interpretation of Article 2(d) (**Subsection A**); and (ii) applies that interpretation to the facts of this case (**Subsection B**), showing that Zeph has not made an investment in Australia and is thus not an "investor of a party" (or, consequentially, a "disputing investor" under Article 18(4)(e)) capable of invoking this Tribunal's jurisdiction.

A. THE CORRECT INTERPRETATION OF ARTICLE 2(D)

146. Article 2(d) of Chapter 11 of AANZFTA, quoted in paragraph 141 above, has the effect that Chapter 11 protects only a person that "seeks to make, is making, or has made an investment". This provision is to be interpreted in accordance with the customary international law rules of treaty interpretation, as reflected in the Vienna Convention on the Law of Treaties ("**Vienna Convention**").[195] Article 31(1) of the Vienna Convention

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190 NoI, **Exh. C-63**, p. 8, lines 137-141; Amended NoA, para. 46.
191 NoI, **Exh. C-63**, p. 8, line 138.
192 Addendum: Legal Principles – Operation of AANZFTA (Annexure 6C to Amended NoA), paras. 26-28.
193 *Id*., para. 27.
194 In fact, it extracted value from Mineralogy, through a loan that was apparently never repaid. See Lys Report, paras. 90-92, 96.
195 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1908), Arts 31-32, **Exh. CLA-17**. The rules of treaty interpretation in the Vienna Convention have been held by many international courts and tribunals to reflect customary international

provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[196]

147. As a matter of ordinary meaning, "making" an investment requires some form of active contribution by the putative investor. It therefore requires more than, for example, "having", "holding", "owning" or "controlling" an investment. Further, the use of the verb "make" in Article 2(d) is, on its ordinary meaning, more than a mere connective, i.e. a term whose sole function is to link the investor and the investment. Effect must be given to the words chosen by the parties, particularly as the use of the verb clearly was not inadvertent: it is repeated three times ("seeks to make, is making, or has made"), emphasising the drafters' deliberate choice.

148. In terms of context, it is significant that the terms used in the definition of "investor of a Party" differ from the terms used in the definition of an "investment" in Article 2(c). The latter refers to "every kind of asset owned or controlled by an investor". Article 2(c) therefore imposes the requirement of either ownership or control. Article 2(d) then imposes an additional free-standing requirement that the investor "seeks to make, is making, or has made an investment". The choice of different terms makes clear that Article 2(d) was intended to create a separate requirement, over and above the requirement for ownership or control of an asset that arises Article 2(c).

149. With respect to object and purpose, one of the objectives of AANZFTA is, as stated at Article 1(c) of Chapter 1, to "facilitate, promote and enhance investment opportunities among the

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law: e.g., *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* [2002] ICJ Rep 625, 645-646, para. 37, **Exh. RLA-35**; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* [2015] ICJ Rep 3, 64, para. 138, **Exh. RLA-36**; *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2, Award of 4 April 2016), para. 537, **Exh. RLA-37**; *British Caribbean Bank v The Government of Belize* (PCA Case No 2010-18, Award of 19 December 2014), para. 121, **Exh. RLA-39**.

196 For the avoidance of doubt, the Respondent rejects the arguments made by the Claimant on the correct approach to the interpretation of treaties: Addendum: Legal Principles – Operation of AANZFTA (Annexure 6C to Amended NoA), paras. 6-8. Contrary to the Claimant's position, the provisions of Chapter 11 of AANZFTA are not to be interpreted reflecting the purpose of "investor protection", but rather are to be interpreted in a balanced way, taking into account the totality of the purposes of the treaty, rather than just focussing on one element: see, e.g., *Saluka Investments BV v The Czech Republic* (PCA Case No 2001-04, Partial Award of 17 March 2006), para. 300, **Exh. RLA-40**; *El Paso Energy International Corporation v The Argentine Republic* (ICSID Case No ARB/03/15, Decision on Jurisdiction of 27 April 2006), para. 70, **Exh. RLA-41**; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (ICSID Case No ARB/07/26, Decision on Jurisdiction of 19 December 2012), para. 53, **Exh. RLA-42**; *ST-AD GmbH v The Republic of Bulgaria* (PCA Case No. 2011-06, Award on Jurisdiction of 18 July 2013), paras. 381-384, **Exh. RLA-43**.

Parties through further development of favourable investment environments" while, pursuant to Article 1(d) of Chapter 1, a related objective is to "establish a co-operative framework for strengthening, diversifying and enhancing … investment". Investment is strengthened, diversified and enhanced through the making of an investment, i.e. through some form of active contribution by the putative investor. That is not true simply of formal changes in corporate ownership structures.

150. Several previous cases have involved investment treaties which have – like Article 2(d) – required the "making" of an investment as part of the definition of "investor" or "investment". In such cases, courts and tribunals have repeatedly held that some form of an *active* investment is required, although it is plain from the cases that interpretation requires a close focus on the specific wording used, as well as on the underlying factual matrix.

151. The most relevant case is *Gold Reserve Inc v Bolivarian Republic of Venezuela*, where the relevant definition of an "investor" was as follows: "'investor' means … [a person] who makes the investment in the territory of [the host State]"[197]. Venezuela made a preliminary objection to the effect that the claimant had not made an investment because it had acquired shares in the Gold Reserve Group through a share swap. As the tribunal explained (emphasis added):

> "This restructure was achieved through a merger of Gold Reserve Corp. with a subsidiary company of Gold Reserve Inc., combined with a share-swap through which shareholders acquired shares in Gold Reserve Inc., the present Claimant, in return for trading-in their shares in Gold Reserve Corp. As a result, Gold Reserve Inc. became the holding company of the group while the former holding company, Gold Reserve Corp., became a subsidiary. <u>No money transfer or flow of funds into Venezuela resulted from the restructure, which took place through a share-to-share swap outside of Venezuela</u>."[198]

152. In its decision (which was subsequently found to be incorrect — see below), the tribunal rejected Venezuela's preliminary objection, holding that the structure of the internal share swap was sufficient to constitute the "making" of an investment.[199] It stated that "[t]he internal workings of the acquisition does not affect whether the parent 'makes' an investment", especially where "the driver behind the restructure was the ability to access further funds from the Canadian market which were then used to further the investment in

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197 *Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/09/1, Award of 22 September 2014), para. 222, **Exh. CLA-32** and **Exh. CLA-72**.

198 *Id.*, para. 256 (emphasis added).

199 *Id.*, paras. 261-272.

the Brisas Project".[200] The tribunal reached this decision by drawing an analogy to a series of cases none of which concerned treaty language that required the putative investor to "make" an investment (and which should have been distinguished on that basis).

153. In enforcement proceedings, in a closely reasoned and persuasive judgment, the High Court of England disagreed with this part of the tribunal's analysis. The Court held that "[t]he ordinary meaning of 'making' an investment includes the exchange of resources, usually capital resources, in return for an interest in an asset", and "the fact that a person has acquired an asset does not necessarily indicate that he has made an investment in that asset".[201] The Court found that, for the "making" of an investment:

> "Mere passive ownership of an asset is insufficient. What is required is an active relationship between the investor and the investment. … [I]n the context of the BIT in this case a person can only be one who 'makes the investment' if there is some action on his part. Passive holding of an asset by itself would not amount to making the investment. That is so, it seems to me, as a matter of the ordinary use of language."[202]

154. Applying that interpretation, the Court did not accept that the manner in which Gold Reserve acquired the shares in the two projects in Venezuela (CAB and the Brisas Project) — namely, in exchange for issuing shares in Gold Reserve — constituted making an investment. As the Court explained:

> "[It was] submitted that [Gold Reserve] transferred some benefit on its acquisition of the CAB shares and Brisas Project in 1999, namely, the shares in [Gold Reserve], and thereby made an investment. I was not persuaded by this submission. The share swap was between shareholders of [Gold Reserve] and the shareholders of Gold Reserve Corp. I accept that the shareholders of [Gold Reserve] transferred some benefit to the shareholders in return for obtaining shares in Gold Reserve Corp., namely, their own shares in [Gold Reserve]. But to describe this as a transfer of benefit by [Gold Reserve] fails to distinguish between the legal personality of [Gold Reserve] and the legal personality of its shareholders. They are separate and distinct. There is no evidence that [Gold Reserve] made any payment or transferred anything of value to Gold Reserve Corp. in return for becoming the indirect owner or controller of the shares in CAB or of the Brisas Project. It may be that there was some 'action' by the directors of [Gold Reserve] at the time of the company re-organisation but I was not referred to any evidence of such action, none was in evidence and it would not be right for me to speculate as to what that action might have been. Whilst [Gold Reserve] undoubtedly became the indirect owner or controller of the

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200 *Id.*, para. 265.

201 *Gold Reserve Inc v The Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm), [2016] 1 WLR 2829, para. 35 (Teare J), **Exh. RLA-44**.

202 *Id.*, para. 37.

> shares in CAB and of the Brisas Project I must conclude that it did not at that time make an investment in the assets in respect of which the protection of the BIT was sought."[203]

155. In the earlier decision in *Standard Chartered Bank v United Republic of Tanzania*, the treaty conferred jurisdiction over disputes "concerning an investment of the [putative investor] in the territory of the [host State]", and the treaty defined "investment" by reference to compliance with the legislation in the "territory of the Contracting Party in which the investment is made".[204] The treaty language was therefore different to that in issue in *Gold Reserve*, in that it did not so clearly impose a requirement that an investor "make" an investment. Nevertheless, despite the less clear treaty language, the tribunal in *Standard Chartered Bank* determined that the investor was required to establish that it had "made" an investment and not simply that it held or owned an investment.[205] Specifically, the Tribunal held that the treaty "protect[ed] investments 'made' by an investor in some active way, rather than simple passive ownership".[206] The following points are notable:

(a) As to the facts in *Standard Chartered Bank*, the claimant's subsidiary, Standard Chartered Bank (Hong Kong), had acquired a number of loans through a series of transactions, and had become the sole lender to Independent Power Tanzania Ltd, which had then defaulted on those loans.[207] The claimant was simply the parent company of the subsidiary which held loans that had been taken out by the Tanzanian borrower. Tanzania (the respondent) argued that the claimant had not "made" an investment in Tanzania because its only contribution was to own shares passively in a company, which in turn owned the investment.[208]

(b) The tribunal considered that the treaty language required the claimant to do "something as part of the investing process, either directly or through an agent or entity under the investor's direction", but that on the facts "[n]o such actions were performed".[209] It

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203 *Gold Reserve Inc v The Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm), [2016] 1 WLR 2829, para. 44 (Teare J), **Exh. RLA-44**.

204 Specifically, it provided that "'investment' means every kind of asset admitted in accordance with the legislation and regulations in force in the territory of the Contracting Party in which the investment is made …". See *Standard Chartered Bank v United Republic of Tanzania* (ICSID Case No ARB/10/12, Award of 2 November 2012), paras 204-205, **Exh. RLA-45**.

205 *Id.*, paras. 222-225.

206 *Id.*, para. 222.

207 *Id.*, paras. 40-46, 196.

208 *Id*., para. 230.

209 *Id.*, para. 198.

said that "protection of the UK-Tanzania BIT requires an investment *made* by, not simply *held* by, an investor", and that, "[t]o be considered to have made an investment, [the claimant] must have contributed actively to the investment".[210] The investment required "some activity of investing … which implicates the claimant's control over the investment or an action of transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to another", with mere "possession of shares" being insufficient.[211]

156. The award in *Standard Chartered Bank* has been subject to some criticism, but the focus of the criticism has been on whether the tribunal was right to interpret the specific treaty at issue to find that it required that the investor actively "make" an investment, rather than criticising the tribunal's analysis of what "making" an investment entails if such a requirement is imposed by the relevant treaty.[212] Consistent with this, it has subsequently been confirmed by one tribunal that the reasoning in *Standard Chartered Bank is* relevant to cases involving "investment treaties which require investments to be made in the territory of the host state".[213] As already explained, that is the case with AANZFTA, which requires that an "investor" is a person that "seeks to make, is making, or has made an investment in the territory of another Party".

157. Similar reasoning was adopted in *AMF Aircraft Leasing v Czech Republic*. The tribunal in that case found that the ordinary meaning of the phrase "make an investment" "indicates that the investor has to act and effectively engage in the action of making the investment".[214] In that case, an active investment existed, but that was because on the facts the claimant

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210 *Id.*, para. 257 (emphasis in original).

211 *Id.*, paras. 231-232. A similar conclusion was reached by the President of the Tribunal in *Alapli Elektric BV v Republic of Turkey*. There, Professor Park stated that the 'making' of an investment requires "an active contribution" which must be "meaningful". See *Alapli Elektrik BV v Republic of Turkey* (ICSID Case No. ARB/08/13, Excerpts of Award of 16 July 2012), para. 350, **Exh. RLA-46**. It was not enough that the claimant investor "served as a conduit" through which financial contributions from other entities were "funneled". *Ibid*., para. 340.

212 See, e.g., *Nachingwea UK Limited, Ntaka Nickel Holdings Limited and Nachingwea Nickel Limited v United Republic of Tanzania* (ICSID Case No. ARB/20/38, Award of 14 July 2023), para. 148, **Exh. RLA-47**.

213 *Flemingo DutyFree Shop Private Limited v The Republic of Poland* (UNCITRAL, Award of 12 August 2016), paras. 323-324, **Exh. RLA-48**.

214 *AMF Aircraftleasing Meier & Fischer GmbH & Co. KG v The Czech Republic* (PCA Case No. 2017-15, Final Award, 11 May 2020), para. 450, **Exh. RLA-49**. To the same effect, see also *Mera Investment Fund Limited v Republic of Serbia* (ICSID Case No. ARB/17/2, Decision on Jurisdiction of 30 November 2018), para. 107, **Exh. RLA-50**.

"directly made and owns the investment", having "itself purchased" the assets in question "by transferring the purchase price".[215]

158. The significance of the term "making" has also been recognised where the relevant investment treaty does *not* contain that term. For example, in *PAO Tatneft v Ukraine*, the English court distinguished the case before it from *Gold Reserve* on the grounds that the treaty in question did not require the investor to have "made" an investment.[216] Hence, unlike in *Gold Reserve,* there was no requirement of "an active relationship between the investor and the investment".[217]

159. One decision, *Addiko Bank AG v Montenegro*, stands as an outlier. The tribunal in that case held that the term "making" does not connote any requirement of an active investment.[218] However, the reasoning is not persuasive, including because:

(a) The award does not cite, let alone analyse, any of the previous awards discussed above, which held that there is an activity requirement inherent in "making" an investment.

(b) The tribunal adopted the view that "the ordinary meaning of the verb 'making' includes an act of acquiring an investment which can be defined as gaining possession or control of, or getting or obtaining something", with it being sufficient to show an "act of obtaining title or possession" even in the absence of any "exchange of monetary value".[219] Australia respectfully disagrees, noting that the tribunals in *Gold Reserve*, *Standard Chartered Bank* and *AMF Aircraft Leasing* reached a different and persuasive conclusion as to the ordinary meaning of "making", holding that it entails an active contribution. The interpretation of the tribunal in *Addiko* departs from that ordinary meaning, and in doing so assimilates "making" to other verbs which do allow a passive investment, such as "holding", "owning" or "acquiring". The result is to equate an investment treaty that requires an investor to "make" an investment with the

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215 *AMF Aircraftleasing Meier & Fischer GmbH & Co. KG v The Czech Republic* (PCA Case No. 2017-15, Final Award, 11 May 2020), paras. 454, 457, **Exh. RLA-49**.

216 *PAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm), [2018] 1 WLR 5947, paras. 78-79, **Exh. RLA-51**.

217 *Id.*, para. 79.

218 *Addiko Bank AG v Montenegro* (ICSID Case No. ARB/17/35, Excerpts of Award of 24 November 2021), paras. 352, 354, **Exh. RLA-52**.

219 *Id.*, para. 352.

quite distinct treaty formulations that do not use any verb at all, and simply refer to an investment "of" an investor or an investor "with" an investment.

(c) The treaty in question in *Addiko* defined an "investor" as "any juridical person or partnership, constituted in accordance with the legislation of one Contracting Party, having its seat in the territory of that Contracting Party and making an investment in the other Contracting Party's territory".[220] The tribunal's view was that this definition "only sets forth a legal and geographical limitation to the Tribunal's jurisdiction".[221] That is counter to the text, given that, in addition to the requirements as to incorporation and the location of the seat of the juridical person, there is a separate requirement that the investor "make" the investment. In any event, the reasoning is not persuasive so far as it concerns the ordinary meaning of the words of Article 2(d) of Chapter 11, interpreted in context and in light of object and purpose.

(d) Finally, the tribunal's reasoning in *Addiko* was based heavily on the fact that it considered the object and purpose of the relevant treaty to be "creating favourable conditions for greater economic cooperation between Austria and Montenegro", which it said did not favour a "restrictive" or "narrow" interpretation of who qualified as an investor.[222] However, the interpretation put forward by Montenegro was neither "narrow" nor "restrictive" — it simply sought to give effect to all parts of the treaty definition of an "investor" and to attribute to the words their ordinary meaning. That is the appropriate interpretive approach. It is entirely consistent with the rules of treaty interpretation in the Vienna Convention, and there are persuasive cases to the effect that a balanced and neutral approach should be taken to the interpretation of investment treaties.[223] This applies *a fortiori* in the case of a multidisciplinary free trade agreement

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220 *Addiko Bank AG v Montenegro* (ICSID Case No. ARB/17/35, Excerpts of Award of 24 November 2021), para. 187, **Exh. RLA-52**.

221 *Id.*, para. 354; see also para. 355.

222 *Id.*, para. 357.

223 See, e.g., *Saluka Investments BV v The Czech Republic* (PCA Case No. 2001-04, Partial Award of 17 March 2006), para. 300 ("The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments"), **Exh. RLA-40**; *ST-AD GmbH v The Republic of Bulgaria* (PCA Case No. 2011-06, Award on Jurisdiction of 18 July 2013), para. 384 ("the Tribunal adopts a neutral approach, based on the ordinary meaning of the text, with particular reference to the will of the parties to the BIT"), **Exh. RLA-43**.

such as AANZFTA, where the context provided by *inter alia* the other treaty terms is different from a bilateral investment treaty.

160. As to what is involved in an active investment, *Capital Financial Holdings Luxembourg SA v Cameroon*[224] is instructive. In that case, the relevant treaty defined the term "investments" as "any kind of asset, invested or reinvested in establishments engaged in economic activity".[225] The claimant, Capital Financial Holdings Luxembourg SA ("**CFHL**"), claimed to have made two investments for the purposes of the BIT, arguing that: (i) it had acquired shares in the Commercial Bank Cameroon ("**CBC**") in 2006 and 2008; and (ii) it had issued two shareholder loans to the CBC in 2007 in the (cumulative) amount of EUR 4,300,000. The respondent, Cameroon, objected to the tribunal's jurisdiction, essentially on the basis that CFHL was a letterbox company. It argued that CFHL had not financed the purported investments because it had received – from a Cypriot company that was the principal shareholder of CFHL (Fotso Group Holdings Ltd) – the money necessary to make the investments.[226] The majority considered that the claimant had in effect paid nothing for the acquisition of just over 32% of the shares in CBC, and that it had not used its own means, at its own risk, to grant the loans of EUR 4,300,000 to CBC.[227] The majority described the transactions as a "circularity".[228] It concluded:

> "Taking account of the circularity of the Claimant's alleged investment consisting of the purchase of 101,575 CBC shares from Mr Yves-Michel Fotso, and the absence of proof of any consideration for the other elements alleged of the claimed investment, the Arbitral Tribunal considers that these elements, over all, do not make it possible to recognise the existence of an investment enabling the Claimant to benefit from the procedural and substantive provisions of the Treaty."[229]

161. The presence of this circularity, without any fresh injection of value by the putative investor, was anathema to that putative investor having "invested" (or having "made an investment").

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224 *Capital Financial Holdings Luxembourg SA v Republic of Cameroon* (ICSID Case No ARB/15/18, Award of 22 June 2017), **Exh. RLA-53** (unofficial English translation of excerpts).
225 *Id.*, para. 460.
226 *Id.*, paras. 444-448.
227 *Id.*, paras. 449-457.
228 *Id.*, para. 455.
229 *Id.*, para. 456.

B. APPLICATION TO THE FACTS IN THIS CASE

162. In order to determine whether Zeph has in fact made an investment in Australia such that it is an "investor of a party" capable of invoking this Tribunal's jurisdiction, it is necessary to: (i) examine the series of transactions by which Zeph was inserted into the corporate ownership chain of Mineralogy; and (ii) consider if there is any evidence of Zeph making an active investment or other contribution of capital into Australia once it became the direct owner of the shares in Mineralogy.

163. Australia relies on the expert evidence of Professor Thomas Lys (the Lys Report, as defined above) in support of its submissions on this issue.

(i) Zeph did not make an investment in Australia through the corporate restructuring transactions

164. As has been explained in Section II(A) above, Zeph was inserted into the corporate ownership chain of Mineralogy as a result of two transactions in December 2018 and January 2019, the first involving MIL and the second involving Zeph.

The first transaction: MIL is inserted into the corporate chain

165. The first of the transactions (the MIL Share Swap) occurred on 16 December 2018 and led to the insertion of the newly incorporated New Zealand company, MIL, into the corporate chain as the direct owner of Mineralogy.[230] MIL had been incorporated only two days earlier, on 14 December 2018.[231]

166. As Professor Lys' evidence makes clear, this transaction is properly characterised as a "share swap" because MIL exchanged with the then owners of the Mineralogy shares newly issued shares in itself for all of the shares in Mineralogy. Having reviewed the relevant Share Purchase Agreement between Mr Palmer, River Crescent and Closeridge,[232] Professor Lys describes the transaction in the following terms in the Lys Report:

> "… [O]n December 16, 2018, MIL entered into a Share Purchase Agreement (contrary to this label, this restructuring was a cash-less stock-for-stock exchange) under which it issued new ordinary shares and delivered them in equal value and proportion to the previous owners of Mineralogy in exchange for all

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230 Mineralogy Group Restructure – December 2018/January 2019 (Annexure A to NoI), **Exh. C-63**, p. 42.
231 Lys Report, para. 60.
232 Share Purchase Agreement dated 16 December 2018 (Exhibit 8 to Annexure A to NoI), **Exh. C-63**, p. 92.

> of their shares of Mineralogy. The number of new MIL shares issued (6,002,896) matched exactly the number of Mineralogy shares outstanding. At the same time, Mr. Palmer's original one MIL share was redeemed and canceled and the NZD $1 in capital was returned to him."[233]

167. Consistently with the above description, the terms of the Share Purchase Agreement made it express that there was "simultaneous sell[ing]" and "concurrent purchas[ing]" of the shares and that the "sole consideration" for the Mineralogy shares was the allotment and issue of the parcels of MIL shares to Mr Palmer, River Crescent and Closeridge that were "equal in number and value" to the Mineralogy shares being sold.[234]

168. The end result of the MIL Share Swap was that MIL then owned all 6,002,896 of Mineralogy's shares and that Mr Palmer, River Crescent and Closeridge then owned the shares in MIL in the same proportions that they had previously owned the shares in Mineralogy.

The second transaction: Zeph is inserted into the corporate chain

169. The second of the transactions (the Zeph Share Swap) occurred on 29 January 2019 and led to the insertion of the newly incorporated Singaporean company, Zeph (then known as MIPL), into the corporate chain as the direct owner of Mineralogy.[235] As Professor Lys explains, Zeph had been incorporated in Singapore on 21 January 2019 under the name MIPL, and MIL was "its sole shareholder with 1 share, and paid-in capital of SGD $1".[236]

170. The effect of the Share Purchase Agreement entered into between Zeph (then MIPL) and MIL, which gave effect to the Zeph Share Swap was:

    (a) Zeph issued 6,002,896 new ordinary shares to MIL; and

    (b) MIL transferred all 6,002,896 of Mineralogy's shares to Zeph.[237]

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233 Lys Report, para. 60 (internal footnotes omitted).

234 Share Purchase Agreement dated 16 December 2018 (Exhibit 8 to Annexure A to NoI), at Background Recital B and cl 2.1 and 2.3, **Exh. C-63**, pp. 94, 98.

235 Mineralogy Group Restructure – December 2018/January 2019 (Annexure A to NoI), **Exh. C-63**, p. 43.

236 Lys Report, para. 63 (internal footnote omitted).

237 *Id*., paras. 63-66; Share Purchase Agreement between MIL and MIPL (Zeph) (Exhibit 20 to Annexure A to NoI), **Exh. C-63**, p. 168.

171. The end result of the Zeph Share Swap was that Zeph became the direct owner of 100% of Mineralogy. Professor Lys summarises this second transaction as follows:

> "… Zeph was created as a new entity in Singapore, and received the Mineralogy shares from MIL in return for newly issued shares of Zeph that were given to MIL. The number of newly issued shares of Zeph and their valuation matched the number and valuation of shares of Mineralogy that MIL held – 6,002,896 shares nominally valued at AUD $6,002,896. Thus, Zeph was a 'shell' that held all the previously issued Mineralogy shares."[238]

172. Again, the transaction is properly characterised as a "share swap" because Zeph exchanged newly issued shares in itself for shares in Mineralogy with MIL (the then owner of the Mineralogy shares). Again, the terms of the Share Purchase Agreement expressly stated that there was "simultaneous sell[ing]" and "concurrent purchas[ing]" of the shares and that the "sole consideration" for the Mineralogy shares was the allotment and issue of the Zeph shares to MIL that were "equal in number and value" to the Mineralogy shares being sold.[239]

173. Mineralogy was not a party to the Share Purchase Agreement that effected the Zeph Share Swap (just as it had not been a party to the Share Purchase Agreement that had effected the MIL Share Swap), and nor did the Share Purchase Agreement provide for any funds or value to be transferred or provided to Mineralogy as part of the transaction.[240] What transpired was a cashless transaction between a New Zealand domiciled company and a Singapore domiciled company.

174. As Professor Lys notes, having considered the accounting statements of Zeph as well as the contractual documents underpinning the MIL Share Swap and the Zeph Share Swap, "no cash changed hands in this restructuring".[241]

175. Not only were the MIL Share Swap and the Zeph Share Swap both "cashless" transactions, but the accounting treatment of the new corporate structure reflects the economic reality that Mineralogy is the accounting parent of the group. Thus, Professor Lys notes that filings with the Australian Securities and Investments Commission ("**ASIC**") state that "Mineralogy

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238 Lys Report, para. 64.

239 Share Purchase Agreement between MIL and MIPL (Zeph) (Exhibit 20 to Annexure A to NoI), at Background Recital B, and cl 2.1 and 2.3, **Exh. C-63**, pp. 170, 173.

240 Obligations for the Board of Mineralogy to take certain steps to facilitate the transfer of its share were obligations on MIL to procure those things to happen: Share Purchase Agreement between MIL and MIPL (Zeph) (Exhibit 20 to Annexure A to NoI), cl 3.2(c), **Exh. C-63**, p. 174.

241 Lys Report, para. 180.

remained as the 'Accounting Parent Entity'."[242] Professor Lys regards this is as "highly significant", as he explains:

> "[I]n my expert opinion, the accounting structure, namely the fact that Mineralogy remains the accounting parent of the group, is highly significant for understanding the underlying economic realities because 'faithful representation,' a fundamental principle of accounting mandating that accounting treatment must faithfully reflect the substance of a transaction and not its form (sometimes referred to as the substance-over-form principle)."[243]

176. The substance of the Zeph Share Swap was that Zeph contributed nothing to Mineralogy, with Mineralogy at all times being the relevant economic actor notwithstanding changes in the holding companies that sat above it in the corporate chain. The presentation of the Zeph Share Swap transaction in the audited financial accounts of Zeph is consistent with the value of the shares in Mineralogy being completely accounted for by way of a cashless share swap between Zeph and MIL and does not indicate that funds or value were transferred to Mineralogy as part of the acquisition of Mineralogy shares. Thus:

(a) The balance sheet in Zeph's 2019 Audited Financial Statements included an amount for "[i]nvestment in [s]ubsidiaries" that was simply the total of the book value (converted to SGD) of the 6,002,896 Mineralogy shares that had a value of AUD 1.00 and the SGD 3.5 million that had been paid for the three Engineering Companies.[244] In fact, as set out in further detail below, the funding for Zeph's acquisition of the Engineering Companies appears to have been provided by Mineralogy by way of a loan which Zeph never repaid, meaning that Zeph actually extracted value from, rather than contributed value to, Mineralogy.[245]

(b) The same balance sheet recorded the ordinary shares that Zeph had issued with the same value as they were valued by Mineralogy prior to the restructuring.[246]

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242 Lys Report, para. 76.

243 *Id*., para. 80.

244 *Id*., paras. 88, 178 (Figure 19). As Professor Lys goes on to explain at para. 205(a) that "…while all four of these items [being the acquisitions of Mineralogy and the three Singaporean engineering companies] are similarly represented on Zeph's financial statements, I find that from an economics perspective, there is a clear distinction between (1) an exchange of shares that is a cash-less exchange of papers between related entities that resulted in Zeph owning Mineralogy, and (2) the purchase by Zeph of three engineering companies with Australian sourced cash invested in Singapore."

245 *Id*., paras. 88, 90-92.

246 *Id*., para. 85.

(c) The equivalent entries of (a) and (b) in this list appear in Zeph's 2019 Statement of Cash Flows.[247]

177. Simply acquiring the shares in the company that constitutes the purported investment without capital or any other contribution flowing to that company is not sufficient to have "made an investment" for the purposes of AANZFTA. In the course of the Zeph Share Swap, Zeph made no such investment in Mineralogy.

(ii) There is no evidence of other active investments or transfers of capital by Zeph

178. Insofar as Zeph may seek to argue that it has made an investment in Mineralogy otherwise than through the acquisition transaction, the evidence before the Tribunal clearly establishes that this did not occur.

179. Professor Lys has undertaken a detailed review of the accounts of Mineralogy and Zeph and concluded that any Singapore-sourced funds were not invested by Zeph outside of Singapore.[248] It follows from that conclusion that Zeph did not make investments of funds into Mineralogy in Australia. That conclusion is also consistent with Professor Lys' review of the Mineralogy accounts.[249]

180. In fact, it appears that the flow of funds has been from Mineralogy to Zeph. Specifically, Mineralogy appears to have loaned SGD 4,039,803 to Zeph, as recorded in the financial statements ending 30 June 2019.[250] Professor Lys concludes from his review of the totality of the available material and the timing of the loan that it is likely this loan was the source of the SGD 3.5 million used by Zeph to acquire the Engineering Companies in January 2019.[251] Professor Lys also forms the view that this loan amount was subsequently extinguished by Zeph (that is, it seems to have been forgiven by Mineralogy).[252] In Professor Lys' opinion the loan was an investment by Mineralogy into Zeph (that is, from Australia into Singapore) and not the other way around.[253] That is, "in January 2019, from an economics perspective, it is Mineralogy who provided the funds to Zeph (i.e., made an outlay

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247 Lys Report, para. 86.
248 See *Id*., para. 95.
249 *Id*., paras. 127-150.
250 *Id*., paras. 90, 94(b), 94(c).
251 *Id*., paras. 88, 94(c).
252 *Id*., paras. 90-92.
253 *Id*., para. 94(b).

of money purportedly to obtain future benefits) rather than Zeph who invested in Mineralogy".[254] Such a conclusion is telling about how in fact Mineralogy operated. To use Professor Lys' language, Mineralogy is the "engine" of other entities of which Mr Palmer is the ultimate beneficial owner.[255]

181. In light of the above, both the primary documents and Professor Lys' analysis confirm that that there is no evidence of Zeph making active investments or contributions into Mineralogy in Australia after it became the direct owner of Mineralogy.

C. CONCLUSION ON "NO INVESTOR" OBJECTION

182. It follows that Zeph has not made an investment in Mineralogy — whether in acquiring or since it acquired that company. It therefore is not an "investor of a Party" within the meaning of Article 2(d) of Chapter 11 of AANZFTA. As a consequence, it also is not a "disputing investor" as defined in Article 18(4)(e) of Chapter 11 of AANZFTA, meaning that it cannot submit a claim to arbitration under Article 21 of Chapter 11. For that reason alone, the Tribunal therefore has no jurisdiction under Chapter 11 of AANZFTA, and Australia's First Preliminary Objection should be upheld.

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254 Lys Report, para. 96.
255 See *Id*., para. 81.

IV. ZEPH HAS NOT ESTABLISHED THE EXISTENCE OF A RELEVANT "INVESTMENT" FOR THE PURPOSES OF ARTICLE 2(c) OF CHAPTER 11 OF AANZFTA

183. The submissions advanced above in support of Australia's first preliminary objection focus upon Article 2(d) of Chapter 11.

184. As a separate preliminary objection, albeit one that arises from the same underlying fact that Zeph has not made any contribution in Australia, Zeph is unable to establish the existence of a relevant "investment" for the purposes of Article 2(c) of Chapter 11 of AANZFTA. For that additional reason, Zeph's claims are outside the Tribunal's jurisdiction.

185. Under Article 20 of Chapter 11 of AANZFTA, the right of a claimant to submit a claim to international arbitration is predicated upon there being an "investment dispute".[256] The term "investment dispute" is not defined, but obviously means a dispute between the investor and the host State that concerns an "investment" of the investor.[257]

186. Zeph claims that its investments include "those assets of [Zeph's] subsidiaries which are owned and controlled by [Zeph], by virtue of its 100% ownership and control of those subsidiaries and in turn their subsidiaries".[258] It proceeds to state that it has or had "a number of 'investments' in Australia" because it "indirectly owned and controlled (through [its relevant] subsidiaries …) a range of assets including claims to money, claims to contractual performance, other rights under contracts, business concessions to exploit natural resources, and shares".[259] Zeph contends that its "investments" include:

(a) "[T]he value of its shares in International Minerals",[260] as well as its shares in Mineralogy;[261]

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256 Art 20 of Chapter 11 of AANZFTA provides that a claimant can submit a claim to international arbitration if "an investment dispute has not been resolved within 180 days of the receipt by a disputing Party of a request for consultations", **Exh. CLA-1**.

257 The "investment" must also meet the additional requirements of a "covered investment" in Art 2(a) of Chapter 11 of AANZFTA, **Exh. CLA-1**.

258 Addendum: Legal Principles – Operation of AANZFTA (Annexure 6C to Amended NoA), para. 26.

259 *Id*., para. 27.

260 Amended NoA, para. 38.

261 Addendum: Legal Principles – Operation of AANZFTA (Annexure 6C to Amended NoA), para. 28.

(b) "[C]ontractual and proprietary rights and interests in the State Agreement and the 2020 Arbitration Agreement (through its subsidiaries)";[262] and

(c) "[R]ights and interests in the First and Second [McHugh] Awards".[263]

187. Of course, shares (for example) may in principle constitute a form of investment.[264] Article 2(c) of Chapter 11 of AANZFTA defines "investment" relevantly as follows:

> "investment[2] means every kind of asset owned or controlled by an investor, including but not limited to the following:
>
> i. movable and immovable property and other property rights such as mortgages, liens or pledges;
>
> ii. shares, stocks, bonds and debentures and any other forms of participation in a juridical person and rights derived therefrom;
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> iii. intellectual property rights which are recognised pursuant to the laws and regulations of each Party and goodwill;
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> iv. claims to money or to any contractual performance related to a business and having financial value [3];
>
> v. rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; and
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> vi. business concessions required to conduct economic activity and having financial value conferred by law or under a contract, including any concession to search for, cultivate, extract or exploit natural resources.
>
> For the purpose of the definition of investment in this Article, returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their character as investments".[265]

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262 Amended NoA, para. 38. See also Addendum: Legal Principles – Operation of AANZFTA (Annexure 6C to Amended NoA), paras. 29-30.

263 Amended NoA, para. 38.

264 The Respondent notes that, whether or not the assets referred to in paras. 3(a)-(c) which Zeph owns/controls only indirectly are properly characterised as "investments", there is a separate question as to their relevance to any claim for loss by Zeph. This question does not fall to be considered at the preliminary objections stage of these proceedings. Australia's rights in this regard are reserved.

265 The text of footnote 2 in this definition reads: "The term 'investment' does not include an order or judgment entered in a judicial or administrative action." The text of footnote 3 in this definition states: "For greater certainty, investment does not mean claims to money that arise solely from: (a) commercial contracts for sale of goods or services; or (b) the extension of credit in connection with such commercial contracts", **Exh. CLA-1**.

188. In addition to an investment needing to be in the form of an "asset", the term "investment" retains its inherent meaning to which effect should be given in accordance with Article 31 of the Vienna Convention. In particular, some form of "contribution" is implicit in the ordinary meaning of the word "investment". As the Tribunal is aware, there is a line of authorities establishing that the term "investment" in Article 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**") connotes certain inherent characteristics, including "contributions".[266] In this context, the existence of a "contribution" has been considered to be a fundamental criterion underpinning the other features which are inherent to an investment (namely, an assumption of risk and the investment being of a certain duration), because "a commitment of capital to a business venture — 'contribution' of capital — implies, in itself, a certain duration for the contribution in question and a risk of loss of the capital contributed".[267] In other words, a contribution "is part and indeed forms the core of the definition of 'investment'".[268]

189. Tribunals operating under rules other than the ICSID Convention, including under the UNCITRAL Rules, have recognised that an "investment" has certain intrinsic features, invariably involving some form of contribution. The same features inform the correct interpretation of "investment" within Article 2(c) of Chapter 11. For example, the tribunal in *Romak v Uzbekistan* (constituted under the Switzerland – Uzbekistan BIT and the UNCITRAL Rules) held that the term "investment" has an "inherent meaning" which must be taken into account in interpreting the relevant investment agreement.[269] It stated (emphasis in original):

> "The Arbitral Tribunal therefore considers that the term 'investments' under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a <u>contribution</u> that extends

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266 See, e.g., *Salini Costruttori S.p.A and Italstrade S.p.A. v Morocco* (ICSID Case No ARB/00/4, Decision on Jurisdiction of 23 July 2001), para. 52, **Exh. RLA-54**; *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No ARB/04/13, Decision on Jurisdiction of 16 June 2006), para. 91, **Exh. RLA-55**; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29, Decision on Jurisdiction of 14 November 2005), para. 130, **Exh. RLA-56**; *Saba Fakes v Republic of Turkey* (ICSID Case No ARB/07/20, Award of 14 July 2010), para. 110, **Exh. RLA-57**; *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic* (ICSID Case No ARB/14/32, Decision on Jurisdiction of 29 June 2018), para. 187, **Exh. RLA-58**.

267 *İçkale İnşaat Limited Şirketi v Turkmenistan* (ICSID Case No ARB/10/24, Award of 8 March 2016), para. 290, **Exh. RLA-59**. See also *Saba Fakes v Republic of Turkey* (ICSID Case No ARB/07/20, Award of 14 July 2010), para. 110, **Exh. RLA-57**.

268 *İçkale İnşaat Limited Şirketi v Turkmenistan* (ICSID Case No ARB/10/24, Award of 8 March 2016), para. 291, **Exh. RLA-59**.

269 *Romak S.A. v Republic of Uzbekistan* (PCA Case No 2007-07/AA280, Award of 26 November 2009), para. 180, **Exh. RLA-60**.

> over a certain period of time and that involves some risk. The Arbitral Tribunal is further comforted in its analysis by the reasoning adopted by other arbitral tribunals … which consistently incorporates contribution, duration and risk as hallmarks of an 'investment.' By their nature, asset types enumerated in the BIT's non-exhaustive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of 'investment,' the fact that it falls within one of the categories listed in Article 1 does not transform it into an 'investment.'"[270]

190. In *Doutremepuich v Mauritius*, a tribunal constituted under the France – Mauritius BIT and the UNCITRAL Rules held that, in addition to falling within a non-exhaustive list of assets (similar to that set out in Article 2(c) of Chapter 11 of AANZFTA), it was necessary to establish that a putative investment possessed certain characteristics intrinsic to an "investment" — a term which it held had an "objective and ordinary meaning" which was to "operate as a benchmark" for the treaty definition of an investment.[271] This was necessary to give effect to the "plain wording" of the treaty.[272] One of the essential criteria was "a contribution to the host State",[273] which the tribunal determined to mean some commitment of expenditure with real economic value, contributed by the investor on a scale that is commensurate with the economic goal or business objective which is pursued.[274]

191. In the recent award in *Komaskavia v Moldova*, the tribunal was constituted under the Cyprus – Moldova BIT and the SCC Arbitration Rules. The definition of "investment" started with the words "[t]he term 'investments' means every kind of asset …" (the same language as Article 2(c) of Chapter 11 of AANZFTA) and proceeded to give a non-exhaustive list of types of assets which were included. The tribunal held that it was necessary to ascertain whether the "asset" in question bore the characteristics ordinarily considered to be indicative of an investment, stating:

> "[T]he existence of an illustrative list of assets in a BIT (and a presumption flowing from inclusion of a particular asset on that list) is not necessarily the end of the interpretative analysis. Presumptions can be rebutted in unusual circumstances, based on particular facts. In this instance, the illustrative list does

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270 *Romak S.A. v Republic of Uzbekistan* (PCA Case No 2007-07/AA280, Award of 26 November 2009), para. 207 (emphasis in original), **Exh. RLA-60**.

271 *Christian Doutremepuich and Antoine Doutremepuich v Republic of Mauritius* (PCA Case No 2018-37, Award on Jurisdiction of 23 August 2019), paras. 117-118, **Exh. RLA-61**.

272 *Id*., para. 117.

273 *Id.*, para. 118.

274 *Id.*, paras. 125-126. On the requirement to contribute something of economic value, see also *Consortium Groupement LESI – DIPENTA v République algérienne démocratique et populaire (People's Republic of Algeria)* (ICSID Case No ARB/03/8, Award of 10 January 2005), s. 2, para. 14(i), **Exh. RLA-62** (English translation from ICSID).

> not trump the objective, ordinary meaning of the definition that precedes it. This is both because words in a treaty do have an ordinary meaning, which VCLT Article 31 requires be taken into account, and because of the very fact that the list is stated not to be exclusive. As the *Romak* tribunal and others have observed, unless the term 'investment' is given some inherent meaning, the non-exclusive nature of the list would provide no benchmark by which a tribunal could evaluate the qualifications of other forms of assets outside the illustrative list. But without any such benchmark, Article 1(1)'s generality ('every kind of asset invested by investors') could be seen as encompassing even transactions that bear none of the traditional hallmarks of investment, such as (for example) a one-time purchase of goods."[275]

192. In *Nova Scotia Power v Venezuela*, the governing treaty was the Canada – Venezuela BIT,[276] Article I(f) of which stated that "'investment' means any kind of asset …" followed by a non-exclusive list of examples (again, reflecting the language of Article 2(c) of Chapter 11 of AANZFTA). The very fact that the list was open-ended led the tribunal to conclude that the definition "calls for recourse to inherent features".[277] The tribunal proceeded to state that "[t]he term investment carries inherent features as part of its ordinary meaning and these must be taken into account by the Tribunal".[278] Invoking the well-established criteria for an "investment", the tribunal held that "an investment can be said to be present when a contribution has been made for a sufficient duration with the hope of receiving a benefit (including the inherent risk that one will not result)".[279]

193. Other tribunals have similarly held that, even where not stated explicitly in a treaty definition, an "investment" must display certain inherent characteristics, including that there must have

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275 *Komaksavia Airport Invest Ltd. v Republic of Moldova* (SCC Case No 2020/074, Final Award of 3 August 2022), para. 148, **Exh. RLA-63**.

276 The applicable rules were the ICSID Arbitration (Additional Facility) Rules of 2006, which the tribunal noted did not impose additional requirements in the way that Art 25(1) of the ICSID Convention does. Nonetheless, it held that "the BIT itself calls for the consideration of inherent features of an investment" and that "[w]hat the ICSID Additional Facility Rules or the ICSID Convention do or do not impose is not relevant in this regard": *Nova Scotia Power Incorporated v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/1, Award of 30 April 2014), para. 80, **Exh. RLA-64**.

277 *Id.*, para. 78.

278 *Id.*, para. 81.

279 *Id.*, para. 84.

been a contribution by the putative investor.[280] According to one recent award, a contribution requires "a commitment of resources".[281]

194. The interpretation adopted in the awards referred to above gives effect to the ordinary meaning of the term "investment" in accordance with Article 31(1) of the Vienna Convention.[282] It also aligns with the object and purpose of AANZFTA, which (as set out in relation to the first preliminary objection above) is best understood as requiring a form of active contribution by the putative investor.[283]

195. As to what is entailed in a "contribution" for the purposes of an "investment", the recent award in *Rand v Serbia*[284] is instructive. The tribunal (which had as its President Professor Kaufmann-Kohler) held that:

> "There must thus be an economic link between the funds and the investor which is such that the contribution made with the funds is that of the investor. What matters is the economic reality of the contribution in consideration of all the relevant circumstances, not the formal arrangements used. An investor could very well borrow money from third parties to make an investment. What matters is that the investor is the one ultimately bearing the financial burden of the contribution."[285]

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280 See, e.g., *Isolux Infrastructure Netherlands B.V. v Kingdom of Spain* (SCC Case No. V2013/153, Award of 12 July 2016), paras. 683-685, **Exh. RLA-65** (unofficial English translation of excerpts), quoting *Salini Costruttori S.p.A and Italstrade S.p.A. v Morocco* (ICSID Case No ARB/00/4, Decision on Jurisdiction of 23 July 2001), para. 52, **Exh. RLA-54**; *Air Canada v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/17/1, Award of 13 September 2021), paras. 293-294, **Exh. RLA-66**; *AMF Aircraftleasing Meier & Fischer GmbH & Co KG v Czech Republic* (PCA Case No 2017-15, Final Award of 11 May 2020), paras. 470-472, **Exh. RLA-49**; *Antonio del Valle Ruiz and Others v Kingdom of Spain* (PCA Case No 2019-17, Final Award of 13 March 2023), para. 372, **Exh. RLA-28**.

281 *Antonio del Valle Ruiz and Others. v Kingdom of Spain* (PCA Case No 2019-17, Final Award of 13 March 2023), paras. 372-373, **Exh. RLA-28**.

282 *Romak S.A. v Republic of Uzbekistan* (PCA Case No 2007-07/AA280, Award of 26 November 2009), para. 181, **Exh. RLA-60**; *Komaksavia Airport Invest Ltd. v Republic of Moldova* (SCC Case No 2020/074, Final Award of 3 August 2022) para. 148, **Exh. RLA-63**; *Nova Scotia Power Incorporated v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/1, Award of 30 April 2014), paras. 76-78, **Exh. RLA-64**; *AMF Aircraftleasing Meier & Fischer GmbH & Co KG v Czech Republic* (PCA Case No 2017-15, Final Award of 11 May 2020), paras. 469, 471-472, **Exh. RLA-49**.

283 See Section III(A) above.

284 *Rand Investments Ltd, William Archibald Rand, Kathleen Elizabeth Rand, Allison Ruth Rand, Robert Harry Leander Rand and Sembi Investment Limited v Republic of Serbia* (ICSID Case No ARB/18/8, Award of 29 June 2023), **Exh. RLA-67**.

285 *Id*., para. 237.

196. The analysis adopted in the above award reflects, and is consistent with, other decisions which have found that a bare acquisition of shares without any contribution of value is insufficient for an investment to have been made.[286]

197. The focus on "the economic reality of the contribution in consideration of all the relevant circumstances" in the awards discussed above is appropriate and essential. In this case, that focus highlights that Zeph has been inserted into the corporate chain for reasons that have nothing to do with the making of a genuine investment in Australia. The economic reality is that Mineralogy and International Minerals are owned and controlled, as they have always been, by the Australian national Mr Palmer. Zeph has not made any contribution at all to the assets of those companies. As set out comprehensively in relation to the first preliminary objection, Zeph acquired its shares in Mineralogy not through any commitment of resources (whether financial or otherwise) but instead merely as a result of a share swap with the New Zealand company, MIL, that Mr Palmer had incorporated shortly beforehand and which had itself acquired the shares in Mineralogy by way of a cashless share swap.[287] Zeph's insertion into the corporate chain is an artificial arrangement that did not include anything that can be characterised as a genuine investment. Zeph expended and contributed nothing. To the contrary, it extracted value from Mineralogy.[288] Nothing about this arrangement comports with the term "investment" as ordinarily and objectively understood.

198. As stated above, a "contribution" is seen as the core feature of an investment and underpins the other features (i.e. risk and duration). However, even taking those other features separately, it is clear that there is no "investment" in this case. Zeph has not assumed any risk in relation to Mineralogy's mining business in Australia; it has not contributed any capital that is at stake and it serves solely as a conduit for dividends between Mineralogy and MIL (which is itself a conduit to Mr Palmer).[289] The fact that Zeph was inserted into the corporate chain only in January 2019 means that there is also no investment satisfying the

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286 See, e.g., *Capital Financial Holdings Luxembourg SA v Republic of Cameroon* (ICSID Case No ARB/15/18, Award of 22 June 2017), paras. 445-462 (in which the loans granted by the claimant to a bank were identical in magnitude to loans granted to the claimant by its own shareholders and were never repaid by the claimant), **Exh. RLA-53** (unofficial English translation of excerpts); *KT Asia Investment Group BV v Kazakhstan* (ICSID Case No ARB/09/8, Award of 17 October 2013), paras. 188-206, **Exh. RLA-68** (in which the claimant acquired its interest by way of an internal restructuring for a nominal price, which was covered by a loan which the claimant never repaid).

287 See paras. 173-176 above.

288 See para. 176(a) above and para. 225 below.

289 See paras. 184-186 above.

"duration" criterion, especially given the context of a lack of contribution and lack of assumption of risk by Zeph.

199. The above analysis applies both to the acquisition of shares in Mineralogy itself, and to the other rights and interests which Zeph claims to hold as a result of its shareholding in Mineralogy[290] (such as indirect ownership of the shares in International Minerals, and any rights which Mineralogy has under the State Agreement, any arbitration agreement with the state of Western Australia, and/or any rights or interests arising from the arbitral awards issued by Mr McHugh).

200. On the basis of that analysis, Zeph's claims are outside the Tribunal's jurisdiction because there is no "investment" and thus there can be no "investment dispute" within the meaning of Article 20 of Chapter 11 of AANZFTA.

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290 See para. 186 above.

V. AUSTRALIA HAS DENIED THE BENEFITS OF CHAPTER 11 OF AANZFTA TO ZEPH AND ITS ALLEGED INVESTMENTS

201. The Respondent's third preliminary objection is based on AANZFTA's denial of benefits clause at Article 11(1) of Chapter 11, which provides as follows:

> "Following notification, a Party may deny the benefits of this Chapter:
>
> (a) to an investor of another Party that is a juridical person of such other Party and to investments of that investor if an investor of a non-Party owns or controls the juridical person and the juridical person has no substantive business operations in the territory of the other Party;
>
> (b) to an investor of another Party that is a juridical person of such other Party and to investments of that investor if an investor of the denying Party owns or controls the juridical person and the juridical person has no substantive business operations in the territory of any Party, other than the denying Party."[291]

202. Article 11(1) encompasses "the benefits of this Chapter", without limitation, and so applies to AANZFTA's substantive protections and dispute resolution provisions. It follows that if the requirements of Article 11(1) are met the Claimant's claims must be dismissed in their entirety.

203. Australia has denied the benefits of Chapter 11 of AANZFTA to Zeph in accordance with Article 11(1)(b) of Chapter 11. It notified both Zeph and the Government of Singapore of its exercise of the entitlement to deny the benefits of Chapter 11 to Zeph and its investments by way of letters dated 22 December 2020[292] and 24 June 2021.[293] Article 11(1)(b) is subject to two substantive requirements and a procedural notification requirement, all of which have been met in this case. The substantive and procedural requirements are addressed in turn below.

204. Specifically, and as will be established in more detail below, both substantive requirements are met because:

(a) "[A]n investor of the denying Party" (Mr Palmer, an Australian national) owns or controls "an investor of another Party that is a juridical person of such other Party" (the Claimant, a Singaporean company); and

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291 Chapter 11 of AANZFTA, Art 11(1)(b), **Exh. CLA-1**, p. 158.
292 Letter from Australia to Volterra Fietta dated 22 December 2020, **Exh. C-153**.
293 Letter from Australia to Volterra Fietta dated 24 June 2021, **Exh. C-155**.

(b) The Claimant has "no substantive business operations in the territory of any Party, other than the denying Party".

205. The date on which these requirements for an effective denial of benefits under Article 11(1)(b) must be assessed is, at the latest, the date on which Zeph invoked the protections of AANZFTA in its Written Request for Consultations dated 14 October 2020. This is because, a dispute having been notified to Australia, it is then for Australia to determine whether the putative claimant (Zeph) is entitled to the protections of Chapter 11 of AANZFTA and/or whether it elects to deny those protections to Zeph. Put differently, following notification of the dispute, it is not open to Zeph to seek to improve its position in relation to a potential denial of benefits, and thus the Tribunal's jurisdiction to resolve the dispute. To do so would be abusive.

206. In this respect, the tribunal in *Guaracachi v Bolivia* acknowledged that the factual conditions for a denial of benefits are not necessarily static and that it is "when a dispute arises" that the respondent State is entitled to assess the evidence to decide whether to deny a treaty's benefits to a putative investor.[294] As the *Guaracachi* tribunal explained, the respondent State's right to deny benefits "can and usually will be used whenever an investor decides to invoke one of the benefits of the BIT."[295] The tribunal continued:

> "It will be on that occasion that the respondent State will analyse whether the objective conditions for the denial are met and, if so, decide on whether to exercise its right to deny the benefits contained in the BIT, up to the submission of its statement of defence."[296]

207. This logic justifies interrogating the extent of the putative investor's business operations *prior to* the invocation of treaty protection. It also denies the appropriateness of looking at any facts that may be aimed at improving the putative investor's position that post-date the notification of the dispute.

208. In the present case, the Claimant submitted its Written Request for Consultations on 14 October 2020, giving Australia notice of a dispute under Chapter 11 of AANZFTA.[297] On

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294 *Guaracachi America, Inc. and Rurelec PLC v Plurinational State of Bolivia* (PCA Case No 2011-17, Award of 31 January 2014), para. 379, **Exh. RLA-69**.

295 *Id.*, para. 378.

296 *Ibid.*

297 Letter from Volterra Fietta, on behalf of Zeph, to the Australian Minister for Foreign Affairs and Trade dated 14 October 2020 (raising a dispute under AANZFTA), **Exh. C-148**, p. 2.

the same date, it also submitted Written Requests for Consultations under the investment chapter (Chapter 9) of the CPTPP,[298] and under Chapter 8 of SAFTA.[299] Thus, as of October 2020, there were multiple investment protection treaties in play, with the investor-State dispute settlement procedures of those treaties having been invoked, and with Zeph also seeking to bolster the grounds for its claim. It was therefore appropriate for Australia to have investigated the Claimant's business operations as at that time, as well as in the period leading up to that time. Having done so, Australia concluded that Zeph's operations in Singapore did not meet the relevant threshold of being "substantive", and thus validly elected to deny the benefits of Chapter 11 of AANZFTA to Zeph.

209. In any event, in this case it would be immaterial if any other date were chosen for ascertaining the factual predicates for a denial of benefits: Zeph has at all material times been owned or controlled by Mr Palmer and has never had substantive business operations in Singapore.

210. Although it might be said that Australia formally bears the burden of establishing that the substantive requirements of Article 11(1)(b) are satisfied,[300] in circumstances where much of the relevant information will be held by the Claimant (given that the information in question necessarily concerns the ownership of the Claimant and the extent of its own business operations), "negative inferences might be drawn" against the Claimant if it does not produce documents shedding light on either who owns and controls it or its business operations in Singapore.[301] In this sense, in a denial of benefits context, "the evidential burden is readily shifted" to the Claimant.[302]

211. In the remainder of this section, Australia demonstrates that: (i) as will presumably be common ground, the Claimant is owned and/or controlled by Mr Palmer, an Australian national, meeting the first substantive requirement for a denial of benefits (**Subsection A**); (ii) the second substantive requirement is also satisfied as Zeph lacks substantive business

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298 Letter from Volterra Fietta, on behalf of Zeph, to the Australian Minister for Foreign Affairs and Trade dated 14 October 2020 (Raising a dispute under CPTPP), **Exh. R-147**.

299 Letter from Volterra Fietta, on behalf of Zeph, to the Australian Minister for Foreign Affairs and Trade dated 14 October 2020 (Raising a dispute under SAFTA), **Exh. R-148**.

300 See, e.g., *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan* (ICSID Case No ARB/ 07/14, Excerpts of Award of 22 June 2010), para. 164, **Exh. RLA-70**. See also, in the analogous context of resolving a preliminary objection based on the claimants' alleged abuse of process in having established a "façade" company in Cyprus, *Alverley Investments Limited and Germen Properties Ltd v Romania* (ICSID Case No ARB/18/30, Excerpts of Award of 16 March 2022), para. 364, **Exh. RLA-71**.

301 See, e.g., *Limited Liability Company Amto v Ukraine* (SCC Case No. 080/2005, Final Award of 26 March 2008), para. 65, **Exh. RLA-72**.

302 *Bridgestone Licensing Services, Inc v Panama* (ICSID Case No ARB/16/34, Decision on Expedited Objections of 13 December 2017), para. 289, **Exh. RLA-30**.

operations in Singapore (**Subsection B**); and (iii) Australia has fulfilled the procedural requirements for a denial of benefits under Article 11(1)(b) of Chapter 11 of AANZFTA (**Subsection C**).

A. ZEPH IS OWNED AND/OR CONTROLLED BY AN INVESTOR OF AUSTRALIA WITHIN THE MEANING OF ARTICLE 11(1)(B) OF AANZFTA

212. The first substantive requirement under Article 11(1)(b) is satisfied in this case. As set out below: (i) ownership and control under Article 11(1)(b) necessarily includes indirect ownership or control (as otherwise the intended operation of this provision could very easily be defeated); (ii) in this case, Mr Palmer, a national of Australia (i.e., "an investor of the denying Party"), "owns or controls" the Claimant.

(i) The terms "owns" and "controls" in Article 11(1)(b) must be interpreted to include indirect ownership or control

213. The phrase "owns or controls" is disjunctive, with the result that only ownership *or* control needs to be established in order for a valid denial of benefits to occur.

214. The terms "owns" and "controls" are not defined expressly in Article 11,[303] nor are these terms defined in other parts of AANZFTA Chapter 11. Article 11 must be interpreted in good faith, in accordance with the ordinary meaning of its terms in their context and in light of the object and purpose of AANZFTA.[304]

215. The plain meaning of the terms "owns" and "controls" encompasses both direct and indirect ownership or control, and ownership or control in both law and fact. The object and purpose of Article 11 indicates that the focus must be on the ultimate owner or controller of the Claimant in fact. This is because the basic purpose of a denial of benefits clause is to prevent the host State's own nationals (or indeed nationals of a third State, i.e. a "non-Party", as the term is used in Chapter 11 of AANZFTA) from benefitting from treaty protections conferred on the investors of another State party to the treaty in question. Such a clause would be deprived of *effet utile* if interpreted to encompass only direct, legal ownership or control. Such an interpretation would defeat the operation of the clause because it would mean that it

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303 Art 11(3) defines the concepts of "owned" and "controlled" for the purposes of Thailand as follows: "a juridical person is: (a) owned by natural persons or juridical persons of a Party or a non-Party if more than 50 per cent of the equity interest in it is beneficially owned by such persons; (b) controlled by natural persons or juridical persons of a Party or non-Party if such persons have the power to name a majority of its directors or otherwise to legally direct its actions."

304 Vienna Convention, Arts 31-32, **Exh. CLA-17**.

could be avoided merely by inserting a foreign entity into the corporate chain between the claimed investor and its beneficial owner or controller, such that any ownership or control that existed in fact would thereafter be indirect.[305]

216. Numerous tribunals have interpreted denial of benefits clauses as encompassing both direct and indirect ownership and/or control. For example:

(a) The tribunal in *NextEra v Spain* held that the term "control" in Article 17(1) of the ECT should be understood to encompass "control in fact".[306] The tribunal expressly rejected a submission by the claimants that there could be no denial of benefits because they were "100% owned by a Dutch cooperative and control follows that ownership".[307] The tribunal explained that:

> "NextEra Energy, Inc., a US corporation is the ultimate principal entity in the NextEra group and notwithstanding the formal provisions on voting, the reality is that the Dutch companies are controlled by the American company and the principal activities of Claimants in respect of the investments in Spain are conducted by the American company. It was officials of the American companies who dealt with the Spanish authorities in making the investment and … all of the representations by the Spanish authorities on which Claimants rely for their legitimate expectations claim in this case were made to those officials. In short, the reality of control is with U.S. nationals."[308]

(b) Similarly, the recent award in *Eco Oro v Colombia* under the Canada – Colombia BIT recognised that the ordinary meaning of the word "control" necessitated an investigation into "actual not putative control".[309]

217. Based on the foregoing, it is clear that indirect ownership or control is sufficient to fulfil the first substantive requirement under Article 11(1)(b) of Chapter 11 of AANZFTA.

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305 Australia notes that the Claimant agrees that ownership and control can be direct or indirect: Addendum: Legal Principles – Operation of AANZFTA (Annexure 6C to Amended NoA), paras. 31-34.

306 *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), para. 250, **Exh. RLA-74**. See, similarly: *Plama Consortium Limited v Republic of Bulgaria* (ICSID Case No ARB 03/24, Decision on Jurisdiction of 8 February 2005), para. 170, **Exh. RLA-73**.

307 *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), paras. 249-252, **Exh. RLA-74**.

308 *Id.*, para. 251.

309 *Eco Oro Minerals Corp. v Republic of Colombia* (ICSID Case No ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum of 9 September 2021) para. 252, **Exh. CLA-65** (although this was in the different context of considering whether it could be held that "control" was exercised by a group of non-Canadian investors acting in concert).

(ii) Zeph is owned or controlled by "an investor of the denying party"

218. As explained above in Section II(B), the ownership structure of Zeph is as follows:

(a) Zeph was incorporated in Singapore on 21 January 2019.[310] It has 6,002,896 issued shares;

(b) Zeph is 100% owned by MIL, which is a company incorporated in New Zealand on 14 December 2018. MIL also has 6,002,896 issued shares. Those shares are owned by Mr Palmer (25,400 shares), River Crescent, which is an Australian company (5,928,988 shares), and Closeridge, which is also an Australian company (48,508 shares);[311] and

(c) Mr Palmer owns all the issued shares in River Crescent and 5,798 of the 5,800 issued shares of Closeridge.[312]

219. It is evident from the foregoing that Zeph is indirectly both owned and controlled by Mr Palmer. As Mr Palmer is an Australian national, the Claimant is thus owned and controlled by "an investor of the denying Party" within the meaning of Article 11(1)(b) of Chapter 11 of AANZFTA.

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310 Audited Financial Statements of Zeph Investments Pte Ltd for the reporting period from 21 January 2019 (Date of Incorporation) to 30 June 2019, **Exh. C-79**, p. 14; ACRA, Business profile of Zeph Investments Pte Ltd dated 19 January 2021, **Exh. C-71**; MIPL's (Zeph's) Application for New Company Name lodged on 21 January 2019, **Exh. R-47**; Zeph Investments Pte Ltd, Consolidated Financial Reports for the Year ended 30 June 2020, **Exh. C-82**, p. 3; Notice of Special Resolution for Change of Name, 4 December 2019, **Exh. R-48**.

311 Mineralogy Group Restructure – December 2018/January 2019 (Annexure A to NoI), **Exh. C-63**, p. 41; New Zealand Companies Office, Company Extract for MIL dated 25 July 2022, **Exh. C-99**; ASIC, Company Extract for River Crescent Pty Ltd dated 30 October 2020, **Exh. R-53**; ASIC, Company Extract for River Crescent dated 30 September 2022, **Exh. R-54**; ASIC, Company Extract for Closeridge Pty Ltd dated 30 October 2020, **Exh. R-55**; ASIC, Company Extract for Closeridge dated 30 September 2022, **Exh. R-56**; ASIC, Company Extract for Elect The President Pty Ltd dated 30 October 2020, **Exh. R-57**; [redacted] WS, p. 61; see also Lys Report, paras. 50-51, 60-61, 65.

312 [redacted] WS, p. 61; New Zealand Companies Office, Company Extract for MIL dated 25 July 2022, **Exh. C-99**; ASIC, Company Extract for River Crescent Pty Ltd dated 30 October 2020, **Exh. R-53**; ASIC, Company Extract for River Crescent dated 30 September 2022, **Exh. R-54**; ASIC, Company Extract for Closeridge Pty Ltd dated 30 October 2020, **Exh. R-55**; ASIC, Company Extract for Closeridge dated 30 September 2022, **Exh. R-56**; ASIC, Company Extract for Elect The President Pty Ltd dated 30 October 2020, **Exh. R-57**.

B. ZEPH DOES NOT HAVE "SUBSTANTIVE BUSINESS OPERATIONS" IN SINGAPORE OR IN THE TERRITORY OF ANY AANZFTA PARTY

220. The second condition for the application of Article 11(1)(b) is also satisfied: the Claimant did not have "substantive business operations" in Singapore either before or at the requisite date (14 October 2020, the date of the Written Request for Consultations). If it matters, nor has it had "substantive business operations" subsequently either in Singapore or in the territory of any other AANZFTA Party.[313]

(i) The threshold for "substantive business operations"

221. The phrase "substantive business operations", which is used in Article 11(1)(b) to designate the second substantive requirement for a denial of benefits under Ch 11 of AANZFTA, differs from the usual formulation of this requirement in other investment treaties, which frequently refer instead to "substantial business activities" in their denial of benefits clauses.[314]

222. AANZFTA does not expressly stipulate the threshold required to establish "substantive business operations". However, when compared to the more common "substantial business activities" formulation, AANZFTA can be seen to specify a more demanding standard, connoting both an increased level of authenticity and genuineness ("substantive" *versus* "substantial") and a more significant form of continuous physical presence ("operations" *versus* "activities"). AANZFTA's departure from the usual framing of this requirement, coupled with the object and purpose of Article 11 of Chapter 11, indicates that the Tribunal

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313 Art 11(1)(b) requires that the investor lack substantive business operations "in the territory of any Party, *other than the denying Party*" (emphasis added). However, in this case, Zeph also does not have substantive business operations in the denying Party, i.e. Australia.

314 E.g., *Singapore-Australia Free Trade Agreement,* signed 17 February 2003, I-40221 UNTS 2257 (entered into force 28 July 2003), as amended by Agreement to Amend SAFTA, signed on 13 October 2016 (entered into force 1 December 2017) ("**SAFTA**"), Chapter 8, Art 18(1), **Exh. RLA-75**; CPTPP, Art 9.15(1), **Exh. RLA-76**; *Indonesia-Australia Comprehensive Economic Partnership Agreement,* opened for signature 4 March 2019 (entered into force 5 July 2020), Art 14.13(1), **Exh. RLA-77**; *United States-Korea Free Trade Agreement,* Art 11.11(2), **Exh. RLA-78**; *Dominican Republic–Central America Free Trade Agreement,* opened for signature 5 August 2004 (entered into force for all Signatories 1 January 2009), Art 10.12(2), **Exh. RLA-79**. The Respondent has identified only one proceeding in which a tribunal applied a denial of benefits clause with a requirement of "substantive business operations". Based on the publicly available record for that proceeding, neither party specifically addressed how this phrase should be interpreted as compared to denial of benefits clauses adopting the usual formulation of "substantial business activities" and the decision of the tribunal accordingly offers limited guidance as to how that phrase should be understood. The tribunal held that the claimants had substantive business operations on the basis that they had a "continuous physical presence" and "managed and organized their international business affairs" from their claimed home State: *IC Power Ltd and Kenon Holdings Ltd v Republic of Peru* (ICSID Case No, ARB/19/19, Award of 3 October 2023), para. 228, **Exh. RLA-102**.

ought to be particularly sceptical of artificial arrangements concocted to give the impression that an investor has "substantive business operations".

223. That said, even the more usual "substantial business activities" formulation would capture artificial arrangements that are designed to extend the protection of investment treaties to domestic disputes. As a tribunal chaired by Sir Christopher Greenwood indicated in *Alverley v Romania*, it is appropriate to exercise particular care in assessing the genuineness of a putative investor company's connection to its State of incorporation if that company is in fact ultimately owned or controlled by a national of the respondent State. The tribunal made this observation in the context of determining where the claimants' "real seat" was located for the purpose of determining whether there had been an investment within the meaning of the Romania – Cyprus BIT. In that context, it stated that if:

> "… all that is happening is that a Romanian investor is recycling funds into an existing Romanian investment through a holding company in Cyprus which really is no more than a paper façade, it is difficult to see such an operation as something within the contemplation of the parties to the BIT. That makes it particularly important to scrutinise the evidence to see whether the Cyprus holding company is exercising some form of effective management and not simply discharging formalities."[315]

224. That reasoning is equally persuasive in the current context. There is the same need for heightened scrutiny so far as concerns whether Zeph had "substantive business operations" in Singapore at the relevant time, given that its ultimate beneficial owner, Mr Palmer, is an Australian national, and that he already owned the very Australian companies the shares in which Zeph claims constitute its investments.

225. As to this, the basic facts are as already explained. As outlined in Section II(D)(vi) above, Mr Palmer, knowing that he may wish to bring investor-State dispute settlement proceedings against Australia, incorporated a company in Singapore and inserted it into the corporate structure immediately above Mineralogy. Then, far from investing in Mineralogy, he extracted funds from Mineralogy, by means of a loan to Zeph that Zeph used in part to enter into transactions with small and wholly unrelated Singaporean businesses in an attempt to give the appearance that Zeph had substantive business operations in Singapore. Three of those businesses (the Engineering Companies) have since been liquidated and

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315 *Alverley Investments Limited and Germen Properties Ltd v Romania* (ICSID Case No. ARB/18/30, Excerpts of Award of 16 March 2022), para. 250, **Exh. RLA-71**.

deregistered,[316] while the other two (the Kleenmatic Companies) have essentially carried on the same businesses that they carried on before they entered into a JVA with, and were subsequently acquired by, Zeph. The question, as the *Alverley* tribunal put it, is whether this sort of arrangement was really within the contemplation of the States Parties to AANZFTA in referring to a threshold of "substantive business operations".[317] The Respondent submits that plainly it was not. It is a device to attempt to circumvent Article 11, and nothing more.

226. The present case is not the typical situation that tribunals have previously considered in deciding whether the activities of a company amount to "substantial business activities". Specifically, previous cases have not addressed a scenario in which a putative investor seeks to establish its business activities and connection with its home State by relying on the activities of small, pre-existing companies in unrelated industrial sectors which the claimant has acquired, and thereafter held passively (probably because it is so transparently a device). Nevertheless, previous arbitral practice provides some helpful guidance, by demonstrating the necessity for the claimant to have material activities in the putative investor's home State, as well as a meaningful and continuous link with that State. For example:

(a) In *Aris Mining v Colombia*, the tribunal held that the claimant was engaged in substantial business activities in Canada consisting of "investment management and financing",[318] noting that the claimant performed corporate functions (such as corporate finance and fundraising), had hired office space, employed full-time employees, held several bank accounts, and purchased goods and services in Canada.[319] These activities had been "carried out over a period of years and [had] the depth and materiality to demonstrate a genuine and meaningful connection (and contribution) to Canada".[320]

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316 Lys Report, paras. 163, 267, 274, 294, 321; Accounting and Corporate Regulatory Authority (of Singapore), Business profile for GCS Engineering Service Pte Ltd dated 26 October 2023, **Exh. R-84**; Accounting and Corporate Regulatory Authority (of Singapore), Business profile for Visco Engineering Pte Ltd dated 26 October 2023, **Exh. R-85**; Accounting and Corporate Regulatory Authority (of Singapore), Business profile for Visco Offshore Engineering Pte Ltd dated 26 October 2023, **Exh. R-86**.

317 *Alverley Investments Ltd and Germen Properties Ltd v Romania* (ICSID Case No ARB/18/30, Excerpts of Award of 16 March 2022), para. 250, **Exh. RLA-71**.

318 *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia v Republic of Colombia* (ICSID Case No ARB/18/23, Decision on the Bifurcated Jurisdictional Issue of 23 November 2020), para. 140, **Exh. RLA-80**.

319 *Id.*, para. 139.

320 *Id.*, para. 140.

(b) In *Amto v Ukraine*, the tribunal noted that the "purpose" of the denial of benefits clause in Article 17(1) of the ECT was to "exclude from ECT protection investors which have adopted a nationality of convenience"[321] and held:

> "… 'substantial' in this context means 'of substance, and not merely of form'. It does not mean 'large', and the materiality not the magnitude of the business activity is the decisive question. In the present case, the Tribunal is satisfied that the Claimant has substantial business activity in Latvia, on the basis of its investment related activities conducted from premises in Latvia, and involving the employment of a small but permanent staff."[322]

The claimant also maintained Latvian bank accounts, and paid taxes in Latvia.[323]

(c) In *Masdar Solar v Spain*, the tribunal adopted the test articulated in *Amto v Ukraine*.[324] It accepted as evidence of substantial business activities the claimant's "unchallenged evidence" that it was a "holding company" which owned major investments.[325] The factors that the tribunal found to be "persuasive of the true extent and materiality of the business conducted by [Masdar] in The Netherlands" included: (i) the holding of major investments in The Netherlands; (ii) the presence of two Dutch directors on the Board of Directors; (iii) the holding of Board Meetings four times a year in Amsterdam; and (iv) the holding of bank accounts in The Netherlands.[326]

(d) In *NextEra v Spain*, the tribunal held that a key indicator of "substantial business activities" was that "substantive work is being done for the company", with it not being material whether the relevant individuals were formally employees or contractors.[327] In other words, what mattered was not the form of the relationship but the substantive question of whether work was genuinely being performed for the company.

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321 *Limited Liability Company Amto v Ukraine* (SCC Case No 080/2005, Final Award of 26 March 2008), para. 69, **Exh. RLA-72**.

322 *Ibid*.

323 *Id.*, para. 68.

324 *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain* (ICSID Case No ARB/14/1, Award of 16 May 2018), para. 253, **Exh. RLA-81**.

325 *Id.*, paras. 224, 254.

326 *Id.*, paras. 224-229, 254.

327 *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), para. 257, **Exh. RLA-74**.

(e) The tribunal in *9REN Holding SARL v Spain* held that "[t]he test of substantial business activities must take its colour from the nature of the business".[328] As evidence of the claimant's "substantial business activities" in Luxembourg in that case, the tribunal noted witness evidence to the effect that the investor "has leased office space and has maintained at least one locally-based employee in Luxembourg", "has also maintained bank accounts there, since incorporation" and "pays taxes in Luxembourg".[329] It also attributed significance to the fact that "meetings of the boards of 9REN Holding and its Luxembourg parent companies are regularly held in Luxembourg" and that "[a]ll of the major decisions about the companies' investments and their operations are made there".[330] The witness evidence also noted that several managers serving on the board of directors of 9REN Holding "permanently reside in Luxembourg".[331]

(f) In *Bridgestone Licensing Services, Inc v Panama*, the tribunal took note of the United States' non-disputing Party submission in which it submitted that "shell companies could be denied benefits but not, for example, firms that maintain their central administration or principal place of business in the territory of, or have *a real and continuous link* with, the country where they are established".[332] The claimant in *Bridgestone* was one of a number of United States subsidiaries ultimately controlled by a Japanese parent company (although this foreign ownership was not addressed as part of the analysis of substantial business activities). The claimant's operations, comprising the maintenance, operation and administration of trademarks, were carried out in the United States from a permanent office in Nashville, from which one director and one officer of the company worked.[333] The claimant entered into licence agreements and product placement agreements with both foreign and United States entities, which were governed by United States law. As part of these activities, the claimant instructed and managed United States-qualified attorneys engaged in trademark and intellectual property work, with annual fees of around USD 600,000.00. It also paid taxes and retained bank accounts in the United States into which royalty

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328 *9REN Holding SARL v Kingdom of Spain* (ICSID Case No ARB/15/15, Award of 31 May 2019), para. 182, **Exh. RLA-82**.

329 *Id.*, para. 180.

330 *Ibid*.

331 *Ibid*.

332 *Bridgestone Licensing Services, Inc v Panama* (ICSID Case No ARB/16/34, Decision on Expedited Objections of 13 December 2017), para. 290, **Exh. RLA-30** (emphasis added).

333 *Id*., para. 256, 280, 293.

fees were paid and from which expenses were paid out.[334] The tribunal observed that the business' activities in the United States "had been a significant part of the business activities of the American Firestone Group, with its headquarters in the United States", both before and after the takeover with the Japanese parent company.[335] Although some activities were contracted out to specialist lawyers, the work was nonetheless "mostly done within the United States".[336]

227. The above cases illustrate that arbitral tribunals have analysed "business activities" as encompassing various activities, including: leasing office space, holding bank accounts, paying taxes, holding board and management meetings, employing local staff, making decisions about investment and other operations. That is all as would be expected. No less important in the current context, the cases also recognise that the term "substantial" requires such activities to be "of substance" or "material", with the focus on whether there is a genuine, meaningful, real and continuous link with the State of incorporation.

228. Such a threshold ensures that actors which are passive or inactive and/or which lack a genuine and continuous link with their State of incorporation — like the Claimant in this case — can be denied the benefits of treaties designed to provide protection for genuine investors from one State when they choose to invest in another State.

229. This need for a genuine connection was identified in *Pac Rim Cayman LLC v El Salvador*, although the facts are less stark than those in the current case. In *Pac Rim*, the tribunal (chaired by V.V. Veeder) held that the claimant was only a passive actor, and did not have any employees, did not lease office space, did not have a bank account and appeared to do nothing other than hold shares in various subsidiaries. The tribunal considered these activities to be insubstantial, particularly in light of the fact that the claimant did not change its activities after the corporate reorganisation through which it acquired the relevant assets in El Salvador.[337] The tribunal observed that the denial of benefits provision does not permit an investor to rely on the activities of a corporate group to satisfy the "substantial business activities" requirement; rather, the activities have to be attributable to the "enterprise"

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334 *Id.*, para. 279.
335 *Id.*, para. 302.
336 *Ibid*.
337 *Pac Rim Cayman LLC v El Salvador* (ICSID Case No ARB/09/12, Decision on Jurisdiction of 1 June 2012), paras. 4.68-4.70, 4.72-4.74, **Exh. RLA-33**.

itself.[338] In that case, the claimant enterprise, Pac Rim Cayman LLC, was part of a group of companies which included Pacific Rim Mining Corporation, Pacific Rim Exploration Inc, and Dayton Mining (US) Inc, as well as a number of subsidiaries in El Salvador.[339] As the tribunal explained:

> "[I]n the Tribunal's view, this first condition under CAFTA Article 10.12.2 ["substantial business activities"] relates not to the collective activities of a group of companies, but to activities attributable to the 'enterprise' itself, here the Claimant. If that enterprise's own activities do not reach the level stipulated by CAFTA Article 10.12.2, it cannot aggregate to itself the separate activities of other natural or legal persons to increase the level of its own activities: those would not be the enterprise's activities for the purpose of applying CAFTA Article 10.12.2."[340]

230. In its terms, that analysis militates against acceptance of any argument that Zeph can establish the necessary "business operations" by pointing to the activities of other companies, such as the Engineering Companies or the Kleenmatic Companies. Those are not activities of the "enterprise itself".

231. While not denying that in some cases a holding company might have substantial business activities, the tribunal in *Pac Rim* found on the facts that the claimant's "activities as a holding company were not directed at its subsidiaries' business activities in the USA, but in El Salvador".[341] In those circumstances, the tribunal concluded that:

> "[T]he Claimant was and is not a traditional holding company actively holding shares in subsidiaries but more akin to a shell company with no geographical location for its nominal, passive, limited and insubstantial activities."[342]

232. The *NextEra* tribunal, referred to above, engaged with this reasoning in its analysis of whether a holding company had "substantial business activities" under Article 17 of the ECT. In that case, the tribunal emphasised that what will be relevant is whether the company is

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338 *Id.*, para. 4.66. See also *Plama Consortium Limited v Republic of Bulgaria* (ICSID Case No ARB/03/24, Decision on Jurisdiction of 8 February 2005), para. 169, **Exh. RLA-73**, where the tribunal emphasised that it was necessary for the claimant itself to be the entity which has "substantial business activities" within the meaning of Art 17(1) of the Energy Charter Treaty (in that case the claimant had conceded that it had no such activities), and the tribunal further held that "this shortfall cannot be made good with business activities undertaken by an associated but different legal entity, Plama Holding Ltd ('PHL'), even where PHL owns or controls the claimant."

339 *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, **Exh. RLA-33**.

340 *Id.*, para. 4.66.

341 *Id.*, paras. 4.73-4.74.

342 *Id.*, para. 4.75.

engaged in substantial "investment activities".[343] Although that tribunal was prepared to accept that "a relatively small number of activities both in terms of quantity and quality" could be sufficient,[344] it nevertheless emphasised that the claimant in that case had proved that it had engaged in activities "more substantial than those in *PacRim*, where there was no board of directors and no bank accounts in the United States".[345] Whilst noting that "substantial business activities" might be present even in the absence of a permanent staff, the *NextEra* tribunal held that in such circumstances "the meetings of the Board of Directors" in the relevant territory would be "significant", as would the claimants' evidence that "in fact 'significant' business decisions relating to their investments were taken" from or in that territory, "including purchasing equipment …, equity injections …, appointing auditors …, hiring counsel for these arbitration proceedings, and hiring liquidators".[346]

233. On this reasoning, the mere holding of shares will necessarily be insufficient to establish substantial business activities (much less "substantive business operations"). That is further illustrated by *Littop v Ukraine*. There, the tribunal (constituted under the ECT) held that Cypriot companies, which held shares in a Ukrainian company, did not have substantial business activities because, although the "shareholding may be a very valuable asset and its value may have grown over the years", this reflected a growth in the subsidiary company rather than business activities on the part of the parent companies.[347] The tribunal reached this conclusion despite the parent companies providing evidence that they had entered into contracts with professional services companies, including because they could not demonstrate that they employed any personnel or held premises in the State of incorporation.[348]

234. Taking into account the text of Article 11(1)(b) of Chapter 11 of AANZFTA and the authorities above, the threshold for "substantive business operations" is subject to the following principles:

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343 *NextEra v Spain* (ICSID Case No ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles of 12 March 2019), para. 258, **Exh. RLA-74**.

344 *Id.*, para. 260.

345 *Id.*, para. 256.

346 *Id.*, para. 258.

347 *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v Ukraine* (SCC Case No. V 2015/092, Final Award of 4 February 2021), para. 625, **Exh. RLA-83**.

348 *Id.*, paras. 629-630.

(a) The term "substantive", like "substantial", means "of substance" (*Amto*, *Masdar Solar*, *9REN*, *Littop*), although with a different and more demanding nuance. Thus, the Tribunal must be satisfied that any business operations of Zeph in Singapore are both substantial and genuine (noting the particular scrutiny required given that an Australian national, Mr Palmer, is the ultimate beneficial owner, as cautioned in *Alverley*).[349]

(b) The only activities on which Zeph can rely in an attempt to satisfy this test are activities of Zeph itself, rather than those of its subsidiaries (*Plama*, *Littop*).

(c) It is significant whether Zeph has its own business premises and permanent staff (*Amto*, *Pac Rim*, *9REN*, *Littop*, *Aris Mining*, *NextEra*) or contractors (*NextEra*) who substantively work for Zeph rather than its affiliates. This is an aspect of Zeph itself needing to have a genuine and meaningful link with Singapore: it is not enough that there is some other business, to which it is related in some way, which has such a link.

(d) The duration of the business activities is also relevant (*Bridgestone Licensing*, *9REN*, *Aris Mining*). As the *Bridgestone* tribunal held, the continuity of the link to the State of incorporation (here, Singapore) is an important consideration.

(e) Other factors such as holding bank accounts, involvement in fundraising and the acquisition of goods and services in Singapore are also relevant (*Amto*, *Aris Mining*) — but again this is subject to the requirement that Zeph itself, as opposed to other companies affiliated with it, must have substantive business operations and a genuine and durable link with Singapore.

(f) Zeph's character as a "shell"[350] or a "pass-through entity"[351] is relevant (*Pac Rim*, *Masdar Solar*, *9REN*, *Bridgestone Licensing*). While in some circumstances a holding company may have substantial business activities even in the absence of a permanent staff in the relevant State, in such circumstances the occurrence of meetings of the Board of Directors in the territory of that State is "significant", as is evidence that "in fact 'significant' business decisions relating to their investments were taken" from or

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349 *Alverley Investments Limited and Germen Properties Ltd v Romania* (ICSID Case No. ARB/18/30, Excerpts of Award of 16 March 2022), para. 250, **Exh. RLA-71**.

350 Lys Report, paras. 33, 64.

351 See *Id.,* paras. 206, 208.

in that territory (*NextEra)*.[352] Such activities are to be contrasted with those of a shell company not undertaking "substantive business operations" including because it has only nominal, passive, limited and insubstantial activities (*Pac Rim*, *Aris Mining*).[353]

(ii) Zeph had no "substantive business operations" in Singapore (or any other AANZFTA Party) at any material time

235. Zeph has never conducted "substantive business operations" in Singapore or any other AANZFTA State Party.

Zeph itself

236. Zeph does not undertake any activities in its own right. This is supported by the evidence of Mr Bruno Vickers, who after carrying out certain investigations, observed that Zeph "did not have any visible physical operations in Singapore."[354]

237. Zeph has never had an office in Singapore. [redacted] asserts that (i) "[d]uring the 2019 calendar year, the Claimant conducted its business operations from 1[redacted] Singapore",[355] (ii) that "during the 2020 calendar year, the Claimant conducted its business operations from two offices" (being the address at [redacted], as well as an address at [redacted], Singapore"),[356] and (iii) that since then "it has continued to operate its business out of the [redacted] address".[357] In reality, however, as is discussed below, the former address was previously connected with the Engineering Companies, while the latter address is the location of the business operations of the Kleenmatic Companies.

238. Before 24 February 2023, the only property that appeared to be registered in Zeph's name in Singapore was two trucks that were owned and registered by Zeph.[358]

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352 *NextEra v Spain* (ICSID Case No ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles of 12 March 2019), para. 258, **Exh. RLA-74**.

353 *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v Republic of Colombia* (ICSID Case No ARB/18/23, Decision on the Bifurcated Jurisdictional Issue of 23 November 2020), para. 141, **Exh. RLA-80**.

354 Vickers WS, para. 47.

355 [redacted] WS, para. 36.

356 *Id*., para. 37.

357 *Id*., para. 38.

358 Vickers WS, paras. 34, 36.

239. Zeph prepares annual audited accounts. However, the preparation of financial accounts is a quintessential example of an activity that a company undertakes simply to preserve its own corporate existence, rather than serving as evidence of its operations. A company doing the bare minimum necessary to exist in its home jurisdiction (without being a delinquent filer),[359] is clearly insufficient to establish "substantive business operations" within the meaning of Article 11(1)(b) of AANZFTA. Holding otherwise would all but eliminate the significance of the "substantive business operations" requirement.

240. [redacted] asserts that Zeph was established in Singapore in part so that the Mineralogy Group would have access to "the banks' head offices for Asia", which was "where the decision-makers were".[360] However, there is no evidence that Zeph engaged any staff relevant to this asserted purpose. As Professor Lys notes, there is "no evidence of any staff employed at Zeph that could execute on the stated purpose for creating Zeph in the first place – securing international financing for Mineralogy's coal exploration in Queensland."[361] Nor did Mr Palmer, or any other executive from the Mineralogy Group, relocate to Singapore. The Respondent is not aware of any evidence that Mr Palmer, or any other executive, travelled to Singapore for the purpose of Board meetings of Zeph, let alone that the Board of Zeph has ever made any decisions concerning the Mineralogy Group (being matters the *NextEra* tribunal held would be "significant" in a case of this kind). As the Lys Report states, there is:

> "nothing in the record that would suggest that any staff capable of international project finance or coal development was ever hired by Zeph. Neither Mr. Palmer, [redacted] nor any of the Palmer-related executives appear to have relocated to Singapore. Per ACRA filings, all the Palmer-related members on the various Singaporean entities' Boards of Directors reportedly maintained their residence in Australia."[362]

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359 The Respondent notes from early 2020, Zeph and certain of its Singapore subsidiaries did not submit financial statements until mid-2022. This affected Zeph's reporting for the financial years 2020, 2021, and 2022. The Respondent also notes that in late 2023, Zeph and certain of its Singapore subsidiaries applied to ACRA for 60-day extensions on filing Annual Returns and Annual Group Meetings. The reasons listed include "[a]ccountant needs more time" and "[a]uditor needs more time". Annual Returns and Annual Group Meetings are now to be filed and occur by 31 January 2024 and 31 March 2024, respectively: Extension of Time for AGM/Annual Return (Zeph Investments Pte. Ltd.), **Exh. R-150**; Extension of Time for AGM/Annual Return (Kleen Venture Pte. Ltd.), **Exh. R-151**; Extension of Time for AGM/Annual Return (One Kleenmatic Pte. Ltd.), **Exh. R-152**; Extension of Time for AGM/Annual Return (Turbid Investments Pte. Ltd.), **Exh. R-153**.

360 [redacted] WS, paras. 120-121.

361 Lys Report, para. 240.

362 *Id*., para. 594.

241. At the time of filing its Written Request for Consultations in October 2020 (and thereafter), Zeph has acted (at most) as a purely passive investor, carrying out no business operations of its own. Professor Lys has described Zeph as "[i]n effect" a "pass-through entity", on the basis that "dividends originating in Australia were rerouted through Singapore and ended up in New Zealand."[363] Further, "99.18% of all dividends paid by Mineralogy simply flowed through Zeph further up the corporate hierarchy. Zeph was not the original source of those funds, and those funds (almost exclusively) did not remain with Zeph."[364]

242. Zeph refers in its Amended Notice of Arbitration to its ownership of certain businesses in Singapore.[365] However, as is detailed below, the engineering businesses to which Zeph refers, namely the Engineering Companies, have had little or no operations since their acquisition by Zeph in February 2019, were in liquidation at the date of the notification of denial of benefits, and have now been dissolved.[366] Otherwise, as far as Australia is aware, the extent of Zeph's activity in Singapore is that it is party to a JVA with the Kleenmatic Companies, being two companies operating a cleaning business (whose shares Zeph then acquired in 2022, well after Zeph sought to rely upon AANZFTA). The supposed "substantive business operations" on which Zeph relies are therefore nothing more than the business operations of other companies, rather than any operations on the part of Zeph itself.

243. In those circumstances, to adopt the words of the *Alverley* tribunal, Zeph's business operations in Singapore are a "paper façade".[367] In this respect:

    (a) Although Zeph reported a net cash change of SGD 0.9 million for the period ended 30 June 2020, it appears that this is simply the cash generated by the Kleenmatic Companies.[368]

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363 Lys Report, para. 208.
364 *Ibid.*
365 Amended NoA, paras. 30, 52.
366 Lys Report, paras. 163, 267 (re GCS Engineering), 294 (re Visco Engineering), 321 (re Visco Offshore Engineering).
367 *Alverley Investments Limited and Germen Properties Ltd v Romania* (ICSID Case No ARB/18/30, Excerpts of Award of 16 March 2022), para. 250, **Exh. RLA-71**.
368 Lys Report, paras. 480-482, 485-487, 491-493.

(b) Although Zeph reported a net cash change of SGD 50,069 for the period ended 30 June 2021 (which is substantially less than the previous year), this too was simply cash created by the Kleenmatic Companies.[369]

(c) Although Zeph reported a net cash change of SGD 29.3 million for the period ended 30 June 2022, this is due to the dividends being paid to Zeph by Mineralogy, rather than as a result of any Singapore operations.[370]

The Engineering Companies

244. On 31 January 2019 (very shortly after its incorporation), Zeph acquired the three Engineering Companies.[371] Zeph purchased the Engineering Companies from the same individual, Mr Chin Bay Goh, and it paid SGD 700,000, SGD 468,685, and SGD 940,677 for them respectively.[372]

245. Although there is evidence that the Engineering Companies had previously been involved in engineering projects prior to 2018,[373] there is little or no evidence that they had any meaningful operations since their acquisition by Zeph. These matters are explained in the Vickers WS and the Lys Report. In particular:

(a) The Engineering Companies entered into voluntary liquidation on 12 October 2020 (mere days prior to the filing of Zeph's Written Request for Consultations, being the date on which Zeph invoked the protections of AANZFTA). The liquidation process was completed on 27 September 2022;[374]

(b) As Mr Vickers states in his witness statement, as of November 2020, October 2023, and November 2023 (when he carried out investigations), there was no evidence of any operations by the Engineering Companies at either their previous registered address or their then current registered address [redacted], Singapore; and [redacted], Singapore).[375] As to these addresses:

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369 Lys Report, paras. 498-500.
370 *Id*., paras. 505, 512, 517.
371 *Id*., para. 36, section III.E.
372 *Id*., para. 181 and figure 20.
373 Vickers WS, para. 77.
374 Lys Report, paras. 163, 267, 294, 321.
375 Vickers WS, paras. 63-67.

(i) Mr Vickers noted that the address at [redacted], Singapore, had been taken over by an unrelated business, Winston Engineering,[376] and the Engineering Companies had not had a visible presence at [redacted] since October 2020;[377] and

(ii) Mr Vickers noted that the address at 600 North Bridge Road, Singapore, was the address of BDO LLP, which had been appointed as the liquidator for the Engineering Companies;[378]

(c) Nor was there evidence that the Engineering Companies have any presence at a number of other possible addresses that Mr Vickers was able to find through his investigations.[379]

(d) As of 2 November 2020, GCS Engineering Service Pte Ltd's health and safety certification had been suspended due to a failure to complete an audit;[380]

(e) As for the Engineering Companies' financial statements:

(i) GSC Engineering Service Pte Ltd reported a loss of SGD 210,133 in 2018, and a loss of SGD 50,221 in 2019 (which, but for debt forgiveness, would have been SGD 845,825);[381]

(ii) Visco Engineering Pte Ltd reported a loss of SGD 112,336 in 2018, and losses in 2019 (excluding debt forgiveness);[382] and

(iii) Visco Offshore Engineering Pte Ltd had a loss of SGD 19,048 in 2018, and reported further losses in 2019;[383]

(f) As for the Engineering Companies' employees:

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376 Vickers WS, paras. 23-25.
377 *Id*., paras. 32, 65.
378 *Id*., paras. 66-67.
379 *Id*., paras. 68-76.
380 *Id*., para. 78.
381 Lys Report, para. 273
382 *Id*., paras. 300-303.
383 *Id*., paras. 325-327.

(i) GSC Engineering Service Pte Ltd had between three and 10 employees during the course of 2019, between three and six employees in 2020, and no employees at all in 2021-2022;[384]

(ii) Visco Engineering Pte Ltd had no more than 19 employees in 2019, an unverified number of employees in 2020, and no employees at all in 2021-2022;[385] and

(iii) Visco Offshore Engineering Pte Ltd had an unverified number of employees in 2019, and no employees at all in 2020-2022.[386]

246. Based on his investigations, Mr Vickers concluded that "the Engineering Companies did not have any business operations in Singapore after 12 October 2020", and that it was "probable that the Engineering Companies did not have any significant business operations after 2018".[387]

247. In much the same vein, Professor Lys concludes that "these three firms [the Engineering Companies] appeared to be failing when Zeph bought them on January 31, 2019."[388] Professor Lys goes on to explain that the value of these companies was not what Zeph apparently paid for them:

> "[W]hile the record does not provide sufficient evidence to perform an elaborate valuation of these three engineering firms, my review of their financial statements indicates that their value was substantially less than SGD $3.5 million, which incidentally is almost 15 times the book value of their combined equity shortly before the purchase. (Indeed … all three engineering firms were liquidated in September 2022, with Zeph only recouping just SGD $451,585 of its investment in them.)"[389]

248. In light of the above, the Engineering Companies are of no assistance to Zeph in establishing that it has substantive business operations for two quite separate reasons. First, even if Zeph was entitled to rely upon the business operations of the Engineering Companies, on the available evidence those companies did not have substantive business operations as at 14 October 2020. Second, any business operations of the Engineering Companies would not be

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384 Lys Report, paras. 281-286.
385 *Id*., paras. 308-313.
386 *Id*., paras. 333-337.
387 Vickers WS, para. 83.
388 Lys Report, para. 339.
389 *Id*., para. 343 (internal footnotes omitted).

treated as substantive business operations of Zeph in any event. Thus, even if Zeph could show that the Engineering Companies had remained operational for any period of Zeph's ownership, no evidence has been provided showing that Zeph played any role in the Engineering Companies beyond merely holding shares in them. The holding of shares is not evidence of any "substantive business operations" by Zeph in Singapore.

The Kleenmatic Companies

249. On 24 January 2020, Zeph entered into a JVA with two entities constituting a cleaning business, the Kleenmatic Companies.[390] On 13 May 2022 (well after the date when Zeph purported to invoke the protection of AANZFTA, and after Australia had denied Zeph the benefits of that treaty), Zeph exercised an option under an option agreement, and acquired 100% of the shares in the Kleenmatic Companies.[391]

250. The JVA is insufficient to prove that Zeph carries out any, let alone substantive, business operations in Singapore. That is because Zeph simply "adopted" the existing business of the Kleenmatic Companies, becoming a passive investor in those companies' business without performing any operational role. Specifically, the evidence reveals that:

(a) Although Zeph claims to "operate" from [redacted], Singapore (which it says is "open for business five days a week during normal working hours in Singapore"), [392] these premises in fact house the operations of the Kleenmatic Companies. In this respect, in November 2020, Mr Vickers conducted a site visit at [redacted], Singapore, and he observed that:

(i) It was a unit at an industrial building with the name and logo of "Kleenmatic" on the door, but with no signage for Zeph;[393]

(ii) Zeph's name was not included in the building directory;[394]

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390 Lys Report, para. 162
391 *Id*., para. 360.
392 [redacted] WS, para. 38.
393 Vickers WS, para. 33(a)-(c).
394 *Id*., para. 33(d).

(iii) Two vehicles marked with "GCS Engineering Company Pte Ltd" and "Visco Offshore Engineering Pte Ltd" were parked there;[395] and

(iv) a security guard said that he had never heard of Zeph, and he said that the two vehicles had been "transferred" to the Kleenmatic Companies.[396]

(b) On 17 November 2020, Mr Vickers had a title search performed in respect of [redacted], which revealed that the property was owned by One Kleenmatic.[397]

(c) Mr Vickers had the same search performed in October 2023, which revealed that Zeph had become the registered proprietor of [redacted] on 24 February 2023.[398] Mr Vickers conducted a further site visit on 30 October 2023, which revealed that (i) [redacted] was "branded with the Kleenmatic name and logo", (ii) there was "no visible branding for Zeph", (iii) Zeph was not listed in the building directory,[399] and (iv) a car marked with Kleenmatic's logo was parked there (which it transpired was a car owned by Kleenmatic Services).[400]

251. As for the asserted "business operations" of Zeph, these are simply those of the Kleenmatic Companies. As Mr Vickers states, "Kleenmatic is a long-standing family-owned cleaning business in Singapore that operated for approximately 20 years prior to Zeph's involvement."[401] Nothing material has changed since Zeph entered into the JVA with Kleenmatic in January 2020:

(a) The business profile and website of Kleenmatic is the same (and none of these have any references to Zeph).[402]

(b) The management of Kleenmatic remains the same, with the business being managed by [redacted] and [redacted].[403]

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395 Vickers WS, para. 33(e)-(f).
396 *Id*., para. 33(g).
397 *Id*., para. 39.
398 *Id*., para. 40.
399 *Id*., para. 41.
400 *Id*., paras. 41(e), 43.
401 *Id*., para. 92.
402 *Id*., paras. 92-94.
403 *Id*., para. 97.

(c) As of 30 October 2023, the LinkedIn profiles of [redacted] and [redacted] state that they work in roles at Kleenmatic (with there being no reference to Zeph),[404] and the Facebook page of Kleenmatic is managed by [redacted].[405]

(d) The clients of the Kleenmatic Companies do not appear to have any awareness of Zeph's involvement in the business.[406]

252. Based on his investigations, Mr Vickers concluded that "[redacted] and [redacted] have held de facto management roles in Kleenmatic since the Kleenmatic business was established and that they continue to run the business", and that "there has been no change to the management of the Kleenmatic business since Zeph entered the JVA with the Kleenmatic Companies."[407]

253. As to employees, the JVA provides that the Kleenmatic Companies were obliged to transfer their employees to Zeph within 29 business days.[408] This contractual arrangement resulted in Zeph — within one month of the JVA — acquiring the employees of the Kleenmatic Companies.[409] According to Professor Lys' analysis, the Claimant's statements in this proceeding often exaggerated the actual number of employees of Zeph and the Kleenmatic Companies.[410] But, more fundamentally, [redacted] claims concerning Zeph's alleged employees are entirely artificial and do not establish that Zeph had "employees" in Singapore in any sense relevant to assessing whether Zeph has "substantive business operations":

(a) These "employees" are in reality individuals who perform services for the Kleenmatic Companies rather than for Zeph.[411]

(b) Based on the average annual salaries of Zeph's "employees" (the median salary in 2020 was SGD $16,171),[412] these were modestly paid cleaning staff performing functions for the Kleenmatic Companies.[413]

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404 Vickers WS, paras. 99-100.
405 *Id*., para. 101.
406 *Id*., paras. 92(c), 97-98, 124, 125.
407 *Id*., para. 103.
408 Lys Report, para. 212. See JVA dated 24 January 2020, cl. 24, **Exh. C-469**.
409 Lys Report, para. 212.
410 *Id*., para. 41.
411 See *Id.,* paras. 210-213; Vickers WS, paras 92-97.
412 Lys Report, para 235.
413 E.g., *Id.,* paras. 213, 224.

(c) As Professor Lys explains, there is "no evidence of any staff employed at Zeph that could execute on the stated purpose for creating Zeph in the first place – securing international financing for Mineralogy's coal exploration in Queensland."[414]

(d) As at August 2021, none of the employees who had social media accounts publicly referred to themselves as employees of Zeph.[415]

(e) Zeph's payment of Central Provident Fund contributions in full follows as a formality from the relationship of employment, rather than because such individuals are providing services to Zeph.[416] Indeed, it appears that many of the Kleenmatic Companies' personnel have limited awareness as to Zeph's identity or relationship to the Kleenmatic Companies.[417]

(f) As the tribunal in *NextEra* recognised, it is the substantive reality of whether individuals are performing services for the claimant which is relevant, rather than whether a formal employment relationship exists between them.[418] In this case, the substantive reality is that Zeph's claimed "employees" are performing services for the pre-existing Kleenmatic Companies.

254. Consistent with *Pac Rim*, *Aris Mining* and *Littop*, the operations of the Kleenmatic Companies should not be deemed to be the activities of Zeph for the purposes of the denial of benefits clause in circumstances where Zeph's role in the JVA with those companies was entirely passive. It bears emphasising that Zeph did not acquire shares in the Kleenmatic Companies until August 2022, almost two years after filing its Written Request for Consultations, and one year and 8 months after Australia notified Zeph that it was contemplating denying the benefits of Chapter 11 of AANZFTA to Zeph.[419] Zeph's

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414 Lys Report, para. 240.
415 Vickers WS, para. 55.
416 Lys Report, para. 215, see especially conclusions at para. 224.
417 Vickers WS, paras. 104-117.
418 *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), paras. 257-258, **Exh. RLA-74**.
419 One Kleenmatic Pte Ltd financial statements for year ended 30 June 2021, **Exh. R-89**, p. 54; Kleen Venture Pte Ltd financial statements for year ended 30 June 2021, **Exh. R-90**, p. 42; Consolidated financial reports of Zeph Investments Pte Ltd for year ended 30 June 2022, **Exh. C-86**, p. 40; Consolidated financial reports for MIL for year ended 30 June 2022, **Exh. C-103**, p. 40. Zeph filed its Written Request for Consultations on 14 October 2020: Letter from Volterra Fietta, on behalf of Zeph, to the Minister for Foreign Affairs dated 14 October 2020, **Exh. C-148**. Australia notified Zeph that it was contemplating denying benefits

subsequent acquisition of the shares in the Kleenmatic Companies provides no basis to attribute the business operations of those companies to Zeph at any time relevant to the denial of benefits analysis, as an investor cannot improve its position on this jurisdictional issue after claiming the benefit of the treaty.

255. Further, even after it acquired its shares in the Kleenmatic Companies, Zeph was not a genuine holding company but instead a nominal, passive, shell company.[420] Specifically:

(a) The business of the Kleenmatic Companies is entirely unconnected to the business of resources exploitation of the much more significant companies in which Zeph holds shares (including Mineralogy).[421]

(b) Unlike a genuine holding company which brings benefits as to control, taxation and risk management for the corporate group (as highlighted in *Pac Rim*), Zeph's control over the Kleenmatic Companies does not have any apparent rationale or business logic.[422]

(c) Zeph's involvement in the Kleenmatic Companies had been of a short duration (some 11 months) when Australia notified Zeph that it was contemplating denying benefits in December 2020.

256. Like Zeph's acquisition of the Engineering Companies, the tribunal should infer that the establishment of the JVA with the Kleenmatic Companies was nothing more than an artificial arrangement designed to create an impression that Zeph is engaged in business operations in Singapore, in an attempt to prevent Zeph from being denied the benefit of the treaty protection that provided the whole rationale for Zeph's incorporation. Zeph sought to achieve that by the device of acquiring an interest in a business with active operations and with a view to portraying those operations as being those of Zeph itself. That was done at a time when treaty proceedings against Australia with respect to existing domestic disputes were already anticipated. On a "good faith"[423] interpretation of Article 11(1), an investor under Chapter 11 of AANZFTA is not permitted to evade a denial of benefits by the simple device of entering into a commercial agreement with one or more pre-existing local companies, with

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on 22 December 2020: Letter from the Office of International Law of the Attorney-General's Department of Australia to Volterra Fietta dated 22 December 2020, **Exh. C-153**.

420 Lys Report, para. 64.

421 *Id*., paras. 40, 466, 527.

422 *Id*., para. 527.

423 Vienna Convention, Art 31(1), **Exh. CLA-17**.

a view to claiming that the business activities of such local company or companies are to be regarded as its own.

257. Zeph's asserted explanation for moving immediately after its incorporation to acquire the Engineering Companies, and establish the JVA with the Kleenmatic Companies, despite their lack of synergy with Mineralogy's business, is not credible. [redacted] is said to have advised Mr Palmer in November 2018 that the new Singaporean company "should immediately set up operations in Singapore and, by acquisition and/or joint venture, establish operations in Singapore",[424] seemingly because "substantial assets should be held by the Singapore company to enhance the prospects of a large capital raising for the Coal project".[425] That explanation is implausible and should be rejected. As Mr Rogers' Expert Report explains:

> "It is hard to fathom what [redacted] means by this. If he was referring to the Mineralogy group shareholdings, this was intended anyway, and is not a means of enhancing the prospects of a large debt raising …
>
> If it is another way of expressing the subsequently made strategic recommendation that the company 'immediately set up operations in Singapore and, by acquisition and/or joint venture, establish operations in Singapore' this is not only not required in project finance, but would generally be seen as a negative. Having, for example, marine engineering and cleaning company interests would lead most financiers to be concerned about the company's focus and objectives."[426]

258. For the above reasons, the Tribunal should conclude that Zeph has not had, nor does it have, "substantive business operations" in Singapore. Although (as stated above) the relevant point in time is the date on which Zeph notified Australia of the dispute (14 October 2020), the same conclusion holds for all other conceivably relevant points in time:

(a) As of 14 October 2020 (the date on which Zeph delivered its Written Request for Consultations): the Engineering Companies were in the process of liquidation, and the cleaning business was being operated through the Kleenmatic Companies and constituted business activities of those entities rather than Zeph. While the JVA had the consequence that Zeph had approximately 187 employees, these individuals

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424 [redacted] WS, para 36.
425 *Id*., para 26.
426 Rogers Report, paras. G.5.4.1-G.5.4.2.

performed services for the Kleenmatic Companies and were "employees" of Zeph in a formal sense only, rather than in any substantive sense.[427]

(b) As of 22 December 2020 (the date on which Australia notified Zeph and Singapore that it was contemplating denying the benefits of Chapter 11 of AANZFTA to Zeph), the position was materially the same as at 14 October 2020.[428]

(c) As of 24 June 2021 (the date of the denial of benefits), the position was still materially the same as at 14 October 2020.[429]

(d) As of 29 March 2023 (the date on which Zeph submitted its claim to arbitration): the Engineering Companies were defunct, Zeph owned the Kleenmatic Companies, and Zeph had approximately 211 employees (who again performed services for the Kleenmatic Companies).[430] However, Zeph remained a nominal and passive investor in the Kleenmatic Companies, carrying out no business operations of its own, and operating essentially as a "pass-through entity" for the funnelling of dividends from Mineralogy to MIL, and beyond.[431]

259. The conclusion based on the available evidence must be that the Claimant has never conducted "substantive business operations" in Singapore. Zeph is instead a "paper façade".[432]

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427 Lys Report, paras. 210-213, 488.
428 *Id*., paras. 490-495.
429 *Id*., paras. 496-502; Vickers WS, para. 96.
430 Lys Report, paras. 510-515.
431 *Id*., paras. 206, 208.
432 *Alverley Investments Limited and Germen Properties Ltd v Romania* (ICSID Case No ARB/18/30, Excerpts of Award of 16 March 2022), para. 250, **Exh. RLA-71**.

C. AUSTRALIA'S DENIAL OF BENEFITS SATISFIED THE PROCEDURAL REQUIREMENTS OF ARTICLE 11(1)(B) OF CHAPTER 11 OF AANZFTA

260. Article 11(1)(b) is not qualified by any temporal limitation. It is, however, predicated on the denial of benefits "[f]ollowing notification".

261. Australia notified both Zeph and the Government of Singapore of its exercise of the entitlement to deny the benefits of Chapter 11 to Zeph and its purported investments by way of letters dated 22 December 2020[433] and 24 June 2021.[434] This meets the procedural requirements of Article 11(1)(b).

262. Australia's invocation of the denial of benefits provision at such an early stage in proceedings (before even the Notice of Intent was filed) is clearly valid in light of the interpretation of similar provisions by other tribunals and authoritative scholars, which require a State to deny benefits within a reasonable time and/or in any event no later than the point at which it is required to file any preliminary objections.[435] Under Article 23(2) of the UNCITRAL Rules, any jurisdictional objections must be raised no later than in the Statement of Defence. Accordingly, a denial of benefits is timely under the UNCITRAL Rules if it is made in the Statement of Defence or earlier (as was the case here).[436]

D. CONCLUSION ON AUSTRALIA'S DENIAL OF BENEFITS TO ZEPH

263. It follows that the pre-requisites for the Respondent's denial of the benefits of AANZFTA Chapter 11 (including its dispute resolution provisions) to Zeph have been satisfied and Zeph's claim must be dismissed on this basis.

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433 Letter from Australia to Volterra Fietta dated 22 December 2020, **Exh C-153**.

434 Letter from Australia to Volterra Fietta dated 24 June 2021, **Exh C-155**.

435 See, e.g., *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12, Decision on Jurisdiction of 1 June 2012), paras. 4.4, 4.83-4.85, **Exh. RLA-33**; *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), paras. 268-269, **Exh. RLA-74**; *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v Ukraine* (SCC Case No. V 2015/092, Final Award of 4 February 2021), paras. 592-593, **Exh. RLA-83**; *Guaracachi America, Inc and Rurelec PLC v Plurinational State of Bolivia* (Award of 31 January 2014), para. 378, **Exh. RLA-69**. See also the decision in *Empresa Eléctrica del Ecuador, Inc. v Republic of Ecuador* (ICSID Case No ARB/ 05/0, Award of 2 June 2009), para. 71, **Exh. RLA-84**. It also appears to have been accepted in *Big Sky Energy Corporation v Republic of Kazakhstan* (ICSID Case No ARB/17/22, Award of 24 November 2021), **Exh. RLA-85** that the denial of benefits provision could be invoked after the submission of a claim to arbitration; Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), p. 472, **Exh. RLA-86**.

436 *Ulysseas, Inc v The Republic of Ecuador* (Interim Award of 28 September 2010), para. 172, **Exh. RLA-87**.

VI. ZEPH'S CLAIM CONSTITUTES AN ABUSE OF PROCESS

264. The Respondent's final preliminary objection is that Zeph's invocation of Article 20 of Chapter 11 of AANZFTA is outside the scope of the Tribunal's jurisdiction and/or Zeph's claim should be declared inadmissible because it is an abuse of process.[437] Accordingly, Zeph's claim should be dismissed by the Tribunal.

265. As is explained in more detail below, arbitral tribunals have consistently recognised that it is an "abuse of process" for an investor to file a claim after having restructured its corporate holdings to establish jurisdiction under an investment treaty for an already existing or foreseeable dispute.

266. As appears from the chronology and statement of facts, at least two inter-connected disputes between Mineralogy and the WA Government had crystallised or were reasonably foreseeable at the time when Zeph was incorporated in Singapore, and then inserted into the corporate chain of ownership above Mineralogy on 29 January 2019:

(a) The first dispute (the BSIOP Dispute) concerned the lawfulness of the WA Government's conduct in relation to the BSIOP Proposal. As outlined in more detail in this Section, between 4 September 2012 (when the WA Government rejected the BSIOP Proposal) and 13 August 2020 (when the Amendment Act commenced), Mineralogy and companies in the Mineralogy Group consistently disputed the lawfulness of WA's conduct in relation to the BSIOP Proposal, and sought to hold WA to its obligations under the State Agreement.

(b) The second dispute (the CITIC Dispute) concerned 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. To recall, Mineralogy has long been involved in numerous, often inter-connected, disputes with both private parties and the WA Government. As set out in detail in Section II (Statement of Facts), one such dispute involved the CITIC Parties' request that Mineralogy submit certain MCPs to the WA Government for approval under the State

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437 The Respondent uses the term "abuse of process" to describe its objection because, in *Immunities and Criminal Proceedings (Equatorial Guinea v France (Preliminary Objections) (Judgment)* [2018] ICJ Rep 292), p. 336, para. 150, **Exh. RLA-88**, the ICJ distinguished between abuse of right and abuse of process, seeing the former as going to the merits. It held that: "An abuse of process goes to the procedure before a court or tribunal, and can be considered at a preliminary phase of the proceedings". However, there is some relevant jurisprudence that treats "abuse of process" as synonymous with "abuse of right".

Agreement. Mineralogy's refusal to submit those MCPs was said by it to be related, in part, to the ramifications of the MCPs for the BSIOP proposal. The two disputes are therefore inter-connected. Mineralogy repeatedly contested the lawfulness of the WA Government's conduct in relation to the CITIC dispute, and the WA Government repeatedly emphasised its capacity to respond to the dispute by unilaterally amending the State Agreement.

267. MIL, and later Zeph, were incorporated and acquired Mineralogy shares as part of an attempt by Mineralogy and Mr Palmer to permit them to deploy Australia's international obligations under investment treaties to fetter the WA Government's freedom of action in responding to the two inter-connected disputes summarised above (both of which concerned the steps that an Australian government might take with respect to an Australian company that is ultimately owned by an Australian citizen). Importantly, there is no requirement that the precise measure adopted by the WA Government in connection with those disputes be foreseen or foreseeable.

268. Specifically, Mineralogy and Mr Palmer sought to internationalise the disputes by incorporating and transferring Mineralogy shares, first to a New Zealand entity (MIL, via the MIL Share Swap), and second, a Singaporean entity (Zeph, via the Zeph Share Swap). Zeph acquired its shares in Mineralogy for a determinative or principal purpose of providing treaty protection to Mineralogy and Mr Palmer with respect to these existing and/or foreseeable disputes between Mineralogy and the WA Government.

269. In this section, Australia sets out the test for assessing an abuse of process (**Subsection A**), and summarises the main facts relevant to the abuse of process objection (**Subsection B**). Applying that test to the facts, it then demonstrates that, on 29 January 2019 when the Mineralogy shares were transferred to Zeph, the (i) relevant dispute/s had arisen (**Subsection C**) or (ii) was/were at least reasonably foreseeable (**Subsection D**), with (iii) the restructure being effected for a determinative or principal purpose of bringing an international claim in relation to those disputes (**Subsection E**). This makes Zeph's current invocation of the protections of Chapter 11 of AANZFTA abusive, and the Tribunal should accordingly decline jurisdiction over Zeph's claims.

A. THE TEST FOR ABUSE OF PROCESS

270. Investment treaty tribunals have consistently recognised that they cannot exercise jurisdiction over claims which constitute an abuse of process.[438] In particular, a clear and persuasive line of cases has held that it is an abuse of process for an investor to restructure its corporate holdings to bring about a change in nationality for the purpose of establishing jurisdiction under an investment treaty to which the investor would otherwise not have access, if that is done when a dispute is reasonably foreseeable or in existence between the parties.

271. As the tribunal in *Phoenix Action Ltd v Czech Republic* explained, an abuse of process "consist[s] in the Claimant's creation of a legal fiction in order to gain access to an international arbitration procedure to which it was not entitled".[439] For the *Phoenix Action* tribunal, a restructuring for such purpose meant that the relevant "investment" was made "not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation", such that it was "not a *bona fide* transaction and cannot be a protected investment".[440]

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438 The "abuse of right" doctrine is based upon the principle of good faith and has been widely recognised in international law. As Professor Cheng states: "A reasonable and bona fide exercise of a right … is one which is appropriate and necessary for the purpose of the right (i.e., in furtherance of the interests which the right is intended to protect). It should at the same time be fair and equitable as between the parties and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed. A reasonable exercise of the right is regarded as compatible with the obligation. But the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation, and a breach of the treaty". Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 2006), p. 125, **Exh. RLA-101**. The abuse of right doctrine has been considered and applied by the Permanent Court of International Justice (*The Free Zones of Upper Savoy and the District of Gex (France v Switzerland)* (1932) PCIJ Series A/B (No 46), p. 167, **Exh. RLA-103**), the ICJ (*Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116, p. 142, **Exh. RLA-89**) and other international courts and tribunals (see, e.g., *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R), Appellate Body Report of 12 October 1998, para. 158, **Exh. RLA-90**).

439 *Phoenix Action, Ltd v The Czech Republic* (ICSID Case No ARB/06/5, Award of 29 April 2009), para. 143, **Exh. RLA-91**.

440 *Id.*, para. 142.

272. The tribunal in *Mobil Corporation v Venezuela* agreed that "restructur[ing] investments only in order to gain jurisdiction under a BIT" for "any dispute born before" the date of a corporate restructure would constitute an abuse of process.[441]

273. The tribunal in *Pac Rim Cayman LLC v El Salvador* noted that there is a "dividing-line" between permissible and impermissible corporate restructures. As the tribunal explained: "the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy".[442] The tribunal further accepted the respondent's submission that an abuse would arise when a restructure occurs "at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration".[443]

274. In *Tidewater v Venezuela*, identification of an abuse of process similarly turned on whether a dispute was "existing" or "could reasonably have been foreseen".[444] To evaluate whether a dispute "could reasonably have been foreseen" at the time of the restructure, the tribunal considered whether "the objective purpose of the restructuring was to facilitate access to an investment treaty tribunal with respect to a claim that was within the reasonable contemplation of the investor".[445]

275. A similar test was applied by the tribunal in *ConocoPhillips v Venezuela*, in which the tribunal looked to the parties' conduct to determine if a claim "was in prospect at the times of the restructurings".[446]

276. After noting the decisions outlined above, the *Philip Morris Asia v Australia* tribunal observed that "[d]espite the variations in the formulations … case law has articulated legal tests on abuse of right that are broadly analogous, revolving around the concept of

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441 *Venezuela Holdings B.V. et al (formerly known as Mobil Corporation, Venezuela Holdings, B.V. et al) v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/27, Decision on Jurisdiction of 10 June 2010), paras. 205-206, **Exh. RLA-92**.

442 *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12, Decision on Jurisdiction of 1 June 2012), para. 2.99, **Exh. RLA-33**.

443 *Id.*, para. 2.100.

444 *Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe C.A. et al v The Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5, Decision on Jurisdiction of 8 February 2013), para. 145, **Exh. RLA-93**.

445 *Id.*, para. 150, quoting Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), p. 465, **Exh. RLA-86**.

446 *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf Paria BV v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits of 3 September 2013), para. 279, **Exh. RLA-94**.

foreseeability".[447] That tribunal correctly recognised that an abuse of process will arise "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 … a dispute is foreseeable when there is a reasonable prospect, as stated by the *Tidewater* tribunal, that a measure which may give rise to a treaty claim will materialise".[448] In that case, the tribunal held that the claimant had undertaken a restructure after a dispute had become foreseeable, and further that the claimant "ha[d] not been able to prove that tax or other business reasons were determinative for the restructuring".[449] This led the tribunal to conclude that "the main and determinative, if not sole, reason for the restructuring was the intention to bring a claim under the Treaty".[450]

277. In *Renée Rose Levy and Gremcitel SA v Peru*, the tribunal engaged in a "global evaluation of the facts" to conclude that there was an abuse of process in circumstances where a share transfer had been undertaken for the purpose of securing jurisdiction under an investment treaty in respect of a "soon-to-be-crystallized *domestic dispute*".[451]

278. The tribunal in *Transglobal Green Energy LLC v Republic of Panama* noted "a line of consistent decisions of arbitral tribunals on objections to jurisdiction based on abuse of the investment treaty system".[452] That tribunal observed that:

> "[t]o determine whether an abuse of rights has occurred, tribunals have considered all the circumstances of the case, including, for instance, the timing of the purported investment, the timing of the claim, the substance of the transaction, the true nature of the operation, and the degree of foreseeability of the governmental action at the time of restructuring."[453]

279. The tribunal in *Cascade v Turkey* held that "a foreseeability analysis is a critical element in an abuse of process inquiry".[454] It observed that "legitimate *ex ante* planning decisions must be distinguished from inappropriate efforts to 'game' the investment arbitration system by

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447 *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015), para. 554, **Exh. RLA-95**.

448 *Ibid.*

449 *Id.*, para. 584.

450 *Ibid*.

451 *Renée Rose Levy and Gremcitel S.A. v Republic of Peru* (ICSID Case No ARB/11/17, Award of 9 January 2015), paras. 185, 191, 193 (emphasis in original), **Exh. RLA-96**.

452 *Transglobal Green Energy LLC and Transglobal Green Panama S.A. v Republic of Panama* (ICSID Case No ARB/13/28, Award of 2 June 2016), para. 102, **Exh. RLA-97**.

453 *Id*., para. 103 (footnotes omitted).

454 *Cascade Investments NV v Republic of Turkey* (ICSID Case No ARB/18/4, Award of 20 September 2021), para. 340, **Exh. RLA-98**.

artificially shifting a domestic investment into international hands, with no real intention of economic activity by the new owners, simply to shield the domestic operation from existing or already impending risks."[455] For that tribunal, "the focus necessarily must be on the 'when' and the 'why' – the timing and circumstances under which shares in a local company, previously held by nationals of the host State, are transferred to new foreign ownership".[456] The *Cascade* tribunal held that a dispute will be foreseeable where it was subjectively "actually foreseen" by the investor, or in circumstances where "a reasonable investor, conducting an appropriate inquiry, should have understood that the investment it was acquiring already faced a significant risk of government action that would adversely affect its rights",[457] noting that "in many cases, specific government action is preceded by some period of deteriorating relationships, and the longer the relationship deteriorates, the more foreseeable adverse State action may become".[458]

280. The *Alverley* tribunal similarly accepted that a claim based on a restructure would constitute an abuse of process if the restructure was undertaken "when … there was a reasonable prospect that a measure which might give rise to a treaty claim had materialised".[459] The tribunal further considered that "the correct test is whether a determinative or principal purpose was to gain the protection of the treaty".[460]

281. In summary, there is a clear line of arbitral decisions confirming that:

(a) It is an abuse of process to make a claim under an investment treaty following a corporate restructuring that occurred either when a dispute already "exists" or "could reasonably have been foreseen".[461]

(b) A dispute will be foreseeable for this purpose if it was actually subjectively foreseen

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455 *Id.*, para. 335.
456 *Id.*, para. 336 (emphasis in original).
457 *Id.*, paras. 343, 345 (citations omitted; emphasis in original).
458 *Id.*, paras. 345, 347.
459 *Alverley Investments Limited and Germen Properties Ltd v Romania* (ICSID Case No ARB/18/30, Excerpts of Award of 16 March 2022), para. 384, **Exh. RLA-71**.
460 *Id.*, para. 376.
461 *Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe C.A. et al v The Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5, Decision on Jurisdiction of 8 February 2013), para. 145, **Exh. RLA-93**.

by the investor, [462] or "when there is a reasonable prospect that a measure which may give rise to a treaty claim will materialise". [463]

(c) In cases where the "objective purpose" of a corporate restructuring was to facilitate access to an investment treaty tribunal, it necessarily follows that a dispute was foreseeable. [464] Thus, a corporate restructuring that occurs "to 'game' the investment arbitration system by artificially shifting a domestic investment into international hands, with no real intention of economic activity by the new owners, simply to shield the domestic operation from existing or already impending risks"[465] is an abuse of process.

(d) Further, the tribunal will ascertain whether the claimant can establish that there was any other "determinative" reason for the restructuring, other than obtaining treaty protection.[466]

282. As the following subsections establish, the test for an abuse of process is met in these proceedings. Zeph was inserted into the corporate chain on 29 January 2019 for the objective purpose of securing treaty protection in respect of inter-related disputes that were already in existence, or at the very least that were reasonably foreseeable at that time that restructuring occurred. Zeph's subsequent invocation of this Tribunal's jurisdiction is therefore an abuse of process.

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462 *Cascade Investments NV v Republic of Turkey* (ICSID Case No ARB/18/4, Award of 20 September 2021), paras. 343, 345 (citations omitted), **Exh. RLA-98**; *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12, Decision on Jurisdiction of 1 June 2012), para. 2.100, **Exh. RLA-33.**

463 *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015), para. 554, **Exh. RLA-95**.

464 *Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe C.A. et al v The Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5, Decision on Jurisdiction of 8 February 2013), para. 150, **Exh. RLA-93**, quoting Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), p. 465, **Exh. RLA-86.**

465 *Cascade Investments NV v Republic of Turkey* (ICSID Case No ARB/18/4, Award of 20 September 2021), para. 335, **Exh. RLA-98**.

466 *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015), para. 584, **Exh. RLA-95**. See also *Alverley Investments Limited and Germen Properties Ltd v Romania* (ICSID Case No ARB/18/30, Excerpts of Award of 16 March 2022), para. 376, **Exh. RLA-71** (the need to ascertain whether the purpose of obtaining treaty protection was "a determinative or principal purpose").

B. THE FACTS RELEVANT TO ZEPH'S ABUSE OF PROCESS

283. The factual background has already been set out in detail in Section II and at Annexure A, but the key facts relevant to the abuse of process objection are emphasised below.

284. A dispute under the State Agreement in relation to the BSIOP Proposal initially emerged between the Mineralogy Group and the WA Government in 2012. The basic contours of that dispute related to the WA Government's liability for alleged non-compliance with the State Agreement following its non-acceptance of the BSIOP Proposal as a valid proposal under the State Agreement in September 2012. The acts of which Zeph complains in its Amended Notice of Arbitration constitute the latest chapter in this longstanding dispute. To recall:

(a) On 8 August 2012, Mineralogy and International Minerals submitted the BSIOP Proposal to the WA Government.[467] On 4 September 2012, Premier Barnett indicated that the BSIOP Proposal was not a valid proposal under the State Agreement, with the Department providing a more detailed assessment on 12 September 2012.[468] Mineralogy and International Minerals disputed the WA Government's position on 4 September 2012 and again on 6 and 7 November 2012.[469]

(b) On 22 February 2013, Mineralogy referred the dispute to arbitration proceedings under the State Agreement.[470] The First McHugh Award was issued on 20 May 2014.[471] At that time, the dispute was in essence a commercial, domestic law, dispute between two Australian companies and the WA Government.

(c) On 22 July 2014, Premier Barnett exercised his power under section 7(1)(c) of the State Agreement to indicate 46 conditions precedent for approval of the BSIOP

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467 Letter from Mineralogy and International Minerals to Premier Barnett dated 8 August 2012 (Located within Affidavit of William Albert Preston, filed in Supreme Court of Western Australia Proceeding ARB 3 of 2013), **Exh. C-410**, p. 18.

468 Letter from Premier Barnett to Mineralogy and International Minerals dated 4 September 2012, **Exh. C-126**; Letter from Mr Wood, Director General of the Department of State Development of WA to Mineralogy (International Minerals copied), dated 12 September 2012, **Exh. R-93**.

469 Letter from Premier of Western Australia to Mineralogy and International Minerals, 'Project Proposal Submission for the Balmoral South Iron Ore Project' dated 4 September 2012, **Exh. C-126**; Letter from Mr Wood, Director General of Department of State Development of WA to Mineralogy (International Minerals copied), dated 12 September 2012, **Exh. R-93**; Letter from Mineralogy to Premier Barnett dated 6 November 2012, **Exh. R-154**; Letter from International Minerals to Premier Barnett dated 6 November 2012, **Exh. R-155**.

470 Originating Summons in Mineralogy Pty Ltd v State of Western Australia (Arb No 3 of 2013) dated 22 February 2013, **Exh. R-156**.

471 First McHugh Award, **Exh. C-442**.

Proposal.[472] Thereafter, the Mineralogy Group and the WA Government developed increasingly opposed positions in relation to whether Mineralogy and International Minerals were entitled to claim damages following the First McHugh Award, and the conditions precedent applicable to approval of the BSIOP Proposal.

285. The dispute between the parties about the WA Government's conduct in relation to Mineralogy's rights under the State Agreement subsequently broadened, including in view of adjacent disputes that arose between the parties from 2016. In particular, the Mineralogy Group came to dispute the legality of any unilateral amendment of the State Agreement by WA to address disputes that had arisen between Mineralogy and the CITIC Parties. To recall:

(a) On 9 December 2016, the CITIC Parties provided Mineralogy with draft MCPs and sought Mineralogy's cooperation to secure necessary approvals for the continued operation of the Sino Iron and Korean Steel Projects.[473]

(b) On 12 December 2016, Mineralogy warned Minister Marmion that the WA Government should not interfere with any commercial negotiations between the parties concerning the draft MCPs.[474] The dispute between the Mineralogy Group and the CITIC Parties concerning the MCPs was directly connected to the BSIOP Proposal, including because Mineralogy viewed the MCPs as potentially overlapping with activities covered by the BSIOP Proposal. Indeed, Mineralogy had itself recognised the connection between the ongoing CITIC proceedings to the First BSIOP Arbitration, including by agreeing to waive interest on damages during a proposed suspension of the First BSIOP Arbitration while the Federal Court of Australia determined proceedings connected to disputes with the CITIC Parties.[475]

(c) On 23 January 2017, Mineralogy informed the CITIC Parties that it would not agree to the enlarged Sino Iron or Korean Steel Projects.[476] This was on the basis, *inter alia*, that the enlarged Sino Iron Project would affect areas that were part of the BSIOP

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472 Letter from Premier Barnett to Mineralogy dated 22 July 2014, **Exh. R-157**.

473 Letter from CITIC Pacific Mining Management on behalf of Sino Iron, Korean Steel to Mineralogy (Minister Marmion and Mr Wood, Director General of the Department of State Development, copied) dated 9 December 2016, **Exh. R-106**.

474 Letter from Mineralogy to Minister Marmion dated 12 December 2016, **Exh. R-107**.

475 Letter from Mineralogy to WA Government State Solicitor dated 15 May 2013, **Exh. R-94**.

476 Letter from Mineralogy to CITIC Pacific Mining Management dated 23 January 2017, **Exh. R-109**.

Proposal. This matter was the subject of domestic court proceedings between Mineralogy and the CITIC Parties during 2017.[477]

(d) On 18 December 2017, the CITIC Parties wrote to Mr Palmer to provide two revised MCPs for Mineralogy's consideration.[478] On 21 December 2017, the WA Government urged Mineralogy to consider submitting those revised MCPs to the WA Government for approval and confirmed that the MCPs provided sufficient detail to meet the requirements of the State Agreement.[479] Thereafter, and as explored in more detail in Section II, the Mineralogy Group, the CITIC Parties, and the WA Government adopted increasingly opposed positions in relation to the dispute concerning the MCPs.

(e) On 19 October 2018, the CITIC Parties commenced proceedings in the Federal Court of Australia against Mineralogy, seeking orders that Mineralogy submit the MCPs to WA for approval under the State Agreement.[480]

(f) On 31 October 2018, Mr Palmer observed: "[t]hey [i.e. the CITIC Parties] want the WA Government to take land for free from Australian companies and individuals despite the fact there is a State agreement in place".[481] That statement correctly recognised that the disputes concerned the rights of "Australian companies and individuals".

(g) On 3 November 2018, Premier McGowan noted that "[t]he State is considering its options" in relation to the State Agreement in light of the dispute between Mineralogy and the CITIC Parties.[482] On 5 and 6 November 2018, Mineralogy sought to be consulted on any proposed changes to the State Agreement.[483]

(h) On 29 November 2018, Premier McGowan noted in Parliament that there was bipartisan support to "sustain the [Sino Iron Pellet] project including altering the state agreement", further stating that "Clive Palmer and Mineralogy are now on notice" that

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477 *Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 16]* [2017] WASC 340, **CLA-5**.

478 Letter from CITIC Pacific Mining Management to Mineralogy (Mr Wood, Director General of the Department of Jobs, Tourism, Science and Innovation, copied) dated 18 December 2017, **Exh. R-112**.

479 Letter from Mr Wood, Director General of the WA Department of Jobs, Tourism, Science and Innovation to Mineralogy (CITIC Pacific Mining Management copied) dated 21 December 2017, **Exh. R-115**.

480 *Sino Iron Pty Ltd v Mineralogy Pty Ltd* [2019] FCA 675, **Exh. R-128**, p. 4.

481 Screenshot of Tweet by Mr Palmer posted on 31 October 2018, **Exh. R-129**.

482 Ben Harvey, 'State set to protect Sino Iron' *The West Australian* (3 November 2018), **Exh. R-130**.

483 Letter from Mineralogy to Premier McGowan dated 6 November 2018, **Exh. R-132**; Letter from Mineralogy to Premier McGowan dated 5 November 2018, **Exh. R-131**.

the "government will do what is in the best interests of Western Australia and the 3000 hardworking Australians who work in CITIC's operations".[484]

(i) On 30 November 2018 and 2 December 2018, Mineralogy wrote to the WA Premier to request that WA not unilaterally amend the State Agreement.[485]

(j) On 2 December 2018, *The Australian Financial Review* published an article noting, in reference to the Premier's statement of 29 November 2018, that "Mr McGowan gave the strongest indication yet that his Labor government is willing to alter a state agreement covering the project to clear the way for expansion CITIC maintains is vital to the future of Sino Iron … Any attempt to change a state agreement, essentially a contract set out by an act of parliament, runs the risk of a protracted legal battle with Mr Palmer."[486]

286. It is against the background of the facts just summarised that two weeks later, on 16 December 2018, 100% of the shares in Mineralogy were transferred by Mr Palmer and two of his Australian companies (River Crescent and Closeridge) to a newly incorporated New Zealand entity, MIL. MIL had been incorporated only two days beforehand, on 14 December 2018.

287. Shortly thereafter, on 18 January 2019, MIL wrote to Premier McGowan asserting that any attempt by the WA Government to amend the State Agreement would result in "expropriation or measures equivalent to expropriation", and putting WA "on notice of MIL's claim *inter alia* under AANZFTA", should the WA Government "take any steps to expropriate, either directly or indirectly, Mineralogy's interests or rights in Western Australia".[487] MIL further "placed on record" that Mr Palmer had previously written to the WA Premier on behalf of Mineralogy on eight previous occasions about these matters.[488] A letter in similar terms was sent to Mr Angus Taylor MP (the then Minister for Energy in the

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484 WA, *Parliamentary Debates,* Legislative Assembly (29 November 2019), **Exh. R-158**, p. 3.

485 Letter from Mineralogy to Premier McGowan dated 2 December 2018, **Exh. R-136**. An identical letter was published in *The West Australian* newspaper on 3 December 2018, **Exh. R-137**; letter from Mineralogy to Premier McGowan dated 30 November 2018, **Exh. R-134**.

486 Brad Thompson, 'CITIC: Clive Palmer raises China security concern in letter to WA Premier', *The Australian Financial Review* (2 December 2018), **Exh. R-135**.

487 Letter from MIL to Premier McGowan dated 18 January 2019, **Exh. R-44**.

488 *Id*., p. 4, referring to letters dated 28 December 2017, 2 August 2018, 13 August 2018, 12 October 2018, 5 November 2018, 6 November 2018, 30 November 2018, and 2 December 2018.

Commonwealth Government), asserting that the WA Government had "threatened to unilaterally repudiate certain rights of Mineralogy".[489]

288. A few days later, on 22 January 2019, multiple press agencies reported on statements made by Mr Palmer that explicitly acknowledged that the insertion of MIL into the corporate chain above Mineralogy was intended to attract investment treaty protection in relation to the disputes summarised above. For example, *The Australian* newspaper reported that:

> "Mr Palmer said the move offshore meant Mineralogy would be able to claim compensation from the Australian government under the investor protection provisions of the Australia-NZ free trade agreement. He vowed to launch a damages claim if West Australian premier Mark McGowan carries through with his threat to legislate in favour of Chinese giant CITIC's interests in the $US10bn Sino Iron project in the Pilbara."[490]

289. On the same day, *ABC News* published an article titled "Clive Palmer threatens to sue Australian taxpayers for $45b as he re-routes business through NZ", in which Mr Palmer is quoted as having stated that "Mark McGowan would be making the taxpayer of Australia pay for" any unilateral amendment to the State Agreement.[491]

290. A few weeks later, in a similar vein, an article in *The Courier Mail* reported that "Mr Palmer has moved control of his business to an unoccupied office in New Zealand, telling the media if the WA Government were to intervene [in Mineralogy's dispute with the CITIC Parties], he would be forced to use international laws to 'sue the Australian taxpayer' for compensation to the tune of $45 billion".[492]

291. As Mr Palmer, and MIL, no doubt subsequently discovered, an exchange of letters between Australia and New Zealand means that Chapter 11 of AANZFTA "shall not create any rights or obligations between New Zealand and Australia". Indeed, the mistake was pointed out in contemporaneous media reports at the time.[493]

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489 Letter from MIL to the Minister for Energy in the Commonwealth Government dated 18 January 2019, **Exh. R-45**.

490 Andrew Burrell, 'Kiwi Flight: Palmer 'to make Australia great' from NZ', *The Australian* (22 January 2019), **Exh. R-46**.

491 Josh Robertson, 'Clive Palmer threatens to sue Australian taxpayers for $45b as he re-routes business through NZ', *ABC News,* (22 January 2019), **Exh. R-449**.

492 Phoebe Loomes, 'Clive Palmer's bizarre big reveal', *The Courier Mail* (8 February 2019), **Exh. R-160**.

493 Nick Evans, 'Palmer's NZ move looks like a flop', *The West Australian* (23 January 2019), **Exh. R-140**.

292. The Tribunal should infer that, in an attempt to rectify the above mistake, on 21 January 2019 Zeph was incorporated in Singapore[494] and, on 29 January 2019, it acquired all the shares in Mineralogy through a share swap with MIL.[495]

293. Subsequently, on 4 February 2019,[496] 14 May 2019,[497] 20 May 2019,[498] 15 October 2019,[499] and 25 November 2019,[500] MIL, Mineralogy, and MIPL repeatedly wrote to Australia invoking "relevant Free Trade Agreement[s]" to protest against unilateral action on the part of the WA Government that would impact Mineralogy's rights in relation to the domestic arbitrations that had been filed in relation to the BSIOP Proposal and under the State Agreement.

294. Of particular note, the letter of 4 February 2019 invoked treaty protection on behalf of MIPL (Zeph) less than a week after it had acquired all the Mineralogy shares. That timing itself strongly supports the inference that the purpose of the Zeph Share Swap was to attract treaty protection. So, too, do the terms of the letter, which said: "Any interference in the rights of Mineralogy under the State Agreement will cause loss and damage to Mineralogy and the investors in Mineralogy (MIPL and MIL) will both strenuously pursue all their rights including under domestic law and under the SAFTA and/or CER for compensation."[501]

295. The timing of this letter, like the contemporaneous media reports, indicates that Mr Palmer had "shifted" his corporate headquarters from the "unoccupied office" in New Zealand to Singapore in an effort "to revive his threat to sue Australian taxpayers for $45 billion" after he found that a New Zealand company could not make an investment treaty claim against Australia under AANZFTA.[502]

296. The letters of 14 May 2019, 20 May 2019 and 15 October 2019 focussed on specific facets of the disputes between the parties. These letters, *inter alia*, warned the WA Government

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494 Audited Financial Statements of Zeph Investments Pte Ltd for the reporting period from 21 January 2019 (Date of Incorporation) to 30 June 2019, **Exh. C-79**, p. 14.

495 This transaction has been explained in detail in Section II – Facts, and Section III – No Investor.

496 Letter from MIL to Premier McGowan dated 4 February 2019, **Exh. R-141**.

497 Letter from Mineralogy to Minister for Housing, Veterans Affairs, Youth and Asian Engagement enclosing letter from Mineralogy to Premier McGowan dated 14 May 2019, **Exh. R-161**, p. 4.

498 Letter from MIPL to Premier McGowan dated 20 May 2019, **Exh. R-144**.

499 Letter from Mineralogy to WA Attorney-General dated 15 October 2019, **Exh. R-145**.

500 Letter from Mineralogy to Premier McGowan dated 25 November 2019, **Exh. R-162**.

501 Letter from MIL to Premier McGowan dated 4 February 2019, **Exh. R-141**.

502 Andrew Burrell, 'Palmer shifts HQ from NZ to Singapore', *The Australian* (13 February 2019), **Exh. R-142**.

against unilaterally modifying the State Agreement and noted the treaty protections engaged in relation to the BSIOP Proposal and Arbitrations, including possible treaty breaches should WA "act in any way which would affect [MIPL and MIL's] rights to pursue their claim for damages as set out in the Award".[503] The letter of 25 November 2019 stated that Australia would breach its international obligations if WA undertook conduct constituting "any interference with the rights of Mineralogy including under the State Agreement or passing any Act or regulation [that] will cause substantial further loss and damage to Mineralogy".[504]

297. Each of these letters discussed above either explicitly or implicitly confirm that the purpose of the insertion of Zeph into the corporate chain above Mineralogy was to provide the foundation for an ISDS claim to be made in an attempt to protect Mineralogy (an Australian company, wholly owned by an Australian citizen) from foreseeable action that the WA Government may take that would be adverse to Mineralogy's interests with respect to the ongoing and inter-related disputes summarised above.

298. Ultimately, action of the kind that Mineralogy and Mr Palmer had subjectively foreseen, and against which they sought to obtain protection by introducing MIL and Zeph into the corporate structure, occurred when, on 13 August 2020, the WA Parliament enacted the Amendment Act. According to Zeph's Amended Notice of Arbitration in these proceedings, the WA Government through the Amendment Act sought to "insulat[e] the State from liability for breach of the State Agreement" and "commercially destroyed the prospects of any further projects being developed under the State Agreement", including "the Sino Iron Project and the Korean Steel Project" and the "BSIOP Project".[505]

299. Australia's final preliminary objection turns upon whether the facts just summarised are sufficient to establish an abuse of process. In Australia's submission, plainly they are. It is hard to imagine a clearer case of abuse.

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503 Letter from Mineralogy to WA Attorney-General dated 15 October 2019, **Exh. R-145**.
504 Letter from Mineralogy to Premier McGowan dated 25 November 2019, **Exh. R-162**.
505 Amended NoA, paras. 27, 39, 84.

C. CRYSTALLISATION OF THE DISPUTE

300. The dispute in this arbitration concerns an allegation that a unilateral legislative measure taken by WA which, *inter alia*, "destroyed the prospects of any further projects being developed under the State Agreement",[506] and which sought to "dismantle the [BSIOP] arbitration process and remove any liability for its breach of the State Agreement",[507] constituted an expropriation of Mineralogy's rights contrary to Australia's obligations under AANZFTA.

301. There is no doubt that, prior to Zeph's acquisition of Mineralogy shares on 29 January 2019, there was already a dispute between Mineralogy and Mr Palmer about whether unilateral legislative action impacting the State Agreement was lawful. For example, on 18 January 2019, the Mineralogy Group had already written to the Minister for Energy in the Commonwealth Government, stating that:

> "Mineralogy is a party to the State Agreement, the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002, which was ratified [by] the Western Australian Parliament. The Premier of Western Australia has in Parliament threatened to unilaterally repudiate certain rights of Mineralogy … If the Premier wants to do so, MIL will suffer a major loss of their investment and such would amount to billions of dollars which under the terms of AANZFTA would immediately become due and payable by the Commonwealth of Australia".[508]

302. While the unilateral repudiation of rights to which reference was made in that letter concerned the CITIC Dispute, Mineralogy's position in that dispute was informed in part by the effect of the MCPs on the BSIOP, such that the issues were interconnected. Further, the corporate restructuring that resulted in the insertion of Zeph into the corporate structure affected all of the existing disputes between Mineralogy and WA, because it was an attempt to use Australia's treaty obligations to fetter WA's freedom of action in resolving all existing and foreseeable disputes of that kind. The significance of that point is underlined by the fact that, by enacting the Amendment Act in order to address the dispute between Mineralogy and WA in respect of the BSIOP Proposal, WA ultimately adopted the very approach the Premier of WA had foreshadowed in November 2018 against which the insertion of Zeph

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506 Amended NoA, para. 39.
507 *Id*., para. 26.
508 Letter from MIL to the Minister for Energy in the Commonwealth Government dated 18 January 2019, **Exh. R-45**.

into the corporate structure was intended to provide protection: a unilateral adjustment of Mineralogy's rights under the State Agreement through legislation.

303. It is, moreover, relevant that, prior to 29 January 2019, the Mineralogy Group had identified several "free trade agreements" under which an international claim might be filed. As the tribunal in *Pac Rim* noted, an investor engaging in a restructure will usually not be able to invoke the relevant arbitration agreement until after the change in nationality occurs.[509] The facts at issue in these proceedings are in this sense unique, due to the clear (albeit legally flawed) attempt to internationalise the existing domestic disputes between the parties through the incorporation of MIL on 14 December 2018 and transfer of Mineralogy shares to it on 21 December 2018. Following that transfer, MIL specifically invoked AANZFTA on 18 January 2019 – almost two weeks prior to the transfer of the shares to Zeph on 29 January 2019. These facts show that the objective purpose of the restructuring was to obtain protection under an investment treaty against unilateral action by WA which WA had foreshadowed it might take.

304. The above factual chronology demonstrates that, prior to the restructure on 29 January 2019, Mineralogy and companies in the Mineralogy Group had consistently disputed the WA Government's conduct in respect of Mineralogy's interests under the State Agreement, including specifically in relation to the parties' rights and obligations in relation to the BSIOP Arbitrations and the legality of any unilateral legislative adjustment of the State Agreement. The WA Government, for its part, repeatedly emphasised its capacity and willingness to legislate in relation to the State Agreement to respond to disputes under it. In those circumstances, the insertion of Zeph into the corporate structure was an attempt to obtain investment protection in relation to a domestic dispute that had already crystallised.

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509 *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12, Decision on Jurisdiction of 1 June 2012), paras 2.98-2.99, **Exh. RLA-33**.

D. FORESEEABILITY OF THE DISPUTE

305. In the alternative, the dispute referred to these arbitral proceedings was at least reasonably foreseeable, as there was "a reasonable prospect … that a measure which may give rise to a treaty claim will materialise"[510] when the restructure occurred on 29 January 2019.

306. The restructure at issue plainly did not occur "before the occurrence of any event or measure giving rise to"[511] the present dispute. To the contrary, the restructure took place following a "period of deteriorating relationships"[512] between Mineralogy and companies in the Mineralogy Group, the WA Government, and third parties. It is within that context that disputes as to how the State Agreement was to operate, and how the projects that were governed by the State Agreement were to progress, evolved and developed over the course of 2012 to 2018. Such disputes were multifaceted. However, by at least late 2018, to use the words of the *Transglobal* tribunal, "it was clear that there was a problem"[513] between Mineralogy and the WA Government in light of the strongly contested positions of both parties *vis-à-vis* in particular the inter-related BSIOP and CITIC Disputes. One key aspect of those strongly contested positions was a disagreement about the legitimacy of WA deciding unilaterally to vary rights arising from the State Agreement.

307. The prospect that the WA Government might take unilateral action that would adversely impact Mineralogy's rights under the State Agreement was not just reasonably foreseeable, but was actually foreseen. Thus:

    (a) On 5 and 6 November 2018, for example, Mineralogy referred to and contested the statements made on 3 November 2018 by both Premier McGowan and the leader of the opposition foreshadowing a possible unilateral amendment of the State Agreement by WA.[514]

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510 *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015), para. 554, **Exh. RLA-95**.

511 *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12, Decision on Jurisdiction 1 June 2012), para. 2.47, **Exh. RLA-33**.

512 *Cascade Investments NV v Republic of Turkey* (ICSID Case No ARB/18/4, Award of 20 September 2021), para. 347, **Exh. RLA-98**.

513 *Transglobal Green Energy LLC and Transglobal Green Panama S.A. v Republic of Panama* (ICSID Case No ARB/13/28, Award of 2 June 2016), para. 116, **Exh. RLA-97**.

514 Ben Harvey, 'State set to protect Sino Iron', *The West Australian* (3 November 2018), **Exh. R-130**; Letter from Mineralogy to Premier McGowan dated 5 November 2018, **Exh. R-131**; Letter from Mineralogy to Premier McGowan dated 6 November 2018, **Exh. R-132**.

(b) On 30 November 2018, in correspondence to Premier McGowan, Mineralogy expressly referred to "reports that you may be considering altering the [State Agreement]",[515] and warned that such action would impact the value of Mineralogy's investment.

(c) On 2 December 2018, Mineralogy again expressly disagreed with the approach of the WA Government towards the State Agreement in correspondence to Premier McGowan, stating: "[y]our Office or the State Parliament should not be used to avoid the requirements of Commonwealth Law. Australian Sovereignty, the independence of our Courts and the Rule of Law [that] underpin our democracy".[516]

(d) On 18 January 2019, MIL (as Mineralogy's newly-incorporated New Zealand owner) warned WA that the amendment of the State Agreement would be in breach of Australia's obligations under AANZFTA.[517] On the same day, MIL also wrote to Mr Angus Taylor MP, the then Australian Minister for Energy in the Commonwealth Government, stating that if the WA Premier were to "unilaterally repudiate" Mineralogy's rights under the State Agreement, as he was then threatening to do, "MIL will suffer a major loss of their investment and such would amount to billions of dollars which under the terms of AANZFTA would immediately become due and payable by the Commonwealth of Australia."[518]

308. Against this background, it is apparent that, by at least late 2018, there was at least a "reasonable prospect … that a measure which may give rise to a treaty claim [would] materialise".[519] Accordingly, when the Zeph Share Swap occurred on 29 January 2019, Mineralogy, Mr Palmer and Zeph actually knew the WA was contemplating unilateral amendment of Mineralogy's rights under the State Agreement, and indeed they expressly had in mind that such action might provide the foundation for a claim under AANZFTA. That subjective knowledge is evidenced by the statements referred to in the previous paragraph. In any event, objectively, "a reasonable investor, conducting an appropriate

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515 Letter from Mineralogy to Premier McGowan dated 30 November 2018, **Exh. R-134**.
516 Letter from Mineralogy to Premier McGowan dated 2 December 2018, **Exh. R-136**.
517 Letter from MIL to Premier McGowan dated 18 January 2019, **Exh. R-44**.
518 Letter from MIL to the Minister for Energy in the Commonwealth Government dated 18 January 2019, **Exh. R-45**.
519 *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015), para. 554, **Exh. RLA-95**.

inquiry, should have understood that the investment it was acquiring already faced a significant risk of government action that would adversely affect its rights".[520] Yet, Zeph "nonetheless chose to proceed in the absence of any real commercial rationale for doing so".[521]

309. The timeline and the conduct of the Mineralogy Group — including its engagement with Australia and invocation of international treaties — unequivocally confirm that it had foreseen that WA may take "adverse State action"[522] in relation to the State Agreement and that a claim was, in fact, "in prospect at the time of the restructuring".[523]

310. Zeph nonetheless seeks to characterise the dispute at issue in these proceedings by reference to the Amendment Act, which was enacted by the WA Parliament on 13 August 2020, and Zeph contends that this measure was not foreseeable at the time it was incorporated.[524]

311. That characterisation of the dispute does not assist Zeph and should anyway be rejected. Indeed, it is inconsistent with Zeph's own case, for its claim in these proceedings includes a claim for damages in relation to conduct that pre-dates the Amendment Act, including damages calculated by reference to the initial decision of the WA Government on the BSIOP Proposal in 2012. Zeph, moreover, seeks damages by reference to loss allegedly incurred as a result of losing "the prospect of any further projects being developed under the State Agreement", including "the Sino Iron Project and the Korean Steel Project, the BSIOP and the Mineralogy Project".[525] The date of conduct forming the basis of a damages claim was correctly held by the *Pac Rim* tribunal to be of relevance to assessing whether the "dividing-line" for an abusive restructuring had been crossed.[526]

312. In any case, 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

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520 Share Purchase Agreement between MIL and MIPL (Zeph) (Exhibit 20 to Annexure A to NoI), para. 3.1, **Exh. C-63**, p. 173; *Cascade Investments v Turkey* (ICSID Case No ARB/18/4, Award of 20 September 2021), para. 345 (emphasis in original; citations omitted), **Exh. RLA-98**.

521 *Cascade Investments NV v Republic of Turkey* (ICSID Case No. ARB/18/4, Award of 20 September 2021), paras. 345, 347 (emphasis in original), **Exh. RLA-98**.

522 *Id*., paras. 345-347.

523 *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf Paria BV v Bolivarian Republic of Venezuela*, (ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits of 3 September 2013), paras. 279-280, **Exh. RLA-94**.

524 See, e.g., NoI, **Exh. C-63**, p. 16.

525 Amended NoA, para. 84.

526 *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12, Decision on Jurisdiction of 1 June 2012), para. 2.108, **Exh. RLA-33**.

claim. The *Cascade* tribunal's persuasive analysis of *what* must be foreseeable for the purposes of an abuse of process objection is instructive in this regard. As that tribunal reasoned, in two passages that warrant quotation in full:

> "350. It bears recalling that States have many different legal and policy tools at their disposal, and the ultimate choice among those tools, in the context of a foreseeable "disagreement" or a "conflict of … interests" with a particular investor, may be quite difficult to predict. Requiring such foresight is not consistent with the purposes of the abuse of process doctrine. Logically, a domestic investor who artificially imposes a foreign entity in an ownership chain in the context of a developing disagreement with its own government, solely to allow itself to invoke an investment treaty in the event the State takes adverse action against its rights, is no less guilty of abuse of process because the State ultimately adopts measure X against the investment, rather than measure Y which the investor may have predicted. From the standpoint of the treaty or the ICSID Convention, either way this was not a true "foreign" investment that those instruments were designed to protect, because the adoption of a foreign flag was not made for the purpose of facilitating genuine additional economic activity, but simply to internationalize a brewing dispute involving a pre-existing domestic investment. The treaty and Convention are agnostic, in this sense, as between the State's choice of measure X versus measure Y to crack down on the investor. What matters to the abuse analysis is the circumstances of the "internationalization" of the investment – was it *bona fide* or a sham? – and not whether the investor correctly predicted the precise tool the State might adopt in an already looming conflict.
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> 351. Stated otherwise, and employing the Schreuer construct quoted in *Maffezini* for the abuse of process context rather than the *ratione temporis* context, what must be reasonably foreseeable is that the State will take some adverse action against the investment, on account of a disagreement or conflict of interests with the investor, which – when it transpires – will impact the investor's rights and therefore be "susceptible of being stated in terms of a concrete claim." This understanding is consistent with the *Philip Morris* tribunal's conclusion that "a dispute is foreseeable when there is a reasonable prospect … that a measure which may give rise to a treaty claim will materialise." That formulation does not require foreseeability of the precise measure that the State eventually adopts, just "*a* measure" (emphasis added) that is capable of harming the investment to the degree that a treaty claim could be asserted."[527]

313. The approach to foreseeability captured in the above passages is consistent with other abuse of process cases in which tribunals have specifically recognised that a dispute may have several different facets.

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[527] *Cascade Investments NV v Republic of Turkey* (ICSID Case No. ARB/18/4, Award of 20 September 2021), paras. 350-351 (citations omitted; emphasis in original), **Exh. RLA-98**.

314. In *Ipek v Turkey*, for example, the tribunal observed that "a test based on foreseeability must of its nature include instances in which the specific State measure has not yet been taken, such that the precise State powers or mechanisms to be used, and their effects on the investment, are not necessarily known to the investor".[528] For the tribunal in *Ipek*, the events relevant to the dispute ultimately filed in the investment treaty arbitration proceedings were viewed on "a continuum", such that "[t]he precise sequence of State measures that would follow may not have been known" at the point when the dispute can nonetheless be said to have been foreseeable.[529]

315. The *Alverley* tribunal similarly recognised that a dispute may "evolve[] over time" and further noted that "it is not necessary that every contour of the dispute as it is eventually laid before an arbitral tribunal has to be foreseeable".[530] That tribunal correctly recognised that "[i]t is the dispute, not the detailed claim, which has to be foreseeable",[531] with the foreseeability test turning on when "there became a reasonable prospect that the Romanian State would take a measure which might give rise to a treaty claim".[532]

316. Consequently, it is irrelevant whether the Mineralogy Group predicted the passage of the Amendment Act prior to the transfer of Mineralogy shares to Zeph on 29 January 2019. What matters — and what the evidentiary record discloses — is that, at the time of the restructuring on 29 January 2019, it was reasonably foreseeable that WA would adopt measures that unilaterally impacted Mineralogy's rights under the State Agreement, being measures "which might give rise to a treaty claim".[533] 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 an Act in the form of the Amendment Act was foreseeable. What matters is that, when that 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.

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528 *Ipek Investment Limited v Republic of Turkey* (ICSID Case No ARB/18/18, Award of 8 December 2022), para. 323, **Exh. RLA-99**.

529 *Id.*, para. 428.

530 *Alverley Investments Limited and Germen Properties Ltd v Romania* (ICSID Case No. ARB/18/30, Excerpts of Award of 16 March 2022), para. 385, **Exh. RLA-71**.

531 *Id*., para. 385.

532 *Id*., paras. 394, 396.

533 *Ibid*.

E. PURPOSE OF THE RESTRUCTURE

317. Where a restructure which is claimed to result in an investment acquiring treaty protection occurs in the context of a foreseeable dispute, there will ordinarily be a strong basis to infer that the restructure was effected for the purpose of obtaining treaty protection. That inference is reinforced in this case by evidence that the principal – and likely sole – purpose for Zeph's acquisition of Mineralogy shares was the filing of a treaty claim in relation to WA's unilateral action in respect of the State Agreement. That inference is not displaced by the alternative purposes invoked by the Claimant, which do not withstand scrutiny.

318. The relevance of purpose was first highlighted by the *Phoenix Action* tribunal, which held that the claimed "investment" had not been made "for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation".[534] Key to that finding was that there were:

> "… strong indicia that no economic activity in the market place was either performed or even intended by Phoenix. … The whole operation was not an economic investment, based on the actual or future value of the companies, but indeed, simply a rearrangement of assets within a family, to gain access to ICSID jurisdiction to which the initial investor was not entitled".[535]

319. More recently, the *Cascade* tribunal drew on that analysis to hold that "a key objective … is to derive from the evidence a conclusion as to whether an investment transaction was made for the genuine 'purpose of engaging in economic activity' in the host State, or only apparently to obtain treaty protection in the face of a looming dispute, for an investment which (prior to the transaction) would not have been entitled to such protection".[536]

320. The importance of the purpose of a corporate restructure to the analysis has been developed by several other tribunals since *Phoenix Action*, in terms that have clarified that the correct inquiry is not as to "sole purpose" of a restructure, but rather as to whether "a determinative or principal purpose" was to obtain treaty protection. As stated above:

    (a) The tribunal in *Philip Morris Asia* held that "the Claimant has not been able to prove that tax or other business reasons were determinative factors for the Claimant's

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534 *Phoenix Action, Ltd v The Czech Republic* (ICSID Case No ARB/06/5, Award of 29 April 2009), para. 142, **Exh. RLA-91**.

535 *Id*., para. 140.

536 *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4, Award of 20 September 2021), para. 340 (citations omitted), **Exh. RLA-98**.

restructuring", and instead concluded that "the main and determinative, if not sole, reason for the restructuring was the intention to bring a claim under the Treaty, using an entity from Hong Kong".[537]

(b) The *Alverley* tribunal expressly held that securing treaty protection did not need to be the sole purpose of the restructuring.[538] Instead, "the correct test is whether a determinative or principal purpose was to gain the protection of the treaty".[539]

321. A claim will thus constitute an abuse of process where it is made possible by a corporate restructuring a determinative or principal purpose of which was to gain access to treaty protection for an investment that is the subject of an existing or foreseeable dispute "which (prior to the transaction) would not have been entitled to such protection".[540] A claim in such circumstances is abusive because it invokes the procedural right of access to arbitration in a dispute to which it was not intended to extend (a domestic dispute, rather than a dispute between a host State and an international investor that seeks to perform meaningful economic activities in the host State).

(i) The true purpose of Zeph's incorporation and acquisition of Mineralogy

322. In the present case, it is clear that a principal purpose — and probably the sole purpose — for Zeph's incorporation and acquisition of Mineralogy shares was to attempt to obtain treaty protection against unilateral action by WA that would adversely affect Mineralogy's rights under the State Agreement. That purpose is evidenced by the following matters:

(a) Contemporaneous media reports recorded that such a rationale was advanced by Mr Palmer as the motivation for the incorporation of MIL in New Zealand in December 2018 and for the MIL Share Swap.[541] The accuracy of those reports is supported by the fact that, immediately after MIL acquired the Mineralogy shares, it wrote to the Federal Australian Government invoking a number of treaties to protest the WA

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537 *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No. 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015), para. 584, **Exh. RLA-95**.

538 *Alverley Investments Limited and Germen Properties Ltd v Romania* (ICSID Case No ARB/18/30, Excerpts of Award of 16 March 2022), para. 347, **Exh. RLA-71**.

539 *Id*., para. 376.

540 *Cascade Investments NV v Republic of Turkey* (ICSID Case No. ARB/18/4, Award, 20 September 2021), para. 340 (citations omitted), **Exh. RLA-98**.

541 Andrew Burrell, 'Kiwi flight: Palmer 'to make Australia great' from NZ', *The Australian* (22 January 2019), **Exh. R-46**.

Government's existing and anticipated conduct in relation to Mineralogy's rights under the State Agreement.[542]

(b) Only weeks later, after it became apparent that the effect of a side-letter between Australia and New Zealand was that MIL could not invoke Chapter 11 of AANZFTA, Zeph was incorporated in Singapore (where no such side-letter exists) and the Zeph Share Swap took place. Less than a week later, Premier McGowan was again warned in relation to potential international liability should the WA Government take unilateral action in relation to Mineralogy's rights under the State Agreement.[543]

(c) These events indicate the evolving understanding of Mineralogy and related entities of the scope of treaty protection, which necessitated shifting the shares from a New Zealand to a Singaporean entity to ensure that there was an appropriate vehicle to bring the present claim, because neither Mineralogy nor any associated entity or person would have had access to equivalent treaty protection prior to restructuring the shareholding through Singapore.[544]

323. The conclusion that a principal purpose for Zeph's incorporation and acquisition of Mineralogy shares was to attempt to obtain treaty protection is supported by the fact that — immediately after its incorporation — it acquired several existing Singaporean businesses and entered into the JVA with the Kleenmatic Companies. The tribunal should infer that this was done in an attempt to establish substantive business operations in Singapore, so as to prevent Australia from denying benefits under the relevant investment treaties. The speed with which this was done demonstrates that this was regarded as a pressing concern. These inferences are supported by the fact that otherwise what occurred "makes no operational sense at all".[545] This is because, as Professor Lys explains, there were no operational synergies — and, in fact, there "simply is no hint of any overlap" — between the Mineralogy

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542 Letter from MIL to Minister for Energy in the Commonwealth Government dated 18 January 2019, **Exh. R-45**.

543 Letter from MIL to Premier McGowan dated 4 February 2019, **Exh. R-141**.

544 Cf. *Cervin Investissements S.A. and Rhone Investissements S.A. v Republic of Costa Rica* (ICSID Case No ARB/13/2, Decision on Jurisdiction of 15 December 2014), paras. 294-296, **Exh. RLA-100** (unofficial English translation of excerpts).

545 Lys Report, para. 527.

Group's mining operations in Australia and the companies which Zeph acquired in Singapore, which were engaged in engineering and office cleaning.[546]

324. Absent the attempt to obtain treaty protection, Zeph's presence in the chain of ownership of Mineralogy is redundant. In other words, Zeph could be removed, and all that would change is that the royalty payments from Mineralogy would flow a slightly different way (more directly) to get to Mr Palmer.

325. That a determinative or principal reason for the restructure was to gain treaty protection for existing or foreseeable disputes explains why there was no subsequent investment or engagement by Zeph in the operations of Mineralogy following the restructure, and why Zeph did not provide any meaningful contribution for the shares it received. The nature of these transactions is addressed in detail in Sections III and IV of this SOPO. For present purposes, the important point is that the transactions indicate that Zeph had "no real intention of [engaging in] economic activity" on behalf of Mineralogy in Singapore.[547] The facts instead disclose "a transfer of the national economic interests to a foreign company in an attempt to seek [treaty] protections", such that "they are in essence domestic investments disguised as international investments for the sole purpose of access" to treaty protection.[548]

(ii) The Claimant's asserted rationales for the corporate restructure

326. The purported justifications for the corporate restructure remain unparticularised, unsubstantiated, and unconvincing. Zeph's evidence (such as it is) comes nowhere close to substantiating its claims that the corporate restructure and acquisition of Mineralogy shares was undertaken for a *bona fide* purpose, as opposed to providing a vehicle through which a

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546 Lys Report, para. 527. GCS Engineering Services Pte Ltd, Visco Engineering Pte Ltd and Visco Offshore Engineering Pte Ltd all characterised themselves as involved in "building and repairing of ships, tankers, and other ocean-going vessels (including conversion of ships into off-shore structures)". ACRA, Business profile for GCS Engineering Service Pte Ltd dated 1 September 2020, **Exh. R-60**, p. 1; ACRA, Business profile for Visco Engineering Pte Ltd, **Exh. R-62**, p. 1. One Kleenmatic Management and Kleen Venture Pte Ltd both characterised themselves as involved in "[g]eneral cleaning services (including cleaning of public areas, offices and factories) except household cleaning and online marketplaces". See ACRA, Business profile for One Kleenmatic Pte. Ltd, **Exh. R-163**, p. 1; see ACRA, Business profile for Kleen Venture Pte. Ltd., **Exh. R-164**, p. 1.

547 *Cascade Investments NV v Republic of Turkey* (ICSID Case No ARB/18/4, Award of 20 September 2021), para. 335, **Exh. RLA-98**. See also *Cervin Investissments S.A. and Rhone Investissements S.A. v Republic of Costa Rica* (ICSID Case No ARB/13/2, Decision on Jurisdiction of 15 December 2014), para. 299, **Exh. RLA-100** (unofficial English translation of excerpts).

548 *Phoenix Action, Ltd v The Czech Republic* (ICSID Case No ARB/06/5, Award of 29 April 2009), para. 144, **Exh. RLA-91**.

treaty claim in respect of existing and/or foreseeable disputes could be filed. Further particularities and evidence would be expected if there were a genuine reason for the restructure. To the extent that Zeph seeks to submit such further evidence, the Respondent expressly reserves its rights, including to submit further evidence in its Reply on Preliminary Objections.

327. The Claimant attempts to explain the rationales for the corporate restructure as follows:

(a) [redacted] asserts that MIL was incorporated and inserted into the chain of ownership of Mineralogy because he wanted to undertake "lithium exploration" projects in New Zealand ("**Alleged Lithium Rationale**");[549] and

(b) [redacted] asserts that Zeph was incorporated and inserted into the corporate chain between Mineralogy and MIL for two reasons:

(i) to assist in securing funding for developing Waratah Coal Pty Ltd's ("**Waratah Coal**") coal holdings in Queensland ("**Alleged Coal Funding Rationale**");[550]

(ii) to obtain access to tax benefits ("**Alleged Tax Rationale**");[551] and

(c) via letters sent by PwC on behalf of Mineralogy in August 2019, Mineralogy asserts that the restructure was for the purposes of protecting existing assets from risks and exposures in Australia ("**Alleged Risk and Exposure Rationale**").

328. None of these purported motivations withstand scrutiny. To the extent that they depend on evidence of [redacted], particular caution is required in assessing that evidence.[552] The purported motivations are addressed in turn below.

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549 [redacted] WS, paras. 125, 132.

550 *Id*., para. 115.

551 *Id*., para. 128.

552 Mr Palmer's evidence has frequently been the subject of judicial criticism. For example: (a) in one case it was accepted that there were "good reasons to doubt" that documentary evidence that was asserted to have been created by Mr Palmer contemporaneously was reliable or genuine: *Parbery v QNI Metals Pty Ltd* (2018) 358 ALR 88; [2018] QSC 107, para. 119, **Exh. R-165**; (b) a judge of the Federal Court of Australia found that "Mr Palmer was attempting to say anything and everything to justify his assertion" and therefore his Honour "[did] not consider it safe to place any significant reliance upon Mr Palmer's evidence": *Palmer v McGowan (No 5)* (2022) 404 ALR 621; [2022] FCA 893, paras. 128, 139, **Exh. R-166**; and (c) a different judge of the Federal Court of Australia determined that "Mr Palmer … was a most unimpressive witness … his evidence was inconsistent with the contemporaneous records … he was an unreliable witness whose

Alleged Lithium Rationale

329. With respect to the incorporation of MIL, [redacted] asserted that he "wanted to explore for lithium deposits in New Zealand and that [he] may have to invest funds there in the future."[553] He added that upon the incorporation of the New Zealand company, "[l]ithium projects could be immediately undertaken in New Zealand and they were."[554]

330. If [redacted] is suggesting that it was necessary to incorporate a New Zealand company in order to engage in lithium exploration, or that a New Zealand company would have meaningful regulatory advantages over an Australian company, this is incorrect. The Respondent refers in this respect to the expert report of Mr Daniel Kalderimis, a New Zealand barrister, who states:

> "I have found nothing in the New Zealand legislative framework regulating lithium or rare earth elements exploration and/or exploitation, foreign investment, or any other legislative framework that I consider relevant, as at December 2018, that would prevent an Australian company from pursuing lithium or other rare earth elements exploration and/or exploitation within New Zealand."[555]

331. Further, Australian companies are not treated less favourably than New Zealand companies under applicable New Zealand regulatory regimes, further undermining the alleged lithium rationale for the incorporation of MIL. As Mr Kalderimis explains:

> "Australian companies conducting mining activities in New Zealand are, certainly in general, to be treated no less favourably than New Zealand companies in like circumstances. Still less is there any basis to suggest that there are meaningful regulatory advantages for an Australian-owned New Zealand company, as against an Australian company pursuing the specific mining exploration and/or exploitation activities."[556]

332. In light of the above evidence, the Alleged Lithium Rationale is wholly unconvincing and should not be accepted as a reason — let alone the determinative or principal reason — for the incorporation of MIL and its acquisition of all of the shares in Mineralogy.

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evidence was at times incredible": *Universal Music Publishing Pty Ltd v Palmer (No 2)* (2021) 158 IPR 421; [2021] FCA 434, para. 44, **Exh. R-167**.

553 [redacted] WS, para. 125.

554 *Id*., para. 132.

555 Kalderimis Report, para. 34.

556 *Id*., para. 35.

Alleged Coal Funding Rationale

333. [redacted] assertion that Zeph was inserted into the corporate chain between Mineralogy and MIL in order to assist in securing funding for developing Waratah Coal's coal holdings in Queensland is likewise wholly unconvincing.[557]

334. Mr Rogers, who is an expert with over 30 years' experience in the financing of mines, expresses disbelief that obtaining funding for coal mining projects in Australia could have been a reason for the insertion of Zeph into the chain of ownership of Mineralogy. In his expert report, Mr Rogers states that:

(a) There is "no basis for believing that Singapore banks would have been more likely to fund the coal projects of Singapore companies than Australian ones between December 2017 and January 2019";[558]

(b) There is no "serious basis for Mineralogy to have believed that the insertion of Zeph into the corporate structure would increase the likelihood of attracting finance from Singaporean banks, or indeed those of any nation";[559] and

(c) It is "inconceivable that inserting Zeph into the corporate structure would have opened the door to any business opportunity in China, given the view that the Chinese Government appeared to have had of Mr Palmer".[560]

335. Professor Lys likewise considers the Alleged Coal Funding Rationale to be "fundamentally flawed",[561] including for the following reasons:

(a) There is no evidence that the transfer of Mineralogy shares to Zeph would yield any advantage for procuring financing for Mineralogy's mining operations in Australia.[562] As Professor Lys explains:

> "The argument that having a Singaporean company involved in engineering and office cleaning would somehow be more advantageous in securing financing for mining explorations in Australia is, in my experience, not credible as a matter of economics and finance. Surely, any competent analysis of Zeph's business activities would conclude that Zeph

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557 [redacted] WS, para. 115.
558 Rogers Report, para. E.1.1.1.
559 *Id*., para. E.1.1.2.
560 *Id*., para. E.1.1.3.
561 Lys Report, para. 526.
562 *Id*., paras. 540-542.

> consists of two unrelated activities: (1) a trivial Singaporean engineering and/or cleaning business, and (2) serving as a depository for Mineralogy shares. I also note that the record does not provide any authoritative support for the assertion that having these unrelated activities in Singapore provides any benefit to securing funding for future Australian mining operation, nor am I aware of any valid theory in my field of expertise that would provide any such support. While intuitively a local physical presence may facilitate the lending process (meeting place, local mailing address, etc.), what really matters to lenders and financiers are the reason why external financing is needed, the underlying assets and the quality of core underlying operations that assure service and repayment of the funding (loans), and the expertise of the professionals in charge of such operations."[563]

(b) There is no evidence that any staff with the expertise necessary to realise the Alleged Coal Funding Rationale were at any time engaged by or for Zeph in Singapore.[564] As Professor Lys explains,[565] this undermines [redacted] passing reference to the restructuring having the benefit of there being "active staff that could assist with our corporate plans".[566] Furthermore, even if staff with relevant knowledge of corporate finance had been sent to Singapore (which — the Respondent emphasises — did not occur), Professor Lys explains that any Singaporean bankers could not have been confused about the financial realities as "even a cursory review of Zeph's financial statements would readily reveal that Zeph has minor, non-mining related operations, in Singapore, and that it holds shares in an Australian entity that in turn owns royalty streams".[567]

(c) There is no contemporaneous documentary evidence supporting that claim that the purpose of the restructure was to assist in securing funding for developing Waratah

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563 Lys Report, para. 541.

564 *Id*., para. 564.

565 *Id*., paras. 593-595 ("I have seen nothing in the record that would suggest that any staff capable of international project finance or coal development was ever hired by Zeph. Neither Mr. Palmer, [redacted] nor any of the Palmer-related executives appear to have relocated to Singapore. Per ACRA filings, all the Palmer-related members on the various Singaporean entities' Boards of Directors reportedly maintained their residence in Australia. … [T]he only identifiable individuals that were added to the Palmer entities by the restructuring are welders, office cleaners, and similar workers that appear to be paid between SGD $2 and $4 per hour").

566 [redacted] WS, para. 132.

567 Lys Report, para. 542; see also Lys footnote 542 ("However, this relatively simple structure is contradicted by my own analysis which implies that, from a corporate governance perspective, Zeph is not the corporate head of Mineralogy. Rather, and consistent with the explicit statement in Zeph's financial disclosures, Mineralogy is the accounting parent of the group.").

Coal's coal holdings in Queensland. The lack of any such documentary evidence is very telling. As Professor Lys explains:

> "In my experience, when companies contemplate significant investments, and restructuring, there typically are contemporaneous corporate documents that memorialize what executives and the key stakeholders were thinking in terms of the purpose, alternatives, and execution – materials such as Board minutes, notes, presentations by advisors, assessments of risks, SWOT analyses, return on investment calculations, tax implication analysis performed by tax experts, and especially advice from transactional experts. However, in the present case, not a single such contemporaneous document was produced in the record."[568]

(d) Professor Lys notes that, if project financing was the true rationale for the restructure, he would have expected to see "presentations by investment bankers analyzing the best type (equity vs. debt, public vs. private, sale vs. securitization, etc.) and the best location (Singapore vs. Hong Kong, to the extent location is deemed to be relevant) for sourcing such financing. Again, not a single such document was produced."[569] For example, the Claimant provides no evidence that any consideration was given to an initial public offering ("**IPO**") in a Southeast Asian market, despite this having been Mr Palmer and Mineralogy's preferred mode of fundraising for previous projects.[570]

(e) The evidence of Professor Lys that is summarised in the previous two paragraphs is supported by what occurred when the Mineralogy Group previously attempted to fundraise in Southeast Asia for Australian mining operations.[571] For example, in previous fundraising efforts, Mineralogy engaged five well-known professional firms, underlining the implausibility of the suggestion that Mr Palmer and Mineralogy would have relied exclusively on [redacted] advice if they were truly seeking to engage in fundraising in Singapore.[572]

(f) According to Professor Lys, even in sensitive cases requiring discretion, it would be unusual for a business to rely "on a single advisor ([redacted]) when contemplating and implementing a complex transaction ultimately aimed at securing billions of dollars in international financing".[573] The absence of contemporaneous documentation

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568 Lys Report, para. 529.
569 *Id*., para. 530.
570 *Id*., paras. 566.
571 *Id*., paras. 559-566.
572 *Id*., para. 563.
573 *Id.,* para. 532.

supporting the claim that this occurred is particularly surprising given that [redacted] alleges that discussions took place with [redacted] over a nine-month period,[574] and [redacted] claims to have, over the years, "develop[ed] commercial and corporate plans and ideas for Mr Palmer's companies and him personally".[575]

(g) Zeph has not provided any evidence of meaningful due diligence in relation to potential Singaporean funders, or indeed any other matters which could be relevant to explaining why Singapore was chosen as the State of incorporation for the new entity.[576] Its evidence is limited to a single article which [redacted] purportedly showed to Mr Palmer stating that Singaporean banks were still willing to lend funds to coal projects.[577] As Professor Lys concludes, "it is unlikely that an enterprise would embark on a restructuring transaction and move ownership of a large mining operation to Singapore based on such scant evidence" without further documented research or external advisors.[578] As Mr Rogers put it in his expert report:

> "Had there been some form of communication between Mr [redacted] and the Singapore banks in advance of the restructuring (as I would have expected) he would have learnt that the Singapore banks did not have the expertise or track record to arrange such a project financing. Indeed, one of the three banks already had a policy in place against the financing of new coal mines."[579]

(h) Even the single article upon which reliance is said to have been placed in fact provides very limited support for the proposition that funding would be forthcoming for an Australian coal mining project. As Professor Lys explains:[580]

(i) One of the three banks mentioned in the article has a major Chinese influence, which given Mineralogy's complicated history with the People's Republic of China ("**China**") would likely be problematic.

(ii) The 21 combined coal projects that the banks have financed totals USD $2.3 billion, far less than the USD 3.6 billion IPO Resourcehouse was pursuing in

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574 *Id*., para. 529, citing [redacted] WS, para. 119.
575 [redacted] WS, para. 10.
576 Lys Report, paras. 567-572.
577 *Id*., para. 567, citing David Fogarty, Singapore banks DBS, OCBC and UOB funding coal projects despite climate risks: Study, The Straits Times (20 January 2018) (Annexure DM-011 to [redacted] WS), **Exh. C-167**.
578 Lys Report, para. 571.
579 Rogers Report, para. E.1.1.7.
580 Lys Report, para. 570.

Hong Kong (which presumably matches Waratah Coal's funding needs for the Queensland coal project). There is no indication that these banks had the wherewithal or track record necessary for Mineralogy's alleged funding needs.

(iii) Half of the projects funded by the banks mentioned in the article have been for coal-fired power stations, which is an entirely different economic proposition compared to mining for coal.

(iv) Most of those have been located in Indonesia and Vietnam, two emerging markets quite different from Australia. The only evidence of Australian activity is an AUD 160 million loan to a consortium to buy the Port of Newcastle.

(i) The evidence on the record indicates that it was not even clear that Mineralogy *needed* international funding for the Waratah Coal project in Queensland.[581] As Professor Lys has explained, the need for international funding appears not to have been considered with any real seriousness.[582] If such funding had been needed, it would have made no sense for Mineralogy to have disengaged its long-time auditors Ernst & Young (one of the renowned "Big 4" with a significant presence in Singapore and New Zealand) one year before the restructure, only to engage a much smaller Australian auditing firm with a physical presence in Australia only.[583]

(j) The conclusion that the need for international funding was not considered with any real seriousness is further supported by the fact that, in its explanation of the Alleged Coal Funding Rationale, the Claimant confuses two types of funding.[584] Zeph's assertion that one of the primary objectives of the restructuring was to secure funding for Waratah Coal's coal project in Queensland appears to be a reference to project finance (where typically the debt and/or equity used to finance the project are repaid from funds generated by the project itself).[585] However, Zeph's description of seeking funding against the royalty streams based on the Royalties Judgment instead suggests a form of lending securitised against expected future cashflows quite unrelated to

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581 Lys Report, Section IV.B.2.a.
582 *Id*., para. 539.
583 *Id*., paras. 43, 145-147.
584 *Id*., Section IV.B.2.b.
585 *Id*., paras. 534-535.

Waratah Coal's Queensland coal project.[586] Professor Lys describes Zeph's evidence in this regard as "imprecise, contradictory, and lack[ing] the expected depth and seriousness one would expect of a project of that magnitude".[587]

(k) Finally, there is no evidence that Mineralogy had a relationship with potential Chinese investors that would provide a commercial justification for the restructuring introducing Zeph into the corporate chain.[588] The disparate events and exchanges involving Chinese banks and government officials which Zeph highlights appear to be "a series of isolated events with only the tiniest after-the-fact connective tissue woven in-between them", with many of these events unparticularised in Zeph's evidence and some of them appearing to relate to entities other than Waratah Coal.[589] In any case, the proposition that Chinese investors would overlook the by then protracted disputes between the Chinese state-owned CITIC Parties and Mineralogy — simply because of the insertion of a Singaporean holding company above Mineralogy in the corporate chain — is untenable.

Alleged Tax Rationale

336. The Claimant does not refer to the Alleged Tax Rationale in its Amended Notice of Arbitration. Nor has it put forward any credible documentary evidence that would support the conclusion that a determinative or principal purpose of the restructure was to obtain any tax advantage. For example, the Claimant has not put forward minutes of board of directors' meetings or reports for any entity within the Mineralogy Group, certificates of tax residency for any entity within the Mineralogy Group, or any filed tax statements or returns (either of Mr Palmer personally or any of the companies in the Mineralogy Group). It has, however, provided a document headed "Mineralogy Group Restructure – December 2018/January 2019" ("**Mineralogy Restructure Memorandum**").[590] That document does not articulate any tax advantages said to arise from the restructure. It relevantly states only that no adverse tax issues will arise, and that the existing tax implications prior to the restructure were

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586 Lys Report, para. 538.
587 *Id*., para. 539.
588 *Id*., paras. 548-557.
589 *Id*., paras. 547, 548, 552.
590 [redacted] WS, para. 129; Mineralogy Group Restructure – December 2018/January 2019 (Annexure A to NoI), **Exh. C-63**, p. 41. The author of that memorandum is not named, and its provenance is unexplained.

maintained.[591] That points strongly against any claim that a determinative or principal purpose of the restructure was to obtain a tax advantage.

337. Notwithstanding the absence of any reference to the Alleged Tax Rationale in the Claimant's Amended Notice of Arbitration, that rationale is adverted to in the witness statements of [redacted] and [redacted]. In particular, [redacted] asserts that he believed that inserting a Singaporean company into the corporate chain and personally moving to Singapore would yield some tax advantages, such as a reduced rate of applicable personal income tax under the laws of Singapore with respect to dividend distributions he receives.[592] That claim is unsubstantiated, poorly articulated and internally inconsistent, including because of:

(a) A lack of any clear description as to what tax advantages it is claimed would be obtained by the restructure;

(b) Inconsistencies as between the explanations offered by [redacted], [redacted] and the Mineralogy Restructure Memorandum concerning the nature of the Alleged Tax Rationale; and

(c) Evidentiary gaps and material omissions in respect of the Alleged Tax Rationale.

338. In his witness statement, [redacted] suggests that there would be "no requirement to pay personal tax on dividends if [he] decided to move to Singapore"[593] and furthermore that "tax implications…were important matters"[594] in considering the restructure (although he neither defines nor discusses those "tax implications" any further). In other words, [redacted] asserts that there would have been a *personal* tax benefit with respect to the taxation of dividend income he would receive, were he to become a resident of Singapore for tax purposes. Of course, [redacted] never relocated to or declared residence for tax purposes in Singapore. Indeed, his witness statement does not claim that he ever intended to do so. Those facts are inconsistent with [redacted] having genuinely sought to secure those alleged benefits.

339. In referring to the alleged tax benefits of the restructure, [redacted] includes no reference to *any* tax laws or regulations, of *any* jurisdiction. Nor does he explain how any of the alleged tax benefits would flow through to him, in circumstances where he is not a shareholder in

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591 Mineralogy Group Restructure – December 2018/January 2019 (Annexure A to NoI), **Exh. C-63**, pp. 46-47.

592 [redacted] WS, para. 128.

593 *Ibid*.

594 *Id*., para. 130.

Zeph (which is wholly owned by MIL), and thus any dividends paid by Zeph are received by MIL (which is confirmed by MIL's financial statements). Finally, [redacted] fails to explain why or how an alleged tax benefit accruing to him in his personal capacity would have anything to do with the restructure of the Mineralogy Group. Given the lack of detail or explanation on all those critical matters, the Alleged Tax Rationale is wholly unconvincing.

340. [redacted] evidence concerning the Alleged Tax Rationale is similarly deficient:

(a) [redacted] recalls that [redacted] informed him that, if dividends were paid out by the Singapore company to a bank not domiciled in Singapore and [redacted] became a resident of Singapore, "there would be no tax payable on such dividends".[595] That takes matters no further than [redacted] own unsubstantiated assertions.

(b) [redacted] also mentions discussing "tax implications"[596] with [redacted], but again there is no explanation of what these tax implications are, nor whether they would result in an advantage to the Mineralogy Group or merely to [redacted] in his personal capacity.

(c) Finally, [redacted] recalls that he "pointed out" to [redacted] that "as Mineralogy was an Australian company it was required to pay company tax of 30% and all dividends would be subject to franking credits and would incur an additional tax if funds were paid out by way of a dividend in Australia of around an additional 16%. If the company earned $500 million a year this would amount to a loss of around 80 million a year…".[597] [redacted] further observed that: "[i]t was concluded that the Singapore structure offered substantial options and benefits in the order of $500 million dollars".[598] [redacted] does not provide any further explanation of what these "substantial options and benefits" are, nor does he offer further evidence to substantiate how this conclusion is reached.

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595 [redacted] WS, para. 27.
596 *Ibid*.
597 *Id*., para. 28.
598 *Id*., para. 29.

341. There are also inconsistencies in the evidence of [redacted] and [redacted] concerning *how* any alleged tax advantages would be realised:

(a) [redacted]'s evidence is that he believed that if he "was personally living in Singapore, when dividends are paid by Mineralogy to [Zeph] to a bank not domiciled in Singapore that there potentially would be no personal tax payable on such dividends".[599]

(b) [redacted]'s evidence is that "[redacted] told me he had considered the matters I raised and that in addition he understood that if dividends were paid out by the Singapore company but not to a Singapore bank located in Singapore that there would be no tax payable on such dividends, if he were a resident of Singapore".[600]

342. Thus, [redacted]'s evidence is that the asserted tax benefits would be derived when dividends were paid to Zeph, whereas [redacted]'s evidence is that those benefits would be obtained when dividends were paid out by Zeph. Further, while [redacted] said that the recipient bank merely needs to be "not domiciled in Singapore",[601] [redacted] said that it must not be a "*Singapore* bank located in Singapore".[602]

343. As observed by Professor Lys,[603] it is inconceivable that Mr Palmer would have restructured the Mineralogy Group to obtain alleged tax advantages without receiving any form of advice or analysis from a tax expert. Yet Zeph has put forward no evidence of such a rationale having been discussed contemporaneously with any tax experts.[604] It should be inferred either that no such advice was ever sought or obtained, or that it does not support the restructure. Either way, that points decisively against acceptance of the Alleged Tax Rationale (particularly when taken together with the other deficiencies identified above).

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599 [redacted] WS, para. 128 (emphasis added).
600 [redacted] WS, para. 27 (emphasis added).
601 [redacted] WS, para. 128 (emphasis added).
602 [redacted] WS, para. 27 (emphasis added).
603 Lys Report, para. 599, 602.
604 *Id*., paras. 599, 601-602.

Alleged Risk and Exposure Rationale

344. Mineralogy offered different rationales for the restructure in letters to the WA and Queensland Governments in August 2019.[605] In those letters, which were written by PwC, Mineralogy characterised the objectives behind the restructure as follows (emphasis added):

> "Mineralogy intends to diversify its investments both in respect of asset mix and geographical locations including undertaking acquisitions in the Asia-Pacific region in places such as Singapore and New Zealand.
>
> In preparation for these proposed acquisitions, Mineralogy wishes to create an appropriate international holding structure for further group investments and to protect its existing assets from risks and exposures arising in Australia and elsewhere."[606]

345. It is notable that neither of these letters refer to the rationales now offered by Zeph and [redacted] in these proceedings to explain the reasons for the restructure in 2019. This, of course, casts serious doubt on the credibility of Zeph's position in the present proceedings.

346. Further, and as Professor Lys highlights, according to these letters, the purpose of the restructure was not to facilitate a flow of investment from Singapore to Australia (as Zeph currently asserts), but instead to facilitate an outward transfer of value from Mineralogy into other jurisdictions, by Mineralogy acquiring foreign assets to diversify its portfolio.[607] This is irreconcilable with Zeph's current position that the objective of the restructuring was to secure funding from abroad for projects in Australia.

347. To the extent that these letters suggest that the rationale for the restructure was to diversify Mineralogy's portfolio, this objective is not supported by the available contemporaneous evidence.[608] Diversification is a means of a company or corporate group reducing its risk.[609] But the Mineralogy Group's total investment in Singapore reduced the risk of Mineralogy's

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605 Letter from PricewaterhouseCoopers to Queensland Commissioner of State Revenue dated 27 August 2019 (Exhibit 22 to Annexure A to NoI; Annexure 1C to Amended NoA), **Exh. C-63**, p. 182; Letter from PricewaterhouseCoopers to WA Commissioner of State Revenue dated 21 August 2019 (Exhibit 23 to Annexure A to NoI; Annexure 1C to Amended NoA), **Exh. C-63**, p. 211.

606 Letter from PricewaterhouseCoopers to Queensland Commissioner of State Revenue dated 27 August 2019 (Exhibit 22 to Annexure A to NoI; Annexure 1C to Amended NoA), **Exh. C-63**, p. 182; Letter from PricewaterhouseCoopers to WA Commissioner of State Revenue dated 21 August 2019 (Exhibit 23 to Annexure A to NoI; Annexure 1C to Amended NoA), **Exh. C-63**, p. 211 (emphasis added). This language is identical in the two letters.

607 Lys Report, para. 575, 577.

608 *Id*., paras. 529, 577, 579-592.

609 *Id*., para. 579.

portfolio by around 1.4%. That is a proportion which, to use Professor Lys' words, is "negligible" and "miniscule"[610] and is incapable of providing a plausible rationale for the restructuring, especially given that other strategies were available which "would have achieved the same (or even a greater) diversification effect at a fraction of the cost".[611]

348. Finally, it is notable that the letters refer to an objective of the restructure as seeking to protect Mineralogy's assets from "risks and exposures arising in Australia and elsewhere". The mechanism by which the restructure was intended to provide that "protection" is not identified. However, the only plausible mechanism is that identified above: i.e. that the inclusion of a Singaporean holding company was an attempt to obtain investment treaty protection against the risks arising from the deteriorating relationship between Mineralogy and the WA Government, including the risk of unilateral action by WA that would adversely affect Mineralogy's rights under the State Agreement. The PwC letters of August 2019 therefore support the conclusion that a principal purpose of the restructure was to permit an investment treaty claim to be made in respect of an existing or foreseeable dispute, rendering the present claim abusive.

E. CONCLUSION ON ABUSE OF PROCESS

349. A clear and consistent line of jurisprudence has established that a claim will constitute an abuse of process in circumstances where treaty jurisdiction is secured through a corporate restructure undertaken with a view to bringing an investment treaty claim in respect of an existing or foreseeable dispute.

350. As detailed above, by late 2018 it was foreseeable — and in fact foreseen — that, following years of deteriorating relations between Mineralogy and WA, WA may take unilateral action that would interfere with or remove Mineralogy's rights under the State Agreement in order to resolve longstanding and inter-related disputes between Mineralogy, WA and the CITIC Parties.

351. In that context Mineralogy's shares were transferred, first, to a New Zealand company and, subsequently, to a Singaporean company — Zeph — for the principal purpose of enabling a

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610 Lys Report, paras. 589-592.
611 *Id*., para. 590.

treaty claim to be filed in respect of any such interference by WA with Mineralogy's rights under the State Agreement.

352. The passage of the Amendment Act — which unilaterally removed some of Mineralogy's rights under the State Agreement — was an event of the very kind that was both foreseen and foreseeable at the time when Zeph was introduced into the corporate structure above Mineralogy. The passage of the Amendment Act was the playing out of a pre-existing domestic dispute with respect to which, prior to the restructure, investment treaty protection would not have been available.[612] Very clearly, the restructure was an attempt to "'game' the investment arbitration system by artificially shifting a domestic investment into international hands, with no real intention of economic activity by the new owners, simply to shield the domestic operation from existing or already impending risks".[613]

353. In such circumstances, Zeph's invocation of Article 20 of Chapter 11 of AANZFTA is an abuse of process and should be dismissed by the Tribunal.

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612 *Cascade Investments NV v Republic of Turkey* (ICSID Case No ARB/18/4, Award of 20 September 2021), para. 340 (citations omitted), **Exh. RLA-98**.

613 *Id*., para. 335.

VII. REQUEST FOR RELIEF

354. On the basis of the foregoing, Australia respectfully requests the Tribunal to:

(a) declare that the claims submitted by Zeph are outside the Tribunal's jurisdiction and/or inadmissible;

(b) dismiss Zeph's claims in their entirety; and

(c) order that Zeph bear the costs of the arbitration, including Australia's costs of legal representation and assistance, pursuant to Article 42 of the UNCITRAL Rules, together with interest on these costs.

Jesse Clarke
General Counsel (International Law)
Office of International Law
Attorney-General's Department

Date: 22 January 2024

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

ZEPH INVESTMENTS PTE LTD
Claimant

and

THE COMMONWEALTH OF AUSTRALIA
Respondent

AUSTRALIA'S STATEMENT ON

PRELIMINARY OBJECTIONS

ANNEXURE A – CHRONOLOGY OF FACTS

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Date	Fact	Relevant Evidence
5 December 2001	Mineralogy Pty Ltd ("**Mineralogy")** and the State of Western Australia ("**WA"**) entered into the Iron Ore Processing (Mineralogy Pty Ltd) Agreement ("the **State Agreement")**. Various subsidiaries of Mineralogy including International Minerals Pty Ltd ("**International Minerals**"), Bellswater Pty Ltd (later known as Sino Iron Pty Ltd ("**Sino Iron**")) and Korean Steel Pty Ltd ("**Korean Steel**") were "co-proponents" and also entered into the State Agreement.	*Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Act 2002* (WA) as at 24 September 2002, **Exh. R-168**
24 September 2002	WA Parliament enacted the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) ("**Agreement Act**"), which ratified and authorised the implementation of the State Agreement.	*Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Act 2002* (WA) as at 24 September 2002, **Exh. R-168**
14 April 2005	The Western Australian Supreme Court - Court of Appeal handed down its decision in *Mineralogy Pty Ltd and Ors v the State of Western Australia and Anor* [2005] WASCA 69, which, in effect, made clear that the State Agreement did not cover proposals for the production of iron ore concentrates.	*Mineralogy Pty Ltd v Western Australia & Anor* [2005] WASCA 69, **Exh. CLA-4**
21 March 2006	Mineralogy entered into Mining Right and Site Lease Agreements ("**MRSLAs**") with Sino Iron and Korean Steel.	MRSLA between Sino Iron and Mineralogy, **Exh. C-172**, p. 91; MRSLA between Korean Steel and Mineralogy, **Exh. C-172**, p. 149
11 June 2006	Sino Iron's ultimate holding company became CITIC Pacific Ltd ("**CITIC Pacific**")	ASIC Current & Historical Company Extract for Sino Iron Pty Ltd dated 20 December 2023, **Exh. R-169**
19 November 2007	Mineralogy and Sino Iron jointly submitted the "Sino Iron Pellet Proposal" for approval.	Letter from Mineralogy and Sino Iron to Eric Ripper, Deputy Premier of WA Government (also Minister for State Development) dated 19 November 2007, **Exh. C-196**, p. 7422
29 February 2008	Mineralogy and Sino Iron submitted the "**Sino Iron Pellet Proposal**" (Proposal 7) for approval under the State Agreement.	Project Proposal (Project 1) dated November 2007 (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, p. 7431
2 May 2008	The relevant Minister in the WA Government approved the Sino Iron Pellet Proposal (the project came to be known as the "**Sino Iron Project**").	Letter from Eric Ripper, Deputy Premier of WA Government dated 2 May 2008 to Mineralogy and Sino Iron (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts, and Contentions), **Exh. C-196**, p. 7512
14 November 2008	Korean Steel's ultimate holding company became CITIC.	ASIC Current & Historical Company Extract for Korean Steel Pty Ltd dated 20 December 2023, **Exh. R-170**

Date	Fact	Relevant Evidence
14 November 2008	The State Agreement was varied by the parties, including to allow Mineralogy and the Co-Proponents to produce iron ore concentrates for sale within Australia and overseas.	*Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Act 2008* (WA), sch 2, **Exh. CLA-3**
4 December 2008	WA Parliament passed a variation to the Agreement Act, (the *Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Act 2008* (WA)) to ratify and implement with amendment to the State Agreement.	*Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Act 2008* (WA), sch 2, **Exh. CLA-3**
11 June 2009	The relevant Minister in the WA Government approved a proposal made by Mineralogy and Korean Steel under the State Agreement ("Proposal 11") ("**Korean Steel Project**").	Letter from Premier Barnett to Sino Iron dated 11 June 2009, **Exh. C-196**, p. 7626
22 June 2009	The relevant Minister in the WA Government approved an "Additional Project Proposal" under the State Agreement related to the Sino Iron Project that had been made by Mineralogy and Sino Iron ("**Proposal 10**").	Sino Iron Project: Additional Project Proposal - Sino Iron Concentrate Proposal dated February 2009 (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, pp. 7514, 7534; Approved 22 June 2009: see letter from Premier Barnett to Sino Iron dated 22 June 2009 (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions) **Exh. C-196**, p. 7554
6 January 2010	The relevant Minister in the WA Government approved a further "Additional Project Proposal" under the State Agreement related to the Sino Iron Project that had been made by Mineralogy and Sino Iron ("**Proposal 12**").	Letter from Premier Barnett (also Minister for State Development) to Mineralogy dated 6 January 2010, **Exh. C-196**, p. 7591
6 January 2010	The relevant Minister in the WA Government approved an "Additional Project Proposal" under the State Agreement related to the Korean Steel Project that had been made by Mineralogy and Korean Steel ("**Proposal 13**").	Letter from Premier Barnett (also Minister for State Development) to Mineralogy dated 6 January 2010, **Exh. C-196**, p. 7591
July 2012	Mineralogy acquired its initial 50% direct shareholding in International Minerals.	GSPN paper, "Tax Consolidation Implications – International Minerals Pty Ltd joining the MIL Tax Consolidated Group", 6 January 2021, **Exh. C-439**
August 2012	Sino Iron had constructed a causeway to Preston Island and a breakwater at Preston Island and associated facilities.	BSIOP Proposal dated 8 August 2012, **Exh. C-410**, pp. 74, 235
8 August 2012	Mineralogy and International Minerals submitted the BSIOP Proposal ("**Proposal 14**") to the WA Government ("**BSIOP Proposal**").	Letter from Mineralogy and International Minerals dated 8 August 2012, **Exh. C-410**, p. 18

Date	Fact	Relevant Evidence
4 September 2012	Premier Barnett (who was also the relevant Minister for the purposes of the State Agreement) wrote to Mineralogy and International Minerals indicating that the BSIOP Proposal was not considered a valid proposal because the proposal was to undertake certain port works approved under the Sino Iron Pellet Project (ie the Sino Iron Project).	Letter from Premier Barnett to Mineralogy dated 4 September 2012, **Exh. C-410**, p. 125
12 September 2012	The WA Government (Director General of the Department of State Development) wrote to Mineralogy and International Minerals providing a more detailed assessment of the BSIOP Proposal and identifying key issues to be addressed.	Letter from Mr Stephen Wood, Director General of the Department of State Development of WA, to Mineralogy dated 12 September 2012, **Exh. R-93**
19 October 2012	Mineralogy wrote to Premier Barnett asserting that Sino Iron was prohibited from making any proposal relating to the ownership or operation of a Port and that the rejection of the BSIOP Proposal was damaging to International Minerals and the Western Australian economy's interests.	Letter from Mineralogy to Premier Barnett dated 19 October 2012, **Exh. C-410**, p. 136
6 November 2012	International Minerals wrote to the WA Government (Premier Barnett) notifying that a dispute had arisen in relation to the BSIOP Proposal with the State of WA and it was initiating the arbitration process under the State Agreement and the *Commercial Arbitration Act 1985* (WA) ("**Commercial Arbitration Act**").	Letter from International Minerals to Premier Barnett dated 7 November 2012, **Exh. C–410**, p. 140
7 November 2012	Minerology wrote to the WA Government (the Premier) notifying them that a dispute had arisen in relation to the BSIOP Proposal with WA and it was initiating the arbitration process under the State Agreement and the Commercial Arbitration Act.	Letter from Mineralogy to Premier Barnett dated 7 November 2012, **Exh. C–410**, p. 141
13 November 2012	The WA State Solicitor wrote to Mineralogy acknowledging the letter of 7 November 2012 and asking for the opportunity to discuss the arbitration prior to it being commenced.	Letter from WA State Solicitor to Mineralogy dated 13 November 2012, **Exh. R–171**
16 November 2012	Premier Barnett wrote to Mineralogy and International Minerals reiterating that the BSIOP Proposal was deemed invalid because it included the undertaking of certain port works already approved under the Sino Iron Pellet Project.	Letter from Premier Barnett to International Minerals dated 16 November 2012, **Exh. C-410**, p. 142; Letter from Premier Barnett to Mineralogy dated 16 November 2012, **Exh. C-410**, p. 144
4 December 2012	Premier Barnett wrote in relevantly the same terms to Mineralogy and International Minerals noting the WA Government had responded to their letters received in November 2012 through the State Solicitor.	Letter from Premier Barnett to International Minerals dated 4 December 2012, **Exh. R-172**, p. 1; Letter from Premier Barnett to International Minerals dated 4 December 2012, **Exh. R-172**, p. 2

Date	Fact	Relevant Evidence
25 January 2013	Mineralogy sent an email to the WA State Solicitor on the appointment of an arbitrator.	Email from Mineralogy to WA State Solicitor dated 25 January 2013, **Exh. C-410**, p. 146
29 January 2013	Mineralogy wrote to the Hon. Michael Kirby (as the prospective arbitrator) providing a summary of the dispute over the BSIOP Proposal.	Letter from Mineralogy to the Hon. Michael Kirby (State Solicitor's Office copied) dated 29 January 2013, **Exh. R-173**
22 February 2013	Mineralogy issued an originating summons for the appointment of an arbitrator pursuant to section 10 of the Commercial Arbitration Act dispute between Mineralogy and International Minerals and WA.	Originating Summons filed by Mineralogy on 22 February 2013 (Indexed bundle of documents referred to in Applicant's Statement of Issues, Facts and Contentions), **Exh. C-196**, p. 7831
18 March 2013	Mineralogy commenced proceedings against Sino Iron and Korean Steel in the NSW Supreme Court (SC/2013/82818) seeking specific performance of royalty clauses within the MRSLAs ("**Royalty Litigation**").	Summons filed by Mineralogy on 18 March 2013, **Exh. C-172**, p. 333
19 March 2013	Former Justice McHugh AC QC ("**Mr McHugh**") was appointed as arbitrator in relation to dispute between Mineralogy and International Minerals and WA in relation to the BSIOP Proposal ("**First BSIOP Arbitration**").	*Western Australia v Mineralogy Pty Ltd* [2020] WASC 58, para. 52, **Exh. CLA-8**
25 March 2013	A directions hearing was held before Mr McHugh and orders were made that the applicants file and serve submissions which were to include the preliminary issue proposed for determination by the arbitration, by 8 April 2013.	Orders made by Mr McHugh dated 25 March 2013, **Exh. R-174**
8 April 2013	Mineralogy's representative wrote to the WA Government to request a discussion between the parties about the progress of the First BSIOP Arbitration.	Email from Mineralogy to State Solicitor dated 8 April 2013, **Exh. R-175**
16 April 2013	Mineralogy commenced proceedings in the Federal Court in Australia against Sino Iron seeking a declaration that it has an entitlement to possession and control the port facilities at Port Preston ("**Port Litigation"**).	*Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825, para. 173, **Exh. R-91**
3 May 2013	Mr McHugh emailed the parties requesting an update on the arbitration.	Email from Mr McHugh to Mineralogy and WA State Solicitor dated 3 May 2013, **Exh. R-176**, p. 3
3 May 2013	The Royalty Litigation was transferred to the WA Supreme Court (now CIV 1808).	*Mineralogy v Sino Iron Pty Ltd* [2013] NSWSC 466, **Exh. R-177**
6 May 2013	WA (State Solicitor) advised Mr McHugh, Mineralogy and International Minerals that it was still waiting for the foreshadowed proposal to adjourn the arbitration and also foreshadowed an application to dismiss the	Letter from WA State Solicitor to Mr McHugh (copied to Mineralogy) dated 6 May 2013, **Exh. R-178**

Date	Fact	Relevant Evidence
	arbitration by WA if no steps were being taken to progress the proceedings.	
8 May 2013	Mineralogy sent an email to Mr McHugh which asserted that the parties to the First BSIOP Arbitration had agreed to a two month hold on the arbitral proceedings.	Email from Mineralogy to Mr McHugh (State Solicitor copied) dated 8 May 2013, **Exh. R-179**
15 May 2013	The WA Government (State Solicitor) wrote to Mineralogy indicating that WA understood that Mineralogy alleged it had a claim for damages against WA and on that basis WA did not agree that all parties would be served by a two-month hold on the First BSIOP Arbitration as Mineralogy had suggested to Mr McHugh in its correspondence because damages would continue to run while Mineralogy pursued its interests in other litigation.	Letter from WA State Solicitor to Mineralogy dated 15 May 2013, **Exh. R-180**
15 May 2013	Mineralogy wrote to WA Government (State Solicitor's Office) offering to waive any interest on damages during the proposed suspension of the arbitration whilst Court proceedings against CITIC were on foot.	Letter from Mineralogy to WA Government State Solicitor, **Exh. R-94**
17 May 2013	The WA Government (State Solicitor) wrote to Mineralogy responding that the waiver of interest was insufficient where the delay could generate a separate head of damage.	Letter from WA State Solicitor to Mineralogy dated 17 May 2013, **Exh. R-181**
23 May 2013	Mineralogy wrote to the WA Government (State Solicitor's Office) stating that it disagrees with WA's position and that the Applicants understood that further "dialogue be explored prior to proceeding with the arbitration process." Mineralogy also foreshadowed that it and International Minerals intended "to submit the proposal to the Minister as it was originally submitted in order to give the Minister the opportunity to properly consider it this time".	Letter from Mineralogy to WA State Solicitor's Office dated 23 May 2013, **Exh. R-182**
27 May 2013	The WA Government (State Solicitor) wrote to Mineralogy inviting a discontinuance of the arbitration process and for negotiations to commence on a proposal which was capable of being approved under the State Agreement.	Letter from WA State Solicitor to Mineralogy dated 27 May 2013, **Exh. R-183**
21 June 2013	Mineralogy and International Minerals submitted another version of the BSIOP Proposal to the WA Government, which was revised to respond to WA's comments on the first proposal ("**Revised BSIOP Proposal**").	Letter from Mineralogy and International Minerals to Premier Barnett dated 21 June 2013, **Exh. C-410**, p. 214
15 July 2013	WA brought an application to dismiss the arbitration under section 46 of the Commercial Arbitration Actin the Supreme Court of Western Australia on the basis that there had been a delay in prosecuting the claim.	Submissions for the dismissal of arbitration dated 15 July 2013, **Exh. C-184**, p. 5090

Date	Fact	Relevant Evidence
26 July 2013	Mineralogy issued a default notice to Sino Iron and Korean Steel in respect of their alleged failure to pay the royalty component in issue in the Royalty Litigation.	*Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 16]* [2017] WASC 340, **Exh. CLA-5**, p. 199
22 August 2013	Premier Barnett wrote to Mineralogy and International Minerals in the same terms, indicating that WA was not satisfied with the Revised BSIOP particularly as to whether the "necessary pre-conditions [under the State Agreement] have been met".	Letter from Premier Barnett to Mineralogy dated 22 August 2013, **Exh. R-184**; Letter from Premier Barnett to International Minerals dated 22 August 2013, **Exh. R-185**
5 September 2013	The Director General of the Department of State Development wrote to IM, regarding the Revised BSIOP Proposal providing WA's comments which detail those areas of the purported project proposals that have been assessed as not meeting the necessary pre-conditions of the State Agreement.	Letter from Director General of the Department of State Development to International Minerals dated 5 September 2013, **Exh. R-186**
7 September 2013	Mr Palmer is elected to the Australian Federal Parliament as the Member for Fairfax in Queensland.	Parliament of Australia, "Mr Clive Palmer", available at https://www.aph.gov.au/Senators_and_Members/Parliamentarian?MPID=LQR (last accessed 6 January 2024), **Exh. R-49**
20 December 2013	In correspondence about the pleadings in the arbitration, Mineralogy wrote to the WA Government (State Solicitor) noting that Mineralogy and International Minerals were incurring "substantial losses" from the Minister failing to honour WA's contractual obligations under the State Agreement.	Letter from Mineralogy to State Solicitor's Office dated 20 December 2013, **Exh. R-187**
20 May 2014	Mr McHugh issued his first award which found that the Minister had no power to reject the BSIOP proposal under Clause 7 of the State Agreement ("**First McHugh Award**").	First McHugh Award, **Exh. C-442**
28 May 2014	The article "Clive Palmer's brawl with China hurting economy, says Colin Barnett" is published in *The Australian* newspaper, wherein Mr Palmer contests that his ongoing legal disputes with CITIC had affected relations with China.	Paul Garvey, *The Australian,* 'Clive Palmer's brawl with China hurting economy, says Colin Barnett, 28 May 2014 (Indexed bundle of documents referred to in Applicant's Statement of Issues Facts and Contentions), **Exh. C-196**, p. 8012
11 June 2014	Mineralogy wrote to the WA Government (State Solicitor) asserting that Mineralogy and International Minerals had "suffered substantial damages" and requesting a meeting following the First McHugh Award.	Letter from Mineralogy to State Solicitor dated 11 June 2014, **Exh. R-95**
17 June 2014	The WA Government (State Solicitor) wrote to Mineralogy rejecting Mineralogy's position on damages and indicating that WA did not consider that either	Letter from State Solicitor to Mineralogy dated 17 June 2014, **Exh. R-96**

Date	Fact	Relevant Evidence
	Mineralogy or International Minerals were entitled to damages following the First McHugh Award.	
8 July 2014	Mineralogy wrote to WA Government (State Solicitor) re-iterating its position on damages and rejecting that the Award was final with respect to quantum of damages owing to Mineralogy and International Minerals.	Letter from Mineralogy to State Solicitor dated 8 July 2014, **Exh. R-97**
22 July 2014	Premier Barnett (as the relevant Minister under the State Agreement) wrote to Mineralogy stating that he was exercising his power under clause 7(1)(c) of the State Agreement to require the BSIOP Project Proposal to be amended to comply with 46 conditions precedent. In that correspondence Premier Barnett further "repeat[ed] my invitation for you to consult with the Department of State Development in respect of the BSIOP proposal and as contemplated by clause 7(3) of the State Agreement".	Letter from Premier Barnett to Mineralogy dated 22 July 2014 (Indexed bundle of documents referred to in Applicant's Statement of Issues Facts and Contentions), **Exh. C-196**, p. 9337
12 August 2014	International Minerals wrote to Premier Barnett expressly in response to the letter of 22 July 2014 requesting consultations with the Premier under the State Agreement.	Letter from International Minerals to Premier Barnett dated 12 August 2014, **Exh. R-98**
18 August 2014	The WA Government (State Solicitor) wrote to International Minerals stating that Premier Barnett could meet with International Minerals and its co-proponent (ie Mineralogy) and requested International Minerals provide a list of items to be discussed, a list of attendees and the capacity in which they would be attending.	Letter from State Solicitor to International Minerals dated 18 August 2014, **Exh. R-99**
26 September 2014	Mineralogy and International Minerals wrote to Mr McHugh regarding their damages claim noting that companies intended to progress the claim and that International Minerals might present a separate damages claim. The letter also sought to preserve Mineralogy's and IM's rights and to "submit[] for arbitration" the dispute as to whether the conditions precedent could be imposed on the BSIOP Proposal and also to plead that the imposition of the conditions precedent exacerbated the damages claim.	Letter from Mineralogy and International Minerals to Mr McHugh dated 26 September 2016, **Exh. R-100**
9 October 2014	The WA Government (State Solicitor's Office) wrote to Mineralogy and International Minerals noting it had previously been indicated that legal representatives of WA were willing to meet concerning the claim for damages, but Mineralogy and International Minerals had not yet sought to do so. Additionally, the letter notes there was no response to the letter dated 18 August 2014.	Letter from State Solicitor's Office to Mineralogy dated 9 October 2014, **Exh. R-101**
13 February 2015	Mineralogy wrote on behalf of itself and International Minerals to the WA Government (State Solicitor) stating they were assessing their damages claim and expressly reserving all of their rights with respect to the damages claim.	Letter from Mineralogy to State Solicitor's Office dated 13 February 2015, **Exh. R-102**

Date	Fact	Relevant Evidence
14 August 2015	Justice Edelman of the Federal Court of Australia gave judgment in the Port Litigation, dismissing Mineralogy's claims.	*Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825, **Exh. R-91**
31 March 2016	CITIC, Sino Iron and Korean Steel ("**the CITIC Parties**") commenced proceedings against Mineralogy seeking specific performance of the China Project Option Agreement (a private commercial agreement separate to the Proposals under the State Agreement that granted the CITIC Parties the option to procure an additional 1 billion tonnes of iron ore from Mineralogy's tenements).	CITIC Limited Annual Report 2018, Notes to the Consolidated Financial Statements, **Exh. C-176**, p. 3852
May 2016	Mr Palmer retires from the Federal Parliament.	Parliament of Australia, "Mr Clive Palmer", available at https://www.aph.gov.au/Senators_and_Members/Parliamentarian?MPID=LQR (last accessed 6 January 2024), **Exh. R-49**
9 December 2016	The CITIC Parties first provided the draft Mine Continuation Proposal ("**MCP"**) regarding Sino Iron and Korean Steel Projects to Mineralogy and the correspondence was copied to the relevant Minister in the WA Government (Minister Marmion) and the Director General of the Department of State Development. The MCPs were Additional Project Proposals under the State Agreement.	Letter from CITIC Pacific Mining Management to Mineralogy on behalf of Sino Iron, Korean Steel to Mineralogy (Minister Marmion and Director General of the Department of State Development copied) dated 9 December 2016, **Exh. R-106**
12 December 2016	Mineralogy wrote to the WA Government (Minister Marmion) to confirm that Mineralogy had not submitted any MCPs to the State and expressed the firm view that the State should not interfere with any commercial negotiations between the parties.	Letter from Mineralogy to Minister Marmion dated 12 December 2016, **Exh. R-107**
29 December 2016	The legal representatives acting for Mineralogy and Australasian Resources Limited (a part owner of International Minerals) wrote to the WA Government (State Solicitor's Office) stating that they had been trying to mitigate its losses in respect of the damages claim from the First BSIOP Arbitration and that both companies were considering their damages. The letter also confirmed that Mineralogy was waiting for the resolution of a dispute in the WA Supreme Court with CITIC subsidiaries before deciding if and what amount of damages claim it should pursue.	Letter from Mineralogy and International Minerals to State Solicitor dated 29 December 2016, **Exh. R-103**
21 January 2017	*The Australian* newspaper reported on an interlocutory application in the Royalties Litigation. The reporting noted Mineralogy had asserted in court that the decision not to sign off on the MCPs was not linked to the failure to pay royalties. The article also alleged that CITIC could be forced to shut down the Sino Iron mine if Mineralogy did not sign off on the MCP.	Paul Garvey, 'Palmer could close mine: Citic', *The Australian* (21 January 2017), **Exh. R-108**

Date	Fact	Relevant Evidence
23 January 2017	Mineralogy wrote to the CITIC Parties in reply to the CITIC Parties' draft MCPs of 9 December 2016, noting the CITIC Parties had not complied with the Mining Right and Site Lease Agreements. The WA Government was copied to this correspondence.	Letter from Mineralogy to CITIC Pacific Mining Management dated 23 January 2017, **Exh. R-109**
17 March 2017	Mr McGowan is sworn in as the Premier of WA following an election in WA.	Parliamentary Library of Western Australia, March 2017, "History Notes: Premiers of WA", p. 2, **Exh. R-188**
27 June 2017	*The Australian* again reported on the Royalties Litigation. The article asserted Mineralogy's refusal to sign off on the MCPs was based on the fact that no royalties were being paid, because without a royalty to motivate, Mineralogy "might not have any rational commercial incentive to expedite, accommodate [or] support any approvals" that the CITIC Parties might seek.	Paul Garvey, 'Palmer row pushes Citic to eye closure', *The Australian* (27 June 2017), **Exh. R-110**
29 June 2017	*The West Australian* newspaper reported that trust between the CITIC Parties and Mineralogy had broken down prior to signing off on the US$12 billion Sino Iron Project in the Pilbara and that the CITIC Parties feared that an adverse finding in the litigation could force it to suspend operations at the Sino Iron Mine.	Stuart McKinnon, 'Trust lacking before Sino deal', *The West Australian* (29 June 2017), **Exh. R-111**
16 August 2017	Premier McGowan wrote to Mineralogy and International Minerals in separate letters, recalling the Minister's decision of 22 July 2014 concerning the conditions precedent on the BSIOP Proposal, noting that as Mineralogy and International Minerals had failed to submit an amended proposal the WA Government, and accordingly notifying them that the WA Government was treating the BSIOP Proposal having lapsed.	Letter from Premier McGowan to Mineralogy dated 16 August 2017, **Exh. C-196**, p. 9375
29 August 2017	In a letter from CITIC to its shareholders, CITIC warned it may suspend operations at its Sino Iron Mine in WA if it could not resolve legal disputes with Mineralogy over royalty payments and land access. The Chairman said that Mineralogy's "uncooperative and adversarial approach posed a threat to the future of Sino Iron".	Letter from CITIC to shareholders dated 29 August 2017, **Exh. R-189**
24 November 2017	*Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 16]* [2017] WASC 340 relating to the Royalty Litigation was handed down, finding Sino Iron and Korean Steel collectively owed Mineralogy approximately $150,000,000.	*Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 16]* [2017] WASC 340, **Exh. CLA-5**
18 December 2017	CITIC Pacific Mining Management wrote to Mr Palmer (as Chairman of Mineralogy) requesting Mineralogy support the CITIC Parties' Revised MCPs and noting that unless the Proposals were approved, the CITIC Parties would be unable to achieve full capacity at the Sino Iron Mine and the mine would be unable to	Letter from CITIC Pacific Mining Management to Mineralogy (Director General of the Department of State Development copied) dated 18 December 2017, **Exh. R-112**; Mine Continuation Proposal for Sino Iron

Date	Fact	Relevant Evidence
	continue operating at all. The correspondence provided revised MCPs for Mineralogy's consideration. The correspondence was copied to the WA Government (Mr Wood as the Director General of the relevant Department).	Project dated December 2017, **Exh. R-113**; Mine Continuation Proposal for Korean Steel Project dated December 2017, **Exh. R-114**
21 December 2017	The WA Government (Mr Wood as the Director General of the relevant State Department) wrote to Mr Palmer (as Chairman of Mineralogy). The letter urged Mineralogy to consider submitting the MCPs to the WA Government and confirmed that the amended proposals now provided sufficient detail to meet requirements of the State Agreement.	Letter from Director General, Department of Jobs, Tourism, Science and Innovation to Mineralogy dated 21 December 2017, **Exh. R-190**
28 December 2017	Mineralogy wrote to Premier McGowan requesting a meeting with Premier McGowan to brief him on numerous matters in respect of Mineralogy projects in the Pilbara region.	Letter from Mineralogy to Premier McGowan dated 28 December 2017, **Exh. R-191**
29 December 2017	Mineralogy wrote to the WA Government (Mr Wood, as the Director General of the relevant Department) noting Mineralogy and Australasian Resources were still considering their position in respect of the arbitration award which was made in their favour. The letter also notes there has been no agreement with Sino Iron or Korean Steel in respect of any lands set out in the MCPs and that Mineralogy did not consent to their submissions as a Project Proposal under the State Agreement.	Letter from Mineralogy to Mr Stephen Wood, Acting Director General of WA Department of Jobs, Tourism, Science and Innovation dated 29 December 2017, **Exh. R-117**, p. 2
13 March 2018	Premier McGowan's Office emailed Mineralogy apologising for being unable to take a meeting with him.	Email from Office of Premier McGowan to Mineralogy dated 13 March 2018, **Exh. R-192**
2 July 2018	Mr Palmer (as a Director of Mineralogy and International Minerals) wrote to Premier McGowan asserting that Mineralogy and International Minerals were in a dispute with WA in connection with damages arising out of the First BSIOP Arbitration.	Letter from Mineralogy and International Minerals to Premier McGowan dated 2 July 2018, **Exh. C–184**, p. 5202
23 July 2018	Mineralogy wrote to the CITIC Parties asserting that the CITIC Parties' attempts to involve the WA Government in a commercial dispute were "deplorable".	Letter from Mineralogy to CITIC Pacific Mining Management dated 23 July 2018, **Exh. R-124**
27 July 2018	Premier McGowan responded to Mineralogy and International Minerals reiterating the position in the letter dated 17 June 2014 sent by the WA Government that it did not accept that there was a dispute over damages that could be referred to arbitration.	Letter from Premier McGowan to Mineralogy and International Minerals dated 27 July 2018, **Exh. R-118**
1 August 2018	Mineralogy and International Minerals wrote to Premier McGowan asserting that there had been no response to its letter dated 2 July 2018 (in fact, as later acknowledged the author had not yet seen the letter from the WA Government dated 27 July 2018). The letter also	Letter from Mineralogy and International Minerals to Premier McGowan dated 1 August 2018, **Exh. R-193**

Date	Fact	Relevant Evidence
	requests the State refer the dispute to arbitration and appoint Mr Finkelstein AC QC as arbitrator.	
2 August 2018	Mineralogy and International Minerals wrote Premier McGowan reiterating that there was a dispute between the parties and requesting that WA reconsider its position.	Letter from Mineralogy and International Minerals to Premier McGowan dated 2 August 2018, **Exh. R-119**
2 August 2018	Mineralogy and International Minerals commenced ARB 12/2018 in the Supreme Court of Western Australia, seeking to use section 11 of the Commercial Arbitration Act to appoint a retired judge to determine the dispute between the parties as to the defendant's liability to pay damages to Mineralogy and IM.	*Western Australia v Mineralogy Pty Ltd* [2020] WASC 58, para. 46, **Exh. CLA-8**, p. 15
6 August 2018	Mineralogy and International Minerals wrote to Premier McGowan asserting that there was a dispute between the parties in connection with WA's liability to pay damages to Mineralogy and International Minerals as a result of the Minister's failure to give a decision within 2 months after receipt of the project proposal for the BSIOP. This letter acts as a second Notice of Arbitration.	Letter from Mineralogy and International Minerals to Premier McGowan dated 6 August 2018, **Exh. R-120**
9 August 2018	The WA Government (State Solicitor's Office) wrote to Mineralogy acknowledging that there appeared to be two purported notices of dispute on foot and requested that if Mineralogy is successful in having an arbitrator appointed for the first dispute, it would withdraw the second notice of dispute.	Letter from State Solicitor's Office to Mineralogy dated 9 August 2018, **Exh. R-121**
9 August 2018	CITIC Pacific Mining Management wrote to Mineralogy (copied to the WA Government), seeking to resolve the MCP dispute. The letter invited Mineralogy to work constructively with the CITIC Parties and the WA Government.	Letter from CITIC Pacific Mining Management to Mineralogy dated 9 August 2018, **Exh. R-125**
13 August 2018	Mineralogy wrote to Premier McGowan noting WA should not be involved in Mineralogy's dispute with the CITIC Parties and may seek to mediate the dispute with the CITIC Parties. Mineralogy also requested a meeting to discuss the matter.	Letter from Mineralogy to Premier McGowan dated 13 August 2018, **Exh. R-194**
16 August 2018	Mineralogy and International Minerals wrote to the WA Government (State Solicitor's Office) stating that it served a valid Notice of Arbitration on 2 July 2018 and that if that notice was accepted, it would withdraw its notice of 6 August 2018.	Letter from Mineralogy and International Minerals to WA State Solicitor's Office dated 16 August 2018, **Exh. R-195**
24 August 2018	Mineralogy and International Minerals wrote to WA Government (State Solicitor's Office) proposing to adjourn ARB 12/2018 in the Supreme Court and apply to Mr McHugh for a directions hearing on the issue of damages arising out of the First BSIOP Arbitration.	Letter from Mineralogy and International Minerals to WA State Solicitor's Office dated 24 August 2018, **Exh. R-196**

Date	Fact	Relevant Evidence
24 August 2018	Mineralogy and International Minerals wrote to Mr McHugh (copied to the State Solicitor's Office) indicating that there was a dispute between WA and the companies about the liability to pay damages following the First McHugh Award, and asking Mr McHugh to determine whether he had jurisdiction to decide the issue.	Letter from Mineralogy and IM to Mr McHugh (State Solicitor copied) dated 24 August 2018, **Exh. R-122**
28 August 2018	The WA Government (State Solicitor's Office) wrote to Mineralogy agreeing to engage Mr McHugh as arbitrator and that Mr McHugh should determine whether the issue of damages was part of the 2014 award. WA noted that if the 2013 award was not final with respect to damages, Mineralogy ought not be allowed to reactivate that claim due to delay.	Letter from WA State Solicitor's Office to Mineralogy dated 28 August 2018, **Exh. R-123**
28 September 2018	CITIC Pacific Mining Management wrote directly to Premier McGowan (Mineralogy copied) unilaterally seeking a five year extension to the time for construction of the pellet plant under the Sino Iron Pellet Proposal, explaining that it had done everything in its power to obtain Mineralogy's consent.	Letter from CITIC Pacific Mining Management to Premier McGowan (Mineralogy copied) dated 28 September 2018, **Exh. R-126**
12 October 2018	Mineralogy wrote to Premier McGowan in response to CITIC Pacific Mining Management's letter of 28 September 2018 asserting that Mineralogy had offered to work with CITIC and that the CITIC Parties had breached the State Agreement. The letter also noted the ongoing litigation in the Supreme Court of WA.	Letter from Mineralogy to Premier McGowan (CITIC Pacific Mining Management copied) dated 12 October 2018, **Exh. R-127**
19 October 2018	The CITIC Parties commenced further proceedings in the Federal Court of Australia against Mineralogy seeking orders that Mineralogy submit the MCPs to the WA Government for approval under the State Agreement (the proceedings were later transferred to the Supreme Court of WA on 17 May 2019) ("**MCP litigation**"). WA was named as a Defendant to these proceedings because of its role in the State Agreement.	*Sino Iron Pty Ltd v Mineralogy Pty Ltd* [2019] FCA 675, para. 2, **Exh. R-128**
30 October 2018	Mineralogy and International Minerals wrote to the WA Government (State Solicitor's Office) concerning the hearing of the preliminary issues in the arbitration and setting out Mineralogy's position on the scope of the dispute as: 1. the issue of damages following Mr McHugh's first award; 2. the claim that the Minister breached the State agreement by his letter of 22 July 2014 purporting to impose conditions precedent and to defer consideration of the BSIOP Proposal; and 3. in the alternative, a claim pursuant to clause 7 of the State Agreement for arbitration of the	Letter from Mineralogy and International Minerals to State Solicitor's Office dated 30 October 2018, **Exh. C–412**, p. 4

Date	Fact	Relevant Evidence
	reasonableness of the Minister's decision of 22 July 2014.	
31 October 2018	Mr Palmer stated publicly (by use of his account on Twitter) "The problem is the Chinese don't want to pay for anything. They want the WA Government to take land for free from Australian companies and individuals despite the fact that there is a State Agreement in place #sovereignty #Australia".	Screenshot of Tweet by Mr Palmer posted on 31 October 2018, **Exh. R-129**
3 November 2018	*The West Australian* published an article noting comments from Premier McGowan urging Mr Palmer and Mineralogy to resolve the issue with CITIC. Comments made by the WA Premier foreshadowed the WA Government may consider amending the State Agreement unless there is a resolution. The WA Premier is quoted as saying "*I urge Mr Palmer to resolve the issues with CITIC as soon as possible to ensure CITIC can continue to operate. The State is considering its options*." The then leader of the opposition was also quoted as saying "… *it is important that the Government does all it can to sustain the project including altering the State Agreement*".	Ben Harvey, 'State set to protect Sino Iron' *The West Australian* (3 November 2018), **Exh. R-130**
5 November 2018	Mr Palmer on behalf of Mineralogy wrote to Premier McGowan directly enclosing the article of 3 November 2018. The letter restated Mineralogy's commitments to the project and requested a meeting with Premier McGowan.	Letter from Mineralogy to Premier McGowan dated 5 November 2018, **Exh. R-131**
6 November 2018	Mr Palmer on behalf of Mineralogy again wrote directly to Premier McGowan seeking an appointment with the Premier to discuss the project between Mineralogy and CITIC. Mineralogy specifically requested to be consulted on any potential changes to the State Agreement.	Letter from Mineralogy to Premier McGowan dated 6 November 2018, **Exh. R-132**
8 November 2018	The office of Premier McGowan sent an email to Mineralogy apologising for being unable to take a meeting with Mineralogy.	Email from Office of Premier McGowan to Mineralogy dated 8 November 2018, **Exh. R-197**
29 November 2018	Premier McGowan made the following comment in Question Time in the WA Parliament: *State agreements are an important instrument. They are a privileged instrument for the companies that are party to them, and by their very nature they are there to ensure the state's best interests are looked after, but there is a responsibility on the beneficiary, Mineralogy, to do the right thing. I noted the recent comments of the opposition leader and his offer to help the government do all he can to sustain the project including altering the state agreement. I thank the opposition leader for this commitment. It appears we are as one on this issue, which is good to know. I am pleased we both agree that*	WA, *Parliamentary Debates,* Legislative Assembly (29 November 2019), **Exh. R-158**, p. 3

Date	Fact	Relevant Evidence
	this issue needs to be resolved. Clive Palmer and Mineralogy are now on notice. At the end of the day, this government will do what is in the best interests of Western Australia and the 3 000 hardworking Australians who work in CITIC's operations.	
30 November 2018	Mineralogy wrote to Premier McGowan noting Mineralogy's concerns that the proposed WA Government action in relation to altering the State Agreement to allow approval of MCPs submitted by CITIC would "sterilise the prime tailing location for the remaining Balmoral North Project and greatly diminish its value to a prospective purchaser".	Letter from Mineralogy to Premier McGowan dated 30 November 2018, **Exh. R-134**
2 December 2018	*The Australian Financial Review* (a national newspaper) published an article noting in reference to the Premier's statement of 29 November 2018 that "Mr McGowan gave the strongest indication yet that his Labor government is willing to alter a state agreement covering the project to clear the way for expansion CITIC maintains is vital to the future of Sino Iron … Any attempt to change a state agreement, essentially a contract set out by an act of parliament, runs the risk of a protracted legal battle with Mr Palmer."	Brad Thompson, 'CITIC: Clive Palmer raises China security concern in letter to WA Premier', *The Australian Financial Review* (2 December 2018), available at https://www.afr.com/companies/citic-clive-palmer-raises-china-security-concern-in-letter-to-wa-premier-20181202-h18lvu (last accessed 11 December 2023), **Exh R-135**
2 December 2018	Mineralogy wrote to Premier McGowan noting that Mineralogy had "religiously complied" with the State Agreement and emphasised that the WA Government should not amend it. Mineralogy also raised the need for the involvement of the Foreign Review Investment Board ("**FIRB**") because Mineralogy considered what was being proposed involved the acquisition of new rights by CITIC.	Letter from Mineralogy to Premier McGowan dated 2 December 2018, **Exh. R-136**
3 December 2018	Mineralogy published the letter sent to Mr McGowan on 2 December in *The West Australian* newspaper.	Letter from Mineralogy to Premier McGowan dated 2 December 2018, published in *The West Australian* on 3 December 2018, **Exh. R-137**
14 December 2018	Mineralogy International Ltd ("**MIL**") registered in New Zealand.	New Zealand Companies Office, Company Extract for Mineralogy International Limited dated 25 July 2022, **Exh. C-99**
14 December 2018	The WA Government (State Solicitor's Office) wrote to Mineralogy and noted that Mineralogy and International Minerals now claimed to have three matters referred to Mr McHugh for arbitration. The WA Government agreed to Mr McHugh determining all of the claims, as well as a preliminary application by WA for the dismissal of those claims.	Letter from State Solicitor's Office to Mineralogy dated 14 December 2018, **Exh. C-413**
16 December 2018	MIL acquired 100% of the shares in Mineralogy in a share swap with the previous owners of Mineralogy.	Share Purchase Agreement dated 16 December 2018 (Exhibit 8 to Annexure A to Notice of Intent dated

Date	Fact	Relevant Evidence
		20 October 2022, cll 2.1, 2.3 and 3.1, **Exh. C-63**, p. 92
20 December 2018	Mineralogy and the WA Government refer the BSIOP dispute to Mr McHugh for a decision on three preliminary issues, including Mineralogy's right to recover damages arising from the 2014 Award and the reasonableness of the conditions imposed by the State on 22 July 2014.	*Western Australia v Mineralogy Pty Ltd* [2020] WASC 58, para. 51, **Exh. CLA-8**, p. 16
18 January 2019	MIL wrote to Premier McGowan and asserted that it "engages in substantive business operations in New Zealand and … has an active and continuous link with that country's economy", and that as such it was "entitled to the protections offered to investors under the [AANZFTA]". The letter refers to the Premier's comments suggesting a variation of the State Agreement.	Letter from MIL to Premier McGowan dated 18 January 2019, **Exh. R-44**, p. 2
18 January 2019	MIL sent a copy of its letter to Premier McGowan to Angus Taylor MP (the Federal Minister for Energy).	Letter from Mineralogy to the Minister for Energy in the Commonwealth Government dated 18 January 2019, **Exh. R-45**
19 January 2019	MIL sent a further letter to Premier McGowan which stated that MIL was entitled to the protections of the Investment Protocol to the Australia-New Zealand Closer Economic Relations Trade Agreement. The letter was otherwise in identical terms to the letter dated 18 January 2019.	Letter from MIL to Premier McGowan dated 19 January 2019, **Exh. R-139**, p. 2
21 January 2019	Zeph was incorporated in Singapore under the name of Mineralogy International Pte Ltd ("**MIPL**"). The relevant corporate filings indicated that its "primary activity" is "other holding companies" and that it does not have an "secondary activity".	Company Constitution of MIPL, p. 39, **Exh. R-198**; MIPL's (Zeph's) Application for New Company Name lodged on 21 January 2019, **Exh. R-47**
22 January 2019	*The Australian* newspaper reported the following statements made by Mr Palmer: "Mr Palmer said the move offshore meant Mineralogy would be able to claim compensation from the Australian government under the investor protection provisions of the Australia-NZ free-trade agreement. He vowed to launch a damages claim if West Australian Premier Mark McGowan carries through with his threat to legislate in favour of Chinese giant CITIC's interests in the $US10bn Sino Iron project in the Pilbara."	Andrew Burrell, 'Kiwi Flight: Palmer 'to make Australia great' from NZ', *The Australian* (22 January 2019), **Exh. R-46**
23 January 2019	*The West Australian* newspaper reported the letter of 19 January to Premier McGowan noting that "documents relating to free-trade deals with New Zealand, on the	Nick Evans, 'Palmer's NZ move looks like a flop', *The West Australian* (23 January 2019), **Exh. R-140**

Date	Fact	Relevant Evidence
	Department of Foreign Affairs website, suggest Mr Palmer would be banned from launching [an ISDS] action."	
23 January 2019	Clive Palmer was appointed a director of MIPL (Zeph). With this appointment, the directors of MIPL (Zeph) at this point were Chitondo Mashayanyika, Tan Cher Wee aka Chen Zhiwei, and Clive Palmer. [redacted], and [redacted], both of Allen and Gledhill (Sinaporean law firm), appointed company secretaries of Zeph.	ACRA Change in Company Information - Mineralogy International Pte. Ltd. lodged 24 January 2019 (dated 31 August 2020), **Exh. R-199**
29 January 2019	MIPL (Zeph) and MIL entered into a share purchase agreement whereby MIPL (Zeph) acquired from MIL all of the shares in Mineralogy. As consideration, MIPL (Zeph) issued an identical number of shares to MIL. Completion takes place on 29 January 2019. As part of the necessary resolutions, the directors of MIPL (Zeph) resolve that MIPL (Zeph) has not carried on any business since its incorporation. MIPL (Zeph) Directors met and the minutes record that MIPL (Zeph) had "*no assets and liabilities other than share capital of 1 full paid ordinary share of SGD$1 held by the initial member"*, and as part of a corporate restructure, MIPL (Zeph) acquired 100% of the shares in Mineralogy.	Share Purchase Agreement between MIL and MIPL (Zeph) (Exhibit 20 to Annexure A to Notice of Intent dated 20 October 2022), **Exh. C-63**, p. 168; MIPL Resolution of Directors dated 29 January 2019 (Exhibit 17 to Annexure A to Notice of Intent dated 20 October 2022, **Exh. C-63**, p. 163; MIPL minutes of directors meeting on 29 January 2019 (Exhibit 16 to Annexure A to Notice of Intent 20 October 2022, **Exh. C-63**, p. 158
31 January 2019	MIPL (Zeph) changed its primary activity to "building and repairing of ships, tankers and other ocean-going vessels (including conversion of ships into off-shore structures)".	ACRA Change in Company Information - Mineralogy International Pte. Ltd. lodged 31 January 2019 (dated 31 August 2020), **Exh. R-200**, p. 3
31 January 2019	MIPL (Zeph) acquired all of the shares in GCS Engineering Services Pte Ltd, Visco Engineering Pte Ltd and Visco Offshore Engineering Pte Ltd ("**the Engineering Companies**").	Notice of transfer of shares in GCS Engineering Service dated 14 February 2019, **Exh. R-201**; Notice of transfer of shares in Visco Offshore Engineering dated 14 February 2019, **Exh. R-202**; Notice of transfer of shares in Visco Engineering dated 14 February 2019, **Exh. R-203**
4 February 2019	Loh Wai Chan was appointed as Director of MIPL (Zeph)	Business profile for Zeph Investments Pte Ltd dated 31 August 2020, **Exh. R-204**
4 February 2019	MIL wrote to Premier McGowan, noting that MIL's interest in Mineralogy was held by the Claimant (MIPL), which (it alleged) engaged in substantive business operations in Singapore. The letter then suggested that MIPL was entitled to the protections of SAFTA.	Letter from MIL to Premier McGowan dated 4 February 2019, **Exh. R-141**

Date	Fact	Relevant Evidence
13 February 2019	"*The Australian*" newspaper reported that in December Clive Palmer had "moved control of much of his business empire" to New Zealand "in the hope that it could allow him to potentially claim compensation from the federal government under investor protections of the Australia-NZ free-trade agreement" but that this "move was short-lived" as that treaty did not provide for investor-State arbitration and that Mr Palmer had "shift[ed] his corporate headquarters from New Zealand to Singapore, as he seeks to revive his threat to sue Australian taxpayers for $45 billion".	Andrew Burrell, 'Palmer shifts HQ from NZ to Singapore', *The Australian,* (13 February 2019), **Exh. R-142**
13 February 2019	[redacted] was appointed as CEO of MIPL (Zeph).	Notice of Appointment of Company Officers for MIPL (Zeph) dated 31 August 2020, **Exh. R-205**
28 February 2019	Clive Palmer became the CEO of MIPL (Zeph), replacing [redacted] Declan Sheridan and Emily Palmer were appointed as directors of MIPL (Zeph). At this point the directors are now Chitondo Mashayanyika, Tan Cher Wee aka Chen Zhiwei, Clive Palmer, Emily Palmer and Declan Sheridan. Chitondo Mashayanyika, Declan Sheridan and Emily Palmer were appointed directors of GCS Engineering Service Pte Ltd, Visco Engineering Pte Ltd, and Visco Offshore Engineering Pte Ltd. Chin Bay Goh remained the other director of those entities.	ACRA Notice of Change in Company Information - Mineralogy International Pte. Ltd. lodged 8 March 2019, **Exh. R-206**; Register of Directors of GCS Engineering Service Pte Ltd dated 2 September 2020, **Exh. R-207**; Register of Directors of Visco Offshore Engineering Pte Ltd dated 2 September 2020, **Exh. R-208**; Register of Directors of Visco Engineering Pte Ltd dated 2 September 2020, **Exh. R-209**
8 May 2019	Premier McGowan allegedly makes comments outside of Parliament that are subsequently published in "*The Canberra Times*" to the effect that Mr Palmer is the "greediest man in Australia".	*The Canberra Times*, 8 May 2019, "WA premier, Palmer war over mining project", **Exh. C-172**, p. 1025
14 May 2019	Mineralogy wrote to Premier McGowan, objecting to his comments about Mr Palmer and noting that the WA should not interfere in a dispute between Mineralogy and CITIC.	Letter from Mineralogy to Minister for Housing, Veterans Affairs, Youth and Asian Engagement enclosing letter from Mineralogy to Premier McGowan dated 14 May 2019, **Exh. R-161**, p. 4
15 May 2019	Mineralogy wrote to Premier McGowan with the reference "Mineralogy State Agreement" and expressly stated its position that "The Western Australian Parliament does not have the power to change our company's rights which are protected by our parent company['s] investment in Mineralogy under the relevant Free Trade Agreement".	Letter from Mineralogy to Premier McGowan dated 15 May 2019, **Exh. R-143**, p. 4
17 May 2019	The MCP Litigation is transferred to the Western Australian Supreme Court.	*Sino Iron Pty Ltd v Mineralogy Pty Ltd* [2019] FCA 675, **Exh. R-128**, p. 2

Date	Fact	Relevant Evidence
20 May 2019	MIPL (Zeph) wrote to Premier McGowan, noting that Mineralogy's involvement was required to submit a Project Proposal relating to the MCPs and warning that "the result" (presumably of any unilateral amendment to the State Agreement) would be arbitration under existing Free Trade Agreements.	Letter from MIPL to Premier McGowan dated 20 May 2019, **Exh. R-144**, p. 2
21 May 2019	The Western Australian Court of Appeal handed down the decision in the Royalty Litigation. The decision largely upholds the judgment at first instance ([2017] WASC 340).	*Sino Iron Pty Ltd v Mineralogy Pty Ltd* [2019] WASCA 80, **Exh. CLA-6**
10 June 2019	Mineralogy wrote to the Premier McGowan, following up letter of 20 May 2019.	Letter from Alexander Law to Premier McGowan dated 10 June 2019, **Exh. R-211**, p. 3
1 July 2019	Chin Bay Goh resigned as director of GCS Engineering Service Pte Ltd, Visco Engineering Pte Ltd and Visco Offshore Engineering Pte Ltd Nadar Rajesh and Kamalaveni d/o Allagappan were appointed as directors of each of these entities. Emily Palmer, Declan Sheridan and Chitondo Mashayankyika are (and remain) the other directors of these entities.	Register of Directors of GCS Engineering Service dated 2 September 2020, **Exh. R-212**; Register of Directors of Visco Offshore Engineering dated 2 September 2020, **Exh. R-213**; Register of Directors of Visco Engineering dated 2 September 2020, **Exh. R-214**
21 August 2019	PWC, on behalf of Mineralogy, wrote to the WA Office of State Revenue in relation to changes to the Mineralogy Group structure. The letter notes the restructure is designed to "protect its existing assets from risks and exposures arising in Australia or elsewhere".	Letter from PricewaterhouseCoopers to WA Commissioner of State Revenue dated 21 August 2019 (Exhibit 23 to Annexure A to Notice of Intent dated 20 October 2022, Annexure 1C to Amended Notice of Arbitration), **Exh. C-63**, p. 211
27 August 2019	PWC, on behalf of Mineralogy, wrote to the QLD Office of State Revenue in relation to changes to the Mineralogy Group structure. The letter notes the restructure is designed to "protect its existing assets from risks and exposures arising in Australia or elsewhere".	Letter from PricewaterhouseCoopers to Queensland Commissioner of State Revenue dated 27 August 2019 (Exhibit 22 to Annexure A to Notice of Intent dated 20 October 2022), **Exh. C-63**, p. 182
11 October 2019	Mineralogy acquires the remaining 50% of International Minerals that it did not already own.	Mineralogy Group Restructure – December 2018/January 2019 (Annexure A to Notice of Intent dated 20 October 2022), **Exh. C-63**, p. 41
11 October 2019	The "**Second McHugh Award**" is issued and finds that Mineralogy and International Minerals were entitled to recover damages in relation to the First McHugh Award and to pursue their claims regarding the conditions precedent imposed by the State on the BSIOP Proposal in July 2014.	Second McHugh Award, **Exh. C-443**

Date	Fact	Relevant Evidence
15 October 2019	Mineralogy wrote to the WA Government (the Attorney-General) referring to the Second McHugh Award and noting that "both [Mineralogy International Pte Ltd] and Mineralogy and [International Minerals] are concerned that the State does not act in any way which would affect their rights to pursue their claim for damages as set out in the Award". The letter specifically invokes the protections of SAFTA.	Letter from Mineralogy to WA Attorney-General dated 15 October 2019, **Exh. R-145**
15 October 2019	An identical letter to the above is sent to the WA Solicitor-General.	Letter from Mineralogy to WA Solicitor-General dated 15 October 2019, **Exh. R-216**
21 October 2019	Mr Palmer was appointed as a director of MIL. The Directors of MIL are now Emily Palmer, Declan Sheridan, Chitondo Mashayanyika and Clive Palmer.	New Zealand Companies Office, Register of Directors for MIL dated 15 July 2020, **Exh. R-215**
31 October 2019	The WA Government sought to appeal the Second McHugh Award in the Supreme Court of Western Australia.	*Western Australia v Mineralogy Pty Ltd* [2020] WASC 58, para. 3, **Exh. CLA-8**, p. 3
25 November 2019	Mineralogy again wrote to Premier McGowan, invoking the protections of SAFTA.	Letter from Mineralogy to Premier McGowan dated 25 November 2019, **Exh. R-162**
25 November 2019	Mr Palmer (as Director of Mineralogy Pty Ltd and International Minerals) wrote to Mr McHugh stating it considers that Mr McHugh has been appointed to arbitrate the damages claim and requests proceeding expeditiously.	Letter from Mineralogy and International Minerals to Mr McHugh dated 25 November 2019, **Exh. C-287**
3 December 2019	Mineralogy International Pte Ltd changes its name to Zeph Investments Pte Ltd ("**Zeph")**.	Change in Company Information for MIPL dated 3 December 2019, **Exh. R-217**
4 December 2019	WA Government sought to have the Second McHugh Award set aside in the Supreme Court of Western Australia (although this application was later discontinued).	Originating summons to set aside award in ARB 9 of 2019 dated 4 December 2019, **Exh. C-415**
14 January 2020	Emily Palmer and Declan Sheridan resigned as directors of GCS Engineering Service Pte Ltd, Visco Engineering Pte Ltd, and Visco Offshore Engineering Pte Ltd (the Singaporean subsidiaries of Zeph) At this point, the directors of each of these entities were Chitondo Mashayanyika, Nadar Rajesh, and Kamalaveni d/o Allagappan	Register of Directors for GCS Engineering Service dated 2 September 2020, **Exh. R-218**; Register of Directors for Visco Offshore Engineering dated 2 September 2020, **Exh. R-219**; Register of Directors for Visco Engineering dated 2 September 2020, **Exh. R-220**
24 January 2020	Zeph entered into a Joint Venture Agreement with Kleen Venture and One Kleenmatic ("**the Kleenmatic Companies**").	Joint Venture Agreement dated 24 January 2020, **Exh. C-469**

Date	Fact	Relevant Evidence
4 February 2020	Loh Wai Chan, owner of Kleenmatic, was appointed director of Zeph.	ACRA Change in Company Information – Zeph Investments Pte. Ltd. lodged 13 July 2020, **Exh. R-221**
7 February 2020	Zeph changed its primary activity to "Manpower contract services (excluding IT manpower)". Its former primary activity of "Building and repairing of ships, tankers and other ocean-going vessels (including conversion of ships into off-shore structures)" becomes its secondary activity.	Notice of Change in Company Information for Zeph Investments dated 31 August 2020, **Exh. R-222**, p. 3
28 February 2020	Judgment was delivered in *State of Western Australia v Mineralogy Pty Ltd* [2020] WASC 58 denying WA's application for leave to appeal the Second McHugh award.	*State of Western Australia v Mineralogy Pty Ltd* [2020] WASC 58, **Exh. CLA-8**
2 March 2020	Mashayanyika was appointed as director of Kleen Venture and One Kleenmatic.	Annual Return for Kleen Venture Pte Ltd dated 28 January 2021, **Exh. R-223**; Annual Return for One Kleenmatic Pte Ltd dated 28 January 2021, **Exh. R-224**
14 May 2020	Mineralogy and International Minerals wrote to the WA Government (State Solicitor's Office) concerning programming of arbitration, but noting that accrual of interest on damages is $100 million per month.	Letter from Mineralogy and International Minerals to WA State Solicitor's Office dated 14 May 2020, **Exh. C-341**
16 June 2020	Mineralogy and International Minerals wrote to the WA Government (State Solicitor's Office) criticising WA's conduct in respect of Mineralogy and IM's arbitral claims.	Letter from Mineralogy and International Minerals to WA State Solicitor's Office dated 16 June 2020, **Exh. C-351**, p. 10854
22 June 2020	Quek Ser Wah Victor was appointed as Director of Zeph.	Notice of Appointment or Cessation of Company Officers for Zeph Investments dated 31 August 2020, **Exh. R-225**
26 June 2020	Mr McHugh set a date for hearing of the damages claim commencing on 30 November 2020.	Minute of directions in arbitration between Mineralogy, International Minerals and WA dated 26 June 2020, **Exh. C-63**, p. 515
29 June 2020	Tan Cher Wee resigned as director of Zeph.	ACRA Change in Company Information – Zeph Investments Pte. Ltd. lodged 13 July 2020, **Exh. R-221**
8 July 2020	The parties and Mr McHugh entered into an arbitration agreement.	Arbitration agreement between Mineralogy, International Minerals, WA and Mr McHugh dated 6 July 2020 (Annexure to Notice of Intent to Submit Dispute to Arbitration), **Exh. C-63**, pp. 488, 494

Date	Fact	Relevant Evidence
13 August 2020	The WA Parliament enacted the Amendment Act.	*Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Act 2020*, **Exh. C-1**
14 August 2020	Letter from WA Government (State Solicitor's Office) to Mr McHugh informing him the (third) arbitration proceedings had been terminated.	Letter from Tania Jeyamohan, Senior Assistant State Solicitor of WA to Mr McHugh dated 14 August 2020, **Exh. C-404**
31 August 2020	Letter from Premier McGowan to the Prime Minister of Australia noting that Mineralogy had foreshadowed in the media and in correspondence that they intend the commence an ISDS claim under the SAFTA.	Letter from Premier McGowan to Prime Minister Scott Morrison dated 31 August 2020, **Exh. R-226**
12 October 2020	Liquidators were appointed to the Engineering Companies.	Notice of Appointment of a Liquidator for GSC Engineering Service Pte Ltd dated 12 October 2020, **Exh. R-75**; Notice of Appointment of Liquidator for Visco Offshore Engineering Pte Ltd dated 12 October 2020, **Exh. R-82**; Notice of Appointment of Liquidator for Visco Engineering Pte Ltd dated 12 October 2020, **Exh. R-78**
14 October 2020	Zeph gave notice of a dispute to Australia and sent a Written Request for consultations under Chapter 11 of AANZFTA.	Letter from Volterra Fietta to the Minister of Foreign Affairs dated 14 October 2020, **Exh. C-148**
14 October 2020	Zeph gave notice of a dispute to Australia and sent a Written Request for consultations under Chapter 8 of SAFTA.	Letter from Volterra Fietta to the Minister of Foreign Affairs dated 14 October 2020, **Exh. R-148**
14 October 2020	Zeph gave notice of a dispute to Australia and sent a Written Request for consultations under Article 9.18 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("**CPTPP**").	Letter from Volterra Fietta to the Australian Minister for Foreign Affairs and Trade dated 14 October 2020 (Raising a dispute under CPTPP), **Exh. R-147**
21 December 2020	A consultation meeting was held between representatives of the Claimant and the Respondent.	Email from the Office of International Law of the Attorney-General's Department of Australia to Volterra Fietta dated 18 December 2020, **Exh. C-152**
22 December 2020	The Respondent provided notice to Zeph of its intention to deny the benefits of AANZFTA, SAFTA and CPTPP to Zeph.	Letter from the Office of International Law of the Attorney-General's Department of Australia to Volterra Fietta dated 22 December 2020, **Exh. C-153**
22 December 2020	The Commonwealth provided notice to the Government of Singapore of its intention to deny benefits of AANZFTA, SAFTA and CPTPP to Zeph.	Letter from the Office of International Law of the Attorney-General's Department of Australia to the Ministry of Trade and Industry of

Date	Fact	Relevant Evidence
		Singapore dated 22 December 2020, **Exh. R-149**
24 June 2021	Australia denied the benefits of AANZFTA to Zeph.	Letter from the Office of International Law of the Attorney-General's Department of Australia to Volterra Fietta (Denial of Benefits) dated 24 June 2021, **Exh. C-155**
4 August 2022	Zeph acquired the Kleenmatic Companies.	One Kleenmatic Pte Ltd financial statements for year ended 30 June 2021, **Exh. R-89**, p. 54; Kleen Venture Pte Ltd financial statements for year ended 30 June 2021, **Exh. R-90**, p. 42; Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2022, **Exh. C-86**, p. 38; Consolidated financial reports for MIL for the year ended 30 June 2022, **Exh. C-103**, p. 38
20 October 2022	Zeph provided Australia with its Notice of Intent with respect to a dispute under AANZFTA.	Notice of Intent dated 20 October 2022, **Exh. C-63**
28 December 2022	The Engineering Companies were deregistered.	Business profile for GCS Engineering Service Pte Ltd dated 26 October 2023, **Exh. R-84**; Business profile for Visco Engineering Pte Ltd dated 26 October 2023, **Exh. R-85**; Business profile for Visco Offshore Engineering Pte Ltd dated 26 October 2023, **Exh. R-86**
7 March 2023	*Sino Iron Pty Ltd v Mineralogy Pty Ltd [No 15]* [2023] WASC 56 handed down, relating to (i) orders compelling Mineralogy to submit a MCP, grant further necessary tenure, take steps to secure the re-purposing of leases and submit a program of work and (ii) damages for its failure to do so.	*Sino Iron Pty Ltd v Mineralogy Pty Ltd [No 15]* [2023] WASC 56, **Exh. CLA-70**
29 March 2023	Zeph submits a claim to arbitration under Chapter 11 of AANZFTA.	Notice of Arbitration (unamended) dated 28 March 2023 (served on 29 March 2023)

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

ZEPH INVESTMENTS PTE LTD
Claimant

and

THE COMMONWEALTH OF AUSTRALIA
Respondent

AUSTRALIA'S STATEMENT ON

PRELIMINARY OBJECTIONS

ANNEXURE B – CORPORATE STRUCTURE DIAGRAM

Jesse Clarke
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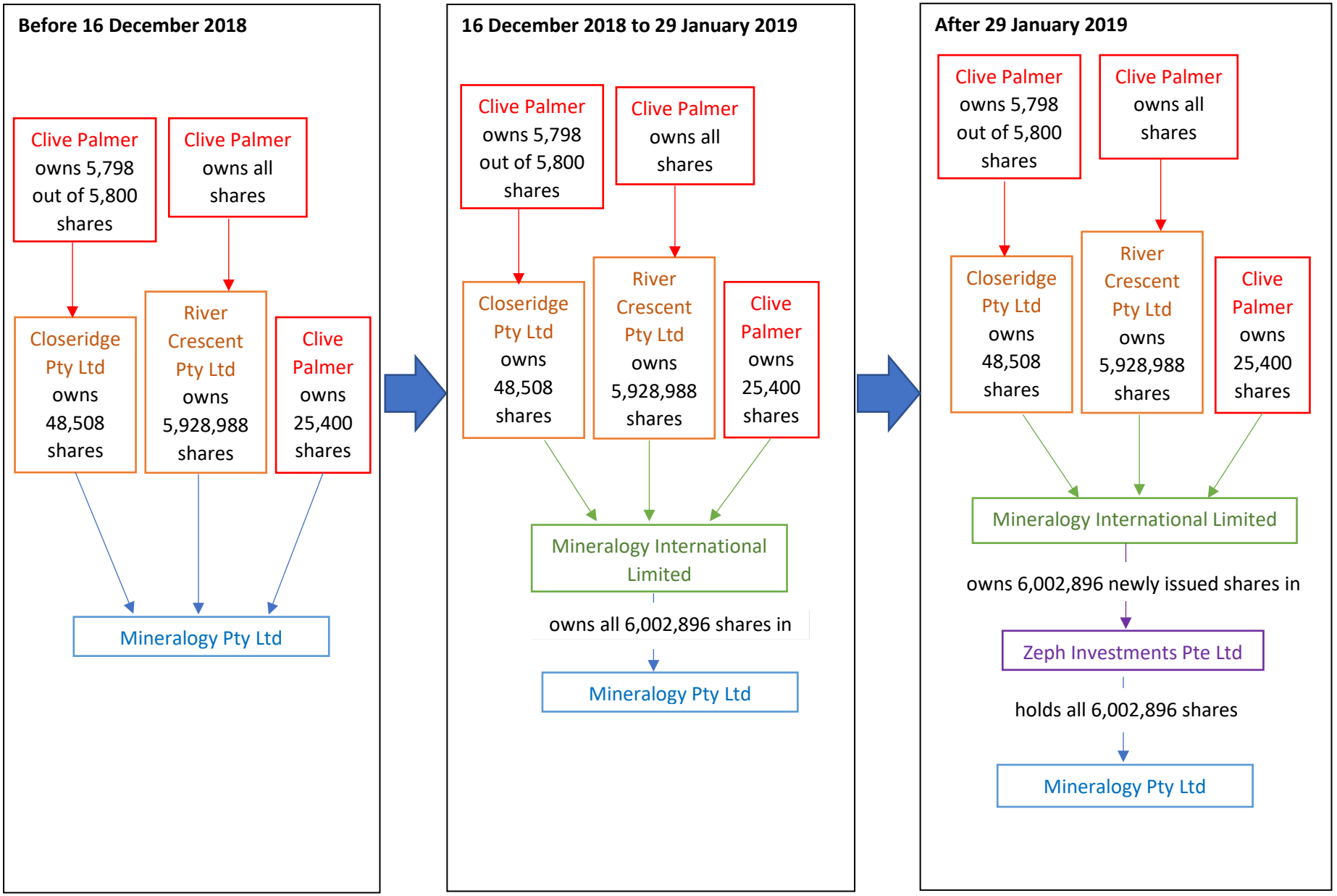
Before 16 December 2018
Clive Palmer owns 5,798 out of 5,800 shares
Clive Palmer owns all shares
Closeridge Pty Ltd owns 48,508 shares
River Crescent Pty Ltd owns 5,928,988 shares
Clive Palmer owns 25,400 shares
Mineralogy Pty Ltd
16 December 2018 to 29 January 2019
Clive Palmer owns 5,798 out of 5,800 shares
Clive Palmer owns all shares
Closeridge Pty Ltd owns 48,508 shares
River Crescent Pty Ltd owns 5,928,988 shares
Clive Palmer owns 25,400 shares
Mineralogy International Limited
owns all 6,002,896 shares in
Mineralogy Pty Ltd
After 29 January 2019
Clive Palmer owns 5,798 out of 5,800 shares
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Zeph Investments Pte Ltd
holds all 6,002,896 shares
Mineralogy Pty Ltd