IN THE MATTER OF AN ARBITRATION UNDER THE 2021 RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW and THE ASEAN-AUSTRALIA-NEW ZEALAND FREE TRADE AGREEMENT

(PCA Case No. 2023-40)

ZEPH INVESTMENTS PTE LIMITED

CLAIMANT

v

THE COMMONWEALTH OF AUSTRALIA

RESPONDENT

CLAIMANT'S RESPONSE TO RESPONDENT'S STATEMENT ON PRELIMINARY OBJECTIONS

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14 MARCH 2024

Tribunal:

Prof. Gabrielle Kaufmann-Kohler

Mr William Kirtley

Prof. Donald McRae

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

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SECTION I: PREAMBLE

A. Preliminary Objections

1. On 22 January 2024 the Respondent filed a Statement on Preliminary Objections ("**Objections**" or "**SoPo**") 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[1].

2. There is much to respond to in the SoPo. But a number of preliminary observations are warranted at the outset.

3. First, the SoPo provides an extensive, but ultimately self-serving and selective account of the factual background. The Respondent provides much irrelevant factual detail, but in respect of the decisive and central internationally wrongful conduct – the passage of the *Amendment Act* and the expropriation of the rights arising under the Arbitration Agreement – the Respondent's Objections are deafeningly silent. There is no detail of the how, or why the *Amendment Act* was prepared, procured, and passed through Parliament. The omission is telling.

4. The detail of the circumstances in which the *Amendment Act* was prepared – privately and secretively at the direction of only two members of the Western Australian Cabinet – is fatal to the Respondent's argument on abuse of process. It demonstrates that the facts of this particular dispute, and the internationally wrongful conduct at the heart of the dispute could never have been foreseeable to the Claimant. The preparation of the *Amendment Act* was designed to be hidden from the Claimant.

5. Second, the Claimant has detailed factual answers to the investor/investment objections, and the denial of benefits which clearly defeat any objection. But it may

1 Email from the Tribunal, PCA Case No. 2023-40 dated 12 December 2023 (CET Time), (**Exh. C-527**).

be that the tribunal can dispose of those arguments on threshold issues on the basis of the Respondent's impermissible inconsistency between the positions earlier adopted in relation to the Claimant and the positions now adopted for forensic advantage in the present proceedings.

6. That is to say, as set out in Section II of this Response, the Respondent will have acquiesced in, or be estopped from denying, the foreign status of the Claimant as a Singapore based company and investor in Australia. The Respondent ought not be permitted to have enjoyed the benefits of treating the Claimant as a foreign entity for the purpose of its taxation and other regulatory laws, but then in this arbitration seek to avoid the burden that arises from the Claimant's status as a Singapore based investor that acquired an investment in Australia and the enjoyment of the relevant protection under the AANZFTA.

7. The Respondent as demonstrated below had acquiesced to the Claimant having protection under the AANZFTA well before the time that the dispute had arisen and subsequently unlawfully sought to deny benefits.

B. Definitions

8. The Claimant's response to the Objections ("**Response**") is set out herein. In this Response, defined terms and abbreviations have the same meanings as set out in the Claimant's Notice of Arbitration dated 28 March 2023 ("**NOA**") (which incorporates the Claimant's Notice of Intent by reference),

<u>other than</u>

a. **"Amendment Act"** which means the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act* 2020 (WA);

b. **"Arbitration Agreement"** which means the 2020 Arbitration Agreement entered into between the State of Western Australia, the Hon. Michael

McHugh AC, KC and Mineralogy Pty Ltd ("**Mineralogy**") and International Minerals Pty Ltd ("**International Minerals**") dated 8 July 2020[2];

c. **"ASIC"** which means the Australian Securities and Investments Commission;

d. **"ATO"** which means the Australian Taxation Office;

e. **"Mediation Agreement**" which means the Mediation Agreement signed by The State of Western Australia on 6 August 2020 the Hon. Wayne Martin AC KC (as the Mediator) and Mineralogy and International Minerals on 5 August 2020[3];

f. **"Objections"** or "**SoPo**" which means the Respondent's Objections;

g. **"State Agreement Arbitration"** which means arbitration to determine the BSIOP dispute that was being determined by the Hon. Michael McHugh AC KC in accordance with the arbitration under the State Agreement; and

h. "**State Agreement Arbitration**" which means the domestic arbitration to determine liability and damages in relation to the BSIOP dispute (the three domestic arbitrations that form part of that overall dispute are referred to as the First, Second and Third State Agreement Arbitrations).

C. Reason for Arbitration

9. It is crucial to bear in mind at the very outset that the reason and basis for this Arbitration (and jurisdictional hearing) is the Respondent's conduct in August 2020. In particular, having executed the Arbitration Agreement in July 2020 and the Mediation Agreement on 5 August 2020 with Mineralogy and International Minerals, the Respondent then proceeded to enact, almost overnight, the *Amendment Act* which it had prepared in secret. That served, *inter alia*, to terminate the Arbitration Agreement and the Mediation Agreement and the State Agreement Arbitration

2 Arbitration Agreement dated 8 July 2020, (**Exh. C-266**).
3 Mediation Agreement counter-signed by the Mediator on 6 August 2020, (**Exh. C-273**).

which the Respondent had just entered into one month earlier. It is the wholly unforeseeable destruction of valuable rights occasioned by that conduct of the Respondent in August 2020 which has given rise to this Arbitration and jurisdictional hearing.

10. It is therefore striking that the Respondent has now sought to shift focus to a range of other historical facts and matters. However, those facts and matters are irrelevant and should be disregarded as a transparent, abusive and misconceived attempt to ground the dispute in events which predate the incorporation of the Claimant contrary to the terms of the NOA.

11. In a similar vein, the Claimant in these proceedings is Zeph Investments Pte Ltd, a Singapore company incorporated in Singapore on 21 January 2019 ("**Zeph"** or the **"Claimant"**) and not Mr Clive Frederick Palmer ("**Mr Palmer**"), who is only one of seven directors of the Claimant. Again, the attempt to focus on Mr Palmer – not least through ongoing (and scurrilous) personal attacks and insinuations in the SoPo should be given short shrift by the Tribunal. Those attacks and insinuations are simply not relevant to this case – which turns on the Respondent's extra-ordinary misconduct in August 2020, long after Zeph was incorporated in January 2019, and the rights of the Claimant under Chapter 11 of AANZFTA - and constitute nothing more than an unnecessary distraction from the real issues at hand**.** Indeed, they serve only to exacerbate the wrongful conduct of 2020 which has given rise to this dispute.

D. Evidence

12. In this Response, the Claimant relies on the NOA and the witness statements made by the Claimant in these proceedings, in particular:

    a. Witness Statement of [redacted] dated 13 January 2023 (Annexure 3C to the Amended NOA) ("[redacted] **WS**"),

    b. Witness Statement of [redacted] dated 22 March 2023 (Annexure 2C to the Amended NOA) ("[redacted] **WS**"),

c. Witness Statement of [redacted] dated 4 March 2024 ("[redacted] **WS**"),

d. Witness Statement of [redacted] dated 14 March 2024 ("[redacted] **WS**"),

e. Witness Statement of [redacted] dated 15 February 2024 ("[redacted] **WS**"), and

f. Annexure A of the NOI[4].

in responding to the Respondent's Objections**.**

E. Structure

13. This Response is structured as follows:

a. In **Section I (Preamble)**, the Claimant explains the structure of this Response, including by introducing some important additional evidence to be considered alongside the evidence already filed with the Notice of Arbitration. Section I also sets out some key points for the Tribunal to bear in mind when reading the Claimant's Response;

b. In **Section II (Estoppel)**, the Claimant addresses the conduct of the Respondent since early 2019 in approving the Claimant as a foreign investor in its jurisdiction and admitting the Claimant's investment, which conduct gives rise to an estoppel;

c. In **Section III (The Dispute)**, the Claimant outlines the nature of the dispute between the Parties. This is the dispute over which the Tribunal has jurisdiction to hear as set out in the Claimant's NOA;

d. In **Section IV (Investor / Investment)**, the Claimant demonstrates that it is an "investor" and has "investments", for the purposes of Articles 2(c) and 2(d) of Chapter 11 of AANZFTA, and is therefore entitled to the protection of Chapter 11 of AANZFTA;

4 NOI, Annexure A, **Exh. C-63**.

e. In **Section V (Denial of Benefits)**, the Claimant demonstrates that it is entitled to the benefits of Chapter 11 of AANZFTA and that there is no basis upon which such benefits can be denied by the Respondent;

f. In **Section VI (Abuse of Process)**, the Claimant demonstrates that there has been no abuse of process via the corporate restructuring that resulted in the Claimant acquiring its covered investments under Chapter 11 of AANZFTA (or otherwise);

g. In **Section VII (Conclusion)**, the Claimant demonstrates that its claims are within the jurisdiction conferred by the AANZFTA and/or are admissible because they comply with the AANZFTA; and

h. In **Section VIII (Relief)**, the Claimant sets out its request for relief in relation to the Respondent's Objections in this jurisdictional hearing.

F. Executive Summary

14. This section provides a summary of the main points in this Response and is provided for the Tribunal's ease of reference, without in any way limiting the detailed submissions below.

15. As a preliminary point, it is important to take into account the fact that the Respondent's Objections are made in the context of the *Amendment Act*: an unprecedented and extraordinary piece of legislation when viewed in the context of Australian history. It is also unique when viewed in the broader parameters of the approach to rule of law and proper conduct of Governments in western democracies going back at least to the Second World War. In short, there has never been a measure like it in any Western democracy anywhere in the world for at least the last 80 years – a fact which underscores the inherent and fundamental flaws in the Respondent's arguments about foreseeability and abuse of process. Further, the fact that the *Amendment Act* runs roughshod over the rule of law means that, if adopted by other states, there would be a genuine threat to the fundamentals of the circa. US

$32 trillion of annual world trade[5]. The importance of the dispute being heard and determined by the Tribunal, therefore, cannot be underestimated.

16. Without prejudice to those overarching remarks, the Claimant's position is that the Respondent's Objections are in any event ill-founded and wholly unmeritorious. The Claimant sets out its position below, explaining its entitlement to protection under the terms of AANZFTA, and explaining why each of the four grounds on which the Respondent relies in asserting that the Tribunal lacks jurisdiction in this case, and/or that the Claimant's claims are inadmissible, cannot withstand scrutiny.

17. *First*, the Respondent argues that the Claimant 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.[6] This argument should be rejected because:

    a. The evidence plainly shows that the Claimant has "made an investment" within the meaning of that provision, including in the particular ways mentioned below;

    b. The Claimant initially "made an investment" through an acquisition of shares. A share swap is a perfectly valid mechanism for making such an investment;

    c. The Claimant has subsequently also invested significant profits or "returns"[7] into its Australian subsidiary, which are being used to undertake further investment in Australia;

    d. The Claimant has had an active role in the management of the investments of its Australian subsidiary in Australia; and

    e. It is therefore clearly established on the evidence that the Claimant has made an investment in the territory of the Respondent and is an "*investor of a Party*" within the meaning of Article 2(d) of Chapter 11.

5 UNCTAD Report titled "Global Trade Update (March 2023), accessed on 4 March 2024 and available at: https://unctad.org/publication/global-trade-update-march-2023]
6 SoPo, Section III.
7 As defined in Article 2(j) of Chapter 11 of AANZFTA.

18. *Second*, the Respondent argues that the Claimant has not identified a relevant "investment" for the purposes of Article 2(c) of Chapter 11 of AANZFTA.[8] This argument should be rejected because:

    a. It is based on the same underlying facts as the first (similarly unmeritorious) objection that the Claimant is not an "investor";

    b. For the same reasons as outlined above, this objection cannot be sustained, either; and

    c. The evidence establishes that the Claimant has investments in Australia within the meaning of Article 2(c) of Chapter 11.

19. *Third*, the Respondent argues that the Claimant is not entitled to the benefits of Chapter 11 of AANZFTA and that the Respondent was entitled to deny, and has denied, the benefits of Chapter 11 to the Claimant and its investments in accordance with Article 11 of Chapter 11 thereof.[9] This argument should be rejected because the second requirement in Article 11(1)(b) of Chapter 11, the evidence comprehensively demonstrates that the Claimant's business operations in Singapore are substantive, and that they have remained so, throughout the relevant timeframe of 2019 – 2024, such that the Respondent cannot deny the benefits of Chapter 11 of AANZFTA to the Claimant.

20. A further point which applies to each of the three objections above is that the Respondent has by its own conduct in the first quarter of 2019 received, accepted, approved and admitted the Claimant as a foreign corporation with investments in the Respondent's territory and has done so on a number of occasions over a number of years. The Respondent cannot now be permitted to refuse to recognise either the status of the Claimant as an investor or the Claimant's investments. It is estopped from doing so.

8 SoPo, Section IV.
9 SoPo, Section V.

21. *Fourth*, the Respondent argues that the Claimant's claims are not within the jurisdiction conferred by AANZFTA and/or are inadmissible because they constitute an abuse of process.[10] This argument should be rejected because:

    a. Contrary to the Respondent's assertion, the relevant dispute with the Respondent had not (on any view), and had not become foreseeable, at or prior to the date of the Claimant's incorporation in Singapore in January 2019;

    b. This dispute arises out of a measure which was imposed on 13 August 2020 and was not foreseen or foreseeable at any time prior to 11 August 2020, i.e. some 19 months after the Claimant's incorporation in Singapore in January 2019;

    c. In any event, the corporate restructuring which was set in motion by June 2018 and which resulted in the Claimant's incorporation in Singapore in January 2019 was not undertaken for any ulterior purpose. Rather, and as the evidence from all of the key players involved demonstrates, it was a *bona fide* process conducted for genuine commercial reasons (including relating to obtaining funding for coal projects and taxation advantages for group shareholders) and was not in any way motivated by a dispute which did not exist, and could not possibly have been foreseen, at that time; and

    d. The Claimant's claims therefore do not constitute an abuse of process.

22. By reason of these matters, and other matters referred to in greater detail below, the Tribunal is respectfully invited to grant the relief requested by the Claimant in this Response and should allow the Claimant's claim to proceed to a hearing on the merits.

G. Brief Points Demonstrating that the Respondent's Objections are Untenable

10 SoPo, Section VI.

G1. Investment / Investor Objection

23. The Claimant has continued to invest in Mineralogy after its initial acquisition. In the Financial Years 2019 and 2020 (i.e., the period after the incorporation of the Claimant and prior to the *Amendment Act*, Mineralogy could have paid out to the Claimant by way of dividend from current year profits, but did not, the following amounts:[11]

    a. For the financial year ended 30 June 2019, AU$ 35.55 million; and[12]

    b. For the financial year ended 30 June 2020, AU$ 207.17 million.[13]

24. These particular investments are set out in the Annual Audited Accounts of Mineralogy for the financial years ended 30 June 2019 and 30 June 2020.[14]

25. Despite Mineralogy being able to pay a dividend of AU$250.84 million, it only paid a dividend to the Claimant of AU$8.115 million[15]. The remaining AU$242.725 million was retained in Mineralogy in Australia and thus remained at Mineralogy's disposal to further invest and develop its activities within the territory of Australia.[16]

26. These amounts each constitute separate additional investments by the Claimant under the AANZFTA. They are recognised in the Annual Audited Accounts of Mineralogy published and searchable on the Respondent's Australian Securities and Investments Commission ("**ASIC**") website since 2019 and 2020 respectively.[17] Under Article 2 of Chapter 11 of AANZFTA ("*Definitions*"), retained profits which are not distributed are investments. For the purposes of Article 2, "*returns that are invested shall be treated as investments*". And "*return*" means "*an amount yielded by or*

11 [redacted] Report, paras 2.1, 6.2, 6.3 & 6.6.
12 [redacted] Report, paras 2.1, 6.2 & 6.6.
13 [redacted] Report, paras 2.1, 6.3 & 6.6.
14 Annual Audited Accounts of Mineralogy for the financial year ended 30 June 2019, p 5, (**Exh. C-476**); Annual Audited Accounts of Mineralogy for the financial year ended 30 June 2020, p 5, (**Exh. C-477**).
15 [redacted] Report, paras 5 and 6.
16 [redacted] Report, para 6.6.
17 [redacted] Report, paras 2.1, 6.2, 6.3 & 6.6; Annual Audited Accounts of Mineralogy for the financial year ended 30 June 2019, p.5 (**Exh. C-476**); Annual Audited Accounts of Mineralogy Pty Ltd for the financial year ended 30 June 2020, p.5 (**Exh. C-477**).

derived from an investment, including profits, dividends, interest, capital gains, royalties and all other lawful income". Undoubtedly, the Claimant has made an investment in Mineralogy.

27. The Claimant will further demonstrate in Section IV of this Response below that the Respondent's investment / investor objection is, and has always been, untenable.

G2. Denial of Benefits Objection

28. As noted above the Respondent has formally admitted the Claimant and the Claimant's investment in Australia. On 29 March 2019, the Respondent approved the Claimant as a "*foreign company*" carrying on a business in Australia (as addressed more fully in Section II of this Response below).[18] The Respondent cannot on the one hand formally admit the Claimant and its investments and have notice of the Claimant's substantive business in Singapore, and then subsequently seek to deny the Claimant the benefits of Chapter 11 of AANZFTA.

29. Cogent factual evidence, as set out in (*inter alia*) the [redacted] WS at paragraphs 27 to 82,[19] illustrates that the Claimant's business in Singapore is indeed "*substantive"*.

30. The Claimant will further demonstrate in Section V of this Response below that the Respondent's denial of benefits objections is, and has always been, untenable.

G3. Abuse of Process Objection

Timing and Foreseeability

31. The Claimant was incorporated in Singapore in January 2019[20]. The Claimant's subsidiaries entered into the Arbitration Agreement in July 2020 (some 18 months

18 Application for registration as a foreign company with the ASIC, (**Exh. C-97**).
19 [redacted] WS at para's 27 – 82.
20 ACRA Certificate of Incorporation, (**Exh. C-70**).

later)[21]. The Arbitration Agreement was entered into by the Claimant's subsidiaries with Michael McHugh AC KC and the Respondent's State of Western Australia.

32. During the very next month on 13 August 2020, the measure of the *Amendment Act* was enacted by the Respondent's State of Western Australia thereby terminating the Arbitration Agreement and terminating the State Agreement Arbitration.

33. It is not possible that some 19 months earlier the Claimant could have known, or could have foreseen, that its subsidiaries would enter into the Arbitration Agreement with two other parties (i.e. the State of Western Australia and Mr McHugh), or that just one month after doing so in July 2020, Western Australia would terminate the State Agreement Arbitration via the extraordinary measure of the *Amendment Act*.

34. The Claimant will further demonstrate in Section VI of this Response that the Abuse of Process Objection is and has always been untenable.

35. Similarly, there is no way that, in January 2019, the Claimant could have foreseen the measures implemented by the Respondent through the *Amendment Act* and this resulting dispute. Indeed, the Respondent itself had not foreseen, or even turned its mind to such measures. The evidence demonstrates beyond any doubt that the concept of amending legislation, which would become the *Amendment Act,* was first conceived by Western Australia's Attorney General, Mr John Quigley, in the early hours of the morning on 23 May 2020. The Tribunal will no doubt recall the text message that Mr Quigley sent to Mr Mark McGowan (the then Premier of Western Australia) at 7.02 am on 23 May 2020:[22]

> "*I must be a bit OCD! I have been awake since 4.15 thinking of ways to beat big fat Clive and his arbitration claim for 23.5 billion in damages remembering the turd has pulled off 2 big wins in arbitration before former High Court justice Michael McHugh. <u>The solution is to be found in an amendment to legislation</u> obstensibly [sic] to protect us Re any dispute with Venues West/2 feet one heart dispute over zip line / stadium roof walk which*

21 Arbitration Agreement dated 8 July 2020, (**Exh. C-266**).
22 Text messages between Mr Quigley and Mr McGowan (**Exh. C-432**).

amendment for that purpose is merely a Trojan horse as within the very small legislative amendment will be a poison pill for the fat man. Can't wait for full day light when I can discuss with our brainiac SG to check I am not having a mid nite fantasy. It's such a neat solution obstentially [sic] to solve one almost non existent problem but the side wind could drop the fat man on his big fat arse ! Can't wait to speak with Josh. We lawyers get off on strangest things Eh ? Ps been giving heaps of thought to PCO too and have good partial solution but will need your support. Hey are you glad me single again … not making love in sweet hours before dawn instead worrying how to defeat Clive! 😂😂😂😂"

(Emphasis added)

36. The two men then vowed to keep the measure secret as they prepared to implement it.

37. This is the genesis of the *Amendment Act* – the moment that it was 'born'. It is also the genesis of this dispute, although the Claimant was unaware of it at the time. To suggest that the Claimant could have foreseen the *Amendment Act* more than a year before it was even contemplated by those who drafted and implemented it is fanciful.

38. Additionally, as Mr Quigley says in his text message, the *Amendment Act* was all about defeating the damages claim (worth AU$23.5 billion plus interest) in the State Agreement Arbitration. Terminating that Arbitration and ensuring that Mineralogy could not bring another claim against Western Australia (including through international arbitration) was at the heart of the *Amendment Act*. As the Tribunal is aware, the entitlement of the Claimant's subsidiaries to claim damages was not even established until October 2019, the State Agreement Arbitration did not even commence until December 2019 (nearly a year after the Claimant was incorporated) and the Arbitration Agreement establishing the terms of that arbitration was not signed until July 2020 (some 18 months after the Claimant's incorporation).

39. Therefore, not only was the *Amendment Act* itself not in contemplation at the time of the restructure, but the primary target of the *Amendment Act* – arbitration under

the Arbitration Agreement – had not even commenced. In other words, the Respondent is asking the Tribunal to find that the Claimant could have foreseen a measure that had not yet been conceived by those who implemented it, in relation to an arbitration that did not exist at the time. Such a finding would constitute a fundamental shift in the way that the abuse of process doctrine has been consistently applied by tribunals over many years. In the Claimant's submission, such a position is fanciful and is not tenable under international law.

40. Moreover, as set out in the table below in Section VI, Western Australia's successful efforts to keep the *Amendment Act* a secret between May – 11 August 2020 was achieved by means of a contemporaneous course of deception planned by Western Australia to appear to comply and participate in the Arbitration Agreement damages phase of the State Agreement arbitration and an associated mediation. That deception was designed to keep the Claimant and Mineralogy believing that the Western Australian government would not interfere, but rather would cooperate, with the arbitral process when that was in fact untrue. These serious allegations are not a matter of supposition or assumption by the Claimant. They are made in reliance on explanations of Western Australia's modus operandi given by the architects of the fraudulent conduct themselves: Western Australia's Attorney-General John Quigley and Premier Mark McGowan.

41. Importantly, Western Australia's successful efforts to dupe the Claimant and Mineralogy into believing that Western Australia would genuinely participate in arbitration under the Arbitration Agreement means the Respondent cannot now contend that a reasonable investor ought to have foreseen that a dispute would arise from legislation being prepared in secret to abolish (*inter alia*) that agreement. The first that the Claimant, or any objective investor in its position, could have known of or foreseen the measure at issue in this AANZFTA arbitration was when the *Amendment Act* was introduced to the Western Australia legislature at 5 pm on 11 August 2020. It cannot be an abuse to have restructured, for treaty protection or otherwise, some 19 months before that date.

42. There is no fine line analysis needed regarding the Claimant's knowledge (objectively appraised) as to the prospect of termination of the State Agreement arbitration by means of the *Amendment Act*. That is because Western Australia, uncontrovertibly, did not itself conceive of the prospect of termination of the arbitration until May 2020 and, having done so, went to extraordinary lengths to keep termination by legislation a secret, even from members of the Western Australian government. To now suppose that the Claimant, objectively speaking, nevertheless could have foreseen termination of the State Agreement arbitration as a reasonable prospect 16 months before Western Australia even conceived of it, is absurd.

43. The Claimant's point is clearly illustrated by *Philip Morris v Australia.*[23] In sharp contrast to the present matter, the measure at issue in that case (plain packaging for tobacco) had been publicly announced by the Government almost a year before the relevant restructure took place. As the tribunal in that case found, it was clear to the claimant well in advance of that restructure that the measures would be introduced via legislation and would be implemented. Nothing coming close to this scenario exists in the present case. Again, in January 2019, the Claimant did not know, and could not have known or foreseen, that Western Australia would implement the measures in the *Amendment Act*. Indeed, Western Australia itself did not know that it would do so. Indeed, the secrecy surrounding the *Amendment Act* meant that most members of the Parliament of Western Australia did not know about it until the bill was introduced under urgency on 11 August 2020. There is no possibility that the Claimant could have reasonably foreseen the *Amendment Act* or the measures which are the subject of the dispute before this Tribunal.

44. The details in respect of the Claimant's Response is further addressed in detail below in Section VI.

Alleged Abusive Conduct

23 *Philip Morris Asia Limited v. The Commonwealth of Australia,* PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015 (**Exh. RLA-95**).

45. Not only was the Respondent's conduct unforeseeable but it is also important to recognise the incontrovertible evidence establishing that the restructuring was effected for a bona fide and proper commercial purpose.

46. In particular, the restructuring was effected to provide the Mineralogy group and Mr Palmer with potential financing, investment and tax advantages.

Matters Applying to all the Respondent's Objections

47. While Sections IV, V and VI of this Response deal with each of the grounds of the Objections in turn, the material in Section II and III is relevant to the Claimant's Response to all three grounds of the Respondent's Objections.

48. The Respondent's Objections are contrary to previous determinations, acceptances, approvals and admission to the Respondent's jurisdiction made to the Claimant and its investments by the Respondent since early 2019. As set out in Section II and IV below, the Respondent has formally admitted the Claimant and the Claimant's investments to the jurisdiction of the Respondent on 29 March 2019. This was before the *Amendment Act* and before the Respondent denied benefits. The Respondent's Objections should be rejected for that reason alone.

SECTION II: ESTOPPEL AND ACQUIESCENCE

The Respondent's Objections are Inconsistent with its Previous Determinations and should be Rejected

A. Introduction

49. The Respondent makes three objections to jurisdiction in its SoPo which are in direct conflict with its own previous determinations and conduct. The Respondent's previous position dictates that its objections must fail, either because it has itself already accepted that the Claimant is a foreign Singaporean investor, and meets the jurisdictional requirements of the AANZFTA, or because, by reason of the Respondent's previous conduct and the Claimant's reliance on that conduct, the Respondent should not now be allowed to advance its jurisdictional objections to the contrary.

50. The matters set out below further demonstrate that:

    a. The Claimant is an investor of Singapore and has made an investment in Australia, and therefore the Claimant is a "*disputing investor*" that has validly submitted a claim;

    b. Mineralogy is controlled by the Claimant, and not by Mr Palmer as is alleged by the Respondent, and accordingly the requirements of Article 11(1)(b) of Chapter 11 of AANZFTA (Denial of Benefits) are not met; and

    c. The Respondent's actions in bringing an abuse of right objection are irreconcilable with good faith obligations under AANZFTA.

A1 - SoPo Sections III and IV: "*Investor*", "*made an investment*", "*investment*"

51. The first two grounds of the Respondent's Objections are:[24]

    a. The Claimant 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 (**"First Objection"**); and

    b. The Claimant has not identified a relevant "investment" for the purposes of Article 2(c) of Chapter 11 of AANZFTA **("Second Objection")**.

52. The substance of the First Objection is that "it is not sufficient that Zeph (allegedly) 'ha[s]' an investment, nor that purported investments may be 'owned or controlled' by it, nor that Zeph 'directly or indirectly acquired' assets in Australia".[25] The Respondent contends that the "making" of an investment requires "some form of active investment, whether by way of contribution of capital or otherwise".[26]

53. The Second Objection is in substance the same as the First Objection, albeit focussing on a separate requirement in Article 2(c) of Chapter 11 of AANZFTA that there be an "*investment*". This objection asserts that "*the existence of a 'contribution' has been a fundamental criterion underpinning the other features which are inherent to an investment*".[27]

54. As explained in Section IV of this Response below, the Claimant is an investor of Singapore which has made an investment that satisfies the requirements of Articles 2(c) and 2(d) of Chapter 11 of AANZFTA.

55. Further, there is no proper basis for either the First Objection or the Second Objection. As a matter of fact, the Respondent has previously accepted the following

24 SoPo, [13] and [14].
25 SoPo, [143].
26 SoPo, [144].
27 SoPo, [188].

facts and the Respondent cannot, having accepted those facts, now seek to deny the Claimant benefits:

a. ASIC, the Respondent's corporate and financial regulator, has accepted that the Claimant made investments in Australia in March 2019 [see part C1 below][28];

b. The Respondent's agency responsible for administering foreign investment into Australia in respect of Australian real estate, the Australian Foreign Investment Review Board (**"FIRB"**), has previously accepted (indeed, itself determined) that the Claimant is an investor of Singapore making an investment in Australia [see part C2 below][29];

c. The Respondent's States of Western Australia and Queensland have each separately determined that the 29 January 2019 restructure which saw the Claimant acquire 100% of the shares in Mineralogy meant that Claimant "*made an acquisition*" in Mineralogy and that the value of the landholdings component of the share transactions was $3,901,429 in Queensland and $189,000,000 in Western Australia [see part C3 below][30];

d. The Respondent's notification of the Claimant and the Government of Singapore of its exercise of the purported right to deny the benefits of Chapter 11 of AANZFTA to the Claimant and its investments by way of letters dated 22 December 2020 and 24 June 2021,[31] was made on the explicit basis that the Claimant is an investor of Singapore and has investments in Australia [see part C4 below][32]; and

28 Refer to C1 below.
29 Refer to C2 below.
30 Refer to C2 below.
31 SoPo, [203]; Letter dated 22 December 2020 from Respondent to Claimant (**Exh. C-153**); Letter dated 24 June 2021 from Respondent to Claimant (**Exh. C-155**).
32 Refer to C4 below.

e. Although the Respondent purported to deny the benefits of AANZFTA on 24 June 2021,[33] the Respondent subsequently in its financial years 2022, 2023 and 2024 Budget Papers expressly acknowledged the Claimant's claims as a "*contingent liability*". The disclosure of the claim as a contingent liability is entirely inconsistent with the Respondent's denial of benefits objection and abuse of process arguments, which consequently cannot be maintained [see part C4 below][34].

A2 – SoPo Section V: Denial of Benefits and Assertion that Mr Palmer Indirectly Owns or Controls Mineralogy

56. The Respondent's position in relation to denial of benefits is that Mr Palmer (an investor of Australia) indirectly owns or controls Mineralogy. The Respondent says that the object and purpose of Article 11 of Chapter 11 of AANZFTA indicates that the focus must be on the ultimate owner or controller of the Claimant in fact and that 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 thereof.[35]

57. However, the Respondent's State of Western Australia has determined precisely the opposite. It has determined that Mineralogy is a foreign corporation because it is owned or controlled by the Claimant [see part D below].[36]

B. Which Position Adopted by the Respondent Should the Tribunal Accept?

58. *First*, the determinations of these agencies and Governments, which bind the Respondent, should be given persuasive weight over the self-serving submissions in the SoPo of the Department of Foreign Affairs ("**DFAT**") which has the conduct of this arbitration on behalf of the Respondent and who instructs the Attorney General's

33 SoPo, [137].
34 Refer to C4 below.
35 SoPo, Section V.
36 Refer to part D below.

Department and whose plain objective is to terminate the Claimant's legitimate claims and absolve the Respondent from liability for its expropriation of the Claimant's investment and other breaches of obligations under the AANZFTA. This is because, unlike DFAT, those other bodies acted impartially with a view to determining the relevant issues on the facts, without being influenced by an irrelevant consideration – that is, how their determinations would impact the Claimant's substantial investor-state dispute settlement ("**ISDS**") claims.

59. *Second:*

a. The Commonwealth of Australia is an indivisible legal entity, meaning that separate federal agencies do not possess any legal personality separate from that of the Commonwealth; rather, each such agency is merely a separate emanation of the same, indivisible legal entity.[37] ASIC and the ATO are, therefore, emanations of the same legal entity, namely Australia. The determinations of ASIC and the ATO are Respondent's determinations and Respondent is bound by them; and

b. Similarly, the determinations of the State Governments of Western Australia and Queensland bind the Respondent. The principles which emerge from Chapter 11 of AANZFTA demonstrate that the decisions of the States of Western Australia and Queensland are the same as if they had been made by the Respondent.[38] "Measures of a party" include

37 As Gordon J explained in *Davis v Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs* (2023) 97 ALJR 214 at [68] (**Exh. CLA-227**): The Commonwealth is a legal or juristic person, although that label may have a different meaning in respect of the Commonwealth compared to when it is applied to a private corporation or a natural person. The branches of the Commonwealth do not have a separate legal personality. Rather, those branches are empowered under the Constitution to exercise certain powers of the Commonwealth. See further Sebastian Howard Hartford Davis, 'The Legal Personality of the Commonwealth of Australia' (2019) 47(1) *Federal Law Review* , 6, (**Exh. CLA-164**). See also *Ex parte Henderson* (1997) 190 CLR 410, 502 (Kirby J), acknowledging the 'reality' that 'for practical reasons' the Commonwealth must 'operate through … servants, agents and emanations, (**Exh. CLA-165**).

38 AANZFTA Ch 11, art 2 (Definitions), (**Exh. CLA-1**)

measures taken by State Governments,[39] and "Measure" itself "means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form".[40] As such, determinations and conduct of the Respondent's States are for the purposes of the AANZFTA, the determinations and conduct of the Respondent.

60. Accordingly, the decisions and determinations of ASIC, the ATO and the States of Queensland and Western Australia are decisions of the Respondent and must bind it. The Respondent (and DFAT) cannot now disown the decisions and purport to adopt different positions simply because it would now suit the Respondent's interests in this arbitration.

C. The Respondent's Acceptance that the Claimant is an Investor with an Investment in Australia

C1: ASIC

C1.1 The Respondent's ASIC Legislation and Policy

61. ASIC is an agency of the Commonwealth of Australia established by the *Australian Securities and Investments Commission Act 2001* (Cth) ("**ASIC Act**").[41] ASIC is Australia's integrated corporate, markets, financial services and consumer credit regulator. ASIC is an independent Australian Government body set up and administered under the ASIC Act and carries out most of its work under the Australian *Corporations Act 2001* (Cth) ("**CA**" or "**Corporations Act**").[42]

39 Ibid.
40 Ibid.
41 *Australian Securities and Investments Commission Act 2001* (Cth), (**Exh. RLA-15**).
42 *Our Role,* Australian Securities & Investments Commission (at 20 February 2024) <https://asic.gov.au/about-asic/what-we-do/our-role/>, (**Exh. C-528**).

62. In performing its functions and exercising its powers under the *ASIC Act*, ASIC must strive to: [43]

    a. Maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and

    b. Promote the confident and informed participation of investors and consumers in the financial system; and

    c. Administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements; and

    d. Receive, process and store, efficiently and quickly, the information given to ASIC under the laws that confer functions and powers on it; and

    e. Ensure that information is available as soon as practicable for access by the public; and

    f. Take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.

63. ASIC has the following powers to discharge the duties and functions set out above:

    a. ASIC must keep such registers as it considers necessary in such form as it thinks fit; and

    b. The registers kept by ASIC include the financial reports of a company, which financial reports are available on ASIC's public register for inspection by the public.[44]

43 *Australian Securities and Investments Commission Act 2001* (Cth), section 1(2), (**RLA-15**).
44 *Corporations Act 2001* (Cth) section 1274, (**Exh. CLA-161**).

C1.2. The Respondent has Recognised that the Claimant is a Foreign Company with Investments in Australia

64. Under Australian law, the Claimant is a foreign company because it is incorporated "*outside Australia*".[45] As explained below, the Claimant is an investor in Australia because it is carrying on business in Australia and as such must be, and has been, approved and accepted by ASIC.[46]

65. Section 601CD of the CA states:[47]

> *(1) A foreign company must not carry on business in this jurisdiction unless:*
>
> *(a) it is registered under this Division; or*
>
> (b) *it has applied to be so registered and the application has not been dealt with*.

66. "*Carrying on business*" is defined in section 21 of the Corporations Act as follows:[48]

> a. *"A body corporate that has a place of business in Australia, or in a State or Territory, carries on business in Australia, or in that State or Territory, as the case may be";*[49] *and*
>
> b. A reference to "*carrying on business*" includes a reference to a body corporate if it administers, manages, or otherwise deals with, *"property situated in Australia, or in the State or Territory, as the case may be, as an agent, legal personal representative or trustee, whether by employees or agents or otherwise"*.[50]

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45 *Corporation Act 2001* (Cth) section 9 (definition of "foreign company" means (a) a body corporate that is incorporated in an external Territory, or outside Australia and the external Territories…'), (**Exh. CLA-161**)**.**
46 Application for Registration as a Foreign Company with the Respondent's ASIC, (**Exh. C-97**); The Respondent's ASIC Current Company Extract for Zeph Investments Pte Ltd, (**Exh. C-483**).
47 *Corporations Act 2001* (Cth) section 601CD, (**Exh. CLA-161**).
48 *Corporations Act 2001* (Cth) section 21, (**Exh. CLA-161**).
49 Ibid section 21(1), (**Exh. CLA-161**).
50 Ibid section 21(2)(b), (**Exh. CLA-161**).

67. Section 601CE of the Corporations Act states:[51]

Application for registration

Subject to this Part, where a foreign company lodges an application for registration under this Division that is in the prescribed form and is accompanied by:

(a) a certified copy of a current certificate of its incorporation or registration in its place of origin, or a document of similar effect; and

(b) a certified copy of its constitution; and

(c) a list of its directors containing personal details of those directors that are equivalent to the personal details of directors referred to in subsection 205B(3); and

(d) if that list includes directors who are:

(i) resident in Australia; and

(ii) members of a local board of directors;

a memorandum that is duly executed by or on behalf of the foreign company and states the powers of those directors; and

(e) in relation to each existing charge on property of the foreign company that would be a registrable charge within the meaning of Chapter 2K if the foreign company were a registered foreign company, the documents that subsection 263(3) requires to be lodged; and

(f) notice of the address of:

51 *Corporations Act 2001* (Cth) section 601CE, (**Exh. CLA-161**).

(i) if it has in its place of origin a registered office for the purposes of a law there in force—that office; or

(ii) otherwise—its principal place of business in its place of origin; and

(g) notice of the address of its registered office under section 601CT;

ASIC must:

(h) grant the application and register the foreign company under this Division by entering the foreign company's name in a register kept for the purposes of this Division; and

(j) allot to the foreign company an ARBN distinct from the ARBN or ACN of each body corporate (other than the foreign company) already registered as a company or registered body under this Act.

68. In accordance with section 601CE(h) and (j) of the Corporations Act on 29 March 2019, ASIC approved the Claimant's application (form 402) and '*Grant*[ed] *the application and register*[ed] *the Claimant as a foreign company under this Division by entering* [the Claimant's] *name in a register kept for the purposes of this Division; and allot*[ed]' to the Claimant an Australian Registered Business Name ("ARBN") distinct from the ARBN or Australian Company Name ("**ACN**") of each body corporate other than the Claimant already registered as a company or registered body under the Corporations Act in Australia.[52]

69. The "Current & Historical Company Extract" obtained from ASIC in respect of the Claimant states that since 29 March 2019, the Claimant has Registered Foreign

52 *Corporations Act 2001* (Cth) section 601CE, (**Exh. CLA-161**); [redacted] WS, [83]-[86]; Application for registration as a foreign company (form 402), dated 8 March 2018, stamped by the Australian Securities & Investments Commission on 12 March 2019, (**Exh. C-97**).

Company (Overseas) ARBN 632 245 599 and its registered address in Australia is Level 17, 240 Queen Street, Brisbane City, QLD, 4000 Australia.[53]

70. On 8 February 2019, Mineralogy lodged with ASIC Form 484 "Change to company details" to record changes in the company details of Mineralogy.[54] Item C4 of the form 484 set out "changes to the register of members" and stated that the shareholding of Mineralogy International Limited ("**MIL**") decreased by 6,002,896 shares to zero shares and the shareholding of Mineralogy International Pte Ltd (now Zeph Investments Pte Ltd) increased to 6,002,896 shares. [55] The form 484 was accepted by ASIC and given a lodgement number and date of lodgement of 8 February 2019,[56] and since that date has been available on ASIC's public register in accordance with the provisions of the Corporations Act set out above. As a result of this change, the Claimant became the 100% shareholder in Mineralogy.

71. As noted above, section 21(1) of the Corporations Act states that a body corporate that has a place of business in Australia, carries on business in Australia[57]. The Claimant's place of business, as acknowledged and recorded by ASIC, is at Level 17, 240 Queen Street, Brisbane, Queensland. ASIC therefore recognised that the Claimant is a foreign corporation 'carrying on business' in Australia. It should not be surprising therefore to find that the Claimant's office in Australia is recognised by the Respondent as being the location from which five of the Claimant's seven directors actively manage the Claimant's investment in Australia and is the Claimant's address for these proceedings.

53 The Respondent's ASIC Current and Historical Company Extract for Zeph Investments Pte Ltd, dated 16 February 2024, (**Exh C-483**).
54 The Respondent's ASIC Form 484, Mineralogy Pty Ltd "Change to Company Details, 8 February 2019, p. 2, (**Exh.C-484**).
55 ASIC Form 484, Mineralogy Pty Ltd "Change to Company Details, 8 February 2019, p. 2, (**Exh. C-484**).
56 ASIC Form 484, Mineralogy Pty Ltd "Change to Company Details, 8 February 2019, p. 1, (**Exh. C-484**).
57 Corporations Act 2001 section 21(1), (**Exh. CLA-161**).

72. It is axiomatic that a foreign corporation carrying on business in Australia has investments in Australia.

73. As further explained below the 'business' carried on by the Claimant in Australia is also disclosed in the consolidated accounts of Claimant which have been lodged with, accepted and published by ASIC, and which includes owning and managing its investment in Mineralogy[58]. The Respondent has admitted Claimant's investment in Mineralogy into its jurisdiction and cannot now seek to deny the Claimant benefits.

74. The Claimant's active role in managing Mineralogy is set out in Section IV of this Response but for ease of reference it is also set out below. In particular:

    a. Five of the Claimant's directors are resident in Australia and are actively involved in the day-to-day operations of Mineralogy;[59]

    b. Mr Bernard Wong ("**Mr Wong**") is the Claimant's Director and Chief Investment Officer (responsible for monitoring the Claimant's investments) and is also Mineralogy's Chief Financial Officer;[60]

    c. Mr Palmer and Ms Emily Palmer are directors of the Claimant,[61] [redacted]

58 Zeph Investments – ASIC Form 405, Financial Year ending 30 June 2019, (**Exh. C-485**); Zeph Investments – ASIC Form 405, Financial Year ending 30 June 2020, (**Exh. C-486**); Zeph Investments – ASIC Form 405, Financial Year ending 30 June 2021, (**Exh. C-487**); Zeph Investments – ASIC Form 405, Financial Year ending 30 June 2022, (**Exh. C-488**).

59 ACRA, *Business Profile for Zeph Investments Pte Ltd* (21 September 2022), Claimant's Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 2, (**Exh. C-63**), p. 53-57; ACRA, *Register of Directors of Zeph Investments Pte Ltd* (2 February 2023), (**Exh.C-73**).

60 LinkedIn Profile of Mr Bernard Wong, (**Exh. R-344**).

61 ACRA, *Business Profile for Zeph Investments Pte Ltd* (21 September 2022), Claimant's Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 2, (**Exh. C-63**), p. 53-57; ACRA, *Register of Directors of Zeph Investments Pte Ltd* (2 February 2023), (**Exh.C-73**); Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2019, (**Exh.C-80**); Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2020, (**Exh.C-82**); Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2021, (**Exh.C-84**); Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2022, (**Exh.C-86**).

[redacted];[62]

d. The Claimant's director, Ms Emily Palmer, is the [redacted] at Mineralogy;[63]

e. The Claimant's director, Mr Declan Sheridan ("**Mr Sheridan**"), is also the [redacted] and [redacted] at Mineralogy, where he commenced his employment in January 2019.[64] Mr Sheridan was appointed as director of the Claimant on 28 February 2019 in anticipation of assisting to secure financing for the coal projects and mining projects;[65]

f. The Claimant appointed Mineralogy's directors, including Ms Baljeet Singh ("**Ms Singh**") who is a director of the Claimant and Company Secretary of Mineralogy and was appointed as director of Mineralogy by the Claimant on 9 November 2020;[66]

g. Mr Palmer is a director of the Claimant and was appointed "Governing Director" of Mineralogy on 9 February 2021;[67]

62 Mineralogy – [redacted] Letter, (**Exh. C-489**); Mineralogy – [redacted] Letter, (**Exh. C-548**); [redacted] WS, para 29(d).
63 [redacted] WS, para 29(e).
64 Statutory Declaration of [redacted], 19 June 2020, (**Exh. C-146**), [2].
65 ACRA, *Business Profile for Zeph Investments Pte Ltd* (21 September 2022), Claimant's Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 2, (**Exh.C-63**), p. 53-57; ACRA, *Register of Directors of Zeph Investments Pte Ltd* (2 February 2023), (**Exh.C-73**); Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2019, (**Exh.C-80**).
66 ASIC, Current & Historical Company Extract of Mineralogy Pty Ltd, extracted on 21 September 2022, Claimant's Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 3, (**Exh.C-63**) p. 61-85; ASIC, Current & Historical Company Extract of Mineralogy Pty Ltd, extracted on 9 February 2023, (**Exh.C-74**); [redacted] WS, para 29(g).
67 Company Constitution of Mineralogy Pty Ltd, dated 9 February 2021, (**Exh. C-490**).

h. Mr Palmer, Emily Palmer, and Declan Sheridan as directors of the Claimant have carried out their roles in Mineralogy since the first quarter of 2019 until the present date;[68]

i. Since its incorporation of the Claimant on 21 January 2019,[69] the Claimant's Board of Directors has remained the same apart from:

i. the former Director and [redacted] of the Claimant, Mr Chitondo Michael Mashayanyika ("**Mr Mashayanyika**"), who ceased as a director on 12 February 2021[70] and was subsequently replaced, on 22 October 2021, by Mr Wong who is presently Director and Chief Investment Officer of the Claimant;[71]

ii. The resignation of the initial Singapore based director Mr Tan Cher Wee, who ceased as a director on 29 June 2020, and was

68 Statutory Declaration of [redacted], 19 June 2020, (**Exh. C-146**), [2]; ACRA, *Business Profile for Zeph Investments Pte Ltd* (21 September 2022)*,* Claimant's Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 2, (**Exh.C-63**)**,** p. 53-57; ACRA, *Register of Directors of Zeph Investments Pte Ltd* (2 February 2023), (**Exh.C-73**).
69ACRA, Certificate Confirming Incorporation of Company, Claimant's Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 10, (**Exh. C-63**)**,** p. 111; ACRA (of Singapore), Certificate of Incorporation for Zeph Investments Pte Ltd, (**Exh.C-70**).
70 ACRA, *Business Profile for Zeph Investments Pte Ltd* (21 September 2022)*,* Claimant's Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 2, (**Exh.C-63**) p. 53-57; ACRA, *Register of Directors of Zeph Investments Pte Ltd* (2 February 2023), (**Exh.C-73**); ACRA (of Singapore) Register of Directors of Zeph Investments Pte Ltd as at 14 February 2024, (**Exh. C-478**)**.**
71 ACRA, *Business Profile for Zeph Investments Pte Ltd* (21 September 2022)*,* Claimant's Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 2, (**Exh.C-63**)**,** p. 53-57; ACRA, *Register of Directors of Zeph Investments Pte Ltd* (2 February 2023), (**Exh.C-73**); Linkedin profile of Mr Bernard Wong, (**Exh. R-344**); ACRA (of Singapore) Register of Directors of Zeph Investments Pte Ltd as at 14 February 2024, (**Exh. C-478**); Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2019, (**Exh.C-80**); Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2020, (**Exh.C-82**)**;** Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2021, (**Exh.C-84**); Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2022, (**Exh.C-86**).

replaced a few days earlier by Mr Quek Ser Wah Victor on 22 June 2020,[72] and

iii. Ms Singh who was appointed a director of the Claimant on 22 October 2021[73].

Additional Evidence of the Claimant's Management of its Investment in Australia

75. At the date of incorporation of the Claimant (21 January 2019), the sole director of Mineralogy Pty Ltd was Anna Palmer.[74] Anna Palmer resigned as a director on 27 February 2019. [75] Mr Palmer was appointed as a director on 27 February 2019.[76]

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72 ACRA, *Register of Directors of Zeph Investments Pte Ltd* (2 February 2023), (**Exh.C-73**)**;** Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2019, (**Exh.C-80**); Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2020, (**Exh.C-82**)**;** Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2021, (**Exh.C-84**); Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2022, (**Exh.C-86**); ACRA (of Singapore) Register of Directors of Zeph Investments Pte Ltd as at 14 February 2024, (**Exh. C-478**)

73 ACRA, *Register of Directors of Zeph Investments Pte Ltd* (2 February 2023), (**Exh.C-73**)**;** Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2019, (**Exh.C-80**); Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2020, (**Exh.C-82**)**;** Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2021, (**Exh.C-84**); Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2022, (**Exh.C-86**); ACRA (of Singapore) Register of Directors of Zeph Investments Pte Ltd as at 14 February 2024, (**Exh. C-478**)

74 ASIC, Current & Historical Company Extract of Mineralogy Pty Ltd, extracted on 21 September 2022, Claimant's Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 3, (**Exh.C-63**), p. 61-85; ASIC, Current & Historical Company Extract of Mineralogy Pty Ltd, extracted on 9 February 2023, (**Exh.C-74**)**;** ASIC Current & Historical Company Extract for Mineralogy Pty Ltd as at 14 February 2024, (**Exh. C-479**).

75 ASIC, Current & Historical Company Extract of Mineralogy Pty Ltd, extracted on 21 September 2022, Claimant's Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 3, (**Exh.C-63**), p. 61-85; ASIC, Current & Historical Company Extract of Mineralogy Pty Ltd, extracted on 9 February 2023, (**Exh.C-74**)**;** ASIC Current & Historical Company Extract for Mineralogy Pty Ltd as at 14 February 2024, (**Exh. C-479**).

76 ASIC, Current & Historical Company Extract of Mineralogy Pty Ltd, extracted on 21 September 2022, Claimant's Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 3, (**Exh.C-63**), p. 61-85; ASIC, Current & Historical Company Extract of Mineralogy Pty Ltd, extracted on 9 February 2023, **Exh.C-74;** ASIC Current & Historical Company Extract for Mineralogy Pty Ltd as at 14 February 2024, (**Exh. C-479**).

76. Except for the appointment of Sarah Jane Mole for just one day on 25 May 2020, Mr Palmer remained the sole director of Mineralogy Pty Ltd from his appointment on 27 February 2019 until 4 November 2020, when both Mrs Anna Palmer and Mr Mashayanyika were appointed directors[77], which was after the introduction of the *Amendment Act* on 13 August 2020[78].

77. During the period that Mr Mashayanyika was a director and Chief Investment Officer of the Claimant (from 21 January 2019 to 12 February 2021),[79] he was a full-time resident of Australia,[80] and the Chief Financial Officer of Mineralogy based in the Claimant and Mineralogy's office at 240 Queen Street in Brisbane (Queensland, Australia).[81] Mr Mashayanyika was in charge of the day-to-day operations and the corporate governance, financial and accounting functions of Mineralogy during his service as a director of the Claimant.[82]

78. From 27 February 2019 until 4 November 2020, Mr Palmer was the sole director and Chief Executive Officer of Mineralogy,[83] and as such responsible for all of the commercial operations of Mineralogy during that time.[84]

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77 ASIC, Current & Historical Company Extract of Mineralogy Pty Ltd, extracted on 21 September 2022, Claimant's Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 3, (**Exh.C-63**), p. 61-85; ASIC, Current & Historical Company Extract of Mineralogy Pty Ltd, extracted on 9 February 2023, (**Exh.C-74**)**;** ASIC Current & Historical Company Extract for Mineralogy Pty Ltd as at 14 February 2024, (**Exh. C-479**).

78 *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA), (**Exh. C-1**).

79 Statutory Declaration of [redacted], 19 January 2021, (**Exh.C-154**)**,** p. 5166, [2]-[3]; ACRA, *Register of Directors of Zeph Investments Pte Ltd* (2 February 2023), (**Exh.C-73**)**.**

80 ACRA, *Register of Directors of Zeph Investments Pte Ltd* (2 February 2023), (**Exh.C-73**).

81 [redacted] WS at para 32.

82 [redacted] WS at para 32.

83 ASIC, Current & Historical Company Extract of Mineralogy Pty Ltd, extracted on 21 September 2022, Claimant's Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 3, (**Exh.C-63**), p. 61-85; ASIC, Current & Historical Company Extract of Mineralogy Pty Ltd, extracted on 9 February 2023, **Exh.C-74;** ASIC Current & Historical Company Extract for Mineralogy Pty Ltd as at 14 February 2024, (**Exh. C-479**).

84 [redacted] WS at para 108; [redacted] WS at para 33..

79. The two additional directors of the Claimant appointed at incorporation, Emily Palmer ([redacted] and [redacted] of Mineralogy) and Mr Sheridan ([redacted] and [redacted] at Mineralogy), were also involved in Mineralogy's operations and are also both full time residents of Australia.[85]

80. Having become an employee of Mineralogy on 14 January 2019,[86] Baljeet Singh became a Director of Mineralogy on 9 November 2020,[87] and became a Director of the Claimant on 22 October 2021.[88] Ms Singh is a full-time employee and a director of Mineralogy and is a resident of Australia based in Mineralogy's offices in Queensland, Australia.[89]

81. Mr Wong became a Director of the Claimant on 22 October 2021,[90] replacing Mr Mashayanyika[91] former [redacted] of the Claimant and Chief Financial Officer of Mineralogy. He was appointed Chief Investment Officer and Director of the Claimant and as such became the Chief Financial Officer of Mineralogy.[92] He is based in Mineralogy's offices in Queensland, Australia and is responsible for all the

85 Statutory Declaration of [redacted], 19 June 2020, (**Exh. C-146**), [2]; *Register of Directors of Zeph Investments Pte Ltd* (2 February 2023), (**Exh.C-73**)**;** [redacted] WS at para 34.
86 [redacted] WS at para 35..
87 ASIC, Current & Historical Company Extract of Mineralogy Pty Ltd, extracted on 21 September 2022, Claimant's Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 3, (**Exh.C-63**), p. 61-85; ASIC, Current & Historical Company Extract of Mineralogy Pty Ltd, extracted on 9 February 2023, (**Exh.C-74**)**;** ASIC Current & Historical Company Extract for Mineralogy Pty Ltd as at 14 February 2024, (**Exh. C-479**).
88 *Register of Directors of Zeph Investments Pte Ltd* (2 February 2023), (**Exh.C-73**)**;** ACRA (of Singapore) Register of Directors of Zeph Investments Pte Ltd as at 14 February 2024, (**Exh. C--478**)**.**
89 [redacted] WS at para 35.
90 *Register of Directors of Zeph Investments Pte Ltd* (2 February 2023), (**Exh.C-73**)**;** ACRA (of Singapore) Register of Directors of Zeph Investments Pte Ltd as at 14 February 2024, (**Exh. C-478**)**.**
91 [redacted] WS at para 36.
92 [redacted] WS at para 36.

accounting and investment functions of Mineralogy,[93] as referred to in the Respondent's **Exh. R-344.**[94]

82. It is evident from the above that the Claimant's directors are intimately involved in the management and operations of Mineralogy. The Claimant has a Chief Investment Officer (Mr Wong) to ensure that its investments are properly managed.[95] The Respondent refers to the "economic reality" of the situation.[96] It is undeniable that the economic reality is that the Claimant is closely involved in, and monitors, all aspects of Mineralogy's business including its investments. This makes sense, given that Mineralogy is such a key investment for the Claimant. The Claimant can hardly be described as a "passive" investor.

83. Accordingly, the Respondent has accepted that the Claimant is a foreign corporation, is carrying on business in Australia and that its business activity includes managing its investments in Australia.

C1.3 The Respondent's ASIC's Acceptance of the Claimant's Financial Statements which Establish that the Claimant has Investments in Australia – Section 601CK Corporations Act

84. Section 601CK of the Corporations Act states:

> ***Balance-sheets and other documents***
>
> *(1) Subject to this section, a registered foreign company must, at least once in every calendar year and at intervals of not more than 15 months, lodge a copy of its balance-sheet made up to the end of its last financial year, a copy of its cash flow statement for its last financial year and a copy of its profit and loss statement for its last financial year, in such form and containing such particulars and including copies of such documents as the*

93 [redacted] WS at para 36.
94 LinkedIn profile of Mr Bernard Wong, (**Exh. R-344**).
95 LinkedIn profile of Mr Bernard Wong, (**Exh. R-344**).
96 SoPo, [197].

company is required to prepare by the law for the time being applicable to that company in its place of origin, together with a statement in writing in the prescribed form verifying that the copies are true copies of the documents so required.[97]

85. In compliance with section 601CK, Claimant has lodged a Form 405 "Statement to verify financial statements of a foreign company" for the financial years ended 30 June 2019, 30 June 2020, 30 June 2021, 30 June 2022 and 30 June 2023 ("**ASIC Form 405**").[98] Each of these ASIC Form 405s enclosed the Claimant's financial statements for the corresponding year, as required by ASIC ("**Financial Statements**").[99] The Financial Statements lodged in each year were the balance sheet up to the end of each financial year, the Profit and loss statement for the financial year and the cash flow statements for the last financial year.

86. Each of the Respondent's ASIC Form 405s so lodged contained a statement signed by the local (Australian) agent which stated:

> *"I verify that:*
>
> - *The copies annexed to this form are true copies of the documents required to be lodged under s601CK(1) of the Corporations Act 2001; and*

97 *Corporations Act 2001* (Cth), section 601Ck, (**Exh. CLA-161**).
98 Zeph Investments – ASIC Form 405, Financial Year ending 30 June 2019 (**Exh. C-485**); Zeph Investments – ASIC Form 405, Financial Year ending 30 June 2020 (**Exh. C-486**); Zeph Investments – ASIC Form 405, Financial Year ending 30 June 2021 (**Exh. C-487**); Zeph Investments – ASIC Form 405, Financial Year ending 30 June 2022 (**Exh. C-488**); Zeph Investments – ASIC Form 405, Financial Year ending 30 June 2023 (**Exh. C-497**).
99 Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2019, (**Exh. C-80**); Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2020, (**Exh. C-82**); Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2021, (**Exh.C-84**); Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2022, (**Exh. C-86**); Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2023, (**Exh. C-516**)**.**

- *The information in this form is true and complete."* [100]

87. Each of the Financial Statements prepared for the Claimant contained an independent auditor's report by Hall Chadwick (NSW) stating that in the auditor's opinion, the financial reports give "*a true and fair view of the* [Claimant's] *Group's financial position … and of its financial position for the year then ended … and complies with International Reporting Standards*."[101]

88. Following lodgement with ASIC, ASIC published each of the Financial Statements and made them available for public inspection on its public registers in accordance with its obligations under ASIC Act.[102]

89. The Claimant's audited Financial Statements, accepted and published by ASIC, contain the following statements for the financial year ended 30 June 2019:

    a. Director's Report providing, among other things, a description of the principal activities of Claimant which include 'investment';[103]

    b. A statement of 'Significant changes in the state of affairs' which includes:

> *The Mineralogy Pty Ltd group was restructured in December 2018 and in January 2019. This involved foreign incorporated holding*

100 Zeph Investments – ASIC Form 405, Financial Year ending 30 June 2019, p. 9 (**Exh. C-485**); Zeph Investments – ASIC Form 405, Financial Year ending 30 June 2020, p. 11 (**Exh. C-486**); Zeph Investments – ASIC Form 405, Financial Year ending 30 June 2021, p. 11 (**Exh. C-487**); Zeph Investments – ASIC Form 405, Financial Year ending 30 June 2022, p. 11 (**Exh. C-488**); Zeph Investments – ASIC Form 405, Financial Year ending 30 June 2023, p 11 (**Exh. C-497**).

101 Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2019, (**Exh. C-80**), p. 194**;** Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2020, (**Exh. C-82**), p.293**;** Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2021, (**Exh. C-84**), p. 385; Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2022, (**Exh. C-86**), p. 457; Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2023, (**Exh. C-516**).

102 *Corporations Act 2001* (Cth), s 1274(1), (**Exh. CLA-161**).

103 Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2019, (**Exh.C-80**), p. 152**.**

companies, Mineralogy International Ltd (New Zealand) and Zeph Investments Pte. Ltd. (Singapore) (formerly Mineralogy International Pte. Ltd.) acquiring Mineralogy Pty Ltd. Mineralogy Pty Ltd is now a wholly owned subsidiary of Zeph Investments Pte. Ltd (ZIP) and ZIP is a wholly owned subsidiary of [Mineralogy International Ltd. (MIL)].

c. The following statement under the heading:

NOTES TO THE CONSOLIDATED FINANCIAL STATEMENTS FOR THE YEAR ENDED 30 JUNE 2019

These consolidated financial statements and notes represent those of Zeph Investments Pte. Ltd. (Singapore) (legal parent) and its Controlled Entities (the 'consolidated group' or 'group'). Zeph Investments Pte. Ltd. is a company limited by shares, incorporated and domiciled in Singapore.

The separate financial statements and notes of Mineralogy Pty Ltd (Australia) have been presented within this financial report as an individual accounting parent entity ('Accounting Parent Entity').

d. The following notes to the accounts:[104]

i. Note 1(a) Principles of Consolidation: The general purpose consolidated financial statements incorporate all of the assets, liabilities and results of the legal parent the Claimant (Zeph Investments Pte. Ltd.) and all of the subsidiaries. Subsidiaries are entities the legal parent controls. The legal parent controls an entity when it is exposed to, or has rights to, variable returns from

104 Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2019, (**Exh. C-80**), p. 158 – 181.

its involvement with the entity and has the ability to affect those returns through its power over the entity. A list of the subsidiaries is provided in Note 12.

ii. Note 2 includes revenue and other income of Claimant's wholly owned subsidiary Mineralogy;

iii. Note 12 discloses the Claimant's investment in its subsidiary Mineralogy;

iv. Note 12(b) states that the Claimant acquired three subsidiaries (GCS Engineering Pte Ltd , Visco Engineering Services Pte Ltd and Visco Offshore Engineering Pte Ltd) in marine engineering industry in Singapore during the year for $3,620,007, and includes the balance sheet position for these three entities; and

v. Note 12(b) also states that during the year, the Claimant through corporate restructure, acquired Mineralogy by issuing 6,002,896 fully paid shares to Mineralogy's shareholder (equivalent to the same number of shares acquired in Mineralogy, being 6,002,896). The note also states that the consideration for the shares acquired in Mineralogy was share issues to Mineralogy shareholders.

vi. Note 18 records the issued capital for the Claimant is 6,002,896 fully paid shares.

90. Accordingly, the audited Financial Statements lodged by the Claimant with the Respondent's ASIC disclose that the Claimant has made an investment in Mineralogy, that it "*acquired*" 6,002,896 shares in Mineralogy, that consideration was paid for the shares and that the value of Mineralogy (and the shares reflecting that value) is substantial.

91. The Financial Statements for the 2020 financial year, 2021 financial year, 2022 financial year and 2023 financial year, all contain similar information as set out above in relation to the Claimant's investment in Mineralogy.[105]

92. Since March 2019 the Respondent has accepted that Claimant is a foreign corporation that is carrying on business in Australia and has admitted Claimant's investment in Mineralogy and recognised and accepted that its business activity is managing its investments in Australia.

93. Section 601CK(2) of the Corporations Act states that if ASIC is of the opinion that the balance sheet, profit and loss statement, cash flow statement or other document do not sufficiently disclose the company's financial position, ASIC can require it to lodge further documents in such form as it requires.

94. In addition to the power under s601CK of the Corporations Act, ASIC also has powers under s 1274 of the Corporations Act as follows:[106]

> *(8) If ASIC is of opinion that a document submitted for lodgement:*
>
> *(a) contains matter contrary to law; or*
>
> *(b) contains matter that, in a material particular, is false or misleading in the form or context in which it is included; or*
>
> *(c) because of an omission or misdescription has not been duly completed; or*
>
> *(d) contravenes this Act; or*
>
> *(e) contains an error, alteration or erasure;*

105 Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2020, (**Exh. C-82**); Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2021, (**Exh. C-84**); Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2022, (**Exh.C-86**); Consolidated financial reports of Zeph Investments Pte Ltd for the year ended 30 June 2023, (**Exh. C-516**).
106 *Corporations Act 2001* (Cth), section 1274, (**Exh. CLA-161**).

ASIC may refuse to register or receive the document and may request:

(f) that the document be appropriately amended or completed and resubmitted; or

(g) that a fresh document be submitted in its place; or

(h) where the document has not been duly completed, that a supplementary document in the prescribed form be lodged.

(9) ASIC may require a person who submits a document for lodgement to produce to ASIC such other document, or to give to ASIC such information, as ASIC thinks necessary in order to form an opinion whether it may refuse to receive or register the first-mentioned document.

(10) …

(11) If a body corporate or other person, having made default in complying with:

(a) any provision of this Act or of any other law that requires the lodging in any manner of any return, account or other document or the giving of notice to ASIC of any matter; or

(b) any request of ASIC to amend or complete and resubmit any document or to submit a fresh document;

fails to make good the default within 14 days after the service on the body or person of a notice requiring it to be done, a court may, on an application by any member or creditor of the body or by ASIC, make an order directing the body or any officer of the body or the person to make good the default within such time as is specified in the order."

95. The Respondent accepted and published the Financial Statements (which disclose that the Claimant has made an investment in Australia) on its public registers, for years. The evidence demonstrates that ASIC did not form an opinion under any of sections 601CK, 601CA or 1274 of the Corporations Act that the Financial Statements 'contain matters contrary to law' or are 'false or misleading' or 'contain error' and the Respondent's ASIC has not required Claimant to change or alter the Financial Statements. A screenshot of ASIC's website demonstrates the acceptance of the Statements:[107]

107 Screenshot from ASIC's website, 5 March 2024 (**Exh. C-523**).

https://connectonline.asic.gov.au/RegistrySearch/faces/landing/panelSearch.jspx?searchTab=search&searchText=zeph+investments&s

Date	Document No.	Document type	Pages	Uncertified	Certified
8/06/2023	031712579	Notice Of Cancellation Or Revocation Of A Lodged Document (106)	1	$19.00	$40.00
8/06/2023	031749163	Notice Of Cancellation Or Revocation Of A Lodged Document (106)	1	$19.00	$40.00
14/04/2023	031793789	Statement Verifying Balance Sheet Of A Foreign Company (405)	55	$47.00	$68.00
14/04/2023	031793787	Annual Return - Foreign Company (406)	11	$47.00	$68.00
8/03/2023	031779113	Statement Verifying Balance Sheet Of A Foreign Company (405)	54	$47.00	$68.00
8/03/2023	031779112	Statement Verifying Balance Sheet Of A Foreign Company (405)	56	$47.00	$68.00
1/09/2022	031697405	Annual Return - Foreign Company (406)	11	$47.00	$68.00
4/01/2022	031484742	Annual Return - Foreign Company (406)	11	$47.00	$68.00
4/01/2022	031484707	Annual Return - Foreign Company (406)	11	$47.00	$68.00
4/01/2022	031444456	Notification Of (404)	4	$19.00	$40.00
4/01/2022	031444457	Memorandum Of Appointment Of Agent Of A Foreign Company (418)	2	$19.00	$40.00
22/12/2021	031481749	Change To Officeholders Of A Registered Body (490)	8	$19.00	$40.00
22/12/2021	031481750	Change Of Registered Office Or Office Hours Of A Regd Body Change Of Foreign Address - Registered Body (489C)	6	$19.00	$40.00
6/03/2020	030044446	Statement Verifying Balance Sheet Of A Foreign Company Change Of Foreign Address Of A Registered Body (405A)	56	$47.00	$68.00
10/12/2019	030774685	Certified Copy Certificate Of Incorporation Or Registration Of Foreign Company (415)	1	$19.00	$40.00
10/12/2019	030774244	Notification Of Change Of Name (409A)	2	$19.00	$40.00
12/03/2019	030439777	Memorandum Of Appointment Of Agent Of A Foreign Company (418)	2	$19.00	$40.00
12/03/2019	030439776	Certified Copy Of The Constitution Of A Foreign Company (416)	40	$47.00	$68.00
12/03/2019	030439775	Certified Copy Certificate Of Incorporation Or Registration Of Foreign Company (415)	1	$19.00	$40.00
12/03/2019	030439577	Application For Registration As A Foreign Company (402A)	8	$19.00	$40.00

96. The Financial Statements are independently audited and verified. ASIC accepted them. In view of ASIC's obligations under the ASIC Act as set out above including to ensure *appropriate levels of surveillance and enforcement to ensure that entities prepare their financial statements in accordance with the requirements of the Corporations Law and applicable accounting standards,* ASIC is taken to have accepted the contents of the Financial Statements including the statements that Claimant has made an investment in Mineralogy and that it "*acquired*" 6,002,896

shares in Mineralogy and that the value of Mineralogy (and the shares reflecting that value) is substantial.

97. In view of the Respondent:

    a. recognising the Claimant as a foreign company conducting business (including investment) in Australia; and

    b. accepting the Claimant's Financial Statements stating that the Claimant has made an investment in Mineralogy,

    the Respondent cannot maintain its inconsistent First Objection and Second Objection or its objection to deny the Claimant the benefits of AANZFTA.

C2 – Australian Foreign Investment Review Board

98. For the reasons set out below, the Respondent through the ATO was aware, and accepted that the Claimant was an investor of Singapore, making an investment in Australia.

99. The framework for foreign investment in Australia is set by the *Foreign Acquisitions and Takeovers Act 1975 ("***FATA***")*.[108] FATA requires foreign investors to notify the Treasurer of proposed foreign investments that meet certain criteria.[109] The Treasurer has the power to prohibit these investments, or apply conditions to the way they are implemented.[110] When making foreign investment decisions, the Treasurer is advised by the Foreign Investment Review Board ("**FIRB**").[111] FIRB is a non-statutory advisory body. Responsibility for making decisions rests with the

108 *Foreign Acquisitions and Takeovers Act 1975;* (**Exh. CLA-166**).
109 *Foreign Acquisitions and Takeovers Act 1975* (Cth), Part 2; (**Exh. CLA-166**).
110 *Foreign Acquisitions and Takeovers Act 1975* (Cth), Part 3; (**Exh. CLA-166**).
111 Australian Government, the Treasury, 'Australia's Foreign Investment Policy', (20 June 2023) <https://foreigninvestment.gov.au/sites/foreigninvestment.gov.au/files/2023-06/AUSTRALIAS_FOREIGN_INVESTMENT_POLICY.pdf>, (**Exh. C-529**).

Treasurer.[112] Foreign investment proposals in respect of residential real estate are administered by the ATO in accordance with FATA.[113]

100. FIRB reviews investment proposals to be satisfied that they are not contrary to the Respondent's national interest or national security. FIRB may apply conditions to manage national interest or national security concerns. The Respondent reviews foreign investment proposals or applications to ensure that inbound investment is in its national interest.[114]

101. "*Investment*" under FATA is the acquisition of an interest in specified types of investments, including residential real estate.[115]

102. "*Foreign person*" is defined in section 4 of FATA to include a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest. Under section 4 FATA, a person holds a "*substantial interest*" if the person holds an interest of at least 20% in the entity.[116] The Claimant and its wholly owned subsidiary Mineralogy are therefore both "*foreign persons*."

103. As can be seen from the above, the Respondent's foreign investment regime regulates investment in Australia by foreign investors, including their investment through a "*substantial interest*" shareholding in Australian entities. As the Claimant is a foreign investor, the Claimant's investment in Australian assets through its wholly

112 Australian Government, the Treasury, 'Australia's Foreign Investment Policy', (20 June 2023) <https://foreigninvestment.gov.au/sites/foreigninvestment.gov.au/files/2023-06/AUSTRALIAS_FOREIGN_INVESTMENT_POLICY.pdf>, (**Exh. C-529**).
113 Australian Government, the Treasury, '*Residential real estate'* <https://foreigninvestment.gov.au/getting-started/investment-information/residentia>, (**Exh. C-530**).
114 Australian Government, the Treasury, *'Australia welcomes foreign investment',* <https://foreigninvestment.gov.au/investing-in-australia/australia-welcomes-foreign-investment>, (**Exh. C-531**).
115 Australian Government, the Treasury, '*Guidance'* <https://foreigninvestment.gov.au/guidance/types-of-investments>, (**Exh. C-532**).
116 *Foreign Acquisitions and Takeovers Act 1975* (Cth), s 4*;* (**Exh. CLA-166**).

owned subsidiary Mineralogy is regulated by the foreign investment regime administered by FIRB and the ATO under the FATA.

104. If the Claimant acquired residential real estate directly, through its wholly owned subsidiary Mineralogy Pty Ltd, Mineralogy would be regarded as a '*foreign person*'. In other words, regardless of whether the Claimant acquired residential real estate directly, or indirectly through Mineralogy, the Respondent under the FATA treats the investment in exactly the same way.[117]

105. As can be seen from the above, the foreign investment regime is actually directed at identifying the ultimate investor and whether it is foreign or not. By so doing, foreign investors and foreign investment are regulated by FATA.

106. In the case of the Claimant, the ATO (administering the FATA in respect of residential real estate) made a determination that Claimant, as a foreign person, was making an investment in Australian assets through its substantial interest (100% shareholding) in Mineralogy.[118]

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117 *Foreign Acquisitions and Takeovers Act 1975* (Cth), s 12*;* (**Exh. CLA-166**).

118 Applications under section 411 of the Duties Act 2001 (Qld) to the Queensland Office of State Revenue, PwC, 27 August 2019, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 22, (**Exh. C-063**), p.182-210; Applications under section 262 of the Duties Act 2008 (WA) to the Western Australia Office of State Revenue, 21 August 2019, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 23, (**Exh. C-63**), p.211-240; Forms submitted to the Queensland Office of State Revenue by Mineralogy International Limited, dated 26 August 2019, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 24, (**Exh. C-63**), p.241-274; Forms submitted to the Western Australia Office of State Revenue by Mineralogy International Limited, dated 19 August 2019, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 25, (**Exh. C-63**), p.275-299; The Queensland Office of State Revenue, Commissioner Assessment Notices to Mineralogy International Limited, 8 October 2019, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 26, (**Exh. C-63**), p.300-318; The Western Australia Office of State Revenue, Duties Assessment Notice to Mineralogy International Limited, 14 February 2020, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 27, (**Exh. C-63**), p.319-321; The Western Australia Office of State Revenue Statement of Grounds for Foreign Transfer Duty, Notice of Intention to Submit Dispute to Arbitration, 16 August 2019, Annexure A, Exhibit 28, (**Exh. C-63**), p.322-326; Letter from the Australian Taxation office to Mineralogy Pty Ltd, Foreign Investment Rules, 30 July 2021, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 29, (**Exh. C-63**), p.327-328; Letter from the Australian Taxation office to Mineralogy Pty Ltd, Foreign Investment and

107. The Claimant, as a foreign investor, made an investment in Australian real estate assets in August 2019. In particular, on 16 August 2019, Mineralogy Pty Ltd acquired a 100% interest in residential real estate at [redacted]. This investment attracted the operation of FATA and was subject to regulatory action by the Respondent.[119]

108. On 30 July 2021, the ATO advised Mineralogy that the ATO was reviewing the Australian residential real estate holdings of Mineralogy and that in respect of the Applecross residential real estate, at the time Mineralogy purchased the property, Mineralogy met the definition of "*foreign person*" within the meaning of FATA. The ATO required that Mineralogy divest itself of the property which Mineralogy did in compliance with FATA.[120]

109. The Respondent cannot therefore properly maintain its First Objection and Second Objection as they are inconsistent with the Respondent's own prior determinations and conduct on multiple occasions.

C3 – The Respondent's Governments of Western Australia and Queensland have Accepted that the Claimant Made An Acquisition in Mineralogy in January 2019

110. As stated above, the Respondent asserts by its First Objection that Claimant has not made an investment in Australia. However, the Respondent's State of Western Australia and Queensland in 2019 and 2020 – long before the passage of the *Amendment Act* and contrary to Respondent's assertions – had in fact determined

Takeovers Act 1975, 7 March 2022, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 30, (**Exh. C-63**), p.329-330.

119 Letter from the Australian Taxation office to Mineralogy Pty Ltd, Foreign Investment Rules, 30 July 2021, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 29, (**Exh. C-63**), p.327-328.

120 Letter from the Australian Taxation office to Mineralogy Pty Ltd, Foreign Investment Rules, 30 July 2021, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 29, (**Exh. C-63**), p.327-328.

that the Claimant *made* an acquisition in Mineralogy when the 29 January 2019 Claimant share transaction occurred.[121]

111. Under both Queensland and Western Australian law, duty is payable on certain transactions pursuant to the relevant *Duties Act* in each State. "Duty" is an indirect tax charged by Australian States and Territories on transactions, such as sale and purchase of real estate and businesses. Duty is normally assessed based on the higher of consideration or the value of the subject matter of the transaction.[122] The *Duties Act* in each state is administered by its "Office of State Revenue" (**"OSR"**) which is an agency of the State.[123]

112. Duty is payable by the parties to a transaction for the sale and purchase of land. Duty is not payable on transactions for the sale and purchase of shares, except where the target company is a "*landholder*" and the sale of the shares in the company is the means by which the purchaser is in effect acquiring the land.[124] These landholder

121 Applications under section 262 of the Duties Act 2008 (WA) to the Western Australia Office of State Revenue, 21 August 2019, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 23, (**Exh. C-063**), p.211-240; Forms submitted to the Western Australia Office of State Revenue by Mineralogy International Limited, dated 19 August 2019, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 25, (**Exh. C-63**), p.275-299; The Western Australia Office of State Revenue, Duties Assessment Notice to Mineralogy International Limited, 14 February 2020, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 27, (**Exh. C-063**), p.319-321; The Western Australia Office of State Revenue Statement of Grounds for Foreign Transfer Duty, Notice of Intention to Submit Dispute to Arbitration, 16 August 2019, Annexure A, Exhibit 28, (**Exh. C-063**), p.322-326.

122 *Duties Act 2001* (Qld), (**Exh. CLA-167**); *Duties Act 2008* (WA), (**Exh. CLA-168**).
123 Queensland Government, Queensland Revenue Office, <https://qro.qld.gov.au/>, (**Exh. C-533**); Government of Western Australia, Department of Finance, RevenueWA, <https://apps.osr.wa.gov.au/portal/0/home>, (**Exh. C-534**).
124 Queensland Government, Queensland Revenue Office, *'Landholders and land-holdings for landholder duty'* <https://qro.qld.gov.au/duties/investors/landholder/landholders/>, (**Exh. C-535**), Government of Western Australia, *'Landholder duty'*, <https://www.wa.gov.au/government/publications/landholder-duty#:~:text=Landholder%20duty%20is%20charged%20on,an%20interest%20in%20a%20landholder.&text=What%20is%20a%20landholder%3F&text=A%20landholder%20is%20any%20corporation,of%20%242%20million%20or%20more>, (**Exh. C-536**).

company provisions are in Chapter 3 of the Queensland *Duties Act* and Chapter 6 of the Western Australia *Duties Act.*[125]

113. Chapter 3 of the Queensland *Duties Act* deals with duty where a person acquires a *significant interest* in a landholding company – which is called a "relevant acquisition"."[L]andholders" is defined as *an entity that has land-holdings in Queensland, the unencumbered value of which are $2,000,000 or more*.[126]

114. Section 158 of the Queensland *Duties Act* states as follows:[127]

> **What is a *relevant acquisition***
>
> *(1) A person makes a relevant acquisition if [underlining added]—*
>
> *(a) the person acquires a significant interest in a landholder; or*
>
> *(b) the person acquires an interest in a landholder and, when the following are aggregated, the aggregation results in a significant interest in the landholder—*
>
> *(i) Interests held by the person in the landholder;*
>
> *(ii) interests acquired or held by related persons of the person in the landholder; or*
>
> *(c) having acquired a significant interest in a landholder as mentioned in paragraph(a) or (b) for which acquisition landholder duty was imposed, the person's interest in the landholder increases.*

125 *Duties Act 2001* (Qld), (**Exh. CLA-167**); *Duties Act 2008* (WA), (**Exh. CLA-168**).
126 *Duties Act 2001* (Qld), s 165, (**Exh. CLA-167**).
127 *Duties Act 2001* (Qld), s 158, (**Exh. CLA-167**).

115. The MIL restructure on 16 December 2018 and the Claimant's (Singapore) restructure on 29 January 2019 are both "*relevant acquisitions*"[128] on the basis that Mineralogy was a landholder at the time of the restructures.[129]

116. The Queensland OSR treated the restructures as "*relevant acquisitions*" on the basis that each of MIL and Claimant had acquired a "*significant interest*" in Mineralogy. A "*significant interest*" in a landholder exists if in the case of a private company (which Mineralogy Pty Ltd is), a person has an interest of 50% or more. The Claimant acquired a 100% interest in Mineralogy Pty Ltd.

117. Accordingly, the Queensland OSR determined that landholder duty was *prima facie* payable because (in accordance with section 158 of the *Duties Act*) the Claimant *"*[made] *a relevant acquisition*" by entering into the restructure transaction on 29 January 2019.[130]

118. The Claimant was able successfully to apply for an exemption from the landholder duty under section 409 of the *Duties Act.*[131] The OSR stated: *"Assessment Comments - Acquisition of 100% of shares in Mineralogy Pty Ltd ACN 010 582 680 (Landholder) by Mineralogy. International Pte Ltd (company incorporated in Singapore) from Mineralogy International Limited (NZ company no. 7185155). Transaction is between group companies. Exemption under s.409(3) applied."*[132]

119. Accordingly, the Respondent's own Queensland Government has determined that when the 29 January 2019 restructure occurred, the Claimant made an acquisition in

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128*Duties Act 2001* (Qld), s 158, (**Exh. CLA-167**). Claimant acquired 100% of the shares in Mineralogy which is a landholder.
129Applications under section 411 of the Duties Act 2001 (Qld) to the Queensland Office of State Revenue, PwC, 27 August 2019, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 22, (**Exh. C-63**), p.182-210.
130The Queensland Office of State Revenue, Commissioner Assessment Notices to Mineralogy International Limited, 8 October 2019, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 26, (**Exh. C-63**), p.300-318.
131 *Duties Act 2001* (Qld), s 409, (**Exh. CLA-167**)**.**
132 The Queensland Office of State Revenue, Commissioner Assessment Notices to Mineralogy International Limited, 8 October 2019, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 26, (**Exh. C-63**), p.300-318.

Mineralogy. This is in direct conflict with the First Objection in which the Respondent asserts that the Claimant has not made an investment in Australia.

120. The position for Western Australia is for all intents and purposes the same as for Queensland and can be briefly summarised as follows:

a. Mineralogy directly and indirectly owns Western Australian land with an estimated unencumbered market value of $2 million or more. On this basis, Mineralogy constitutes a "*landholder*" as defined under section 155 of the Western Australia *Duties Act*;[133]

b. The 29 January 2019 restructure gave rise to a "*relevant acquisition*" as defined under section 163 of the Western Australia *Duties Act*;[134]

c. Section 165 defines "*acquisition"* as "*an acquisition by a person of an interest in a landholder*". Section 167 defines an "*acquiring person*" as "*the person making the acquisition*" [emphasis added];[135]

d. The Claimant was the *acquiring person* being the person making the acquisition;

e. Mineralogy applied under section 262 of the *Duties Act* for exemptions from landholder duty under section 259 in respect of the acquisition arising as a result of the restructure;[136] and

f. On 14 February 2020, the Western Australia OSR issued an exemption under section 263 of the *Duties Act* from the transactions. OSR ascribed

133 *Duties Act 2008* (WA) s 155, (**Exh. CLA-168**).
134 *Duties Act 2008* (WA) s 163, (**Exh. CLA-168**).
135 *Duties Act 2008* (WA) s 165, (**Exh. CLA-168**).
136*Duties Act 2008* (WA) s 262, (**Exh. CLA-168**)**;** Applications under section 262 of the Duties Act 2008 (WA) to the Western Australia Office of State Revenue, 21 August 2019, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 23, (**Exh. C-63**), p.211-240.

the value of the landholdings the subject of the acquisition as $189,000,000.[137]

121. Accordingly, the Respondent's State of Western Australia, has also determined that when the Claimant's 29 January 2019 restructure occurred, the Claimant made an acquisition in Mineralogy. Again, this is in direct conflict with the First Objection by which the Respondent asserts that the Claimant has not made an investment in Australia.

C4 – The First Objection and Second Objection are Directly in Conflict with the Respondent's Denial of Benefits

122. The Respondent's First Objection and Second Objection to jurisdiction are advanced on the basis that the Claimant is not, as is required under Article 2(d) of Chapter 11 of AANZFTA, an investor of a party (i.e. Singapore) and has not made investments in Australia and has not identified a relevant "*investment*" for the purposes of Article 2(c) of Chapter 11. However, the Respondent's third objection is premised on the Claimant being an investor of Singapore in circumstances where the Respondent has recognised the Claimant as being an investor and has admitted its investments in Australia.

123. Respondent's third objection is that it has denied the Claimant the benefits under, Chapter 11 of AANZFTA, Article 11(1)(b)[138] which provides:

> *1. Following notification, a Party may deny the benefits of this Chapter:*

137 The Western Australia Office of State Revenue, Duties Assessment Notice to Mineralogy International Limited, 14 February 2020, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 27, (**Exh. C-63**), p.319-321.

138 SoPo, [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) [emphasis added];

(a) …

(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.

2. …

124. By invoking Article 11(1)(b) of Chapter 11 of AANZFTA, the Respondent necessarily asserts that:

a. The Claimant is an investor of Singapore because:

i. Invoking Article 11(1)(b) involves a statement by the Respondent that Claimant is an investor of Singapore *[A Party may deny benefits…to an investor of another Party]*. This is contrary to the First Objection and Second Objections in the SoPo, noted above in which the Respondent contends that the Claimant is not an investor of Singapore; and

ii. Article 2 and Articles 20 and 21 (Claims) deals with investor of a Party and disputing investor. Article 11 deals with investor of another Party. "Investor of a Party" is defined in Article 2*: "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".* "Investor of another party" is not defined. There is no reason to give "investor of a Party" and "investor of another Party" any materially different meaning, when it comes to the meaning of investment.

b. The Claimant has made an investment in Australia which is the same investment in respect of which benefits are sought to be denied. The

relevant investment is the shareholding in Mineralogy which is an investment in Australia.

125. The Respondent's denial of benefits objection is therefore directly contrary to the First Objection and Second Objection. The Respondent's SoPo does not posit the denial of benefits in the alternative to the first and second objection. The Respondent knowingly persists with two mutually inconsistent objections, which is in itself an abuse of the processes of this Arbitration.

126. The denial of benefits objection was raised by the Respondent in 2020,[139] well before the First Objection and Second Objection, and the Respondent should be confined to it. Where a party seeks to invoke denial of benefits, it thereafter cannot argue positions which are inconsistent with the denial of benefits, including an argument that the Claimant is not an investor of Singapore which has investments in Australia. Accordingly, the Respondent ought not be permitted to maintain the First Objection and the Second Objection.

C5 – The Respondent has Accepted the Claimant's Claims as a Contingent Liability

127. In the Respondent's Budget Papers for the financial years 2022, 2023 and 2024, the Respondent has recognised the Claimant's claims in this arbitration as an "*unquantified contingent liability*".[140]

128. Each of those Budget Papers states:

> "*The Commonwealth has received a notice of arbitration from Singapore-registered company Zeph Investments Pte Ltd (Zeph) in relation to a dispute pertaining to the Iron Ore Processing (Mineralogy Pty Ltd) Agreement*

139 SoPo, [204]; Letter from Australia to Volterra Fietta dated 22 December 2020, (**Exh. C-153**).

140 Australian Government, '*Budget 2021-22: Budget Paper No. 1'*, (**Exh.C-62A**); Australian Government, '*Budget 2022-23: Budget Paper No. 1'*, (**Exh.C-62B**); Australian Government, '*Budget 2023-24: Budget Paper No. 1'*, (**Exh. C-62C**); Mid-Year Economic and Fiscal Outlook 2020-21 Extracts, December 2020, (**Exh. 524**).

Amendment Act 2020 (WA). Zeph has raised this claim under Chapter 11 (Investment) of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA).

Should Australia be unsuccessful in this proceeding, Australia would be liable for any compensation found to be payable to the claimant. Any such potential liability cannot be quantified at this stage."[141]

129. The Respondent's own acknowledgement that the Claimant's claims are a "*contingent liability*" is entirely inconsistent with the Respondent's denial of benefits objection and the Respondent's abuse of process arguments which should not be allowed to be brought.

130. The Respondent has publicly taken a position that demonstrates that it understands and accepts that the Claimant legitimately enjoys benefits under AANZFTA and that the Respondent cannot properly deny the Claimant's enjoyment of those benefits. Accounting Standard AASB 1049: *Whole of Government and General Government Sector Financial Reporting* states in its objective notes: "*This Standard requires compliance with other applicable Australian Accounting Standards except as specified in this Standard.*" In particular, paragraph 9 of AASB 1049 states: "*Unless otherwise specified in this Standard, the whole of government financial statements and the GGS financial statements shall adopt the same accounting policies and be prepared in a manner consistent with other applicable Australian Accounting Standards*."[142]

131. The Australian Accounting Standard applicable to contingent liabilities is AASB 137.[143] The Respondent was required to follow AASB 137 in disclosing the unquantifiable contingent liability relating to the *Amendment Act*. The objective

141 Australian Government, '*Budget 2021-22: Budget Paper No. 1'*, (**Exh.C-62A**); Australian Government, '*Budget 2022-23: Budget Paper No. 1'*, (**Exh.C-62B**); Australian Government, '*Budget 2023-24: Budget Paper No. 1'*, (**Exh. C-62C**); Mid-Year Economic and Fiscal Outlook 2020-21 Extracts, December 2020, (**Exh. 524**).
142 Accounting Standard AASB 1049, (**Exh. C-537**).
143 Accounting Standard AASB 137, (**Exh. C-538**).

of AASB 137 is stated to be "*to ensure that appropriate recognition criteria and measurement bases are applied to provisions, contingent liabilities and contingent assets and that sufficient information is disclosed in the notes to enable users to understand their nature, timing and amount*".

132. A "*contingent liability*" is defined at paragraph 10 of AASB 137 as:[144]

    a. A possible obligation that arises from past events and whose existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the control of the entity; or

    b. A present obligation that arises from past events but is not recognised because:

        i. It is not probable that an outflow of resources embodying economic benefits will be required to settle the obligation; or

        ii. The amount of the obligation cannot be measured with sufficient reliability.

133. Paragraph 16(b) of AASB 137 notes that "where it is more likely that no present obligation exists at the end of the reporting period, the entity discloses a contingent liability, unless the possibility of an outflow of resources embodying economic benefits is remote (see paragraph 86)".[145]

134. Given that the Respondent disclosed a "*contingent liability*" under paragraph 86 of AASB 137, in a context where its disclosure was both statutorily required and publicly made, the Respondent's investigations must have led it to conclude that the possibility of an outflow of resources in settlement of the present dispute is more than remote. This necessarily means that, inter alia, the Respondent's

144 Accounting Standard AASB 137, (**Exh. C-538**).
145 Accounting Standard AASB 137, (**Exh. C-538**).

genuine – indeed, its publicly self-identified – understanding is different from that now implied by the Respondent's denial of benefits. It therefore follows that the Respondent understands that the Claimant fulfils the requirements of AANZFTA so as to enjoy the benefits of Chapter 11 thereof.

135. The Budget Papers are formal documents of the Respondent, being its accounts, prepared in accordance with accounting standards produced by the Treasury and the Department of Finance and made available to the Parliament of the Respondent for its consideration in passing budget measures. If the Respondent genuinely thought that it had more than a remote possibility of successfully denying the benefits of the Treaties to Claimant, it would have been under a legal constraint not to have made the budgetary disclosure that it did. Thus the very existence of that disclosure contradicts the position taken by the Respondent in its SoPo.

D. SoPo Section V: Denial of Benefits and Assertion that Mr Palmer Indirectly Controls Mineralogy

D1. The Respondent's State of Western Australia has Determined that the Claimant Controls Mineralogy

136. This submission is without prejudice to the foregoing as to the Respondent's "investor" objections.

137. By its denial of benefits submission, the Respondent argues that Article 11(1)(b) of Chapter 11 of AANZFTA is satisfied because the first limb of the test (ownership or control) is met.[146] The Respondent argues that Mr Palmer (an investor of Australia) indirectly controls Mineralogy. The Respondent says that the object and purpose of Article 11 indicates that the focus must be on the ultimate owner or controller of the

146 SoPo, Section III, Part A, [212 and following].

Claimant in fact and that it is clear that indirect ownership or control is sufficient to fulfil the first substantive requirement under Article 11(1)(b).

138. However, the Respondent's State of Western Australia has determined precisely the opposite. It has determined that Mineralogy is a foreign corporation because it is owned or controlled by the Claimant (and no other party).[147]

139. As noted above, on 16 August 2019, Mineralogy purchased residential real estate at [redacted]. On this acquisition Mineralogy was required by the Respondent's Western Australian Government to pay foreign transfer duty on the basis that Mineralogy is a foreign corporation. The Respondent's State of Western Australia determined that the higher rate of 'foreign transfer' duty of 7% should be payable and duty of $418,600 was paid by Mineralogy.[148]

140. Western Australia recognised that Mineralogy is a foreign corporation because a foreign person (namely the Claimant) has a controlling interest in Mineralogy.[149] The Government of Western Australia Department of Finance and Office of State Revenue, said in its Statement of Grounds that:[150]

147 Applications under section 262 of the Duties Act 2008 (WA) to the Western Australia Office of State Revenue, 21 August 2019, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 23, (**Exh. C-63**), p.211-240; Forms submitted to the Western Australia Office of State Revenue by Mineralogy International Limited, dated 19 August 2019, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 25, (**Exh. C-63**), p.275-299; The Western Australia Office of State Revenue, Duties Assessment Notice to Mineralogy International Limited, 14 February 2020, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 27, (**Exh. C-63**), p.319-321; The Western Australia Office of State Revenue Statement of Grounds for Foreign Transfer Duty, Notice of Intention to Submit Dispute to Arbitration, 16 August 2019, Annexure A, Exhibit 28, (**Exh. C-63**), p.322-326.

148 The Western Australia Office of State Revenue Statement of Grounds for Foreign Transfer Duty, Notice of Intention to Submit Dispute to Arbitration, 16 August 2019, Annexure A, Exhibit 28, (**Exh. C-63**), p.322-326.

149 The Western Australia Office of State Revenue Statement of Grounds for Foreign Transfer Duty, Notice of Intention to Submit Dispute to Arbitration, 16 August 2019, Annexure A, Exhibit 28, (**Exh. C-63**), p.322-326.

150 Ibid.

8. 100% of the shares in Mineralogy are held by Mineralogy International [now Claimant] which is incorporated in Singapore;

9. Mineralogy is a corporation in which a foreign person has a controlling interest, the foreign person being Mineralogy International; and

10. Therefore, Mineralogy is a foreign corporation in accordance with section 205C(2)(b) of the *Duties Act* and a foreign person in accordance with section 205A thereof.

141. A "*controlling interest*" is defined to include elements of both control and ownership. The Western Australia *Duties Act* defines a "*controlling interest*" to include control that is direct or indirect. The complete section is set out in the footnotes.[151]

142. If Western Australia thereby considered that Mr Palmer held an indirect "*controlling interest*" in Mineralogy (as now asserted by the Respondent), Western Australia would have determined that Mineralogy was not a foreign corporation (because Mr Palmer is not foreign and is Australian). It did not do so. Instead, it determined that Mineralogy is directly or indirectly controlled by the Claimant (not by Mr Palmer) and that therefore Mineralogy was a foreign corporation.

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151 Duties Act 2008 (WA) s 205C, (**Exh. CLA-168**)*: Foreign corporation (1) in this section – potential voting power has the meaning given in the Foreign Acquisitions and Takeovers Act 1975 (Commonwealth) section 4; voting power has the meaning given in the Foreign Acquisitions and Takeovers Act 1975 (Commonwealth) section 4; (2) A corporation is a foreign corporation if – (a) the corporation is incorporated outside Australia; or (b) the corporation in which the foreign persons have a controlling interest; (3) for the purposes of subsection 2(b), foreign persons have a controlling interest in a corporation if 1 or more foreign persons or their associates – (a) controls at least 50% of the voting power; or (b) control at least 50% of the potential voting power in the corporation; or (c) hold at least 50% of the issued shares in the corporation; (4) In Subsection (3) references to control are to control that is direct or indirect, including control that is exercisable as a result or by means or arrangements or practices, whether or not having legal or equitable force, and whether or not based on legal or equitable rights.*

143. The Respondent is bound by its own State of Western Australia's determination that Claimant directly or indirectly controls Mineralogy, not Mr Palmer. The Respondent therefore cannot maintain its objection in its denial of benefits objection that the "*first substantive requirement of Article 11(1)(b) is satisfied in this case"*[152].

Respondent is Barred from Advancing its Abuse of Process Argument

Introduction

144. The Respondent contends in its Objections that "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." *[153]*

145. First, the Claimant repeats and relies on its submissions in Section VI of this Response, in which it clearly demonstrates that the objective purpose of the corporate restructuring in January 2019 was a good faith restructure for legitimate commercial purposes and not, as is alleged, for the purpose of securing treaty protection.

146. Second, as explained below, the Respondent is in any event barred from advancing an 'abuse of process' objection due to its own conduct. Such conduct falls into three categories:

    a. The Respondent's own lack of good faith in respect of the Claimant's investments;

    b. The Respondent's acceptance of the Claimant's entitlement to jurisdiction;

    c. The Respondent's attempted invocation of denial of benefits; and

152 SoPo, [213].
153 SoPo, [282].

d. The Respondent's conduct in respect of the *Amendment Act* as set out in this Response.

Abuse of process – applicable principles

147. As the Respondent observes[154], investment treaty tribunals have recognised that they cannot exercise jurisdiction over claims which constitute an abuse of process. The theory of abuse of process is an application of the principle of good faith in respect of the exercise of rights (in the context of international treaty rights and obligations).[155] The principle of good faith requires every right to be exercised honestly and loyally[156].

148. Whether a right is exercised in good faith by an investor must be determined in the context of the mutual obligations owed by the investor and the State. The line delimiting the rights of the investor and the State is traced to a point where there is a reasonable balance between the conflicting interests involved and becomes the limit between the rights and obligations of the parties.[157]

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154 SoPo, [270].

155 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 2006), (**Exh. CLA-169**), p. 121.

156 Ibid p 123

157 Ibid p 131 -132: Good faith in the exercise of rights, in this connection, means that a State's rights must be exercised in a manner compatible with its various obligations arising either from treaties or from the general law. It follows from this interdependence of rights and obligations that rights must be reasonably exercised. The reasonable and bona fide exercise of a right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect and which is not calculated to cause any unfair prejudice to the legitimate interests of another State, whether these interests be secured by treaty or by general international law. The exact line dividing the right from the obligation, or, in other words, the line de limiting the rights of both parties is traced at a point where there is a reasonable balance between the conflicting interests involved. This becomes the limit between the right and the obligation, and constitutes, in effect, the limit between the respective rights of the parties. The protection of the law extends as far as this limit, which is the more often undefined save by the principle of good faith. Any violation of this limit constitutes an abuse of right and a breach of the obligation-an unlawful act. In this way, the principle of good faith, by recognising their interdependence, harmonises the rights and obligations of every person, as well as all the rights and obligations within the legal order as a whole.

149. Accordingly, the conduct of both State and investor must be looked at in determining this reasonable balance. Therefore, the conduct of the Respondent in seeking to invoke an abuse of process challenge to jurisdiction is itself subject to the very same strictures of good faith including obligations owed by the Respondent to act with honesty, fairness, and cooperation in its interactions and dealings with the Claimant.[158] That is because abuse of process is "*an expression of the more general principles of good faith*".[159] Consequently, the Respondent's allegations of a breach by the Claimant of the obligation of good faith in respect of a matter must be determined having regard to the Respondent's own conduct in respect of that same matter.

The Respondent's Own Lack of Good Faith

150. In the present circumstances, the matter in respect of which both the Claimant's and the Respondent's conduct is to be analysed is the Claimant's investment in the Respondent's territory of Australia that is, the January 2019 share transaction by which the Claimant acquired 100% of the shares in Mineralogy and the Respondent's conduct towards the Claimant in respect of it.

151. The Respondent's lack of good faith in respect of the Claimant's investment manifests in three ways:

158 Sanja Djajic, *Good Faith in International investment Law and Policy in* J. Chaisse, L. Choukroune and S. Jusoh, *Handbook of International Invesment Law and Policy* (Springer, 2021) (**Exh. CLA-170**): Good faith obligations are mutual in international investment law and arbitration (p.1). Both investors (claimants) and States (respondents) have the obligation to act in good faith throughout the investment proceedings. Pg 9 This means that both parties are expected to adhere to the principles of honesty, fairness, and cooperation in their interactions and dealings with each other, and good faith obligations can be invoked by both parties as a defense or as a basis for their claims (p.9). The principle of good faith applies equally to investors and States, and it permeates into every aspect of the relationship between a foreign investor and a host State (p.10).

159 *Abaclat et. al. v Argentine Republic,* ICSID Case No. ARB/07/05, Decision on Jurisdiction and Admissibility, 4 August 2011, (**Exh. CLA-192**), [646].

a. The Respondent failed to make timely disclosure to the Claimant that it contended that the Claimant's investments were not covered by AANZFTA on abuse of process grounds;

b. Despite determining that it considered that the Claimant's investments should not have protection under AANZFTA, the Respondent has continued to accept, regulate and receive duties, fees and taxes from, the Claimant in respect of the Claimant's investments in Australia; and

c. The Respondent received higher payments of duty because it determined the Claimant was a "*foreign investor*".

152. As to the first item above, the Respondent was informed contemporaneously by the Claimant of the 2019 transaction, i.e. that the Claimant was an investor of Singapore and had made investments in the territory of Australia and that it considered its investments had the protection of AANZFTA.[160]

153. For all of the reasons previously discussed, the Respondent must be regarded as having informed the Claimant in December 2020 that it considered the Claimant as an investor of Singapore which had made investments in Australia.[161] Despite its knowledge of the investments and its acceptance and admission of the investments into its territory, it was not until after the commencement of this arbitration on 28 April 2023 that the Respondent first gave notice to the Claimant that it contended that the Claimant's claims were abusive. This is despite the opportunities afforded to, and indeed the obligations upon, the Respondent to raise this objection during the good faith consultations in the pre arbitration phase. For almost three-and-a-half

160 Letter from MIL to Western Australia dated 4 February 2019, (**Exh. R-141**)**.**
161 The Respondent sought to deny benefits under Article 11 Chapter 11 AANZFTA in December 2020 which is made by the Respondent on the express basis that Claimant is an investor of Singapore which has made investments in Australia. Article 11(1)(b) of Chapter 11 of AANZFTA, states: "*Following notification, a Party may deny the benefits of this Chapter: (b) to an investor of another Party that is a juridical person of such other Party and to investments of that investor if…".* The Respondent necessarily asserts that the Claimant is an investor of Singapore because invoking Article 11(1)(b) involves a statement by the Respondent that Claimant is an investor of Singapore *[A Party may deny benefits…to an investor of another Party]* with investments in Australia.

years, the Respondent, despite being fully apprised of the factual grounds upon which its abuse of process argument is now based, and despite having a positive duty to do so during the pre-arbitration phase[162], did not make any such disclosure, assertion or claim to the Claimant. Such a fact of itself further reinforces the Claimant's submission that the abuse of process objection is a recent opportunistic contrivance, completely at odds with the determinations of the Respondent in other circumstances and therefore of itself abusive. [163]

154. During that time, and to the knowledge of the Respondent, the Claimant continued to conduct its substantive business operations in Singapore and maintained and managed its investments in Mineralogy and reinvested dividends in Mineralogy. All this occurred without any notice from the Respondent that it considered that the Claimant's investments were made "*for the objective purpose of securing treaty protection"*. The Claimant believed, and had informed the Respondent of such belief, that the Claimant was entitled to the protections of AANZFTA. In the absence of notice, the Claimant was entitled to believe that the Respondent made no objection to the protection of its investments under the treaty on abuse of process grounds.

155. The Respondent was fully aware that the Claimant had such a belief and took no steps, despite its obligation of good faith, to disabuse the Claimant. In fact, by its denial of benefits notification in December 2020, and its recognition of the Claimant as a foreign company carrying on business in Australia, the Respondent took positive steps which actively reinforced the Claimant's understanding and belief. The Claimant was entitled to presume that its investments continued to be afforded the protections of AANZFTA and were not subject to such an objection and the Respondent cannot, on account of its absence of good faith, now purport to seek to prevent the Claimant from having the protections of the AANZFTA.

156. As to the second item above, and as set out in this Response above, during the period from 2019 to 2023, the Respondent repeatedly on different occasions and through

162 Article 19 Consultations, Chapter 11 AANZFTA (**Exh. CLA-1**). Article 13 Transparency or other articles imposed an obligation on Australia to notify the abuse argument earlier.
163 See part G3 above.

multiple agencies and States of the Respondent determined that the Claimant was an investor of Singapore making investments in the Respondent's territory. The Respondent determined that the Claimant made an acquisition in Mineralogy in January 2019 and accepted the investments in its territory. The Respondent imposed duties and fees and derived revenues from the Claimant's investments.[164]

157. The Respondent was fully aware that the Claimant considered that the treaty protections applied to its investment. Despite the Respondent determining that it considered that the Claimant's investments should not have protection under the treaty on abuse of process grounds, the Respondent continued even after that point in time to accept and regulate the Claimant's investments in Australia and to impose and charge and receive duties, fees and revenues from such investments.

158. The primary purpose of the AANZFTA[165] includes the enhancement of trade and investment. It strikes at the heart of this purpose for a State privately to form a position that it will seek to prevent an investor from bringing a treaty claim on abuse of process grounds whilst simultaneously encouraging the investor to believe that the investment has been accepted, not disclosing that position to the investor and continuing to accept and admit the investor's investments in the State's territory and charge and receive duties, fees and taxes in respect of the Claimant's investments. Yet that is precisely what the Respondent has done. Such conduct is consistent with the Respondent's secret scheme to devise the *Amending Act*.

159. The Respondent's interactions with the Claimant in this regard are blighted by a lack of honesty, fairness or openness. On any sensible view, the Respondent has not acted in good faith.

160. The Parties' good faith obligations are inter-dependent so as to harmonise their respective rights and obligations. The nature of the Claimant's good faith obligations in respect of the exercise of its treaty rights are to be determined having regard to the Respondent's conduct in respect of the same rights and/or obligations. Any right

164 See part G3 above.
165 See paras 179 – 181 and 257 – 258 below.

of the Respondent to object on abuse of process grounds must be evaluated having regard to the Respondent's own good faith obligations, with which it has not complied, and the rights of the Claimant to expect that its investments continued to be afforded the protections of the AANZFTA.

161. Having breached its own good faith obligations in respect of the very matter which is the subject of its own 'abuse of rights' objection, it is simply not open to the Respondent to advance its abuse of rights objection.

The Respondent has Accepted the Claimant's Jurisdiction and Cannot Maintain its Inconsistent Abuse of Process Argument

162. The Respondent has through its prior conduct and determinations already accepted that the Claimant is an investor of Singapore which has made investments in the Respondent's territory, and that therefore jurisdiction exists over the Claimant's claim.

163. The Respondent's abuse of process objection seeks to deny the jurisdiction which the Respondent has already accepted. The Respondent's two positions are in direct conflict.

164. Importantly, the Respondent's ongoing acceptance of jurisdiction continued after the Respondent became fully apprised of all of the facts and circumstances upon which it now relies to support its abuse of process objection. The Respondent, despite being in a position to seek to deny jurisdiction on grounds of abuse, in fact continued to admit jurisdiction on numerous occasions.

165. Clearly, the Respondent's previous acceptance and admission of jurisdiction, genuinely made and not linked to the potential liabilities arising out of this arbitration, must take precedence over its recently announced and contrived abuse of process arguments, which seek to deny jurisdiction.

The Respondent's Invocation of Denial of Benefits

166. The Respondent has purported to deny the Claimant benefits under Article 11(1)(b) of Chapter 11 of AANZFTA.

167. Invoking Article 11(1)(b) of Chapter 11 of AANZFTA means that the Respondent has already accepted and admitted that the Claimant is an investor of Singapore which has made investments in Australia and that therefore jurisdiction exists for the Claimant's claim.

168. Article 11 operates on the basis that the Claimant is entitled to the benefits of Chapter 11 unless the denial is effective. Thus invoking Article 11(1)(b) of Chapter 11 of AANZFTA means that the Respondent accepts that, *prima facie,* the Claimant has jurisdiction to bring its claims.

169. For the same reasons as set out in paragraphs above, the Respondent cannot maintain its abuse of process argument given that it is inconsistent with the position which the Respondent has committed itself to, in the context of its denial of benefits objection.

170. The foregoing matters are a continuation of the Respondent's lack of good faith as evinced by the introduction of the *Amendment Act* itself.

Conclusion

171. The Respondent received, accepted, approved and admitted that the Claimant was a foreign corporation with investments in the Respondent's territory. The Respondent cannot subsequently refuse to recognise either the Claimant as an investor or the Claimant's investments. Nor can the Respondent deny the Claimant the benefits to which it is entitled under the AANZFTA. For the same reasons, the Claimant cannot maintain its argument that there has been any abuse of process in respect of the Claimant or its investment being made in the Respondent's territory.

172. The Respondent has applied its domestic laws to the Claimant and its investments and determined that the Claimant is a foreign person making an investment in its territory and that Mineralogy is controlled by the Claimant (and not by Mr Palmer).

The Claimant has been subject to and has complied with the Respondent's domestic laws which apply to its investments in Australia.

173. Pursuant to Article 31(1) of the Vienna Convention on the Law of Treaties ("**Vienna Convention**")[166] treaties should be interpreted (i) in good faith, (ii) in accordance with their ordinary meaning of the terms, (iii) in their context and (iv) in the light of their object and purpose.

174. It displays a disregard for the 'good faith' interpretation of AANZFTA for the Respondent to advance an interpretation which is directly inconsistent with that adopted under the Respondent's own domestic laws which regulated the Claimant's investments into Australia. The Respondent cannot argue in good faith that its interpretation of the laws which it has established to regulate investment into its territory, and which are intended to apply in respect of investments under AANZFTA, should not be applied in respect of the meaning of "investor" and "investment" made under that treaty.

175. The requirement that the AANZFTA be construed in its 'context' points to the same outcome. The relevant context under the AANZFTA is that an investor (such as the Claimant) will make its investment in Australia in accordance with the domestic laws of the Respondent. Given that context, it is plain that the meaning of "investor" and "investment" under the AANZFTA should be in line with applicable meanings under the Respondent's domestic law.

Law on Procedural Objections

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Law on Procedural Objections

176. "*An abuse of process can occur when a procedural right is exercised in 'contradiction with the goal pursued' in the establishment of that right*."[167] In other words, it can be an abuse of process to exercise a legitimate right in a manner that is contrary to the object

166 Vienna Convention on the Law of Treaties, (**Exh. CLA-17**).

167 Hervé Ascensio, *Abuse of Process in International Investment Arbitration*, Chinese J. Int'l L. 764–765 (2014), (**Exh. CLA-214**).

and purpose of the system that provided for the existence of that right.[168] The theory of abuse of process is 'an expression of the more general principle of good faith'.[169] In this regard, abuse of process has proven to be a difficult subject to define the limits of as it seeks to police conduct that is by definition not prima facie illegal.[170] The 2004 Report of the International Law Association (ILA) described the purpose of abuse of process this way:

> it is necessary for a court to prevent a misuse of its procedure in the face of unfairness to another party, or *to avoid the risk that the administration of justice might be brought into disrepute among right-thinking people.* The doctrine rests upon the inherent power of the court to prevent a *misuse of its procedures* even though a party's conduct may not be inconsistent with the literal application of the *procedural rules.*[171]

177. Thus, an abuse of process is an 'abuse of rights' in the specific context of procedural rights. Whereas an 'abuse of right' more generally refers to improper exercise of any legal right, abuse of process narrowly focuses on the improper exercise of procedural rights."[172]

Procedural Rights Must be Exercised in Good Faith

178. The Respondents objection of "Abuse of Process" is an abuse of process itself. The Respondent's Objection is brought in face of the matters set out above. Those

168 Ibid.
169 *Abaclat* et al. *v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, (4 Aug. 2011), para. 646, (**Exh. CLA-192**).
170 Emmanuel Gaillard, Abuse of Process in International Arbitration, 32 ICSID Rev. 1, 17–32 (2017), (**Exh. CLA-215**).
171 ILA Committee on International Commercial Arbitration, Interim Report: Res judicata and Arbitration (Berlin 2004) (**Exh. CLA-216**) (emphasis added). The ILA quote appears to derive from the English High Court case Hunter v. Chief Constable of the West Midlands Police [1982] A.C. 529, at 536, (**Exh. CLA-217**).
172 Eric De Brabandere, 'Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims, 3 J. Int'l Disp. Settlement 609, 621 (2012), (**Exh. CLA-218**); Branson, John David. 'The Abuse of Process Doctrine Extended: A Tool for Right Thinking People in International Arbitration', *Journal of International Arbitration* 38, no. 2 (2021): 187–188, (**Exh. CLA-219**).

matters set out in this Section II clearly demonstrate the Respondent's claim of abuse of process is not brought in good faith and must be dismissed.

Abuse of Process in International Arbitration[173]

Principles of Public International Law

179. The principle that every legitimate procedural right must be exercised in good faith is the foundation of the abuse of process doctrine in public international law. This doctrine derives its recognition in international law from its acceptance as a legal principle in '*most national legal systems* [which] *constitute*[s] *a primary source of international law*'.[174] Both common law and civil law jurisdictions recognize the principle that procedural rights must be exercised in good faith. Accordingly, abuse of rights is recognized as a general principle of international law.

180. For instance, Article 2 of the Swiss Civil Code states that '[e]*very person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations. The manifest abuse of a right is not protected by law*'.[175] The Swiss Civil Procedure Code, Article 52, also requires all '*those who participate in proceedings must act in good faith*'.[176] Similarly, the German Civil Code ("**BGB**") includes provisions regarding the requirement to exercise lawful rights in good faith. Article 226 of the BGB provides that '[t]*he exercise of a right is not permitted if its only possible purpose consists in causing damage to another*'.[177] German courts have applied the abuse of rights doctrine codified in Article 226 in circumstances where

173 Branson, John David. 'The Abuse of Process Doctrine Extended: A Tool for Right Thinking People in International Arbitration'. *Journal of International Arbitration* 38, no. 2 (2021): 189–190, (**Exh. CLA-219**).
174 Michael Byers, Abuse of Rights: An Old Principle, A New Age, 47 Mcgill L. J. 389, 392 (2002), (**Exh. CLA-220**).
175 Swiss Civil Code (Dec. 1907, Status as of 1 Jan. 2018), Art. 2, (emphasis added) (**Exh. CLA-221**).
176 Swiss Civil Procedure Code (effective 19 Dec. 2008), Art. 52 (**Exh. CLA-222**).
177 German Civil Code, Art. 226 (last amended 2013), (**Exh. CLA-223**).

the lawful right is exercised '*with no regard for the legitimate interests of the other parties*' and where the exercise of rights is '*carried out maliciously*'.[178]

181. Likewise, under the French Civil Code, Article 1382 provides liability where '[a]*ny act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it*'.[179] Although the French Civil Code does not include a provision on abuse of rights as directly as the Swiss Code or BGB, the courts of France have nevertheless interpreted the broad language of Article 1382 to include the abusive exercise of rights.[180] The Court of Cassation, by way of example, held as early as 1937 that '*even the legitimate exercise of the rights of ownership will generate liability if the resulting inconvenience to third parties goes beyond the ordinary obligations toward neighbours*'.[181]

182. Of particular relevance, the doctrines of res judicata and collateral estoppel are examples of common law doctrines that bar the use of legitimate rights when the exercise of those rights violates the public policy goals of finality and protection from successive or abusive litigation.[182]

183. The Respondent has brought its procedural objection in circumstances where its conduct from 2019 has been such that it recognised and admitted the Claimant and its investment in 2019 and despite receiving notice from the Claimant.[183]

184. Despite the Respondent's expressed knowledge, the Respondent approved the Claimant as an "investor", admitted its investment, did not claim any denial of

178 Vera Bolgár, Abuse of Rights in France, Germany, and Switzerland: A Survey of a Recent Chapter in Legal Doctrine, 35 Louisiana L. Rev. 1016, 1028 (1975), (**Exh. CLA-224**).
179 French Civil Code, Art. 1382 (consolidated version as of 19 May 2013), (**Exh. CLA-225**).
180 Bolgár, supra n. 13, at 1017, (**Exh. CLA-224**).
181 Ibid., at 1021–1022, (**Exh. CLA-224**).
182 Southern Pacific Railroad Co. v. United States, 168 U.S. 1, 48 (1897) (the court observed that the general principle of res judicata 'is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society')"; (**Exh. CLA-226**).
183 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**).

benefits and did not give notice of an alleged abuse of process until 28 April 2023 over three years later. The Respondent did not act in good faith. Accordingly, the Respondent's Objections are an abuse of process.

Purpose of AANZFTA

185. The primary purpose of the AANZFTA[184] is to strengthen the economic linkages between parties through trade including by reinforcing "*long-standing ties and friendship*", to "*deepen and widen economic linkages*", to promote regional economic integration and development, to increase the participation of "*newer ASEAN Member States*" through exports and capacity building, and to enhance trade, investment and greater business opportunities amongst the State parties.

186. The Respondent entered into the AANZFTA for the purpose of enhancing trade and promoting investment in its territory of Australia, which was to be undertaken in accordance with the Respondent's own domestic laws regarding such investment. The Claimant then made its investment in Australia in accordance with those laws. Applying those same domestic laws, the Respondent determined conclusively that (i) the Claimant was an investor of Singapore, (ii) the Claimant made an investment in Australia; and (iii) Mineralogy was controlled by the Claimant and not Mr Palmer. In such circumstances, the Respondent is prevented from now arguing for contradictory meanings of "investor", "investment" or "control" under the AANZFTA.

187. Accordingly, the Respondent's objections should be dismissed and the Tribunal should proceed to hear the merits of the Claimant's claims in this arbitration.

E. Estoppel and Acquiescence – The Law

E1. Introduction

188. In view of the above steps taken by the Respondent, or alternatively by its agents, in respect of the Claimant and its subsidiaries, as addressed above, the Respondent

184 AANZFTA Preamble.

cannot now advance arguments which are inconsistent with the positions it previously adopted.

189. In particular, because of its previous conduct the Respondent has acquiesced in the Claimant's status as an investor enjoying benefits under the AANZFTA, or will be estopped from advancing its investor objection, as well as its denial of benefits and abuse of process arguments; alternatively, those arguments are inadmissible.

E2. Applicable Legal Principles of Estoppel

190. In general terms, estoppel has been said to be "based on the fundamental requirement of good faith, which is found in all systems of law, national as well as international".[185]

191. In international law, the principle underlying estoppel has been described as follows: "… inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible … a State must not be permitted to benefit by its own inconsistency to the prejudice of another State …".[186]

192. Whilst the above description refers to States alone, it is now well-established that the same principle is applicable, as a matter of international law, where private parties are involved.[187]

193. It is the Claimant's position that it is not necessary to establish any form of prejudice or detriment on the part of the Claimant order to establish such an estoppel. For example, in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*[188] the ICJ preferred the so-called 'broader' view of estoppel, according to which there is a general prohibition of inconsistent behaviour without any need to

185 *Amco Asia Corporation v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, (**Exh. CLA-172**), [47].
186 *See*, *The Temple of Preah Vihear (Cambodia v. Thailand)*, ICJ, Judgment of 15 June 1962 (Merits), (**Exh. CLA 171**)**,** Separate Opinion of Vice-President Alfaro, at 40.
187 *See*, for example, *Amco Asia Corporation v. Indonesia* (**Exh. CLA-172**)), at para 47.
188 *(Qatar v. Bahrain)*, ICJ, Judgment of 1 July 1994 (Jurisdiction and Admissibility) (**Exh. CLA-173**).

demonstrate such detrimental reliance. The ICJ concluded that: "[t]*he two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a text, the Foreign Minister of Bahrain is not in a position subsequently to say that he intended to subscribe only to a "statement recording a political understanding", and not to an international agreement*".[189]

194. In the context of investment treaty arbitration, in particular, tribunals have been ready to apply this same broader formulation of estoppel (significantly, without any requirement of detrimental reliance):

    a. In *Middle East Cement Shipping and Handling Co S.A. v. Egypt*,[190] for instance, the respondent's argument that a vessel was not an "*investment*" by the claimant was rejected, on account of the fact that an authority and the courts of the respondent had previously treated the claimant as the vessel's owner, such that they were "*barred from disputing its ownership*" under the relevant bilateral investment treaty.[191] Thus, inconsistent behaviour, without more, was adequate to ground the estoppel;

    b. Similarly, in *CME Czech Republic B.V. v. Czech Republic*,[192] the tribunal held that the respondent was not entitled to maintain, for the purposes of the arbitral proceedings, that certain steps taken back in 1996 were void, whereas it had formerly taken the view that those steps were necessary (and legal): "[t]*his change of the legal position of the host State towards the foreign investor is in the eyes of this Tribunal unacceptable and cannot be given credence or effect. It cannot easily be reconciled with the principle that a party cannot be heard to deny that which it has previously affirmed and on which the other party has*

189 *ibid*, at para 27.
190 ICSID Case No. ARB/99/6, Award, 12 April 2002 (**Exh. CLA-174**).
191 *ibid*, at paras 134-135.
192 UNCITRAL, Final Award, 14 March 2003 (**Exh. CLA-175**).

acted in reliance".[193] In reaching that view, the Tribunal held that inconsistent behaviour sufficed for the purposes of the estoppel;

c. The same approach to estoppel was adopted, once more, in *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*,[194] the tribunal reasoning that "*principles of fairness*" alone dictated that a government should be estopped from raising violations of its own law as a jurisdictional defence when it had overlooked such violations and endorsed an investment that was not in compliance with its law[195] (albeit the claimant's estoppel argument was ultimately unsuccessful in that matter);[196] and

d. The claimant's estoppel case prevailed in *Ioannis Kardassopoulous v. Georgia*[197]. The tribunal found that the respondent could not "*simply avoid*" the legal effect of a joint venture agreement, entered into between the claimant and a State-owned entity, by referring to the alleged illegality of that agreement under Georgian law, in circumstances where assurances regarding its validity had previously been given by government officials.[198] According to the tribunal, the agreement had been "*cloaked with the mantle of Governmental authority*", such that the respondent was estopped from objecting to jurisdiction on the basis that it was void *ab initio* as a matter of Georgian law.[199]

195. Further examples of tribunals adopting this approach, protecting investors where States have sought to change their stance, include:

193 *ibid*, at paras 487-488.
194 ICSID Case No. ARB/03/25, Award, 16 August 2007 (**Exh. CLA-176**). *See*, also, *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, (**Exh. CLA-42**) at para 120, in which the tribunal endorsed the approach taken to estoppel in *Fraport AG Frankfurt Airport Services Worldwide v. Philippines* and further stated that its application was not limited to allegations of non-compliance with a respondent's law.
195 *ibid*, at para 346.
196 *ibid*, at para 347.
197 ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007 (**Exh. CLA-64**).
198 *ibid*, at para 191.
199 *ibid*, at para 194.

a. In *Karkey Karadeniz Elektrik Uretim A.S. v. Pakistan*,[200] the tribunal concluded that the respondent had "*consistently maintained*" that the claimant's investment was established in accordance with Pakistani law and was estopped, therefore, from arguing in the arbitral proceedings – to attack the jurisdiction of the tribunal – that that investment was invalid on the grounds of a breach of that law;[201] and

b. The tribunal in *Chevron Corporation v. Ecuador*[202] – referring to the principle of *allegans contraria non audiendus est*, i.e., that a State "*cannot blow hot and cold*", the basis of which it located "*in common sense and common justice … whether it is called 'estoppel' or by any other name*"[203] – held that the respondent was precluded from denying the existence of an "*investment*", within the meaning of the bilateral investment treaty in question, on the basis that the denial was inconsistent with representations previously made by its judicial branch.[204] As the tribunal put it:

"Applying the principle of good faith under international law … it is impermissible for the Respondent to 'blow hot and cold' or to 'have it both ways', to Chevron's detriment and the Respondent's benefit … the Respondent cannot now defeat, under the principle of good faith, the object and purpose of the Arbitration Agreement … with a jurisdictional objection … treating Chevron so differently … as regards assets and, therefore, "investments" in Ecuador … the Respondent is required in this arbitration, as a matter of good faith, to treat Chevron … consistently with the statements made and acted upon by the Respondent's judicial branch in [legal proceedings in Ecuador]." [205]

200 ICSID Case No. ARB/13/1, Award, 22 August 2017, (**Exh. CLA-177**).
201 *ibid*, at paras 626-628.
202 PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, (**Exh. CLA-178**).
203 *ibid*, at para 7.88
204 *ibid*, at para 7.112.
205 *ibid*. Whilst the tribunal mentioned "*detriment*", it is evident that it was referring to the detriment to the claimant of the respondent's denial of the existence of the investment, for the purposes of the arbitral proceedings, and not the original statements of the respondent.

E3. Applicable Legal Principles of acquiescence

196. Rooted in the concept of good faith, on one view, "*acquiescence is the implicit... creation of an obligation by consent, whereas waiver is* [its] *reversed image– that is, the consent to give up a right that actually existed*".[206] However, on another, acquiescence may also result in the loss rather than creation of rights.[207] In any event, as the International Court of Justice said in *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*,[208] although estoppel and acquiescence (or waiver) may arise from the same facts:

> "*they are ... based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion*." [209]

197. One difference between estoppel and waiver or acquiescence is that the latter doctrines are unilateral, focusing exclusively on the conduct of the representing/consenting party.

198. The International Court of Justice said in the *Case concerning Armed Activities on the Territory of the Congo*, "waivers or renunciations of claims or rights must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right".[210] To much the same effect, in the *Case concerning Certain Phosphate Lands in Nauru*, to which Australia was a party, the Court said that a waiver must be "clear and unequivocal".[211] With respect to acquiescence, it has, likewise, been said that it only operates:

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206 See e.g., Andreas Kulick, 'About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals" (2016) 27(1) *European Journal of International Law* 107, (**Exh. CLA-228**) at 108.
207 See e.g., Nuno Sergio Marques **Antunes**, "Acquiescence", *Max Planck Encyclopedia of International Law* (Oxford University Press), (**Exh. CLA-229**) at [14].
208 Judgment, 12 October 1984, ICJ Reports (1984) 246, (**Exh. CLA-230**)
209 Ibid, (**Exh. CLA-230**) at [129]-[130].
210 *(Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168 at [293].
211*(Nauru v. Australia)*, Judgment - Preliminary Objections, 26 June 1992, (**Exh. CLA-231**) at [13].

> "[in reference to] facts that are (or ought to be) known by the acquiescing State (notoriety), where such facts are of direct interest for the acquiescing State (interest), when these facts have existed for a significant period (lapse of time) without significant change of context and the meaning conveyed (consistency), and in cases in which the conduct is attributable to a relevant representative of the State (provenance)." [212]

199. By way of example, in *WA Investments-Europa Nova Limited v The Czech Republic*, the Czech Republic was held to have waived any right to object to the Tribunal's jurisdiction, by reason of its representations "*repeated at different stages throughout these proceedings, that no jurisdictional objection would be raised*".[213]

200. By way of further example, in the *Temple of Preah Vihear Case*, which concerned a dispute between Thailand and Cambodia over their boundary, Thailand was held to have acquiesced to the boundary shown in maps provided to it because the:

> "*circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. Qui tacet consentire videtur si loqui debuisset ac potuisset [He who keeps silent is held to consent if he must and can speak].*
>
> *So far as the Annex I map is concerned, it was not merely the circumstances of the communication of this and the other maps that called for some reaction from the Siamese side, if reaction there was to be ; there were also indications on the face of the map sheet which required a reaction if the Siamese authorities had any reason to contend that the map did not represent the outcome of the work of delimitation.*" [214]

212 Antunes, (**Exh. CLA-229**) at [21]; see *Delimitation of the Maritime Boundary in the Gulf of Maine Area* Judgment, 12 October 1984, [1984] ICJ Rep 246 (**Exh. CLA-230**) at [129].
213 PCA Case No. 2014-19, Award, 15 May 2019, (**Exh. CLA-232**) at [449].
214 *(Cambodia v. Thailand)*, Judgment - Merits, 15 June 1962, (**Exh. CLA-171**) at p 23.

201. That touchstone of circumstances that called for some reaction, is applicable in the present case.

Conclusion – Applying the Principles to the Facts

202. As set out in more detail above, the Respondent has previously recognised the Claimant as a foreign company conducting business (including investment) in Australia. For example, on 29 March 2019[215], and in accordance with sections 601CE(h) and (j) of the Corporations Act, in early 2019 ASIC approved the Claimant's application (form 402) and "*Grant*[ed] *the application and register*[ed] *the Claimant as a foreign company under this Division by entering* [the Claimant's] *name in a register kept for the purposes of this Division*; *and allot*[ted]" and granted to the Claimant an Australian Registered Body Number (ARBN) distinct from the ARBN or Australian Company Number (ACN) of each body corporate other than the Claimant already registered as a company or registered body under the Corporations Act in Australia.[216]

203. Further examples demonstrate that the Respondent treated Mineralogy as foreign owned:

    a. on 21 August 2019 an application was made by PwC on behalf of Mineralogy titled "*Mineralogy Group –Applications for Connected Entities Exemption under Duties Act 2008 (WA) – Section 262*" to the Western Australian OSR;[217]

    b. on 27 August 2019, an application made by PwC on behalf of Mineralogy titled "*Mineralogy Group – Section 411 Applications for Exemptions in respect of*

215 Claimant's Certificate of Registration of a Foreign Company issued by the Australian Securities and Investments Commission, (**Exh. C-482**).
216 **Exh. C-97**.
217 See Applications under section 262 of the Duties Act 2008 (WA) to the Western Australia Office of State Revenue, 21 August 2019, NoI, Annexure A, Exhibit 23, (**Exh. C-63**), p.211-240.

Corporate Reconstruction Transactions" to the Queensland OSR dated 27 August 2019;[218]

c. on or about 8 October 2019, the Queensland OSR assessed that no duty was payable on the restructure on the basis of the PwC application;[219]

d. on or about 14 February 2020, the Western Australia OSR confirmed that no duty was payable on the restructure on the basis of the PwC application;[220]

e. on 16 August 2019, Mineralogy purchased residential real estate at [redacted]. On this acquisition Mineralogy was required by Western Australia to pay Foreign Transfer Duty on the basis that Mineralogy was a foreign corporation by reason of its ownership by the Claimant;[221]

f. on 30 July 2021, Mineralogy received a letter from the Respondent's ATO in respect of [redacted]. That letter stated that, in the Respondent's view, Mineralogy was a foreign person for the purposes of the FATA by reason of its ownership by the Claimant, and it had failed to comply with that Act by failing to obtain approval prior to its acquisition of [redacted];[222]

g. on 7 March 2022, Mineralogy received a letter from the ATO completing the review of its Australian residential real estate holdings on the basis that

218 See Applications under section 411 of the Duties Act 2001 (Qld) to the Queensland Office of State Revenue, PwC, 27 August 2019, NoI, Annexure A, Exhibit 22, (**Exh. C-63**), p.182-210.
219 See The Queensland Office of State Revenue, Commissioner Assessment Notices to Mineralogy International Limited, 8 October 2019, NoI, Annexure A, Exhibit 26, (**Exh. C-63**), p.300-318.
220 See The Western Australia Office of State Revenue, Duties Assessment Notice to Mineralogy International Limited, 14 February 2020, NoI, Annexure A, Exhibit 27, (**Exh. C-63**), p.319-321.
221 The Western Australia Office of State Revenue Statement of Grounds for Foreign Transfer Duty, 16 August 2019, NoI, Annexure A, Exhibit 28, (**Exh. C-63**), p.322-326.
222 Letter from the Australian Taxation office to Mineralogy Pty Ltd, Foreign Investment Rules, 30 July 2021, Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 29, (**Exh. C-63**), p.327-328.

Mineralogy would remediate the breach of FATA by disposing of the property it had acquired in 2019 being [redacted];[223] and

h. on 31 March 2022, remediating the breach of the FATA Act in accordance with the Respondent's direction, Mineralogy transferred the Property to Mr Palmer.

204. In respect of FATA, the Respondent has represented that Mineralogy's investments are subject to the FATA, the premise of which is that Mineralogy is a "*foreign person*" (see FATA, section 40(5)). That is defined to mean, relevantly, "*a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest*" (FATA, section 4). The Claimant is the "*foreign corporation*" which holds a substantial interest in Mineralogy.

205. The Western Australian and Queensland Governments (who will bind the Respondent) in communicating the acceptance of the applications made by PwC on Mineralogy's behalf for duty exemptions, have also represented, or acquiesced in their acceptance of the restructuring that it was *bona fide* and that the Claimant was in control of Mineralogy (and, in turn, International Minerals).

206. That is particularly so in respect of communications (explained in more detail below being):

(a) The 8 October 2019, Commissioner Assessment Notice issued by the Queensland OSR dated 8 October 2019, in which the Office of State Revenue for the State Government of Queensland granted an exemption to the Claimant, MIL and Mineralogy for the transactions constituting the reconstruction of the corporate group.[224]

223 Letter from the Australian Taxation office to Mineralogy Pty Ltd, Foreign Investment and Takeovers Act 1975, 7 March 2022, NoI, Annexure A, Exhibit 30, (**Exh. C-63**), p.329-330.
224 Commissioner Assessment Notice issued by the Queensland Office of State Revenue dated 8 October 2019, NoI, Annexure A, Exhibit 26, p300, (**Exh. C-63**).

(b) On 14 February 2020, Duties Assessment Notice issued by the Western Australian OSR, in which the OSR for the State Government of Western Australia granted an exemption to the Claimant, MIL and Mineralogy for the transactions constituting the reconstruction of the corporate group.[225]

207. In this case, therefore, the Respondent has plainly acted in a way which is entirely inconsistent with the positions it is now seeking to adopt in this arbitration, such that it is estopped from doing so in line with the abovementioned arbitral decisions.

208. In addition, in the [redacted] WS at paragraphs 42 to 47[226], [redacted] confirms that he, as the then sole director of Mineralogy, made a recommendation in the accounts of the amount of dividends that Mineralogy would pay out in the 2019 and 2020 years and that Mineralogy retained over AU$240 million dollars of its earnings in Australia and did not pay out those amounts, when it could have, to the Claimant. It was recommended to the Claimant that the accounts recommendation be passed at the meeting of shareholders of Mineralogy in the years 2019 and 2020 (**Exh. C-546** and **Exh. C-547**) [redacted] further states in paragraph 42 (of the [redacted] WS)[227] that Mineralogy made the decision to retain over AU$240 million dollars of its earnings in Australia and not pay out the said amounts, and the Claimant made the decision as the shareholder to approve the accounts **in reliance** on the Respondent having approved the Claimant as a "foreign company" pursuant to the Claimant's Application for Registration under Section 601CE of the Corporations Act in 2019.[228]

209. First, it will be clear that Australia acquiesced in the Claimant's status and foreign company that enjoyed the benefits of protection under investment treaties. Indeed in the despite the Respondent's complaint about the letters sent on 4 February 2019 (Respondent's **Exh. R-141**) in which Mr Mashayanyika Chairman of MIL made

225 Duties Assessment Notice issued by the Western Australian Office of State Revenue dated 14 February 2020, NoI, Annexure A, Exhibit 27, p 319, (**Exh. C-63**).
226 [redacted] WS at paras 42-47.
227 [redacted] WS at para 42
228 [redacted] WS at para 42; Minutes of meeting of members of Mineralogy, 2 December 2019, (**Exh. C-546**); Minutes of meeting of members of Mineralogy, 13 April 2021, (**Exh. C-547**).

reference to treaty protections under the Singapore-Australia Free Trade Agreement, that was precisely the sought of circumstances that "called for a reaction" – to coin the language of the *Temple of Preah Vihear Case*. That is to say, even if this Tribunal were to consider that it was open to deny benefits to an investor retrospectively after the investment has been made (which is not accepted by the Claimant) once the Respondent was made aware of the protections afforded to Claimant any failure to then deny benefits to the Claimant must be treated as acquiescence.

210. Alternatively, the Respondent's omission to deny benefits to the Claimant or a class of investors including it *prior to* the making of its investments (or at least *at the time of* obtaining various approvals and tax rulings regarding the acquisition) was a representation by silence that the Claimant's investments would not be denied the benefits of the AANZFTA.

211. In this case, therefore, the Respondent has plainly acted in a way which is entirely inconsistent with the positions it is now seeking to adopt in this Arbitration.

SECTION III: THE DISPUTE

212. The Respondent acknowledges at paragraph 23 of its Objections as follows:

> "***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 expressed (such as the "preponderance of the evidence").[229] 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*."" [230]
>
> [Emphasis added]

213. Whereas the Claimant has provided substantial, clear and cogent evidence of <u>facts</u> by way of the witness statements served with its NOA/Statement of Claim and the

229 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**).

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

additional witness statements referred to above and below, in contrast the Respondent has provided little or no evidence of the facts.

214. It is the Claimant's respectful submission that the role of the Tribunal in considering the Respondent's Objections is properly to evaluate the factual evidence and apply the provisions of the AANZFTA and international law to such factual evidence in reaching its conclusions.

215. The Respondent's evidence consists of ill-informed and/or inadmissible opinion and speculation, sometimes cast in terms which cast doubt upon the objectivity and independence of the makers of those statements, and therefore have little to no relevance to the factual enquiry that must be undertaken by the Tribunal.

216. Again, the Claimant relies on its NOA/Statement of Claim (incorporating by reference, inter alia, the Claimant's Notice of Intent), together with evidence filed with the said notice as well as the additional evidence filed with these submissions, being the witness statements as set out in paragraph 6 of this Response above.

A. The Dispute – Notice of Arbitration

217. Article 20 (Claim by an Investor of the Party) of Chapter 11 (Investment) of the AANZFTA permits only that "*the disputing investor may, subject to this Article submit to conciliation or arbitration a claim*", and under Article 21 (Submission of a Claim), the AANZFTA states that " *[a] disputing investor may submit a claim*".

218. The UNCITRAL Arbitration Rules of 2021 set out the content of a notice of arbitration and Article 3, sub-paragraph 3, states that the claimant must include details of the dispute which will be the subject of the arbitration. The nature and scope of the dispute is therefore determined and defined by what is included and described in the notice of arbitration.

219. In this case, the NOA was served on the Respondent on 29 March 2023 and it incorporated the Notice of Intent dated 20 October 2022[231], by way of paragraph 4

231 Notice of Intent, dated 20 October 2022, (**Exh. C-63**).

of the NOA. The NOA thereby incorporates by reference, in its entirety, the Notice of Intent. The Notice of Intent defined the dispute in section 6, from line 447, as follows:

"***6. The Dispute***

6.1. Background

The dispute to be submitted to arbitration under the AANZFTA arises out of the enactment of the 2020 Amendment Act on 13 August 2020. This Act terminated the 2020 Arbitration Agreement and thereby breached Articles 6 and 9 of the AANZFTA. The dispute between the Claimant and the Commonwealth ***first arose on 13 August 2020****. [Emphasis added]*

Having drafted the 2020 Amendment Act in secret and rushed it through the Western Australian Parliament, Mr McGowan and Mr Quigley left no doubt in their public statements that the purpose of the Act was to terminate the 2020 Arbitration Agreement and the 2020 Arbitration, thereby avoiding any liability in connection with the 2020 Arbitration Agreement or the breaches of the State Agreement found by Mr McHugh in the First and Second Awards. As a result of the 2020 Amendment Act, Zeph's Subsidiaries have lost the ability to pursue their claims for loss and damage pursuant to the 2020 Arbitration Agreement.

As a matter of international law, the actions of Western Australia are attributable to the Commonwealth and the Commonwealth bears responsibility for those actions, including the enactment of the 2020 Amendment Act. The Claimant has suffered significant damage as a result of the termination of the 2020 Arbitration Agreement and 2020 Arbitration and the prohibition on seeking remedies for established breaches by WA of the State Act. The 2020 Amendment Act breaches the Commonwealth's obligations to the Claimant under the AANZFTA. The 2020 Amendment Act was discriminatory and resulted in the expropriation of the Claimant's contractual, proprietary and other rights and interests of the Claimant (through its ownership of the Zeph Subsidiaries) under the 2020 Arbitration Agreement. The

Commonwealth has thereby caused the Claimant loss and damage to its investments in Australia.

The heart of the dispute is that the 2020 Arbitration Agreement made in writing and executed and accepted by all parties on or about 8 July 2020 was terminated by the Commonwealth in bad faith by the 2020 Amendment Act, in breach of the Expropriation and nationalization obligations of Article 9 and all of the obligations of Article 6 of AANZFTA.

The Claimant did not know and could not have known prior to the execution and 2020 Arbitration Agreement by all parties on or about 8 July 2020 that the 2020 Arbitration Agreement would be abruptly terminated by legislation, which had been prepared in secrecy by the Commonwealth. Likewise, the Zeph Subsidiaries, proceeding in good faith with a model litigant, did not know and could not have known that the Commonwealth would terminate the 2020 Arbitration Agreement less than a month after its execution by the 2020 Amendment Act. The 2020 Amendment Act also expropriated the Balmoral South Iron Ore Proposal, the First Award and the Second Award, in breach of the expropriation and nationalization obligations of Article 9 of AANZFTA.

The damages the Claimant is entitled to, inter alia, is the amount the Zeph Subsidiaries would have received had the 2020 Arbitration proceeded to a hearing in accordance with the provisions of the 2020 Arbitration Agreement as ordered by Michael McHugh AC KC. The evidence required to establish the Commonwealth liability is the 2020 Arbitration Agreement, the Amendment Act, and, Article 9 of AANZFTA. The evidence required to establish the Claimant's damages on this part of the claim is all pleadings, evidence (including expert reports), sworn statements and expert reports, directions and submissions brought before Mr Michael McHugh AC KC in the 2020 Arbitration prior to the termination of the 2020 Arbitration Agreement, which was purportedly extinguished by the 2020 Amendment Act (without any form of compensation) and was a valuable right to recover damages."

220. The effect of the *Amendment Act* is summarised above. This remainder of this section analyses the provisions of the Act in more detail and describes the consequent breaches of the AANZFTA.

221. This dispute commenced with the passing of the *Amendment Act* which is set out in exhibit **Exh. C-1**. The date of the commencement of the dispute is the date of the passing of the *Amendment Act* which was (as per the NOA, at paragraph 2) 13 August 2020. The Claimant is only seeking relief in this arbitration in respect of the damages caused to it by the introduction of the *Amendment Act*.

B. Purpose of the *Amendment Act*

222. The main purpose of the *Amendment Act* was to terminate the Arbitration Agreement entered on 8 July 2020 and the State Agreement Arbitration and to achieve the following objectives and outcomes:

    a. Any relevant arbitration and arbitration agreement (including the State Agreement Arbitration and the Arbitration Agreement) between the Respondent's State of Western Australia and the Claimant's subsidiaries that is in progress or otherwise not completed immediately before commencement of the *Amendment Act* is terminated with immediate effect (section 10);[232]

    b. The First and Second Awards in favour of the Claimant's subsidiaries in the State Agreement arbitration are of no effect and are taken never to have had any effect (section 10);[233]

    c. On and after commencement of the *Amendment Act*, Western Australia has and can have no liability to any person in any way connected with the Balmoral

232 Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 10, (**Exh. C-1**)
233 Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 10, (**Exh. C-1**).

South Iron Ore Proposal (and any such liability existing before commencement is extinguished) (section 11);[234]

d. On and after commencement of the *Amendment Act*, no proceedings can be brought to establish, quantify or enforce any such liability (section 11);[235]

e. There can be no appeal against or review of any of Western Australia's conduct concerning the Balmoral South Iron Ore Proposal and the rules of natural justice, including any duty of procedural fairness, shall not apply (section 12);[236]

f. The Balmoral South Iron Ore Proposal (which was the subject of the First Award) is to have no contractual or other legal effect under the State Agreement or otherwise (section 9);[237]

g. The Claimant's subsidiaries and their relevant director (as defined) must indemnify, and keep indemnified, Western Australia against any loss or liability connected with the Balmoral South Iron Ore Proposal, including those arising under international law or international treaties (section 14);[238]

h. The Claimant's subsidiaries and their relevant director must indemnify, and keep indemnified, Western Australia against any legal costs and any liability to pay any legal costs of any other person in connection with legal proceedings connected with the Balmoral South Iron Ore Proposal, as well as any loss

234 Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 11, (**Exh. C-1**).
235 Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 11, (**Exh. C-1**).
236 Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 12, (**Exh. C-1**).
237 Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 9, (**Exh. C-1**).
238 Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 14, (**Exh. C-1**).

connected with a stated intention or threat to bring such proceedings (section 14);[239]

i. Western Australia may (without limitation) enforce this indemnity even if it has not made any payment or done anything else to meet, perform or address the proceedings, liability or loss in question (section 14);

j. No conduct of Western Australia connected with the consideration of courses of action for resolving disputes about the Balmoral South Iron Ore Proposal, including anything in connection with the *Amendment Act* itself and any communications and statements made in connection therewith, has or has ever had the effect of causing or giving rise to the commission of a civil wrong by Western Australia (section 18);[240]

k. No such conduct of Western Australia has or has ever had the effect of placing Western Australia in breach of or of frustrating the State Agreement, any related arbitration agreement, any related mediation agreement, or any other agreement or understanding, nor of giving rise to any right or remedy against Western Australia (section 18);[241]

l. No document, other thing or oral testimony connected with such conduct is admissible in evidence or can otherwise be relied upon or used in any proceedings in any way that is against the interests of Western Australia (section 18);[242]

239 Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 14, (**Exh. C-1**).
240 Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 18, (**Exh. C-1**).
241 Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 18, (**Exh. C-1**).
242 Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 18, (**Exh. C-1**).

m. Western Australia has and can have no liability to any person that is in any way connected with such conduct and any such liability that Western Australia had before commencement of the *Amendment Act* is extinguished (section 19);[243]

n. No such conduct of Western Australia can be appealed against, challenged, quashed or called into question on any basis and the rules of natural justice, including any duty of procedural fairness, shall not apply (section 20);[244]

o. Any proceedings in which such conduct is appealed against, challenged, quashed or called into question on any basis that are not completed before commencement of the *Amendment Act* are terminated (section 20);[245]

p. Any proceedings in which such conduct is appealed against, challenged, quashed or called into question on any basis have been completed before commencement of the *Amendment Act*, any remedy, ruling or other outcome unfavourable to Western Australia or that requires Western Australia to do or not do anything are extinguished (section 20);[246] and

q. Any such conduct of Western Australia before, on or after commencement of the *Amendment Act* does not constitute and is taken never to have constituted an offence (section 20).[247]

C. The Amendment Act Prohibits International Arbitration

243 Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 19, (**Exh. C-1**).
244 Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 20, (**Exh. C-1**).
245 Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 20, (**Exh. C-1**).
246 Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 20, (**Exh. C-1**).
247 Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 20, (**Exh. C-1**).

223. As is evident from the above summary and Annexure E of the Notice of Intent[248], the *Amendment Act* prohibits the commencement of any investor-State arbitration by the Claimant and seeks to destroy the value of any such arbitration. The *Amendment Act* produces the following consequences which directly and significantly affect any international arbitration connected with the subject matter of the dispute:

a. *First*, the *Amendment Act* purports to proscribe the commencement and prosecution of an international arbitration, and the pursuit of remedies therein. This is apparent from the definition of "*proceedings*" in section 7, which is defined in paragraph (c) to include "*non-WA proceedings*", which in turn is defined to include proceedings that take place "*under international law (including an international treaty or other agreement or instrument)*" or "*outside Western Australia on any other basis*". Section 11(3) relevantly prohibits the bringing of proceedings "*against the State*" (defined in s 7(4) relevantly to include proceedings connected with "*enforcing a liability of the State*" or seeking any relief or award "*unfavourable to*" the State). Further, s 12(1) prohibits the State's conduct connected with a disputed matter being "*called into question on any basis*" or from being the subject of various remedies "*in any proceedings*". Hence, on its face, the *Amendment Act* purports to proscribe the commencement and prosecution of an international arbitration;

b. *Second*, the *Amendment Act* purports to render unenforceable any award obtained by the Claimant in an international arbitration. As noted above, section 12(1)(b) purports to prohibit various remedies arising from conduct of the State connected with a disputed matter, including injunctive and declaratory relief. This is bolstered by section 17(5), which provides that no execution "*can be issued out of any court against the State*". Section 12(4) provides that, to the extent that any remedy described in section 12(1) is sought in proceedings, those proceedings are "*terminated*";

248 Notice of Intent, dated 20 October 2022, (**Exh. C-63**).

c. *Third*, the *Amendment Act* purports to proscribe any monetary award in favour of the Claimant being satisfied by the State (sections. 17(2)–(4) and 25(2)–(4)). This has the effect of denying the Claimant access to any meaningful remedy for the State's breach; and

d. *Fourth*, sections 14–16 and 22–24 of the *Amendment Act* impose punitive "*indemnities*" on the Claimant's subsidiaries and one of its directors. The purported effect of these indemnities is that, if a party such as the Claimant brings an international arbitration against the Commonwealth connected with a disputed or protected matter, various persons (including the Claimant's subsidiaries and Mr Palmer, a director of both those subsidiaries and the Claimant itself) are jointly and severally required to indemnify Western Australia in respect of any amount that might be recovered from the Commonwealth.

224. The dispute this Tribunal has been asked to determine is whether the *Amendment Act* breaches the Respondent's obligations under the AANZFTA. This dispute could never have been foreseeable at any time prior to 5.00 p.m. on 11 August 2020. The provisions of the *Amendment Act* and its undermining of the rule of law are unprecedented in a Western democracy and by their very nature could never have been foreseeable and nor, therefore, could this dispute have been foreseen.

SECTION IV: INVESTOR / INVESTMENT

A. RESPONSE TO FIRST OBJECTION: Claimant is an "Investor of the Party" Under Article 2(d) of Chapter 11 of the AANZFTA

Introduction

225. As outlined below, in addition to the matters set out in Sections I and II, the Claimant is an "investor of a Party" entitled to bring a claim under Chapter 11 of the AANZFTA.

226. An "investor of a Party" is defined in Art 2(d) of Chapter 11 of AANZFTA as:

> "*a natural person of a Party or a juridical person of a Party that seeks to make, is making, or has made an investment in the territory of another Party*."

227. The Claimant clearly meets this definition based on the facts and the matters stated in Section I and elsewhere in this Response and this Section IV.

228. As discussed below, the Respondent's attempt to read into the definition of "investor" a requirement of an active investment or contribution must be rejected. It is contrary to the weight of authority on the meaning of "make an investment", and contrary to the plain meaning of the definition, interpreted in accordance with the Vienna Convention[249] which is addressed further below.

229. To some extent, however, the difference between the Parties' interpretations of "investor" is academic. The Claimant is an investor on both the Claimant's and the Respondent's preferred definitions. That is because the Claimant made an active

249 *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**).

investment and continues to be actively involved in the management of its investment, as the evidence below demonstrates. The Claimant is, therefore, an "investor of a Party" and is entitled to bring a claim under the AANZFTA.

The Evidence shows that the Claimant Made an Investment

The Claimant Acquired the Investment through a Payment of Shares

230. On 29 January 2019, pursuant to a share purchase agreement, the Claimant purchased 6,002,896 shares in Mineralogy from MIL, a New Zealand incorporated company. In return, the Claimant paid to MIL consideration in the form of 6,002,896 newly-issued shares in the Claimant.[250] The shares had a value of SGD 6,002,896.00.

231. The Share Purchase Agreement[251] recorded that:

> "*Subject to and on the terms of this Agreement, the Seller agrees to simultaneously sell to the Buyer and the Buyer agrees to concurrently purchase from the Seller, the respective parcel of Mineralogy Shares held by the Seller in sole consideration and exchange for the issue of the Consideration share is the Buyer to the Seller such that the Seller will receive a parcel of newly issued Consideration Shares in the Buyer being equal in number and value to the parcel of Mineralogy Shares agreed to be sold and transferred to the Buyer on the terms and conditions set out in this Agreement*."

232. "Consideration Shares" were defined in the Share Purchase Agreement as "*6,002,896 newly issued fully paid ordinary shares in the capital of the Buyer as set out in clause 2.3*".

250 Share Purchase Agreement between Claimant and MIL, 29 January 2019, NoI, Annexure A, (**Exh. C-63,** p.168). Following the share swap, MIL became the parent of the Claimant. At the time of the share swap, the Claimant's name was "Mineralogy International Pte Limited" (See Notice of Intent, **Exh. C-63**, Annexure A).
251 Share Purchase Agreement between Claimant and MIL, 29 January 2019, NoI, Annexure A, (**Exh. C-63,** p.168).

233. The Share Purchase Agreement is a detailed, 12-page document that sets out the rights and obligations of both parties, including warranties, representations and duties that must be undertaken upon execution. The Share Purchase Agreement is signed by two directors from each company.

234. In accordance with the Share Purchase Agreement, the parties executed the transaction. The transfer was supported by all appropriate shareholder resolutions, company minutes, director appointments, share transfer forms, and tax rollover elections.[252]

235. All of these documents were prepared by the reputable law firms representing the parties to the transaction (being [redacted] in New Zealand and [redacted] in Singapore, both of which are large, well-respected law firms). Where required, relevant documents were supplied to the Commonwealth's Australian Tax Office. Other regulatory authority notifications in Australia and overseas were made and the relevant company records and share registers were updated.[253] The corporate restructuring was fully transparent and undertaken in compliance with all laws and regulations.

236. In addition, following its purchase of the shares in Mineralogy[254], the Claimant applied to become registered as a foreign corporation in Australia under the Australian *Corporations Act*.[255] The application was approved by the regulator (the Respondent's ASIC) following the provision of information demonstrating the Claimant's investment in Mineralogy.[256]

252 These documents were attached to Annexure A of the Notice of Intent and labelled Exhibits 12-19 and 21 (**Exh. C-63**), pp. 153-167 and 181.
253 These documents were attached to Annexure A of the Notice of Intent and labelled Exhibits 22-28 (**Exh. C-63**, pp. 182-326).
254 Share Purchase Agreement between Claimant and MIL, 29 January 2019, NoI, Annexure A (**Exh. C-63,** p.168).
255 Application for registration as a foreign company with the Australian Securities & Investments Commission, (**Exh. C-97**).
256 [redacted] WS at paras 14 to 17; Claimant's Certificate of Registration of a Foreign Company issued by the Australian Securities and Investments Commission, (**Exh. C-482**).

237. The purchase of the Mineralogy shares was recorded in the Claimant's Annual Accounts as follows:[257]

> *"During the year Zeph Investments Pte. Ltd. (ZIP) through corporate restructure, acquired Mineralogy Pty Ltd (MIN) by issuing shares 6,002,896 to MIN shareholders equivalent to the same number of shares ZIP acquired in MIN of 6,002,896.*
>
> | | |
> |---|---|
> | *Shares acquired in MIN* | *6,002,896* |
> | *Consideration - share issues to MIN shareholders* | *6,002,896"* |

The Claimant Made Investments in the Form of Reinvesting Returns

238. In addition to the initial investment made to purchase the Mineralogy shares, the Claimant has made continuing significant investments in the form of dividends or "returns"[258] that have been retained by Mineralogy and not distributed to the Claimant.

239. As confirmed in the independent expert report of [redacted] of [redacted] dated 14 February 2024 which is attached to the [redacted] WS (the "[redacted] **Report**"), as at June 2020 (just prior to the ***Amendment Act*** being passed) Mineralogy had retained profits for the financial years 2019 and 2020 of AU$[redacted] million[259].

240. [redacted] in the [redacted] Report confirms that Mineralogy had the following funds available for distribution to the Claimant in the financial years 2019 and 2020:

    a. Financial year 2019 (ended 30 June 2019): AU$ 482,997,183; and

257 Claimant's Consolidated Financial Statements for year ended 30 June 2019, p.26, (**Exh. C-80**).
258 As defined in Article 2(j) of Chapter 11 of the AANZFTA.
259 [redacted] Report, paras 6.2, 6.3 and 6.6.

b. Financial year 2020 (ended 30 June 2020): AU$ 698,283,485.[260]

241. A dividend was paid or declared in the financial year 2020 of only AU$ 8,115,000 as follows:

a. $1.15 million was paid and declared on 29 June 2020;[261]

b. $7.00 million was declared on 30 June 2020, but not paid (i.e. distributed) in that financial year.[262]

242. [redacted] in the [redacted] Report then confirms that the following current year profits were retained by Mineralogy in the financial years 2019 and 2020:[263]

a. For the financial year ended 30 June 2019, retained profits of AU$ 35.55 million; and

b. For the financial year ended 30 June 2020, retained profits of AU$ 207.17 million.

243. These retained profits each constitute separate investments under the AANZFTA[264]. The retained profits are set out in the audited accounts of Mineralogy.[265]

Loan from Mineralogy to the Claimant

244. The Lys Report[266] at paragraph 36 and paragraphs 88 to 92 inclusive discusses the SG $3.5 million loan from Mineralogy to the Claimant for the Claimant to fund the acquisition of the three Singapore engineering businesses, and asserts that such loan

260 [redacted] Report, para 4.5, Table.
261 [redacted] Report, para 4.2; Declaration of Dividend, Mineralogy, 29 June 2020 10:30am, (**Exh. C-539**).
262 [redacted] Report, para 4.2; Declaration of Dividend, Mineralogy, 29 June 2020 10:40am, (**Exh. C-540**).
263 [redacted] Report, para 5.3.
264 Article 2, Definitions, Chapter 11 of AANZFTA.
265 Annual Audited Accounts of Mineralogy for the financial year ended 30 June 2019, (**Exh. C-476**); Annual Audited Accounts of Mineralogy for the financial year ended 30 June 2020, (**Exh. C-477**).
266 Lys Report dated 20 January 2024.

was not a market-based arm's-length transaction and therefore not commercially viable, and further supposes that it must have been forgiven and is therefore tantamount to a gift. This conclusion is incorrect in a number of ways.

245. *First*, it ignores the fact that the loan occurred within a 100% wholly owned group, and it is not uncommon for there to be short-term interest-free loans within such wholly owned groups. The Claimant as the parent of Mineralogy could dictate the terms of the loan. In this regard:

    a. Lys' comment at footnote 68 of the Lys Report that *"*[t]*ax authorities around the world routinely limit the ability of entities to issue such interest-free loans"* is irrelevant in this case as the Claimant and Mineralogy are members of an Australian tax consolidated group and therefore intra-group transactions are ignored from an Australian tax perspective. It is common within Australian tax consolidated groups for intra-group loans to be interest-free; and

    b. Further, Lys' comment at footnote 69 of the Lys Report that *"*[i]*n Australia, I understand that a similar concept exists, with Division 7a benchmark interest rates promulgated by the Australian Taxation Office"* is also irrelevant. Division 7A does not apply to loans between companies, and in any event could not apply to loans between members of a tax consolidated group as they would be ignored.

246. *Second*, the entire SG $4,039,803 loan (which includes the SG $3.5 million loan to fund the three Singapore engineering businesses) was not forgiven, but was in fact repaid in full by the Claimant to Mineralogy within 18 months of it originally being advanced. In this regard:

    a. During the financial year ended 30 June 2020, Mineralogy Pty Ltd declared dividends of AU $1,115,000 and AU $7,000,000 to its shareholder, the Claimant. Dividends paid/declared for that year are shown in the Financial

Reports of Mineralogy for the financial year 2020 Consolidated to a total of AU $8,115,000;[267]

b. Corresponding dividend income of SG $7,751,975 (i.e. AU $8,115,000 converted to SGD) is reflected as revenue at Note 17 of **Exh.C-81** Audited Financial Statements of the Claimant for the financial year ended 30 June 2020;[268]

c. Of the dividend income of SG $7,751,975 received by the Claimant in the financial year 2020, an amount of SG $1,065,120 (equivalent to the AU $1,115,000 dividend from Mineralogy) was declared, approved and paid as a dividend to the Claimant's shareholder, MIL;[269]

   As a consequence, dividend income of SG $6,686,855 (equivalent to the AU $7,000,000 dividend from Mineralogy) was retained as income by the Claimant. This dividend of AU $7,000,000 was reflected as a liability of Mineralogy and a receivable of SG $6,686,855 for the Claimant as at 30 June 2020, resulting in the repayment in full of the SG $4,039,803 loan owing by the Claimant and Mineralogy to nil as at 30 June 2020. This nil loan balance is noted by Lys himself at paragraph 92 of the Lys Report, and confirmed by Note 24 of the Audited Financial Statements of the Claimant for the financial year ended 30 June 2020[270]; and

d. The excess of the dividend income of SG $6,686,855 over the loan repayment of SG $4,039,803, amounts to SG $2,647,052.

267 See Financial Reports of Mineralogy Pty Ltd for the financial year ended 30 June 2020, pp 2 and 23, (**Exh. C-477**).
268 Audited Financial Statements of the Claimant for the financial year ended 30 June 2020, Statement of Changes in Equity and Notes 22 and 24, (**Exh. C-81**).
269 Audited Financial Statements of Zeph Investments Pte Ltd for the financial year ended 30 June 2020, Statement of Changes in Equity and Notes 22 and 24, (**Exh. C-81**).
270 (**Exh. C-81**).

247. In addition to the investments set out in above, [redacted] in the [redacted] Report then confirms that the following current year profits were retained by Mineralogy in FY2019 and FY2020:[271]

a. For the financial year ended 30 June 2019, retained profits of AU$ 35.55 million; and

b. For the financial year ended 30 June 2020, retained profits of AU$ 207.17 million.

Claimant Actively Manages its Investments in Mineralogy

248. In addition to its initial investment and the further investments in Financial Years 2019 and 2020, the Claimant has also played an active role in managing Mineralogy. In particular, and as also set out in Section II of this Response above:

a. Five of the Claimant's directors are resident in Australia and are actively involved in the day-to-day operations of Mineralogy;

b. Mr Wong is the Claimant's Chief Investment Officer (responsible for monitoring the Claimant's investments) and is also Mineralogy's Chief Financial Officer;[272]

c. Mr Palmer and Ms Emily Palmer are directors of the Claimant and are the only [redacted];[273]

d. The Claimant's director, Mr Sheridan, is [redacted] at Mineralogy. Mr Sheridan was appointed as director of the Claimant in anticipation of assisting to secure financing for the coal projects;[274]

271 [redacted] Report, para 5.3.
272 LinkedIn profile of Bernard Wong, (**Exh. R-344**).
273 [redacted] WS para 29(c).
274 [redacted] WS para 29(f).

e. The Claimant appoints Mineralogy's directors, including Ms Singh who is a director of the Claimant, and Company Secretary of Mineralogy and who was appointed director of Mineralogy on 9 November 2020;[275]

f. Mr Palmer is a director of the Claimant and was the "Governing Director" of Mineralogy at the time that the *Amendment Act* was passed;[276] and

g. The Claimant produces independently audited consolidated financial statements every financial year which include Mineralogy and are filed with the Australian companies regulator – the Respondent's ASIC. This accords with the Claimant's obligations as a registered foreign company in Australia.[277]

249. It is evident from the above that the Claimant's directors are intricately involved in the management and operations of Mineralogy. The Claimant has a Chief Investment Officer (Mr Wong) to ensure that its investments are properly managed. The Respondent refers to the "economic reality" of the situation.[278] It is undeniable that the economic reality is that the Claimant is closely involved in, and monitors, all aspects of Mineralogy's business including its investments. This makes sense given that Mineralogy is such a key investment for the Claimant. The Claimant can hardly be described as a "passive" investor.

250. In short, the Claimant has made an investment in Australia by:

a. Purchasing the shares in Mineralogy;

275 ASIC Current and Historical Company Extract, Exhibit 3 to Annexure A of the Notice of Intent, (**Exh. C-63**), p.65.
276 Company Constitution of Mineralogy Pty Ltd, dated 9 February 2021, (**Exh. C-490**).
277 Zeph Investments – ASIC Form 405, Financial Year ending 30 June 2019, p. 9 (**Exh. C-485**); Zeph Investments – ASIC Form 405, Financial Year ending 30 June 2020, p. 11 (**Exh. C-486**); Zeph Investments – ASIC Form 405, Financial Year ending 30 June 2021, p. 11 (**Exh. C-487**); Zeph Investments – ASIC Form 405, Financial Year ending 30 June 2022, p. 11 (**Exh. C-488**); Zeph Investments – ASIC Form 405, Financial Year ending 30 June 2023, p 11 (**Exh. C-497**).
278 SoPo, [197].

b. Investing in 2019 and 2020 significant profits (or returns) into Mineralogy which are being used to undertake further investment; and

c. Playing an active role in the management of Mineralogy's investments in Australia since February 2019.

251. Based on the evidence, the Claimant has *made* an investment in the territory of the Respondent and is an "investor of the Party" under Chapter 11 of AANZFTA.

The Respondent's Preliminary Objection that the Claimant is not an "Investor" must be Dismissed

252. The Respondent has raised a preliminary objection that the Claimant is not an investor of a Party because it "holds" investments, rather than has "made" investments. As the evidence above shows, this is incorrect. The Claimant made an investment in Australia when it (i) transferred a benefit/value in exchange for the shares in Mineralogy; (ii) repeatedly invested returns into Mineralogy as an ongoing investment; and (iii) actively managed its investments in Australia.

253. Whilst there is overwhelming evidence that the Claimant is an investor (even on the Respondent's definition), the Respondent's definition of "investor" should also be rejected. It is unsustainable in the light of the plain meaning of the AANZFTA and inconsistent with the jurisprudence on the interpretation of "made" an investment.

254. The Respondent contends that the definition of investor in Article 2(d) of Chapter 11 of AANZFTA requires an investor to have made an *active* investment in the territory of the respondent State.[279]

255. It is not clear from the Respondent's submissions exactly what it considers is required for an investor to make such an active investment. The concept is inherently nebulous. The Respondent states that "to make" is a verb and that it means something different from holding or owning.[280] Simply describing its grammatical

279 SoPo, [144].
280 SoPo, [147].

form in this way, however, does not assist in elucidating the meaning of "make". To then jump from this negative definition to importing a requirement that there be an "active investment" gives the word "made" in Article 2(d) of Chapter 11 of AANZFTA a weight that it cannot bear.

256. In relation to the purchase of shares, the Respondent's position seems to be that only shares purchased with cash can constitute an investment and a "cashless transaction" cannot do so.[281] The reasons that the Respondent considers that a cashless transaction cannot constitute an investment are not clear. Certainly, there is nothing in the wording of the AANZFTA that supports such an interpretation. Nor is there any reason of principle or logic that supports such an interpretation. Moreover, as discussed below, the Respondent's position runs against the clear weight of authority.

257. Rather than engage with the Respondent's specific arguments which are difficult to follow, the Claimant sets out below the correct interpretation of "investor of a Party", as defined in Article 2(d) of Chapter 11 of AANZFTA, interpreted in the manner required by the Vienna Convention.

The Correct Interpretation of "investor" in Article 2(d)

258. Article 2(d) of Chapter 11 of AANZFTA requires that an investor has made, is making or seeks to make an investment in the territory of the respondent State. There is no dispute between the Parties over the meaning of the majority of Article 2(d) – it is only the meaning of "make" that is at issue.

259. The obligation of the Tribunal in the present case is to apply the terms of the AANZFTA, interpreted in accordance with the principles set out in Articles 31-32 of the Vienna Convention. As noted above, pursuant to Article 31(1) of the Vienna Convention, treaties should be interpreted (i) in good faith, (ii) in accordance with the

281 See SoPo, [173-175].

ordinary meaning of their terms, (iii) in their context and (iv) in the light of their object and purpose.

260. If a term in a treaty is ambiguous, the Tribunal may take account of the preparatory work of the treaty and the circumstances of its conclusion (as per Article 32 of the Vienna Convention).

261. In applying these principles of the Vienna Convention, many tribunals have cautioned against the temptation to imply requirements or conditions into a treaty that the parties have not chosen to include.[282] This is exactly what the Respondent requests that the Tribunal do in the present case. Like many tribunals before it, this Tribunal should resist the temptation to read into the AANZFTA terms or requirements that the State Parties chose not to include. To do so would be to fall into error.

Ordinary Meaning of "Make an Investment"

262. As a matter of English grammar, in the construction "*to make an investment*", the verb "to make" is nothing more than the delexical verb that the noun "investment" takes. In other words, the verb "make" has little or no substantive meaning in its own right. The important part of the meaning is taken out of the verb and put into the noun. The meaning of "make" is derived from the noun "an investment". To focus on the verb "make" would be no more fruitful than to focus on the verb "take" (another delexical verb) in the phrase "take a photograph". The Respondent's focus is inherently misconceived.

263. The AANZFTA defines "investment" in Article 2(c) very broadly as "*every kind of asset owned or controlled by an investor*" and goes on to provide a non-exhaustive list of such assets, including "*shares, stocks, bonds and debentures and any other forms of participation in a juridical person and rights derived therefrom.*"

282 See *RENERGY S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022, para 558, (**Exh CLA-179**); *Saluka Investments BV v The Czech Republic* PCA Case No 2001-04, Partial Award, 17 March 2006, para. 229, (**Exh. RLA-40**); *Garanti Koza LLP v Turkmenistan*, ICSID Case No ARB/11/20, Award, 19 December 2016, para 231, (**Exh. CLA-180**).

264. Consequently, to "make" an investment (being the owning or controlling of the relevant asset) is syntactical, not substantive – it is the syntactical means by which the provision conveys that, temporally, the "investment" need not be one that has already been made, but includes one that the investor is "seeking to make" in the future, or is in the process of "making". The word "make" is the means by which those temporal points are expressed as a matter of English. It does not require the investment to have been made by any particular means.

265. The better understanding of the definition of investor is, therefore, a person who is in the process of acquiring, is seeking to acquire, or has already acquired the ownership or control of the relevant asset (i.e., the investment). This is consistent with the findings of Butcher J in *PAO Tatneft v Ukraine*, when he says:[283]

> "*In my judgment the phrase "are invested by" does not import a requirement that, in order to be an investment, there should have been an active process of the commitment of resources by the investor therein. The purpose of the words "are invested by" is to permit, within the definition of "investment", a link between the specification of the types of assets which are comprised within the term and the person who owns or is otherwise interested in those assets (who must be an investor of the other Contracting State) …*"

266. This meaning accords with the ordinary and natural use of language to describe an investor who has invested in a company by holding shares (regardless of the manner in which the shares were obtained) as having "made an investment" in that company or as having "invested in" the company.[284]

267. This ordinary meaning of "*make an investment*" is consistent with the definition of "*covered investment*" in Article 2(a) of Chapter 11 of AANZFTA which includes an

283 *PAO Tatneft v Ukraine* [2018] EWHC 1797, at para 68, (**Exh. RLA-51**).
284 This is consistent with the findings in *Mytilineos Holdings SA v Serbia and Montenegro*, UNCITRAL, Award on Jurisdiction, 8 September 2006, paras 126-131, (**Exh. CLA-181**).

investment of an investor that already exists or that is "*established, acquired or expanded*".

268. Certainly, the term "*make an investment*" carries with it no limitation as to the means by which the investment is made. It is a straightforward, broad definition (just as the definition of investment is straightforward and broad[285]). There is no requirement in the AANZFTA that the action of owning or controlling an asset take the form of a cash payment (as opposed to a share swap) or the provision of any specific type or amount of consideration. It was, of course, open to the State parties to include such conditions, but they did not do so.

269. In accordance with the Vienna Convention, and the jurisprudence of investment tribunals, an arbitral tribunal should not imply into a treaty requirements or conditions that have not been included by the State parties themselves. Particularly pertinent is the Swiss Federal Tribunal's warning in relation to interpreting the phrase "*invested by investors*" in a case involving similar jurisdictional objections to those raised by the Respondent in the present case:[286]

> "*… the BIT does not contain requirements going beyond the holding by an investor of one Contracting Party of assets in the territory of the other Contracting Party. Therefore, the Arbitral Tribunal cannot be followed when it relied on additional conditions, of which it considers that they are not met in this case, to declare itself incompetent.*"

270. The arbitral tribunal in that case had attempted to imply into the relevant treaty a requirement that the claimant engage in the act of investing, based on the words "*invested by investors*". The Swiss Federal Tribunal said that the phrase "*invested by investors*" did not require an active investment be made by the investor in exchange for the assets.[287] The holding of assets was sufficient to fulfil the definition. It is

285 See *Clorox Spain SL v Venezuela*, Decision of the Swiss Federal Tribunal, 20 May 2022, para 3.4.2.5, (**Exh. CLA-182**).
286 *Clorox Spain SL v Venezuela*, Decision of the Swiss Federal Tribunal, 20 May 2022, para 3.4.2.7 (**Exh CLA-182**).
287 Ibid., para 3.4.2.7.

submitted that the same logic applies in the present case to the phrase "*made an investment*", particularly as the requirement that an investor must have "*invested*" is arguably higher than simply having to make an investment.

The Context, Object and Purpose all Support the Ordinary Meaning

271. Nothing in the context, object or purpose of the AANZFTA supports any alternative meaning of "make an investment" or implies that additional conditions over and above those expressly stated should be imposed on an investor. Given that the primary purpose of the AANZFTA (like that of other similar treaties) is investor protection, that is entirely unsurprising.

272. In considering context, the definition of investor must be read in conjunction with the definition of the terms "investment" and "covered investment". These terms are broadly defined and clearly contemplate that an investment may be "acquired" and held by an investor after its establishment.

273. There is no suggestion that anything further or "active" is required beyond that needed to acquire ownership of an asset.

274. In addition, the Tribunal will be aware that the State parties added a footnote to the definition of "investor of a Party". The Claimant uses the term "added" because the AANZFTA text is broadly based on the 2004 US Model BIT.[288] The Model BIT states that an investor of a Party is someone that "attempts to make, is making, or has made an investment…". Clearly the reference to an investment being "made" comes from the Model BIT. However, the footnote in the definition of investor has been deliberately added by the State parties.

275. The footnote states that "*seeks to make*" an investment requires the investor to have taken "*active steps*" to make an investment. The requirement for "active steps" is

288 A Kawharu and L Nottage, "Models For Investment Treaties In The Asia-Pacific Region: An Underview" 34 (2017) Arizona Journal of International & Comparative Law, 461, at 502, (**Exh. CLA-183**).

not specified in relation to an investor who "*is making or has made an investment*". The State parties could have chosen to specify that active steps were also required for these latter terms but did not do so. It is submitted that the State parties' decision to limit "active steps" to an investor seeking to make an investment should be respected. No such requirement should be implied into those terms that the State parties have deliberately chosen not to include within the footnote.

276. The Respondent contends that the insertion of the term "*make*" was a "*deliberate choice*" by the State parties negotiating the AANZFTA and that they chose to repeat the term three times.[289] However, these words were part of the US Model BIT on which the AANZFTA is based. It is submitted that the Tribunal should place little importance on this point. The word "make" was not inserted into the Treaty three times by the State parties – it was the term already in the Model document used by the State parties.

277. In accordance with the Vienna Convention, the definition of investor should also be interpreted in the light of the Treaty's object and purpose. The preamble is helpful in elucidating this purpose. The preamble does not refer to money flows, inward investments or contributions. The primary purpose of the AANZFTA appears to be to strengthen the economic linkages between the States parties through trade, including to reinforce "*long-standing ties and friendship*", to "*deepen and widen economic linkages*", to promote regional economic integration and development, to increase the participation of "*newer ASEAN Member States*" through exports and capacity building, and to enhance trade, investment and greater business opportunities among the State parties.

278. A definition of investor that focusses on the relationship between the investor and the investment (i.e., through owning or controlling the investment) is entirely consistent with the purpose of the AANZFTA to deepen and widen the economic linkages between the State parties and to promote regional integration.

289 SoPo, [147].

279. Taking the above into account, the Claimant submits that reading the definition of investor in context and in light of the AANZFTA's purpose, militates against the imposition of any additional requirement that an investor must provide an "active contribution" in terms of funding or managing an investment. In fact, adopting the Respondent's definition of "investor of a Party" would undermine the straightforward language of "investment" and "covered investment", which both contemplate that passive ownership of an asset is sufficient to constitute a protected investment.

The Claimant made an Initial Investment when it Purchased the Shares in Mineralogy

280. In accordance with the above definition, the Claimant made an investment when it purchased the shares in Mineralogy on 29 January 2019. The transfer of the Mineralogy shares in return for consideration (the Claimant's shares) is sufficient to engage in an action that resulted in the "the ownership or control of the asset".

281. At the heart of the Respondent's submission that the Claimant is not an investor is its contention that the share swap through the investment was made is not capable of satisfying the Treaty definition. This is because, according to the Respondent, a share swap was a "cashless transaction".[290]

282. The reasons for this position are not clearly articulated by the Respondent. The fact that a transaction does not involve money changing hands does not render it valueless or incapable of forming an investment. There is nothing in the AANZFTA that requires an investor to acquire an investment through the payment of cash or an injection of capital. Equally, there is no prohibition in the AANZFTA on acquiring an investment through a share swap or other payment in kind.

283. In the present case, the original investment in Mineralogy was made by its original owners (ultimately Mr Palmer). Following the decision in 2018 to restructure the

290 SoPo, [173].

group to access offshore funding options and enable additional group investments,[291] the shares in Mineralogy were transferred for value to the New Zealand entity (MIL). The shares were then purchased by the Claimant. The Claimant paid value for the shares by transferring newly-issued, fully-paid "Consideration Shares" to MIL.[292]

Making an Investment Through a Share Swap

284. A share swap is a perfectly valid mechanism for making an investment. This was confirmed by the Tribunal in *Gold Reserve v Venezuela*, a case described by the Respondent as the "*most relevant*."[293] In that case, Venezuela made submissions similar to those of the Respondent, including that Gold Reserve had not made an investment when it merely acquired ownership of the investment in a "*share-to-share intragroup swap without any capital expenditure*."[294] The treaty at issue required that the putative Canadian investor "*makes the investment*" in Venezuela.[295]

285. The Tribunal observed that "*the fact that no money had changed hands*" was not a persuasive argument and that the internal workings of a transaction did not affect whether an investment had been made.[296]

286. The Tribunal referred to previous authorities confirming that an investment could be made through an internal corporate restructuring, including *Millicom v. Senegal*,[297]

291 [redacted] WS paras 49 to 72.
292 Share Purchase Agreement, 29 January 2019, Annexure A to the NoI, Exhibit 20, (**Exh. C-63**).
293 SoPo, [151].
294 *Gold Reserve Inc v Venezuela,* ICSID Case No ARB(AF)/09/1, Award, 22 September 2014, para 229, (**Exh. CLA-32**).
295 *Gold Reserve Inc v Venezuela,* ICSID Case No ARB(AF)/09/1, Award, 22 September 2014, para 248, (**Exh. CLA-32**).
296 *Gold Reserve Inc v Venezuela,* ICSID Case No ARB(AF)/09/1, Award, 22 September 2014, para 265, (**Exh. CLA-32**).
297 *Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on Jurisdiction, 16 July 2010, para 83, (**Exh. CLA-184**).

Aguas del Tunari v. Bolivia,[298] and *Mobil v. Venezuela*.[299] In all three cases, the tribunals confirmed that the claimant company was a valid investor, even though it had been inserted into the corporate chain through a cashless corporate restructure.

287. In the English High Court, Venezuela challenged the jurisdiction finding. Teare J upheld jurisdiction based on Gold Reserve's significant investment of funds to develop the project after it had acquired the shares. However, he overturned the finding that Gold Reserve had made an investment through the initial restructuring process.

288. The reason that Teare J overturned this finding was not because the investment had been made through an internal share-swap (i.e., was cashless). Indeed, Teare J specifically held that in transferring their shares in Gold Reserve, the shareholders of Gold Reserve had indeed *"transferred some benefit."*[300]

289. The problem identified by Teare J was that the claimant (Gold Reserve) had not played any role in the share transfer. The share transfer had been made by Gold Reserve's shareholders and not by Gold Reserve itself. Teare J observed that there had been no "*transfer of benefit by* [Gold Reserve]" and that the tribunal had "*fail*[ed] *to distinguish between the legal personality of* [Gold Reserve] *and the legal personality of its shareholders.*"[301]

290. His Honour stated that Gold Reserve (the claimant) and its shareholders were "*separate and distinct*" and that, as the share swap had been undertaken by the shareholders, there was "*no evidence that* [Gold Reserve] *made any payment or transferred anything of value … in return for becoming the indirect owner or controller*

298 *Aguas del Tunari v. Bolivia,* ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005, (**Exh. CLA-185**).
299 *Mobil Corporation et al. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, (**Exh. RLA-92**).
300 *Gold Reserve v Venezuela* [2016] EWHC 153 (Comm), para 44, (**Exh. RLA-44**).
301 Ibid.

of the shares."[302] It for this reason that he found that the initial restructuring did not constitute an investment by Gold Reserve.[303]

291. The situation in *Gold Reserve v Venezuela* is very different to the present case. Here, the Claimant (Zeph) transferred the shares itself. It was a party to the Share Purchase Agreement and had rights and obligations under that Agreement. The transfer was not made by a distinct third party. As Teare J specifically acknowledged, transferring shares constitutes the transfer of a benefit and is therefore capable of founding an investment. Nothing in the decision of the English High Court suggests that cash must be transferred in order to *make* an investment.

292. That share swaps can constitute an investment has also been confirmed by more recent cases.

293. In *Clorox v Venezuela*, the Swiss Federal Tribunal overturned an arbitral award in which the tribunal found that an investor who acquired shares through a corporate restructure had not "*invested*" in those shares and therefore was not entitled to protection under the treaty. The Swiss Federal Tribunal held that the arbitral tribunal had erred in establishing a requirement that the claimant itself provide consideration for the acquisition of the shares in order to have "*invested*" in those shares. The Swiss Federal Tribunal said that the arbitral tribunal "*appears to be engaging in a material analysis of the original of the funds invested under cover of the "formal" criterion of an act of active investment*".[304] It was not permissible, according to the Swiss Federal Tribunal, to deny jurisdiction on the basis that the initial investment, being the

302 Ibid.

303 The English High Court decision is consistent with *Quiborax v Bolivia*, ICSID Case No.ARB/06/2, Decision on Jurisdiction, 27 September 2012, (**Exh, CLA-186**) where two investors were found to qualify as they had purchased their investment by the payment of money or shares. The third investor had paid nothing for his sole share and therefore was found not to qualify as an investor.

304 *Clorox Spain SL v Venezuela*, Decision of the Swiss Federal Tribunal, 20 May 2022, para 3.4.2.4, (**Exh CLA-182**).

creation or repurchase of the asset, was carried out by someone else and was then transferred to a claimant through a corporate restructuring.[305]

294. In *Westwater v Turkey*, Westwater acquired the shares of an Australian company through a share swap. The transaction gave it an indirect interest in a Turkish company. The tribunal confirmed jurisdiction, rejecting Turkey's argument that only expenditures made after the acquisition of the underlying assets qualified as protected investments. The tribunal also affirmed that, while Westwater had not transferred any cash as part of the share swap, it had paid for the shares in the form of its own treasury shares.[306]

295. In *Renergy v Spain*, the claimant (incorporated in Luxembourg) was 100% owned by a Spanish national who had made the original investment and then transferred it (through a series of transactions) to the claimant. The claimant had been specifically incorporated for the purpose of holding the investment. The tribunal confirmed jurisdiction and distinguished *KT Asia v Kazakhstan* (relied upon by the respondent in that case), as *KT Asia* had not involved the internal restructuring of a corporate group.[307] The tribunal also noted that the majority of investment cases supported the conclusion that an active contribution from the new owner was not required absent specific wording in the treaty.[308]

296. The legitimacy of acquiring an investment through a corporate restructuring has been confirmed on many other occasions, including *Levy v Peru*,[309] in *Tidewater v*

305 Ibid., para 3.4.2.4.
306 *Westerwater Resources Inc v Republic of Turkey,* ICSID Case No. ARB/18/46, Award 3 March 2023, para 148, (**Exh. CLA-187**).
307 *RENERGY S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022, para 570, (**Exh. CLA-179**).
308 Ibid., para 571.
309 *Levy v Peru*, ICSID Case No ARB/10/17, Award, 26 February 2014, para 148, (**Exh. CLA-188**).

Venezuela,[310] *Aguas del Tunari SA v. Republic of Bolivia*,[311] and *Mobil v Venezuela.*[312] Such corporate restructurings are commonly executed through share swaps or similar mechanisms, rather than the exchange of cash.

Making an Investment through Returns

297. The AANZFTA expressly includes the investment of returns within the definition of "investment". Article 2(c) of Chapter 11 states:

> "*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.*"

298. "Returns" are defined in Article 2(j) as "*amount[s] yielded by or derived from an investment, including profits, dividends, interest, capital gains, royalties and all other lawful income*."

299. The status of invested dividends as "contributions" to an investment was expressly confirmed in *OI European Group v Venezuela* where the tribunal held:[313]

> "*When a shareholder decides not to collect profits in full, but to leave them- in whole or in part with the company, it is waiving a right and making a contribution of cash to the company, which is enriched to the extent of the amount that the shareholder relinquished.*

310 *Tidewater et al. v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5, Decision on Jurisdiction, 8 February 2013, para 184, (**Exh. RLA-93**).
311 *Aguas del Tunari SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005, para 330, (**Exh. CLA-185**).
312 *Mobil Corporation et al. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, para 204, (**Exh. RLA-92**).
313 *OI European Group v Venezuela*, ICSID Case No ARB/11/25, Award, 10 March 2015, paras 241-244, (**Exh. CLA-189**).

It is true that the funds provided by the foreign investor to Venezuelan Companies would have been generated in the destination country itself. But this is irrelevant:

- *first, because there is no requirement that the funds be of foreign origin;*
- *and also, because the investor could have repatriated the dividends, since the BIT grants it the right to do so, in order to immediately reinvest them in the company; all that has happened is that both cash flows have been compensated.*

The Respondent also raises one last argument: OIEG could not have made a contribution by means of its own inaction-that is, by not withdrawing the profits generated in the form of dividends.

The argument is not persuasive: it is not true that the investor has remained inactive. The creation of a reserve requires an agreement of the company's governing bodies, controlled by the OIEG, in which it decides to distribute only part of the profits, and apply the rest to reserves."

300. The tribunal in *OI European Group* confirmed that a contribution in the form of effort (management) of the investment also creates an investment. A contribution by management includes participation and voting in shareholder meetings, as well as appointing directors and managers of the subsidiary company.[314]

301. Notwithstanding, the Claimant has made active investments in Australia (refer to the [redacted] WS at paragraphs 30 to 47.[315]

302. While there is no requirement for "an active contribution or management", in order for an investment to be regarded as being "made", such active contribution and management are themselves considered as separate investments.

314 Ibid., paras 254-246.
315 [redacted] WS, at paras 30 to 47.

303. Based on the plain words of the Treaty and the jurisprudence, there can be no doubt that (i) all returns and dividends invested by the Claimant into Mineralogy and (ii) contributions to management of Mineralogy, are sufficient of themselves to constitute an investment (independent of the initial value of the share swap).

304. Amounts in respect of those years after the incorporation of the Claimant and prior to the enactment of the *Amendment Act* which could have been paid out to the Claimant by Mineralogy by way of dividend from current year profits to the Claimant, but were not paid out in FY2019 and FY2020, are:

    a. For the year ended 30 June 2019, AU$ 35.55 million[316].

    b. For the year ended 30 June 2020, AU$ 207.17 million[317].

305. These particular investments are set out in the Annual Audited Accounts of Mineralogy for the years ended 30 June 2019 and 30 June 2020[318].

306. The Claimant did not receive a dividend from Mineralogy from current year profits. Mineralogy held these funds in Australia and thus remained at Mineralogy's disposal to further invest and develop its activities within the territory of Australia[319].

307. These amounts each constitute separate additional investments by the Claimant under the AANZFTA and are recognised in the audited accounts of Mineralogy published and searchable by the Respondent's ASIC since 2019 and 2020 respectively.

No Requirement for Active Contribution or for Investment to be "actively" Made

308. Notwithstanding, the Claimant has, in an event, made active investments in Australia.[320]

316 [redacted] Report, paras 6.2 and 6.6.
317 [redacted] Report, paras 6.3 and 6.6.
318 Financial Reports of Mineralogy Pty Ltd for the year ended 30 June 2019, (**Exh. C-476**).
319 Financial Reports of Mineralogy Pty Ltd for the year ended 30 June 2020, (**Exh. C-477**).
320 See [redacted] WS, paras 30 to 47.

309. The AANZFTA does not include any requirement that an investment must be actively made or that an active contribution be made to the host State.

310. The Respondent referred to the case of *Addiko Bank AG v Montenegro* in which the tribunal held that the requirement to "make" an investment does not mean it must have been "actively made".[321] The Respondent calls this case an "*outlier*".[322] The analysis below demonstrates however that, far from being an outlier the *Addiko* tribunal's reasoning is entirely consistent with a long line of authority finding that it is inappropriate to imply in a treaty a requirement for an active investment, when no such requirement has been specifically included by the State parties.

311. As described above, in *Clorox v Venezuela*, the Swiss Federal Court overturned the decision of an arbitral tribunal that found the phrase "*invested by an investor*" required an act of active investment.[323]

312. In the recent case of *Nachingwea v Tanzania*, the respondent contended that, as the claimant's investment was made through affiliate companies, it was "passive" and did not constitute an investment. The treaty required investments to be "made", but the tribunal held that the term "made" could not be interpreted to mean "actively made".[324] In any case, capital contributions made to the project would satisfy any such requirement that did exist.[325]

313. Similarly, in *Renergy v Spain,* the tribunal decided to follow the "*larger number of cases*" in rejecting the suggestion that the assets owner must have made an active contribution to qualify as an investor.[326] Importantly, the tribunal also noted that there was "*little support for the idea that an active role of the current holder of an*

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321 *Addiko Bank AG v Montenegro,* ICSID Case No. ARB/17/35, Excerpts of Award, 24 November 2021, paras. 352-354, (**Exh. RLA-52**).
322 SoPo, [159].
323 *Clorox Spain SL v Venezuela*, Decision of the Swiss Federal Tribunal, 20 May 2022, para 3.4.2.4, (**Exh CLA-182**).
324 *Nachingwea v Tanzania*, ICSID Case No ARB/20/38, Award, 14 July 2023, para 153, (**Exh. RLA-47**).
325 Ibid., 164-165.
326 *RENERGY S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022, paras 571-575, (**Exh. CLA-179**).

investment is inherent in the concept of investment",[327] which is consistent with the definition of investment in the AANZFTA.

314. In *Kim v. Uzbekistan*, the tribunal considered treaty wording that required assets to be "*invested by the investors*" and "*investments made by* [claimant]". The tribunal held that this wording did not connote "*a distinction between active and passive investors requiring the former*".[328] The tribunal specifically stated that the term "made" did not indicate the requirement for any ongoing active role in the investment.[329]

315. This principle was reaffirmed recently in *Antonio del Valle Ruiz et al v. Kingdom of Spain,* where the tribunal stated:[330]

> "*With regard to contribution, the Tribunal is of the view that each Claimant must show that it has made a commitment of resources. Contrary to Spain's position, this does however, not mean that there is any purported requirement for "active" contribution or management of the investment.182 To the contrary, it is sufficient for the Claimants to show that they have purchased their shares and/or bonds for a price.*"

316. All of these cases are consistent with the conclusions of the eminent authors Dolzer, Kriebaum and Schreuer, who state:[331]

> "*A theory that requires an active contribution by each investor as a requirement for protection would require that every shareholder plays an active role in the investment. This would seriously undermine the position of shareholders as investors* [in investment treaty law]."

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327 Ibid., para 376.
328 *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, para 312, (**Exh. CLA-190**).
329 Ibid., para 310.
330 *Antonio del Valle Ruiz et al v. Kingdom of Spain*, PCA Case No. 2019-17, Award, 13 March 2023, para 3, (**Exh. RLA-28**).
331 Dolzer, Kriebaum and Schreuer, *Principles of International Investment Law* (3rd ed, Oxford University Press, 2022) at 78 – 80, (**CLA-191**).

317. In contrast to this series of cases, the Respondent relies upon *Standard Chartered Bank v Tanzania* to assert that an investment must be actively made. The Claimant urges great caution when considering the views expressed in *Standard Chartered Bank v Tanzania* as the decision has been subject to direct criticism and seldom followed. The evidence is nevertheless clear that five of the Claimant's seven directors were resident in Australia and actively managing the investment as referred above.

318. The requirement that there be an "active" relationship between investor and investment in that sense has nothing to do with the qualifying criteria that the Respondent asks the Tribunal to read into Articles 2(d) and (c). Moreover, if the tribunal's approach in *Standard Chartered Bank* were applied to this case, it is clear beyond any argument that the Claimant was an "*active*" investor, as the tribunal in that case used the term. The Claimant's relationship with Mineralogy is a world away from Standard Chartered Bank's entirely passive relationship to the loans (investment) in that case, given it had never taken any decision to invest and had sought treaty protection only because of its status as ultimate holding company.

319. Similarly, in *PAO Tatneft v Ukraine*, on which the Respondent purports to rely, the finding of Bucher J actually supports the Claimant's interpretation of investor when he says:[332]

> "*In my judgment the phrase "are invested by" does not import a requirement that, in order to be an investment, there should have been an active process of the commitment of resources by the investor therein. The purpose of the words "are invested by" is to permit, within the definition of "investment", a link between the specification of the types of assets which are comprised within the term and the person who owns or is otherwise interested in those assets (who must be an investor of the other Contracting State) …*"

332 *PAO Tatneft v Ukraine* [2018] EWHC 1797, at para 68, (**Exh. RLA-51**).

320. For all of the above reasons, in the Claimant's respectful submission, the Tribunal should adopt the plain and ordinary meaning of investor which does not require any active contribution or investment, consistent with the considerable weight of jurisprudence on this issue. The matter is a moot point however as the Claimant is an active investor in its investment[333].

321. Notwithstanding, the Claimant has made active investments in Australia as described by [redacted] in his [redacted] Witness Statement.[334]

No Requirement for Additional Contribution or for Value to be Transferred into the Territory of the Host State

322. Notwithstanding the separate contributions to investment made by the Claimant in actively managing its investment, and by making additional investments by the retention of profits within the jurisdiction of the Respondent, there are a number of cases that have considered whether an investor who purchases an existing investment is required to make a separate contribution to the investment. Consistently with the jurisprudence that an active investment is not required, the vast majority of cases have found that no additional contribution of capital is required by the new investor upon acquisition of the assets.

323. In *Gold Reserve v Venezuela*, the tribunal confirmed that making an investment "*does not require that there must be a movement of capital or other values across Venezuelan borders.*"[335] The tribunal observed that, if this were not so,[336]

> "*…it would mean that an existing investment in Venezuela, owned or controlled by a non-Venezuelan entity, would not be protected by the BIT if it were acquired by a third party, with cash or other consideration being paid*

333 See above, particularly para's 230 - 242.
334 [redacted] WS, paras 30 to 47.
335 Gold Reserve Inc v Venezuela, ICSID Case No ARB(AF)/09/1, Award, 22 September 2014, para 261, (**Exh. CLA-32**).
336 Ibid., para 262.

outside Venezuela, even if the acquiring party then invested funds into Venezuela to finance the activity of the acquired business."

324. Such a position would be absurd, unless the State parties had made it clear that this was their intention. The reasoning of the tribunal in *Gold Reserve v Venezuela* on this issue was cited with approval in *Flemingo v Poland*.[337]

325. In *Abaclat v Argentina*, the tribunal rejected Argentina's position that the phrase "has made, makes or undertakes to make investments in the territory of the other Contracting Party" required a transfer of money into Argentina. The tribunal found that, once it had concluded that there was a valid "investment", an investment was "made" as soon as the assets were purchased.[338]

326. In *Levy v. Peru,* even a transfer free of charge (intra-family transaction) was said to constitute an investment as the contribution of the previous owner was sufficient to fulfil any such requirement. The tribunal said:[339]

"*It is clear that the Claimant acquired her rights and shares free of charge. However, this does not mean that the persons from whom she acquired these shares and rights did not previously make very considerable investments of which ownership was transmitted to the Claimant by perfectly legitimate legal instruments.*"

327. In *MNSS B.V. v Montenegro*, the respondent State disputed that the claimant had "*made*" an investment because it merely passively owned a loan receivable that had been assigned to it.[340] The Tribunal rejected this argument, stating that any requirement for a contribution to be made is satisfied by the contribution of the

337 *Flemingo v Poland*, UNCITRAL, Award, 12 August 2016, para 315, (**Exh. RLA-48**).
338 *Abaclat v Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction, 4 August 2011, para 412, (**Exh. CLA-192**). See also *Orascom TMT Investments Sarl v People's Democratic Republic of Algeria*, ICSID Case No ARB/12/35, Award, 31 May 2017, para 382, (**Exh. CLA-193**).
339 *Levy v Peru*, ICSID Case No ARB/10/17, Award, 26 February 2014, para 148, (**Exh. CLA-188**).
340 *MNSS B.V. v Montenegro*, ICSID Case No ARB(AF)/12/8, Award, 4 May 2016, para 126-127, (**Exh. CLA-194**).

original owner. No further additional contribution is required by the new owner. It was said that:[341]

> "*The fact that RCA was not an active investor because of the activity connotation of the expression "making an investment," as argued by the Respondent, does not mean that an investor, once a loan is made or equity in a company is acquired, needs to make further investments or be particularly active in the management of the investment*."

328. This was confirmed by the tribunal in *Flemingo v Poland*, which stated:[342]

> "*the inclusion of "acquired" assets within the definition allows for investments that have already been made in Poland to fall within the scope of the Treaty as soon as they are acquired by an Indian investor*."

329. As noted above, the tribunal further observed that the ordinary meaning of the words "making an investment in the territory …" does not require that there be a movement of capital or other values into the respondent State (in that case, into Poland).[343]

No Requirement for Value of Payment

330. In respect of the share swaps, the AANZFTA does not specify that a certain value must be paid for an investment or that transactions to acquire an investment must be at arm's-length. Previous tribunals have repeatedly confirmed that no value requirement impliedly exists in the concept of investment, absent clear wording in the relevant treaty.

331. In *Gavrilović v. Croatia*, the tribunal confirmed:[344]

> "*the amount of the purchase price is similarly immaterial. Neither the ICSID Convention nor the BIT requires that the purchase price of*

341 Ibid., para 204.
342 *Flemingo v Poland*, UNCITRAL, Award, 12 August 2016, para 324, (**Exh. RLA-48**).
343 Ibid., at 315.
344 *Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, para 210, (**Exh. CLA-195**).

a particular asset reach a certain threshold in order to constitute an "investment" and the Tribunal does not consider it appropriate to read such a requirement into them. Other arbitral tribunals have agreed, finding it unnecessary to inquire into the adequacy of consideration absent a directive to do so from the operative."

332. The tribunal in *Gavrilović* relied on *Invesmart v Czech Republic.* In that case, the tribunal refused to look into the adequacy of consideration because it would imply an additional requirement of "*a qualitatively adequate investment*".[345]

333. This is particularly true in a corporate restructuring situation. The few cases where value has been at issue generally involve transactions that did not fall into a corporate group restructure and where beneficial ownership of the investment was retained by someone else.[346]

334. In any case, there has been valuable consideration here as six million shares in the Claimant were issued to the seller of the Mineralogy shares.

No Requirement Regarding the Origin of Funds

335. The AANZFTA does not include any provision or particular requirements in relation to the origin of funds or capital invested in an investment.

336. The authorities are clear that a tribunal is not permitted to read into a treaty a requirement regarding the origin of funds if the State parties have not included such a requirement. It was, of course, open to the AANZFTA State Parties to specify any restrictions on origin of funds and they chose not to do so. The Tribunal should respect this.

337. The Claimant's position is consistent with the findings of several tribunals that have considered this issue.

345 *Invesmart v. Czech Republic*, UNCITRAL, Award, 26 June 2009, para 189, (**Exh. CLA-196**).
346 *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, (**Exh. RLA-57**)*; KT Asia v Kazakhstan* ICSID Case No ARB/09/8, Award, 17 October 2013, (**Exh. RLA-68**).

338. *Tokios Tokelés v Ukraine* is the most well-known of these cases. The tribunal held that the fact that the capital invested did not originate outside the Ukraine was irrelevant to jurisdiction, as there was no origin of capital requirement in the treaty.[347]

339. In *Eiser v. Spain*, the tribunal similarly confirmed that "*the origins of capital invested by an Investor in an Investment are not relevant for purposes of jurisdiction*."[348]

340. In *Renergy v Spain*, Spain complained that the acquisition of the shares by the claimant – said to be a shell company – was funded by Mr Gómez (a Spanish national who had originally owned the investment). Funds were not contributed by the claimant. The tribunal found jurisdiction and noted that numerous cases had held that "*the origin of the funds invested was not relevant to the existence of an investment*."[349]

341. In *Gavrilović v. Croatia* the tribunal rejected the argument that the claimant was not an investor as it had not used its own funds to make the investment. The source of the funds was said to be irrelevant.[350]

342. Similarly, in *South American Silver v Bolivia*, the tribunal stated that nothing in the treaty prevented an investor from obtaining "*resources from third parties or companies of the group to which it belong[ed] in order to make the investment. In fact, nothing in the Treaty states that the Tribunal must examine the origin of the capital invested by an investor in order to decide on its jurisdiction*."[351]

343. This is consistent with the findings in *Saipem v Bangladesh*, where the tribunal said:[352]

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347 *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para 82, (**Exh. CLA-197**).
348 *Eiser v Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para 228, (**Exh. CLA-198**).
349 *RENERGY S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022, para 578, (**Exh CLA-179**).
350 *Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, paras 209 and 216, (**Exh. CLA-195**).
351 *South American Silver v Bolivia,* Award, 22 November 2018, para 322, (**Exh. CLA-199**).
352 *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction, 21 March 2007, para 106, (**Exh. CLA-200**).

"*With respect to the first one, it is true that the host State may impose a requirement that an amount of capital in foreign currency be imported into the country. However, in the absence of such a requirement, investments made by foreign investors from local funds or from loans raised in the host State are treated in the same manner as investments funded with imported capital. In other words, the origin of the funds is irrelevant.*"

344. The Respondent places considerable emphasis on the flow of funds between the companies within the Mineralogy Group and, most curiously, on Mr Clive Palmer's nationality. None of this is relevant in the absence of specific restrictions on these matters in the AANZFTA.[353] As numerous cases elucidate, it is not for the Tribunal to put in place restrictions that the State parties chose not to include in the AANZFTA, despite being able to do so.

Conclusion on Investor / Investments Objectives

345. There is no doubt that the Claimant is an investor of a Party which has made an investment in the Respondent state of Australia. This is evidenced by:

    a. The initial transfer of value to MIL in the form of the Consideration Shares, paid to purchase the Mineralogy shares in accordance with the Share Purchase Agreement;[354]

    b. The investment of returns into Mineralogy in the amount of AU$ 242.69 million as at June 2020, and significantly more since that date[355]; and

353 *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, (**Exh. CLA-197**).
354 Share Purchase Agreement between Claimant and MIL, 29 January 2019 (**Exh. C-63**), p. 163.
355 [redacted] Report, at para 6.2, 6.3 and 6.6.

c. The active management of Mineralogy and its investments since acquiring the shares in January 2019[356].

346. The evidence is conclusive on this point. There is simply no basis on which to find that the Claimant is not an investor or to deny jurisdiction on this ground.

347. Again the Tribunal is also respectfully referred to the inconsistency of the Respondent's arguments – on the one hand denying the Claimant the benefits of an investor and on the other hand stating that it is not an investor at all.

B. RESPONSE TO SECOND OBJECTION: The Claimant has an "Investment" under Article 2(c) of Chapter 11 of the AANZFTA

348. The Respondent raises an objection that the Claimant has not made an "investment". This objection is based on the same underlying facts as the first objection that the Claimant is not an "investor".[357]

349. For the same reasons as outlined above, this objection cannot be sustained.

Broad Definition of Investment

350. The definition of investment in the AANZFTA is very broad and includes:

> 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;

356 See above, particularly para's 248- 251.
357 SoPo, [184].

(ii) shares, stocks, bonds and debentures and any other forms of participation in a juridical person and rights derived therefrom;

(iii) intellectual property rights which are recognised pursuant to the laws and regulations of each Party and goodwill;

(iv) claims to money or to any contractual performance related to a business and having financial value;

(v) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; and

(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.

351. Tribunals interpreting similar clauses have repeatedly confirmed the open, non-restrictive language that the treaty parties have chosen to employ when adopting such a definition.

352. On a plain reading, the definition of investment does not require a contribution or other element that are prescribed in the Salini test under Article 25 of the ICSID Convention. Clearly, Article 25 is not applicable to the present case and nor are the *Salini* criteria per se.[358] The Tribunal should, therefore, interpret the definition investment in the AANZFTA in accordance with the principles of the Vienna Convention as outlined above.

358 *Flemingo v Poland*, UNCITRAL, Award, 12 August 2016, para 298, (**Exh. RLA-48**).

353. While no investment tribunal has specifically interpreted the definition in the AANZFTA, as noted above the AANZFTA definition is based on the 2004 US Model BIT and many tribunals have considered similar or identical definitions in other treaties.

354. For example, when interpreting a similarly worded provision, the tribunal in *Lee-Chin v Dominican Republic* said:[359]

> "*The text cited in the foregoing paragraph shows the Treaty drafters' intention to adopt an open definition of the investments covered thereby. In general, it is worth pointing out that the drafters were free to reduce the scope of protected investments. The Tribunal finds no sign of a restrictive legislative policy option to such effect in this text. On the contrary, in light of the language of the provision under analysis, the Tribunal cannot but conclude that the intention of the Contracting Parties to the Treaty was the exact opposite. The Tribunal is aware of the general maxim of interpretation whereby where the text makes no distinction, the interpreter should make no distinction as well. The Tribunal could adopt similar maxims such as expressio unius est exclusio alterius as bases, although with some differences, to reach the same conclusion*."

355. It is submitted that this is the correct approach to interpreting the definition of investment in the AANZFTA. Similar conclusions have been reached by numerous other tribunals interpreting similar provisions in other treaties.[360]

356. Notably, the definition of investment is sufficiently broad to include both direct and indirect investments. In *Siemens v Argentina*, the tribunal also concluded that

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359 *Lee-Chin v Dominican Republic* ICSID Case No. UNCT/18/3, Jurisdiction Award, 15 July 2020, paras 211-212, (**CLA-39**).

360 See, for example, *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v Bolivarian Republic of Venezuela* ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, paras 151-158, (**Exh. CLA-62**); *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019, paras 193-204, (**Exh. CLA-63**); *Ioannis Kardassopoulos v. Georgia* ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, paras 123-24, (**Exh. CLA-64**).

indirect investments were not excluded by broadly worded definitions like that found in the AANZFTA:[361]

> "*The Tribunal has conducted a detailed analysis of the references in the Treaty to 'investment' and 'investor'. The Tribunal observes that there is no explicit reference to direct or indirect investment as such in the Treaty. The definition of 'investment' is very broad. An investment is any kind of asset considered to be such under the law of the Contracting Party where the investment has been made. The specific categories of investment included in the definition are included as examples rather than with the purpose of excluding those not listed. The drafters were careful to use the words 'not exclusively' before listing the categories of 'particularly' included investments. One of the categories consists of 'shares, rights of participation in companies and other types of participation in companies'. The plain meaning of this provision is that shares held by a German shareholder are protected under the Treaty. The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments.*"

357. In *Deutsche Telekom v. India*, the tribunal confirmed that:[362]

> "*Investments are often made indirectly. It is indeed not unusual for investors to structure their foreign investments through several corporations for a variety of legal and regulatory reasons. India itself notes as much, when it suggests that DT may have made its investment through the Singaporean subsidiary due to the favorable double taxation regime between India and Singapore.124Therefore, the*

361 *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, para 137, (**Exh. CLA-60**).
362 *Deutsche Telekom v India*, PCA Case No. 2014-10, Interim Award, (**Exh. CLA-201**).

ordinary meaning of the terms "investment" or "invested" is not restricted to assets which an investor owns directly."

358. In the Claimant's submission, the definition of investment in the AANZFTA is broad and includes both direct and indirect investments. The ordinary meaning of the definition in the AANZFTA should be applied. The Claimant's investments include but are not limited to the following:

    a. direct shareholding in Mineralogy;

    b. indirect shareholding in International Minerals;

    c. rights and interests in the mining leases held by Mineralogy;

    d. rights and interests in the State Agreement;

    e. rights and interests in the Arbitration Agreement;

    f. rights and interests in the State Agreement arbitration proceedings that were terminated; and

    g. significant returns invested by the Claimant into Mineralogy since January 2019.

359. If there is a contribution requirement in the context of a corporate restructuring,[363] then the Claimant's investments clearly satisfy this for the reasons set out above. The returns invested by the Claimant into Mineralogy, which expressly constitute investments in their own right under the AANZFTA, also demonstrate a clear and significant contribution by the Claimant. The Claimant has also made contributions through its initial investment and the ongoing management of Mineralogy.[364]

Duration of Investment

363 See *KT Asia v Kazakhstan* ICSID Case No ARB/09/8, Award, 17 October 2013, para 194, (**Exh. RLA-68**).

364 *Saluka Investments BV v The Czech Republic* PCA Case No 2001-04, Partial Award, 17 March 2006, para 211 (**Exh. RLA-40**).

360. In respect of duration, the Respondent states that "*Zeph was inserted into the corporate chain only in January 2019* which *means that there is also no investment satisfying the "duration" criterion*."[365] The Respondent offers no basis or justification for this assertion which is entirely at odds with the jurisprudence and patently incorrect on the facts.

361. The Claimant has now owned Mineralogy for over five years. At the time the *Amendment Act* was passed, the Claimant had owned Mineralogy for 19 months. In *Antonio del Valle Ruiz v Spain*, a duration of three months was deemed sufficient to meet any duration criterion that may exist.[366] Moreover, duration should be assessed in the light of the intended duration period, rather than period prior to the alleged breach.[367] It is clear that the intended duration in the present case was always long term, given the reasons that the corporate restructure was undertaken. The Claimant has continued to invest in Mineralogy over the five-year period that it has owned the shares. There are no plans for the Claimant to divest its investment, given some benefits (particularly around taxation) remain ongoing. It is submitted that the Claimant has clearly satisfied any duration requirement.

Risk

362. In respect of risk, the Claimant has invested significant value into Mineralogy by way of "returns". Of course, holding shares in an entity by its very nature involves risk. The Claimant runs a risk of deprivation of dividends or a distribution on winding up, notwithstanding that it was not the original purchaser of the shares as issued and notwithstanding that its initial acquisition of the shares did not involve a flow of capital into Australia. Other risks include, *inter alia,* market risk and sovereign risk as well as normal industry risks. Moreover, it should also be recalled that at the time the Claimant purchased the Mineralogy shares:

365 SoPo, [198].
366 *Antonio del Valle Ruiz et al v. Kingdom of Spain*, PCA Case No. 2019-17, Award, 13 March 2023, para 374 (**Exh. RLA-28**).
367 *KT Asia v Kazakhstan* ICSID Case No ARB/09/8, Award, 17 October 2013, para 209 (**Exh. RLA-68**).

a. The second arbitral award had not yet been issued by Mr McHugh AC KC in the State Agreement Arbitration relating to the BSIOP. Mineralogy did not, therefore, know whether it even had a right to damages regarding the rejection of the BSIOP Proposal. That issue was not resolved until the second arbitral award was issued in October 2019. The sovereign risk arising out of that initial rejection was preventing Mineralogy from developing further projects at that time and would be resolved only if Mineralogy was successful in recovering damages;

b. While Mineralogy had been successful in the royalty dispute with CITIC, CITIC had appealed against the Royalty Judgment and the outcome of the appeal was unknown at that time; and

c. Mineralogy's coal investments through Waratah Coal were uncertain given the veto on funding through Australian banks. To be able to develop those projects, Mineralogy required the Claimant to arrange offshore funding.

363. There can be no question that the Claimant undertook risk when it invested in Mineralogy and the Respondent's unsupported contention that no risk was assumed must be rejected.[368] It must be noted that the Engineering Companies went into liquidation because of the COVID-19 pandemic. Such risk, includes, *inter alia,* rights on liquidation, sovereign risk, market risk and exchange risk and risk of a medical pandemic to name but a few.

Conclusion on Investment Objection

364. In conclusion, the Claimant has investments in Australia under the definition in Article 2(c) of Chapter 11 and is entitled to protection for those investments. The Tribunal has jurisdiction to determine the Claimant's claims.

368 SoPo, [198].

SECTION V: DENIAL OF BENEFITS

The Respondent has not Denied the Benefits of Chapter 11 of AANZFTA to the Claimant and its Investments

A. Introduction

365. The Respondent's third preliminary objection to the Claimant's claim is that the Claimant is not entitled to the benefits of Chapter 11 of the AANZFTA because the Respondent has denied such benefits to the Claimant and its investments in accordance with Article 11 of Chapter 11. There is again no merit in this objection for the reasons set out below.

366. Article 11(1) of Chapter 11 of the AANZFTA provides that:

> "*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.*"[369]

367. The Respondent relies, in particular, on Article 11(1)(b) of Chapter 11. It argues that:

369 Article 11(1) of Chapter 11 of the AANZFTA.

a. The Claimant is owned or controlled by Mr Palmer, who is an Australian national (i.e., "*an investor of the denying Party*"); and

b. The Claimant – the relevant "*juridical person*" of "*another Party*" to the AANZFTA (i.e., Singapore) – has "*no substantive business operations*" in Singapore.[370]

368. The Respondent further contends that it has fulfilled the necessary procedural requirements for a denial of benefits under Article 11(1)(b), namely by notifying both the Claimant and the Government of Singapore of its exercise of its purported entitlement to deny the benefits of Chapter 11 to the Claimant and its investments at an early stage of the present proceedings (i.e., by way of letters dated 22 December 2020[371] and 24 June 2021).[372]

369. However, for all the reasons set out below, such conditions have not been met and the Respondent is not entitled to deny benefits to the Claimant and its investments.

B. Initial Observations

370. Before turning to the substantive and procedural requirements of Article 11(1)(b) of Chapter 11 themselves, the Claimant makes the following three important, initial observations in respect of the Respondent's stance on denial of benefits.

The Two Substantive Conditions of Article 11(1)(b) are Cumulative

371. First, the Claimant emphasises that – as the language of Article 11(1)(b) itself makes clear – the Respondent 's right to deny benefits to the Claimant and its investments is subject to two cumulative substantive requirements if the Respondent is to succeed, namely that the Claimant (1) must be owned or controlled by an investor of

370 Or any other party to the AANZFTA, aside from Australia.
371 Letter from the Respondent to Volterra Fietta (on behalf of Zeph) dated 22 December 2020 (**Exh. C-153**).
372 Letter from the Respondent to Volterra Fietta (on behalf of Zeph) dated 24 June 2021 (**Exh. C-155**).

the denying Party (i.e., the Respondent); and (2) must not have any *"substantive business operations"* in Singapore.[373]

372. It is only if both of these conditions are satisfied that the Respondent will be entitled to deny benefits to the Claimant and its investments as per Article 11(1)(b) of Chapter 11 of the AANZFTA: *see*, for example, *Aris Mining Corporation v. Colombia*.[374]

Claimant's Response to Ground 1 being: The Claimant (1) must be owned or controlled by an investor of the denying Party (i.e., the Respondent)

Claimants Response to Ground 1

373. Because the Claimant operates a substantive business in Singapore it is irrelevant whether a national of Australia owns or controls the company – denial of benefits is simply not available under Article 11(1)(b) of Chapter 11 of the AANZFTA.

Respondent's Ground 2 being: The Claimant does not have any "substantive business operations" in Singapore**.**

Claimant's Response to Ground 2

374. The Claimant's Response to Ground 2 is set out hereunder.

375. The Claimant's business operations in Singapore are substantive, and they remained so, throughout the relevant timeframe of 2019 – 2024, such that the Respondent cannot deny the benefits of the AANZFTA to the Claimant.

376. The evidence set out in the [redacted] WS, the [redacted] WS and the [redacted] WS, set out the details of the Claimant's business operations in Singapore between 2019 - 2024. The evidence about the Claimant's active involvement in the

373 Or any other party to the AANZFTA, save from Australia.
374 ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020, para 133, (**Exh. RLA-80**).

management and financing of the Claimant's Subsidiaries including Mineralogy is set out in paragraphs 29 to 39 of the [redacted] WS and Annexure A of the NOI[375].

Summary of Evidence on "Substantive Business Operations" in Singapore

A. Overview

377. This part sets out the key facts concerning the Claimant's status in Singapore and the substantive business operations being carried out by the Claimant in Singapore. It is respectfully submitted that the facts are incontrovertible (as set out in [redacted] and [redacted] witness statements)[376]. This dictates that the Respondent's attempts to attack the Claimant through inadmissible 'expert' evidence should be rejected in their entirety.

378. As the Tribunal will see from the summary below, the Claimant was established as a fully-fledged commercial entity in January 2019, readily meeting the 'substantive business operations' threshold (which is addressed in Part B of these submissions below) from the very outset.

379. Moreover, the Claimant has continued to expand its business operations in Singapore throughout the material period, with a large number of employees and with a body of third-party professionals and service providers providing support[377]. That all serves to illustrate the extent to which the Respondent's attacks on the Claimant are unfair, misconceived and improper.

B. The Claimant has "substantive business operations" in Singapore

375 Notice of Intent, Annexure A, (**Exh. C-63**).
376 [redacted] WS at para 86 to 108.
377 The scale of the workforce can be seen from the recent Chinese New Year photograph, (**Exh. C-541**).

380. The Claimant was incorporated in Singapore on 21 January 2019[378], with company number 201902599N.

[I] The Claimant has a Physical Presence in Singapore

381. The Claimant has had a physical presence in Singapore since the year of its incorporation, and it continues to have such a presence today.

382. In particular, in 2019 - following its incorporation – the Claimant conducted its business in Singapore from an office at 1 Joo Koon Way, #01-04, Singapore, 628942 ("**Joo Koon Way**").[379]

383. The Claimant continued to operate from Joo Koon Way during 2020, but also began carrying on business in Singapore from another office, at 80 Genting Lane, #11-02, Singapore, 349595 ("**Genting Lane**").[380]

384. Since then, the Claimant has continued to operate in Singapore from Genting Lane, which is open for business five days a week during normal working hours in Singapore.[381]

[II] Nature and Extent of the Claimant's Business Operations in Singapore

385. On or around 31 January 2019, shortly after its incorporation, the Claimant acquired three subsidiary engineering companies in Singapore, namely GCS Engineering Services Pte Limited ("**GCS**"), Visco Engineering Pte Limited ("**VEPL**"), and Visco

378 A copy of Zeph's Certificate of Corporation, as issued by the Accounting and Corporate Regulatory Authority – which is the regulator of companies incorporated in Singapore – (**Exh. C-482**).

379 [redacted] WS at para 36.

380 [redacted] WS at para 37.

381 [redacted] WS at para 38.

Offshore Engineering Pte Limited ("**VOPL**") (together, the "**Singaporean Engineering Subsidiaries**").[382]

386. At that time, GCS's principal activities included marine works and various other engineering activities and processes, whilst VEPL and VOPL's principal activities included the repairing of ships, tankers, and other ocean-going vessels.[383]

387. On or around 4 January 2020, the Claimant entered into a joint venture arrangement with two companies incorporated in Singapore, namely Kleen Venture Pte Limited ("**KVPL**") and One Kleenmatic Pte Limited ("**OKPL**") (the "**Joint Venture**").[384]

388. As [redacted] explains,[385] the Claimant and its directors had no prior involvement with KVPL or OKPL prior to the Claimant's entry into the Joint Venture: it was an arm's length commercial transaction.

389. As part of the Joint Venture with KVPL and OKPL, the Claimant began offering corporate cleaning services in Singapore.[386] The Claimant is the controlling party of the Joint Venture, with a 90 per cent interest therein; the remaining 10 per cent interest is split 50/50 between KVPL and OKPL.[387]

390. As the Claimant's financial statements demonstrate,[388] the Claimant's financial performance in Singapore has, broadly speaking, progressively increased since its incorporation in January 2019:

    a. The Claimant's total assets, on a standalone basis, rose from SGD $8.2 million in the 2019 financial year to SGD $42 million in the 2022 financial year, whilst the total assets of the Claimant's consolidated group (including the

382 [redacted] WS at para 46; Share Purchase Agreement dated 31 January 2019 between Chin Bay Goh and the Claimant, (**Exh. C-507**).
383 [redacted] WS, para 45.
384 [redacted] WS, para 64; Joint Venture Agreement between Claimant, One Kleenmatic Pte Ltd and Kleen Venture Pte Ltd, (**Exh. C-469**).
385 *ibid*.
386 [redacted] WS, para 65.
387 [redacted] WS, para 73.
388 (**Exh. C-79**) to (**Exh. 86**); [redacted] WS, paras 41-62.

Singaporean Engineering Subsidiaries) increased from AUD $613 million to AUD $664 million.

b. The value of the Claimant's transactions in Singapore rose from SGD $2 million in the 2019 financial year (comprising expenses) to nearly SGD $10 million in the 2022 financial year (including income of SGD $5 million), whilst the total assets of the Claimant's consolidated group increased from AUD $567 million (including income of AUD $ 306 million) to AUD $1.68 billion (including income of AUD $774 million).

391. Such improving financial performance was achieved notwithstanding that the Claimant was forced to place its Singaporean Engineering Subsidiaries into voluntary liquidation in October 2020, due in large part to the impact of the COVID-19 pandemic on trading conditions.[389]

392. Further, the Claimant received approximately SGD $2.2 million in business grants from the Singapore Government between 2020 and 2022.[390]

[III] The Claimant Employs Permanent Staff and Engages Third Parties to Carry out its Business Operations in Singapore

393. As set out in some detail in the [redacted] WS[391] and the Claimant's Staff Report exhibited thereto[392] (which forms part of the books and records of the Claimant),[393] since its incorporation the Claimant has employed, and continues to employ, permanent staff in Singapore – both directly itself and via its Singaporean Engineering

389 [redacted] WS, para 57.
390 [redacted] WS, paras 51, 56, and 62; Audited Financial Statements of Zeph Investments Pte Ltd for the financial year ended 30 June 2020, (**Exh. C-81**); Audited Financial Statements of Zeph Investments Pte Ltd for the financial year ended 30 June 2021, (**Exh. C-83**)**;** Audited Financial Statements of Zeph Investments Pte Ltd for the financial year ended 30 June 2022, (**Exh. C-85**).
391 [redacted] WS,paras 66-79.
392 [redacted] WS, paras 66-67; Zeph Staff Report (**Exh. C-88**).
393 [redacted] WS, para 66.

Subsidiaries and the JVA – and also engages third parties to carry out its business operations in Singapore.

394. As to permanent staff:

a. During 2020, 2021, and 2022, the Claimant itself directly employed 146, 135 and 113 employees respectively.[394]

b. KVPL and OKPL employed 97 staff in 2020; 136 employees during 2021; and 165 staff in 2022.[395] As [redacted] explains,[396] all of these employees were employed on behalf of the Joint Venture (of which the Claimant, as set out above, was, and is, the controlling party).

c. Prior to their being placed into voluntary liquidation as a result of the effects of the COVID-19 pandemic, the Claimant's Singaporean Engineering Subsidiaries employed 62 staff during 2019 and 27 employees in 2020.[397]

395. As to third parties:

a. The Claimant engaged 34 workers via a third-party labour hire firm in Singapore in 2019.[398]

b. The Claimant has also retained a number of other third parties in Singapore to provide a variety of services (and continues to do so), such as:

i. [redacted], in relation to specialist tax advice;

ii. [redacted], as auditors;

iii. [redacted], in respect of company secretarial and related services;

iv. [redacted], as the Claimant's tax agent;

394 [redacted] WS, paras 72.a, 76.a, and 78.a.
395 [redacted] WS, paras 72.b-c, 76.b-c, and 78.b-c.
396 [redacted] WS, para 73.
397 [redacted] WS, paras 68.a-c and 72.d-e.
398 [redacted] WS, para 69.

v. [redacted], in relation to legal services; and,

vi. [redacted], to provide notary public services.[399]

[IV] The Claimant's Directors

396. Mr Palmer was appointed as a director of the Claimant on 23 January 2019 and continues to hold that appointment to this day.[400] He is currently one of seven directors of the Claimant.[401]

397. Of those seven directors, two are currently resident in Singapore, namely Quek Ser Wah Victor and Loh Wai Chan.[402]

398. As per [redacted] evidence,[403] these resident directors have control of the Claimant's day-to-day operations and decision-making and are also [redacted] in Singapore.

[V] The Claimant's Licences and Insurance Policies in Singapore

399. In addition, the Claimant currently holds:

a. Singapore Government cleaning licences, as issued by the National Environment Agency (a statutory government agency) back in March 2020, for the purposes of conducting its corporate cleaning services in Singapore.[404]

b. A number of insurance policies in Singapore, including in respect of workers' compensation, public liability, and business insurance.[405]

Evidence on Substantive Business

399 [redacted] WS, para 82; Bundle of engagement letters, (**Exh. C-96**).
400 [redacted] WS, para 27.
401 [redacted] WS, para 33.
402 [redacted] WS, paras 39-40; ACRA Business profile of Zeph Investments Pte Ltd dated 1 February 2023, (**Exh. C-77**).
403 *ibid*.
404 [redacted] WS, para 80; Licences issued to Zeph Investments Pte Ltd, (**Exh. C-94**).
405 [redacted] WS, para 81; Bundle of insurance policies, (**Exh. C-95**).

400. The Claimant has a substantive business in Singapore. In accordance with the requirements of the Singapore Companies Act 1967,[406] the Claimant:

a. has a registered address in Singapore;

b. has directors resident in Singapore;

c. appoints Singapore auditors;

d. produces audited accounts; and

e. carries on its business and operations according to Singapore Law.

401. The Claimant currently has seven directors, as follows:[407]

a. Clive Frederick Palmer, appointed on 23 January 2019 (Australia resident);

b. Emily Susan Moraig Palmer, appointed on 28 February 2019 (Australia resident);

c. Declan Jack Zournazi Sheridan, appointed on 28 February 2019 (Australia resident);

d. Loh Wai Chan, appointed on 4 February 2020 (Singapore resident);

e. Quek Ser Wah Victor, Director, appointed on 22 June 2020 (Singapore resident);

f. Bernard Tze Loong Wong, appointed on 22 October 2021 (Australia resident); and

g. Baljeet Singh, appointed on 22 October 2021 (Australia resident).

402. In the past, the following people have served as directors of the Claimant:

406 (**Exh. CLA-162**).
407 ACRA Business profile of Zeph Investments Pte Ltd dated 1 February 2023, (**Exh. C-77**).

a. Mr Mashayanyika, appointed on 21 January 2019 and ceased on 12 February 2021 (Australia resident);[408] and

b. Tan Cher Wee, appointed on 21 January 2019 and ceased on 29 June 2020 (Singapore resident).[409]

403. The company secretaries (Yee Koon Daphne ANG and Zhe Lei TAN) are resident in Singapore.[410]

404. The Claimant's current business operations comprise two primary components: (i) running the cleaning business in Singapore; and (ii) actively managing its investments in Australia. Both tasks constitute substantive business operations.

405. The two directors who are resident in Singapore and are primarily responsible for the day-to-day business operations in Singapore. The Singapore-based directors are also [redacted].[411] The five remaining directors are Australia-based and are responsible for actively managing the Claimant's Australian investments.

406. The Claimant produces annual audited financial statements. Since 2020, the Claimant's auditors have been [redacted].[412]

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408 ACRA, *Business Profile for Zeph Investments Pte Ltd* (21 September 2022), Claimant's Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 2, (**Exh.C-63**), p. 53-57; ACRA, *Register of Directors of Zeph Investments Pte Ltd* (2 February 2023), (**Exh.C-73**). ACRA (of Singapore) Register of Directors of Zeph Investments Pte Ltd as at 14 February 2024, (**Exh. C-478**)**.**

409 ACRA, *Business Profile for Zeph Investments Pte Ltd* (21 September 2022), Claimant's Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 2, (**Exh.C-63**), p. 53-57; ACRA, *Register of Directors of Zeph Investments Pte Ltd* (2 February 2023), (**Exh.C-73**). ACRA (of Singapore) Register of Directors of Zeph Investments Pte Ltd as at 14 February 2024, (**Exh. C-478**)**.**

410 Business Profile, Singapore Accounting and Corporate Regulatory Authority, 1 February 2023, (**Exh. C-77**).

411 [redacted] WS, para 40.

412 See Bundle of Engagement Letters, pp.13-16 (**Exh. C-96**); [redacted] WS, para 47; [redacted] WS para 82.

407. The Claimant's primary business in Singapore trades under the name of "Kleenmatic".[413] Its registered office (and base for its business) is at 80 Genting Lane, #11-02 Ruby Industrial Complex, Singapore 349565.[414] The office is open to the public during normal working hours. Singapore law requires that a company's registered address be open and accessible to the public for not less than three hours during ordinary business hours on each business day.[415] The Claimant complies with this requirement.

408. The Claimant's previous registered office was at 1 Joo Koon Way #01-04, Singapore, 628942. In August 2020, the Claimant changed its registered office to Genting Lane, where it has remained ever since.[416] It is not surprising, therefore, that Mr Vickers was unable to locate the Claimant at Joo Koon Way in November 2023.[417]

409. The Singapore Accounting and Corporate Regulatory Authority (**ACRA**) records the Claimant's principal business activities as manpower contracting services and general cleaning services.[418]

The Joint Venture Business

410. Since January 2020, the Claimant has operated the Joint Venture business in Singapore. It acquired an interest through a Joint Venture Agreement dated 24 January 2020. Under the Joint Venture Agreement, the Claimant owned a 90%

413 See https://www.kleenmatic.com/; [redacted] WS paras 91 and 97.
414 Business Profile, Singapore Accounting and Corporate Regulatory Authority, 1 February 2023, (**Exh. C-77**).
415 Companies Act 1967 (Sing), s 142(1) (**CLA-162**).
416 [redacted] WS, paras 36-37; Audited Financial Statements for the reporting period from 21 January 2019 to 30 June 2019, p.11, (**Exh. C-79**); Audited Financial Statements for the financial year ended 30 June 2020, p.12, (**Exh. C-81**); Business Profile, Singapore Accounting and Corporate Regulatory Authority, 1 February 2023, (**Exh. C-77**).
417 Vickers WS, para 30.
418 Business Profile, Singapore Accounting and Corporate Regulatory Authority, 1 February 2023, (**Exh. C-77**); Certificate of Good Standing, Singapore Accounting and Corporate Regulatory Authority, (**Exh. C-78**).

interest in the business and its joint venture partners owned the remaining 10%, as follows:[419]

a. Claimant (90%);

b. One Kleenmatic Pte Ltd (5%); and

c. Kleen Venture Pte Ltd (5%),

(together, "**JV Partners**").

411. Under Singaporean law, minority joint venture partners are considered "subsidiaries" of the majority joint venture partner for accounting purposes. However, the Claimant did not own the minority JV Partners at that time and, prior to entering into the Joint Venture Agreement, had no relationship with those companies.

412. After entering the Joint Venture Agreement, the Claimant took over the day-to-day operations of the Joint Venture business in accordance with its obligations under the Agreement.[420] The Claimant's two Singapore-based directors actively managed the business there, and the Claimant employed the staff engaged in that business. As noted above, the Claimant retained the Kleenmatic name, given the goodwill and brand recognition associated with it. The Claimant now owns the entire business outright, having acquired the shares in the minority JV Partners on 4 August 2022.[421] Notwithstanding, the business still operates as a joint venture. In short, the Claimant has managed and operated the Joint Venture business since January 2020 – it does so actively and not through any other entity.

413. The Claimant now owns all the Joint Venture parties, having acquired all the shares in the minority JV Partners (holders of 10% of the Joint Venture) on 4 August 2022.[422]

419 Joint Venture Agreement, 24 January 2020, (**Exh. C-469**).
420 Joint Venture Agreement, 24 January 2020, (**Exh. C-469**).
421 Consolidated Financial Reports for the year ended 30 June 2022, p.38 (**Exh. C-86**).
422 Consolidated Financial Reports for the year ended 30 June 2022, p.38 (**Exh. C-86**).

414. On 13 August 2020 – the date of breach in this dispute - the Joint Venture business was operating under the Joint Venture Agreement. The JV Partners had the following obligations under the Agreement:

a. The Claimant was the "Manager" of the Joint Venture.[423]

b. The operating costs of the Joint Venture business were 90% paid by the Claimant, with the remaining 10% paid in equal shares by the minority JV Partners.[424]

c. The Claimant was responsible for contracting on behalf of the Joint Venture.[425]

d. The Claimant determined the funding required for the Joint Venture business[426] and approved all payments and withdrawals.[427]

e. The JV Partners owned all joint venture property as tenants in common in proportion to their participation interests.[428]

f. The Claimant was responsible for creating an annual business plan and budget for the Joint Venture.[429]

g. The JV Partners were severally liable for the obligations of Joint Venture in proportion to their interest (they were not jointly liable). The Claimant therefore was duly liable for 90% of the Joint Venture's obligations.[430]

Employees

415. Those engaged in providing the cleaning services for the Joint Venture are directly employed by the Claimant. As at 29 February 2024, the Claimant currently employs

423 Joint Venture Agreement, definitions, (**Exh. C-469**).
424 Joint Venture Agreement, cl 5, (**Exh. C-469**).
425 Joint Venture Agreement, cl 9, (**Exh. C-469**).
426 Joint Venture Agreement, cl 21, (**Exh. C-469**).
427 Joint Venture Agreement, cl 11.2, (**Exh. C-469**).
428 Joint Venture Agreement, cl 9, (**Exh. C-469**).
429 Joint Venture Agreement, cl 6, (**Exh. C-469**).
430 Joint Venture Agreement, cl 7, (**Exh. C-469**).

256 people,[431] all engaged in the Joint Venture business. At the time of the breach, in the calendar year of 2020, the Claimant employed approximately 146 people. [432]

416. As an employer in Singapore, the Claimant is required to make contributions to the Singapore Government's Central Provident Fund (**CPF**). The CPF is the Singapore Government Authority that administers the compulsory retirement savings and pension plan for working Singaporeans into which all Singapore business enterprises are required to pay contributions in respect of each of their employees. This requirement is mandated by the Laws of Singapore.

    a. In the financial year to 30 June 2020, the Claimant paid total staff contributions to the CPF of S$262,548 (excluding CPF contributions for directors).[433]

    b. In the financial year to 30 June 2021, the Claimant paid total staff contributions to the CPF of S$536,912 (excluding CPF contributions for directors).[434]

    c. In the financial year to 30 June 2022, the Claimant paid total staff contributions to the CPF of S$365,354 (excluding CPF contributions for directors).[435]

Licences Issued by Government Regulatory Authorities

417. To carry on the Joint Venture business, the Claimant is required to obtain a licence from the Singaporean National Environment Agency. In March 2020, the Agency issued a one-year licence to the Claimant to carry on a cleaning business. It has renewed that licence to the Claimant in each subsequent year.[436] This licence has been granted to the Claimant since 2020.

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431 [redacted] WS at para 106.
432 Zeph Staff Report (**Exh. C-88**), [redacted] WS, para 72(a).
433 Audited Financial Statements for the financial year ended 30 June 2020, p.37 (**Exh. C-81**); see also Claimant's Record of Payment to the CPF for February to June 2020, pp. 1-16 (**Exh. C-91**).
434 Audited Financial Statements for the financial year ended 30 June 2021, p.36 (**Exh. C-83**).
435Audited Financial Statements for the financial year ended 30 June 2022, p.32 (**Exh. C-85**) (see also CPF Record of Payment, (**Exh. C-93**)).
436 Licences issued to Zeph Investments Pte Ltd (**Exh. C-94**).

418. The Joint Venture Agreement, the payments to the CPF, the Governmental licence, and the significant number of employees employed directly by the Claimant to operate its businesses are clear evidence of the substantive business activities that the Claimant undertakes in Singapore. From January 2020, the Joint Venture business operated in accordance with the Joint Venture Agreement. The Respondent's dismissal of the clear and obvious business operations of the Claimant is self-serving and entirely inconsistent with the reality on the ground. The Claimant operates a successful and valued service in Singapore. The fact that it took over operating this business from its previous owners does not make it any less substantive or legitimate.[437]

COVID-19 Government Subsidies

419. The 2020 and 2021 financial years were impacted by the global COVID-19 pandemic. The Singapore Government offered businesses operating in Singapore certain grants and relief during the COVID-19 pandemic. The Claimant received the following payments from the Singapore Government during the pandemic to assist it in operating its business during that time:

    a. In the year to 30 June 2020, the Claimant received S$536,026 in Government grants on account of the pandemic;[438]

    b. In the year to 30 June 2021, the Claimant received S$1,053,544 in Government grants on account of the pandemic;[439] and

    c. In the year to 30 June 2022, the Claimant received S$614,037 in Government grants on account of the pandemic.[440]

437 Contrary to the Respondent's suggestions at SoPo, [253].
438 Audited Financial Statements for the financial year ended 30 June 2020, p. 36, (**Exh. C-81**).
439 Audited Financial Statements for the financial year ended 30 June 2021, p. 35, (**Exh. C-83**).
440 Audited Financial Statements for the financial year ended 30 June 2022, p. 31, (**Exh. C-85**).

420. These payments evidence the Claimant's ongoing and significant business activities in Singapore. The Claimant would not have been eligible for such substantial payments, had it not been operating a genuine and substantive business in Singapore.

Insurance Policies held by the Claimant

421. The Claimant holds the following insurance policies in Singapore required to operate its business in Singapore: [441]

a. Workers' Compensation Insurance:

i. 20 March 2020 to 19 March 2021, with [redacted] for 156 employees;[442] and

ii. 20 March 2021 to 19 March 2023 and thereafter with [redacted] for 138 employees.[443]

b. Public liability:

i. 20 March 2021 to 19 March 2023 and thereafter with [redacted].[444]

c. Business insurance:

i. 20 March 2020 to 19 March 2023, with [redacted].[445]

422. These insurance policies are a significant and genuine cost to the Claimant, required to operate its substantive business.

Consultants Engaged to Assist in Operating Singapore Business

441 Bundle of Insurance Policies, (**Exh. C-95**).
442 Bundle of Insurance Policies, pp. 5-8, (**Exh. C-95**).
443 Bundle of Insurance Policies, pp. 10-29, (**Exh. C-95**).
444 Bundle of Insurance Policies, pp. 30-47, (**Exh. C-95**).
445 Bundle of Insurance Policies, pp. 1-4, (**Exh. C-95**).

423. The Claimant engages a number of professional services firms in Singapore to advise and assist it with its business operations in Singapore. These include:

a. [redacted], engaged to provide tax advice since June 2019;[446]

b. [redacted], engaged to provide audit services since May 2020;[447]

c. [redacted], engaged to provide corporate secretarial and related services since January 2019;[448]

d. [redacted], engaged as the Claimant's tax agent since August 2020;[449]

e. [redacted], engaged to provide legal services since December 2022;[450] and

f. [redacted] – Notary Public Services (engaged via the Claimant's tax agents [redacted] on 6 October 2022).[451]

424. These are all genuine business relationships with reputable firms, required to operate the Claimant's substantive business in Singapore.

Previous Business Operations in Singapore

425. As explained by [redacted] in his [redacted] Witness Statement[452], when the Claimant was incorporated it initially invested in two marine engineering businesses in Singapore.[453]

446 Bundle of Engagement Letters, pp. 2-12, (**Exh. C-96**).
447 Bundle of Engagement Letters, pp. 13-16, (**Exh. C-96**).
448 Bundle of Engagement Letters, pp. 17-20, (**Exh. C-96**).
449 Bundle of Engagement Letters, pp. 21-22, (**Exh. C-96**).
450 Bundle of Engagement Letters, p. 23, (**Exh. C-96**).
451 Bundle of Engagement Letters, from p. 24, (**Exh. C-96**).
452 [redacted] WS, para 46.
453 [redacted] WS, para 46; See also Consolidated Financial Reports for the year ended 30 June 2019, p. 26, (**Exh. C-80**).

426. As of 30 June 2019, the Claimant's business comprised the holding and managing of investments, including three Singapore subsidiaries involved in marine engineering in Singapore:[454]

    a. GCS Engineering Services Pte Ltd (principal activities included marine works, engineering activities and processes); and

    b. Visco Engineering Pte Ltd and Visco Offshore Engineering Pte Ltd (principal activities include the repairing of ships, tankers, and other ocean-going vessels).

427. The 2019 Audited Consolidated Financial Statements for the 2019 financial year state that the Claimant "*operates in building and repairing ships, tankers, other ocean going vessels by manpower contracting. The* [Zeph] *Group is currently in the process of increasing the number of employees to more than 100 for the 2020 financial year*."[455]

428. These subsidiaries had a number of employees. They paid salaries and contributions to the Singapore Government's CFP for these employees.[456] For example, the records show:

    a. Between July 2019 and January 2020, GCS Engineering Services paid $17,628 to the CPF on behalf of 13 employees;[457] and

    b. Between May and July 2019 and January 2020, Visco Offshore Engineering paid $27,090 to the CPF on behalf of 24 employees (in addition to agency fees for 34 foreign workers also employed during that period).[458]

454 Audited Financial Statements for the reporting period from 21 January 2019 to 30 June 2019, p. 11, (**Exh. C-79**).
455 Consolidated Financial Reports for the year ended 30 June 2019, p. 2, (**Exh. C-80**).
456 [redacted] WS, para 68.
457 CFP Record of Payment for GCS Engineering Services, (**Exh. C-89**).
458 CFP Record of Payment for Visco Offshore Engineering, (**Exh. C-90**) (It is noted that some employees were shared by Visco Offshore Engineering and GCS Engineering Services, but each company contributed separately for the employee).

429. In addition, during the period from 21 January to 30 June 2019, the Claimant paid CPF contributions of S$13,135.[459]

430. For the year ended 30 June 2019, the Claimant's Engineering Companies had total revenue and other income in Singapore as follows:

   a. GCS Engineering Service Pte. Ltd.: SG$1,365,105; [460]

   b. Visco Engineering Pte. Ltd.: SG$2,119,803; [461] and

   c. Visco Offshore Engineering Pte. Ltd.: SG$1,062,668. [462]

431. Due to trading conditions experienced by these companies in 2020 during the COVID-19 pandemic, they were placed into voluntary liquidation in October 2020.[463] The COVID-19 pandemic was particularly difficult for the shipping industry and, consequently, these marine engineering businesses were acutely affected.

The Claimant's Audited Financial Statements Demonstrate that it has a Substantive Business in Singapore

Financial Year 2019

432. The Claimant's Audited Financial Statements for the financial year ending 30 June 2019 demonstrate that the Claimant's total assets on a standalone basis were valued at over S$8,200,000.[464] The Claimant's standalone Audited Financial Statements

459 Audited Financial Statements for the reporting period from 21 January 2019 to 30 June 2019, p. 17, (**Exh C-79**).
460 GCS Engineering Services Pte Ltd Audited Financial Statements for the Reporting Period from 1 January 2019 to 30 June 2019, p. 7, (**Exh. C-542**).
461 Visco Engineering Pte Ltd Audited Financial Statements for the Reporting Period from 1 September 2018 to 30 June 2019, p. 7, (**Exh. C-543**).
462 Visco Offshore Engineering Pte Ltd Audited Financial Statements for the Reporting Period from 1 January 2019 to 30 June 2019, p 7, (**Exh. C-544**).
463 [redacted] WS para 57; Appointment of Liquidator – GCS, (**Exh. R-74**); Notice of Appointment of Liquidator- GCS, (**Exh. R-75**); Appointment of Liquidator – Visco, (**Exh. R-78**); Notice of Appointment of Liquidator – Visco, (**Exh. R-79**); Appointment of Liquidator Visco Offshore, (**Exh. R-82**); Appointment of Liquidator – Visco Offshore, (**Exh. R-83**).
464 Audited Financial Statements for the reporting period from 21 January 2019 to 30 June 2019, p. 7, (**Exh. C-79**).

record that the Claimant incurred expenses in the financial year of $2,029,233,[465] resulting in a loss, although much of that loss was incurred due to writing off a loan to one of its subsidiaries in the amount of $1,975,670.[466]

433. The Claimant's Consolidated Audited Accounts for the financial year ending 30 June 2019 record that the consolidated group total income for operations in Australia, Singapore and New Zealand during this financial year was approximately A$300 million.[467]

434. In addition, after accounting for the Singapore and Australian subsidiaries, the Claimant's Consolidated Audited Accounts for the financial year ending 30 June 2019 record that the total assets of the Claimant's consolidated group in that financial year were approximately A$613,435,345.[468]

Financial Year 2020

435. The Claimant's Audited Accounts for the financial year to 30 June 2020 record that the Claimant generated income in Singapore (excluding dividends) of S$5,680,594.[469] This included grants received from the Singaporean Government on account of the COVID-19 pandemic in the amount of S$536,026.[470] In the same period, the Claimant incurred expenses of S$3,797,307.[471] The Claimant's total assets on a standalone basis were valued at over S$19.1 million for the 2020 financial year.[472]

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465 Audited Financial Statements for the reporting period from 21 January 2019 to 30 June 2019, pp. 8, 22, (**Exh. C-79**).
466 Audited Financial Statements for the reporting period from 21 January 2019 to 30 June 2019, pp. 10, 18, (**Exh. C-79**).
467 Consolidated financial reports for the year ended 30 June 2019, p. 4, (**Exh. C-80**).
468 Consolidated financial reports for the year ended 30 June 2019, p. 5, (**Exh. C-80**).
469 Audited Financial Statements for the financial year ended 30 June 2020, p. 36, (**Exh. C-81**).
470 Audited Financial Statements for the financial year ended 30 June 2020, p. 36, (**Exh. C-81**).
471 Audited Financial Statements for the financial year ended 30 June 2020, p. 8, (**Exh. C-81**).
472 Audited Financial Statements for the financial year ended 30 June 2020, p. 7, (**Exh. C-81**).

436. These accounts evidence the Claimant's substantive business in Singapore a few months prior to the passing of the *Amendment Act* on 13 August 2020.

437. In addition, the Claimant's Consolidated Audited Accounts for FY20 record that the consolidated group income for operations in Australia, Singapore and New Zealand during this financial year was approximately A$349,500,000.[473] After accounting for the Singapore and Australian subsidiaries, the total assets of the Claimant's consolidated group were valued at just under A$806 million.[474]

438. As stated above, GCS Engineering Services Pte Ltd, Visco Engineering Pte Ltd and Visco Offshore Engineering Pte Ltd were placed into voluntary liquidation in October 2020, in large part, because of the trading conditions experienced by these companies during the COVID-19 pandemic.

439. The Claimant had taken the risk its investment in the Engineering Companies referred to above and as such had lost the companies due to the COVID-19 pandemic in 2020.

Financial Year 2021

440. The Claimant's 2021 financial year ran from 1 July 2020 to 30 June 2021. The *Amendment Act* was passed during this period.

441. The Claimant's Singapore business continued to operate during the 2021 financial year. The Claimant's assets were worth approximately S$13,100,000 during this financial year and the Claimant's income (excluding dividends) was S$5,347,107.[475] This included revenue from services, as well as from Government grants to account for the impact of the COVID pandemic. The Claimant incurred expenses of S$4,588,507[476] and employed around 135 people.[477]

473 Consolidated Financial Reports for the year ended 30 June 2020, p. 3, (**Exh. C-82**).
474 Consolidated Financial Reports for the year ended 30 June 2020, p. 4, (**Exh. C-82**).
475 Audited Financial Statements for the financial year ended 30 June 2021, pp. 6 and 35, (**Exh. C-83**).
476 Audited Financial Statements for the financial year ended 30 June 2021, p. 7, (**Exh. C-83**).
477 [redacted] WS, para 76(a).

442. As at 30 June 2021, the total assets of the Claimant's Consolidated group were valued at over A$1,051,166,879 as at 30 June 2021[478]. The Claimant also received income on a consolidated basis of A$545,503,344 and incurred expenses of A$230,998,876.[479]

Continued Activity of the Singapore Business since July 2021

443. During the financial year to 30 June 2022, the Claimant received income (excluding dividends) on a standalone basis of S$5,036,189 from its Singapore business.[480] It incurred expenses of S$4,963,706.[481] As this period continued to be impacted by the COVID-19 pandemic, the Claimant continued to receive Government grants during this financial year.

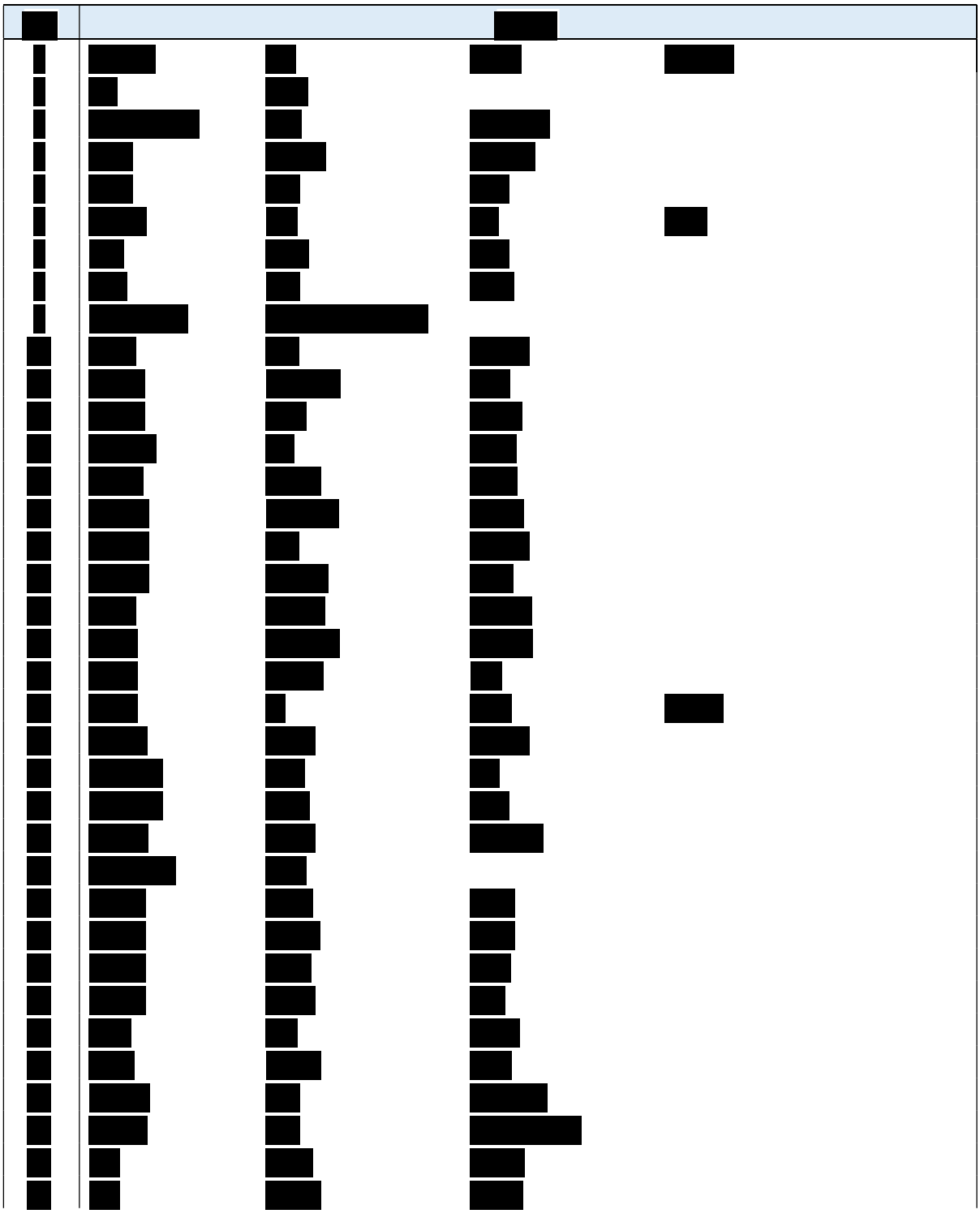
444. During the financial year to 30 June 2023, the Claimant received income on a standalone basis of S$10,415,391 from its Singapore business.[482] It incurred expenses of S$6,865,711.[483] Government grants in the amount of S$190,996 were received. The total assets for the Claimant on a standalone basis was S$76,990,970 as at 30 June 2023[484]. These figures show that the Claimant has built up the Joint Venture business over the years and is now running a highly successful business in Singapore with a significant standalone asset base.

Employees of the Claimant Resident in Singapore - Calendar Year 30 June 2023

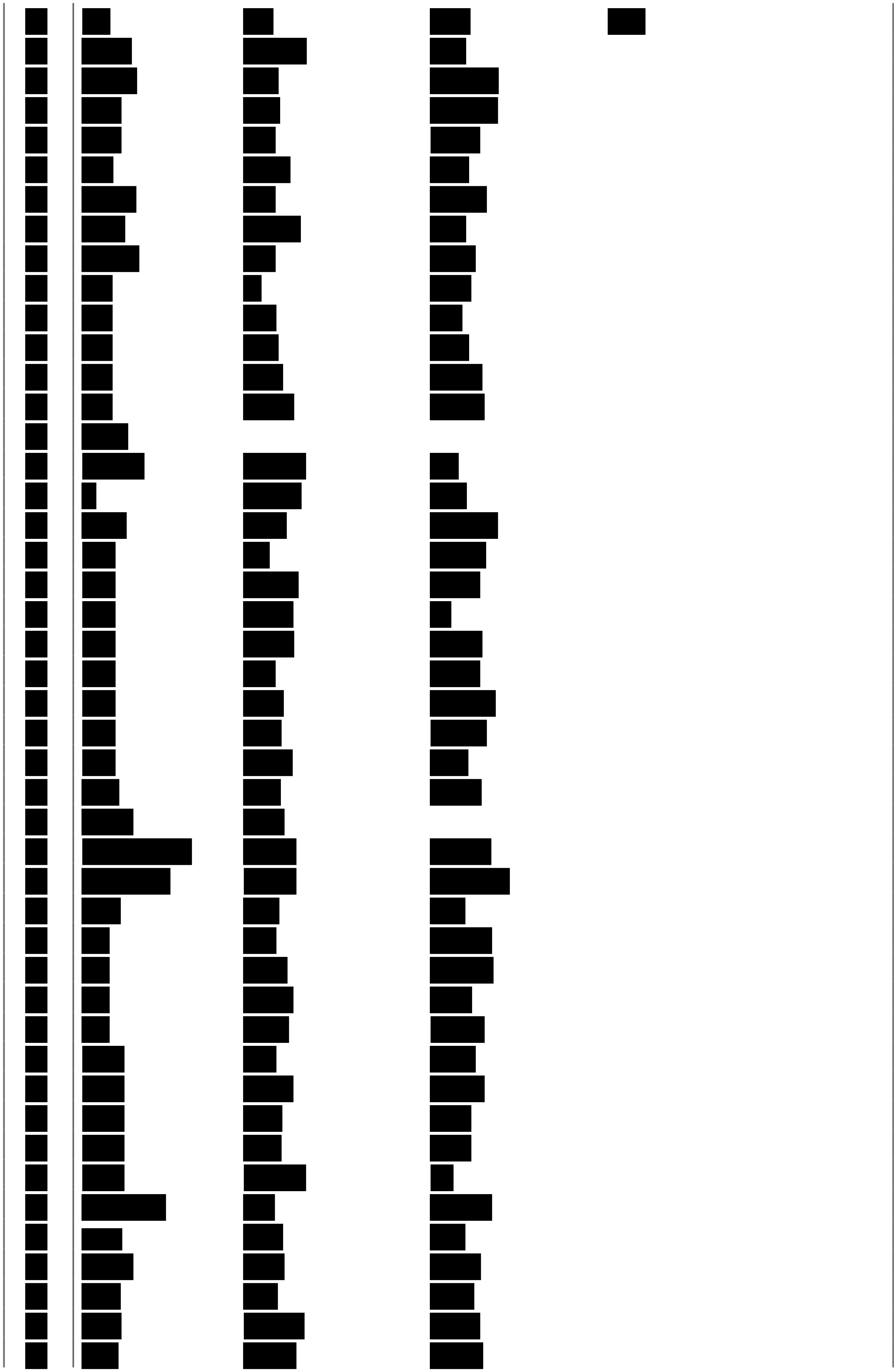
478 Consolidated Financial Reports for the year ended 30 June 2021, pp. 4, (**Exh. C-84**).
479 Consolidated Financial Reports for the year ended 30 June 2021, pp. 3-4, (**Exh. C-84**).
480 Audited Financial Statements for the financial year ended 30 June 2022, p. 31, (**Exh. C-84**).
481 Audited Financial Statements for the financial year ended 30 June 2022, p. 7, (**Exh. C-84**).
482 Audited Financial Statements for the financial year ended 30 June 2023, p. 31, 32, (**Exh. C-515**).
483 Audited Financial Statements for the financial year ended 30 June 2023, p. 7, (**Exh. C-515**).
484 Audited Financial Statements for the financial year ended 30 June 2023, p. 6, (**Exh. C-515**).

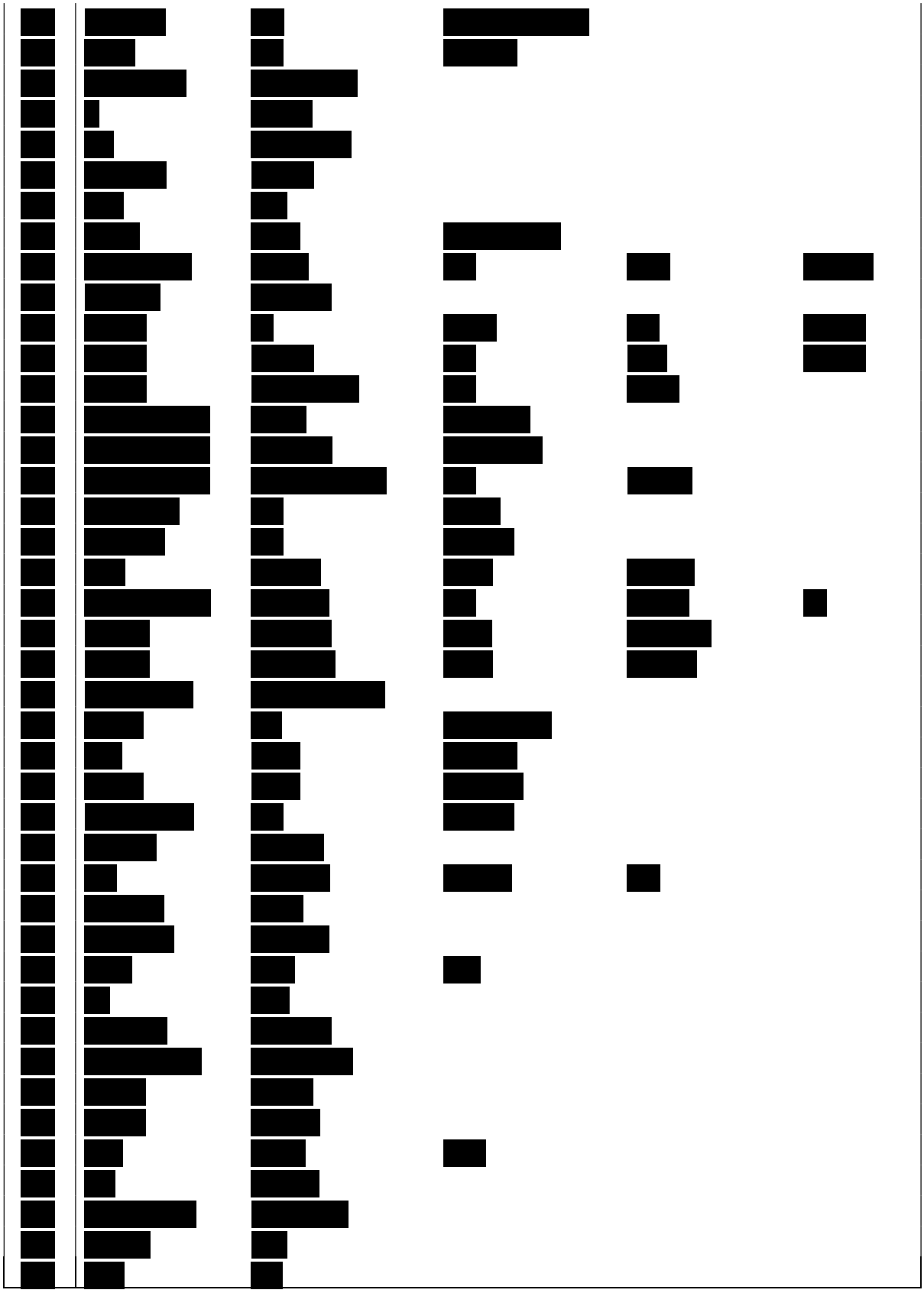
445. The Zeph Investments Pte Ltd Staff Report confirms that as at 30 June 2023, the Claimant employed a total of 246 employees, comprised of:[485]

a. 170 employees of the Claimant:



[redacted] WS para 141; Zeph Staff Report, 30 June 2023 (**Exh. C-498**).



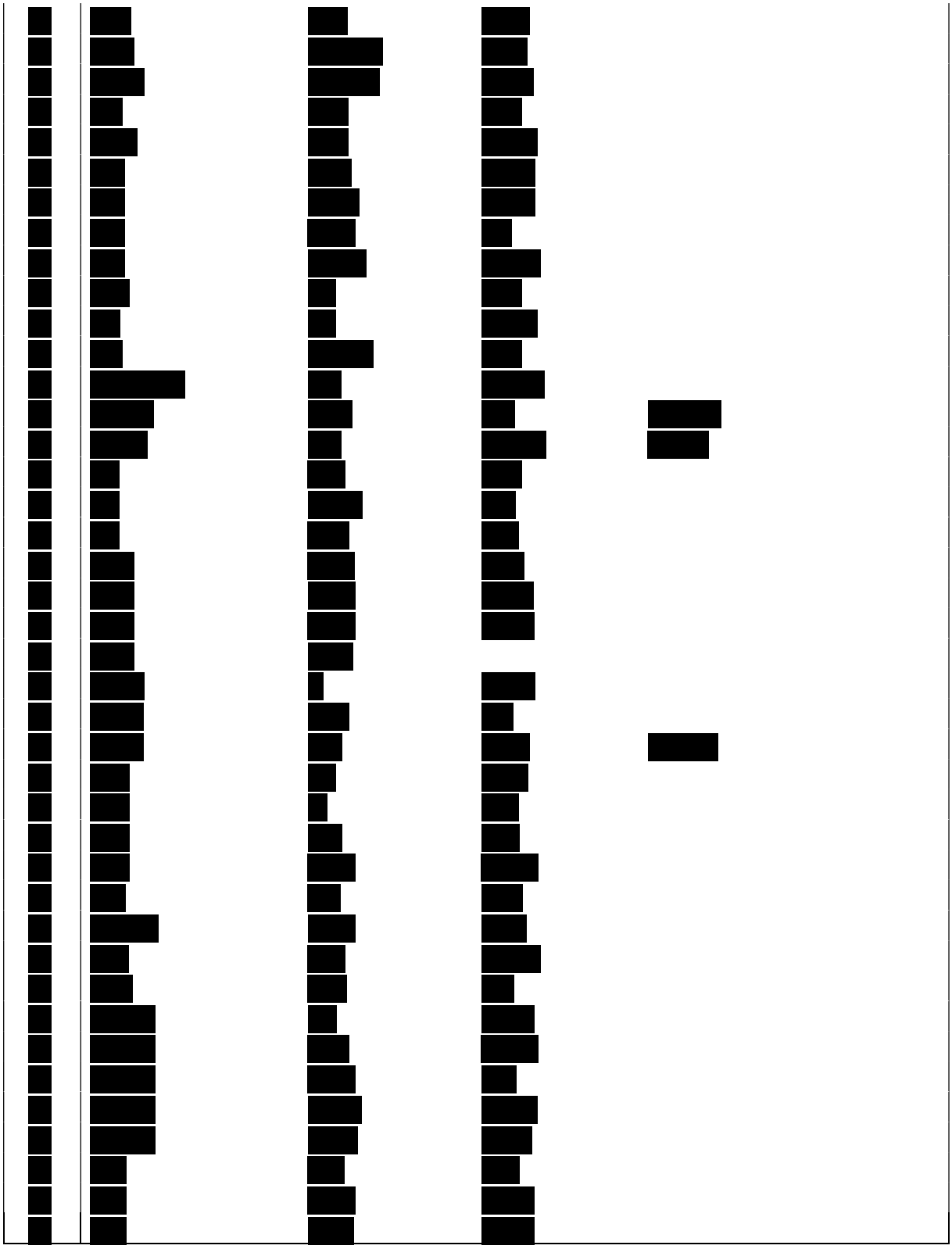


b. 21 employees of Kleen Venture Pte Ltd, trading as Kleenmatic Management:

No.	NAME
[redacted]	[redacted]

c. 57 employees of One Kleenmatic Pte Ltd, trading as Kleenmatic Services:

No.	NAME
[redacted]	[redacted]



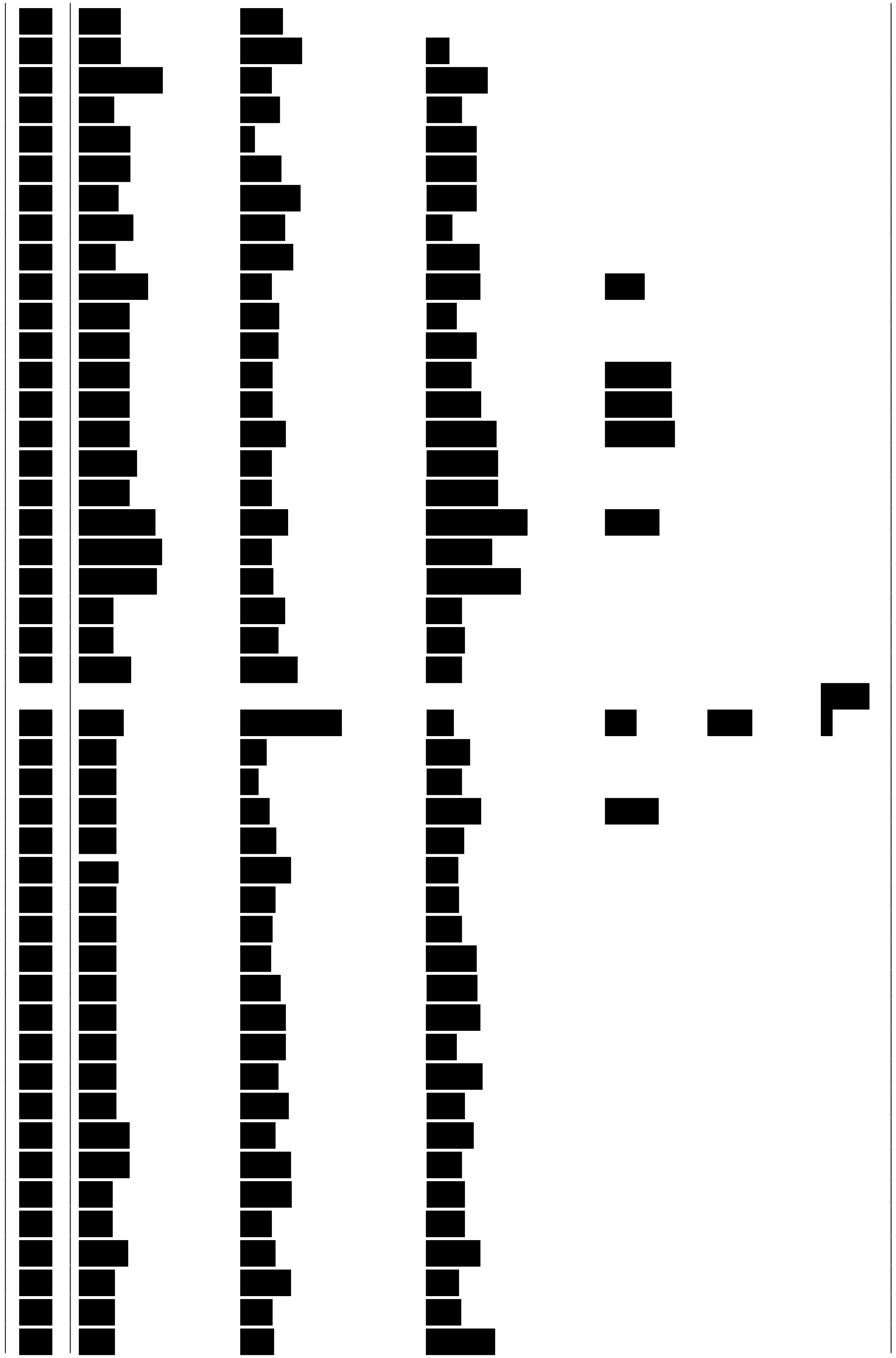
Employees of the Claimant Resident in Singapore – Calendar Year 31 January 2024

446. The Zeph Investments Pte Ltd Staff Report confirms that as at 31 January 2024, the Claimant employed a total of 265 employees, comprised of:[486]

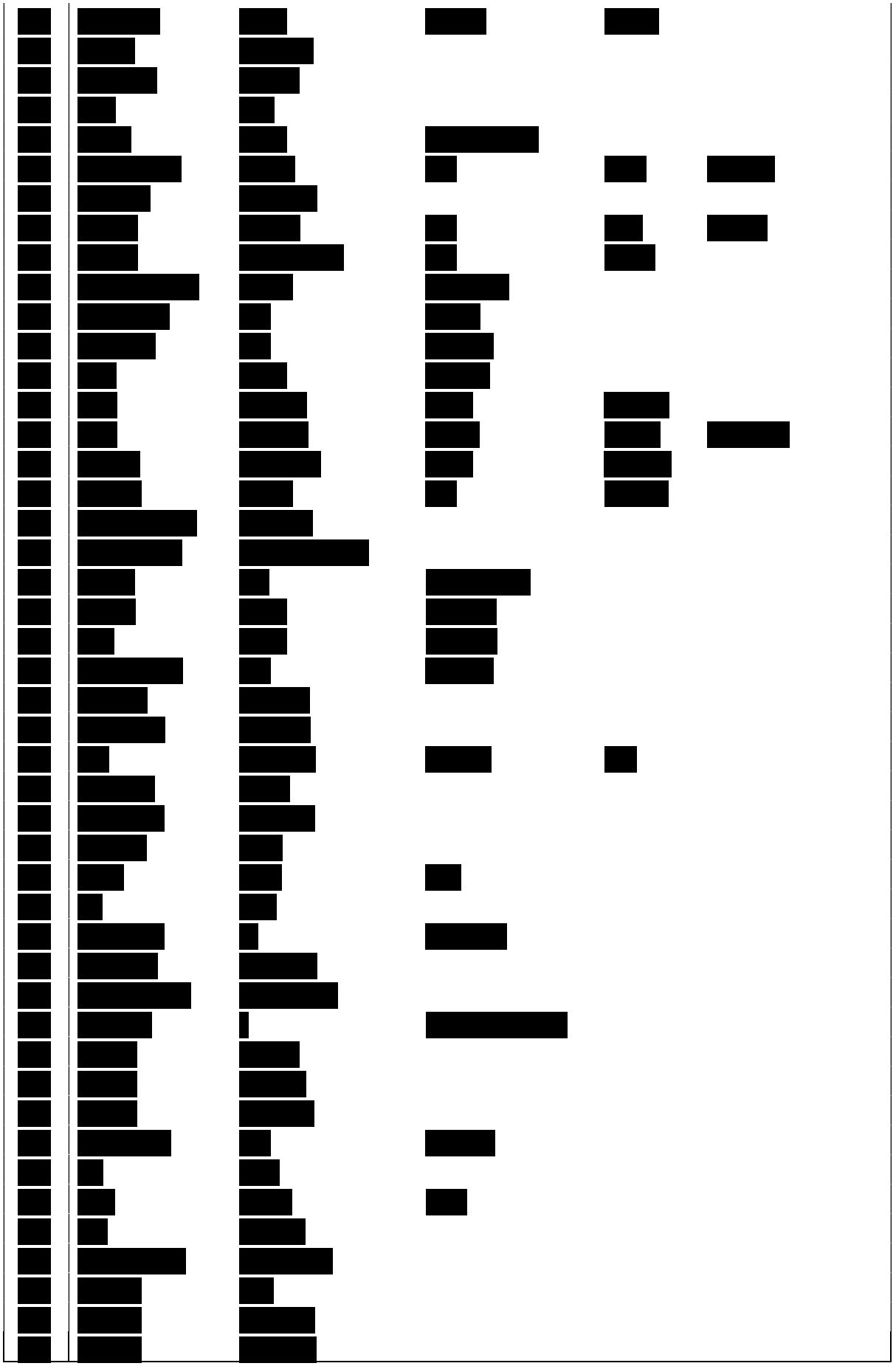
a. 265 employees of the Claimant:

No.	NAME
[redacted]	[redacted]

486 [redacted] WS para 142; Zeph Staff Report 31 January 2024 (**Exh. C-510**).



[redacted]



b. 1 employee of Kleen Venture Pte Ltd, trading as Kleenmatic Management:

[redacted]	[redacted]
[redacted]	[redacted]

c. 1 employee of One Kleenmatic Pte Ltd (a wholly owned subsidiary of the Claimant), with the Joint Venture trading as Kleenmatic Services:

No.	NAME
[redacted]	[redacted]

447. The Claimant hosted a Chinese New Year party for its staff and other directors and their families. The 2024 Chinese New Year Party took place at Marina Bay Sands in Singapore on 17 February 2024.[487] Below is a photo taken at that party which was attended by local staff and the Singapore directors Quek Ser Wah Victor and Loh Wai Chan and their families and other directors of the Claimant including Mr Bernard Wong (Chief Investment Officer and Director of the Claimant, and Chief Financial Officer of Mineralogy) as well as Mr Declan Sheridan (Director of the Claimant and [redacted] and [redacted] at Mineralogy):

487 [redacted] WS, para 135.

[redacted]

448. Below is a link to a video of the Claimants 2024 Chinese New Year Party attended by the Claimant's employees in Singapore as well as four of the Claimant's seven directors:

[redacted]

Conclusion

449. The Claimant has been operating businesses in Singapore since January 2019 and continues to do so today. Its business operations have been regulated by the Government and laws of Singapore and the Claimant complies with all regulatory

requirements. The Claimant's business has been operating profitably, even during the pandemic. It is fanciful for the Respondent to suggest that the Claimant does not operate a business simply because that business trades under the name of "Kleenmatic" and existed before the Claimant took it over. As the evidence above demonstrates, the Claimant operates a genuine and substantive business in Singapore. It remains committed to continuing its operations in Singapore for the reasons inter alia that it first incorporated there (as described in this Response). There is no basis upon which the Respondent can seriously argue that the Claimant does not operate a substantive business in Singapore.

Date of Assessment

450. The Respondent contends that the date on which the two substantive conditions for an effective denial of benefits must be assessed in this case is, at the latest, the date on which the Claimant submitted its Written Requests for Consultations pursuant to the AANZFTA (the "AANZFTA Written Consultations"), i.e., 14 October 2020. This is said by the Respondent to be the date on which its "dispute" with the Claimant under the AANZFTA arose. The Claimant's position is that the date is 13 August 2020, the date of the *Amendment Act*.

451. In any event, however, the Claimant agrees with the Respondent that it is in fact immaterial what date of assessment is adopted by the Tribunal, albeit for a very different reason: namely, the Claimant has, at all material times, had substantive business operations in Singapore**.**

452. In interpreting this second substantive requirement in Article 11(1)(b) of Chapter 11, therefore, the questions for the Tribunal are: (1) what is the difference (if any) between "*substantial business activities*" and "*substantive business operations*", for the purposes of denial of benefits; and (2) what guidance can be found in the decisions of other tribunals, construing the former formulation?

The Test for Determining what is "Substantive"

453. Article 11(1) refers *to "substantive business operations"* and a question arises as to the meaning of the word *"substantive"*. No specific meaning is ascribed to that word by the AANZFTA and the word should therefore be given its ordinary meaning. Dictionary definitions of the word *"substantive"* indicate that it means nothing more than *"having substance"*. Some dictionary definitions treat the term *"substantive"* as being synonymous with *"substantial"* although this is open to doubt because it is arguable that something may *"have substance"* without necessarily being *"substantial"*.

454. Assuming for the sake of argument, however, that the term *"substantive"* is the same or similar in meaning to the term *"substantial"*, however, there are authorities on the meaning of *"substantial"* in this context which provide at least some guidance.

455. It has been held that:

> *"A business activity may not be cursory, fleeting or incidental, but must be of sufficient extent and meaning as to constitute a genuine connection by the company to its home state. That genuine connection is necessary to ensure that the company is one that the home State has an interest to protect, and which the host State would consider it appropriate for the home State to protect. The connection between the company and its home State cannot be merely a sham, with no business reality whatsoever, other than an objective of maintaining its own corporate existence"*.[488]

456. It has further been said that:

> *" … although there has not been a significant jurisprudence on the question of 'substantial business activities', the tribunals that have found such activities to*

488 *Gran Colombia Gold Corp. v Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020, para 137, (**Exh. RLA-80**).

exist have been prepared to do so on the basis of a relatively small number of activities both in terms of quantity and quality".[489]

457. It is plain from the evidence in this case that the business operations of the Claimant in Singapore are *"substantive business operations"* within the meaning of Article 11(1) of Chapter 11 of the AANZFTA.

The Ordinary Meaning of the Words

458. The Respondent begins its own analysis by baldly asserting that the AANZFTA – in choosing "*substantive*" instead of "*substantial*", and "*operations*" rather than "*activities*" – "*can be seen to specify a more demanding standard*".[490] However, that is (with respect) a wholly self-serving submission that is divorced from the ordinary meaning of the words (contrary to Article 31 of the Vienna Convention and the Respondent's own stance in respect of the construction of Article 11(1)(b)[491]) and is an unsustainable construction:

    a. Although "*substantive*" may connote "*authenticity and genuineness*",[492] in line with its plain meaning (i.e., having substance; being real as opposed to apparent), it does not impose a higher threshold.

    b. "*Substantial*", too, can be defined as being real and not illusory; but it also means considerable in quantity, or significantly great. As such, if anything, "*substantive*" is less exacting: whilst a business' operations or activities might very well be "*substantive*" without being "*substantial*", it is difficult to conceive how they may properly be "*substantial*" but not "*substantive*".

489 *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, 12 March 2019, para 260, (**Exh. RLA-74**).
490 SoPo, [222].
491 SoPo, [214].
492 SoPo, [222].

c. As to "*operations*" and "*activities*", the former does not imply a "*more significant form of continuous physical presence*".[493] In this context, "*operations*" should be treated as referring to the fact of functioning, or being in effect (i.e., is a business 'operational' in a particular territory?), whereas "*activities*" suggests a more positive set of commercial actions.

459. Accordingly, the Claimant's primary position – in view of the natural meaning of the language used – is that the threshold for "*substantive business operations*" is materially lower, from Claimant's perspective, than "*substantial business activities*". Its alternative position is that the applicable standard, in relation to both formulations, is essentially the same – but either way there can be no possibility of the Respondent's construction being treated as correct.

Preparatory Points

460. Prior to exploring what assistance can be derived from other awards and decisions in this area, two preparatory points must be made.

461. First, the Claimant notes the Respondent's citation of an observation of the tribunal in *Alverley Investments Ltd v. Romania*,[494] in support of its contention that the fact that Mr Palmer is an Australian national somehow necessitates a "*heightened scrutiny*" as to whether the Claimant has "*substantive business operations*" in Singapore.[495] This submission is without any merit:

a. As the Respondent itself recognises,[496] the tribunal in *Alverley Investments Ltd v. Romania* was not dealing with denial of benefits at all; it was determining where the claimants' "*seat*" was located, for the purposes of deciding whether there had been an investment within the meaning of the treaty in question.

493 SoPo, [222].
494 *Alverley Investments Ltd v. Romania*, ICSID Case No. ARB/18/30, Excerpts of Award, 16 March 2022, (**RLA-71**).
495 SoPo, [223-224].
496 SoPo, [223].

b. As is obvious from the extract from the award quoted by the Respondent in its SoPo, although that tribunal did refer to the fact that the ultimate beneficial owner of the claimant was a Romanian national, it was not that which made it "*particularly important*" to examine the activities of the relevant Cypriot holding company; it was the possibility that the company was a "*paper façade*" that was "*simply discharging formalities*", rather than "*exercising some form of effective management*".[497]

c. The tribunal in *Alverley Investments Ltd v. Romania* further held, in terms, that the "[t]*he fact that the UBO is located in another country* [i.e., Romania] *cannot, therefore, preclude the holding company being held to have a "real seat" in its State of incorporation* [i.e., Cyprus]"; what had to be demonstrated was a degree of "*effective management*" from Cyprus.[498]

462. Second, the Claimant wholly rejects the partisan and misleading descriptions of its business in Singapore, and the nature of the Claimant's case in relation to the same (in response to the Respondent's third preliminary objection), as adopted by the Respondent in order to contextualise its analysis of other awards and decisions in respect of this second substantive requirement. In particular:

a. The Claimant relies on the fact that the Claimant itself:

i. Was incorporated in Singapore on 21 January 2019 (i.e., well before the Claimant's AANZFTA Written Consultations were submitted and long before its Notice of Intent to Submit a Dispute to Arbitration under the AANZFTA was filed in October 2022);

ii. Has since conducted – and continues to conduct – substantive business operations from a physical office in Singapore; and,

497 *Alverley Investments Ltd v. Romania*, (**RLA-71**), para 250.
498 *Alverley Investments Ltd v. Romania,* (**RLA-71**), para 248 (emphasis added).

iii. As at 29 February 2024, employs **more than 250** employees in Singapore. [499]

b. The Claimant's subsidiary engineering companies in Singapore (the "**Engineering Subsidiaries**") and its participation in a Joint Venture arrangement in Singapore are substantive active businesses.

Previous Arbitral Practice

463. Turning to the relevant previous arbitral practice:[500]

a. In *Limited Liability Company AMTO v. Ukraine*,[501] the tribunal found that the purpose of the denial of benefits provision in Article 17(1) of the ECT was "*to exclude from ECT protection investors which have adopted a nationality of convenience*".[502] Notably, though, it held that "*substantial*"[503] meant "*of substance, and not merely of form*", but did not mean "*large*" and should be determined by reference to the "*materiality not the magnitude of the business activity*".[504] The tribunal was satisfied that the claimant had met this condition, on the grounds that it conducted "*investment related activities*" in Latvia where it employed a "*small but permanent staff*".[505] Consequently, this award supports the Claimant's position that "*substantive*" does not impose a higher threshold than "*substantial*" (and, if anything, the former is less exacting than the latter).

b. The approach in *Limited Liability Company AMTO v. Ukraine* was followed in *Masdar Solar & Wind Cooperatief UA v. Spain*.[506] The tribunal – again applying

499 [redacted] WS para 106.
500 *See*, paragraphs 226-233 thereof.
501 SCC Case No. 080/2005, Final Award, 26 March 2008, (**Exh. RLA-72**).
502 *Limited Liability Company AMTO v. Ukraine,* (**Exh. RLA-72**), para 69.
503 As in "*substantial business activities*".
504 *Limited Liability Company AMTO v. Ukraine,* (**Exh. RLA-72**), para 69.
505 *Limited Liability Company AMTO v. Ukraine,* (**Exh. RLA-72**), para 69.
506 ICSID Case No. ARB/14/1, Award, 16 May 2018, (**Exh. RLA-81**), paras 253-254. This approach was adopted, too, by the tribunal in *Mercuria Energy Group Ltd v. Poland*, SCC Case No. 2019/126, Award, 29 December 2022, (**Exh. CLA-203**) para 570.

Article 17(1) of the ECT – found that the evidence adduced by the claimant as to its standing as a holding company in the Netherlands with substantial international assets under its control – including the fact that it had two Dutch directors; that its board met at least four times a year in Amsterdam; and that it held bank accounts in the Netherlands[507] – was "*persuasive of the true extent and materiality of the business conducted by Claimant in the Netherlands*".[508] This award, then, undermines any suggestion by the Respondent that a "*more significant form of continuous physical presence*" is required.

c. Relatedly, the decision of the tribunal in *Bridgestone Licensing Services, Inc v. Panama*[509] simply illustrates that, although an investment treaty's benefits may legitimately be denied to "*shell companies*" which are no more than so-called "*free rider*" investors, companies which – for example – maintain their central administration or principal place of business in the territory in question, or have a "*real and continuous link*" with that territory, should not fall foul of denial of benefits clauses.[510] That tribunal did not, as the Respondent appears to intimate,[511] apply this "*real and continuous link*" formulation as some kind of hard-and-fast rule for "*substantial business activities*". Further, whilst the claimant's activities in the US were significant in that case,[512] such a level of activity is not required in order to demonstrate "*substantial business activities*", given that it is materiality (and not magnitude) that counts.[513] And the tribunal in *Bridgestone Licensing Services,*

507 *Masdar Solar & Wind Cooperatief UA v. Spain,* (**Exh. CLA-203**), paras 225-226 and 229.
508 *Masdar Solar & Wind Cooperatief UA v. Spain,* (**Exh. CLA-203**), paras 254.
509 ICSID Case No. ARB/16/34, Decision on Expedited Objections, (**RLA-30**).
510 *Bridgestone Licensing Services, Inc v. Panama,* (**RLA-30**), paras 290, 302.
511 SoPo, [226-228].
512 Comprising, as they did, the maintenance, operation, and administration of trademarks from a permanent office in Nashville; the entry into licence and product placement agreements with both foreign and US entities; and the associated instruction and management of US-qualified attorneys (as well as the payment of taxes and retention of bank accounts in the US): *see*, for example, *Bridgestone Licensing Services, Inc v. Panama* (**RLA-30**), paras 279, 302.
513 *See* also, for example, *Big Sky Energy Corporation v. Kazakhstan*, ICSID Case No. ARB/17/22, Award, 24 November 2021, (**Exh. RLA-85**) para 286.

Inc v. Panama observed, too, that – although such activities were "*overseen*" by the claimant's Japanese parent and "*decisions of principle were taken in Japan*" – that was not incompatible with the US subsidiary carrying on "*substantial business activities*".[514]

d. The Respondent is right to identify that, in *NextEra v. Spain*, the tribunal reasoned that the key question was whether "*substantive work is being done for the company*" in the territory in question; and that it matters not, in this respect, whether it is being undertaken by permanent employees (or contractors).[515] In addition, however, the Claimant draws the Tribunal's attention to the fact that the tribunal in *NextEra v. Spain*:

    i. Stated, once more, that it is the quality, and not just the quantity, of the activities that is significant;[516] and,

    ii. Accurately acknowledged that other tribunals have been prepared to hold – correctly, in the Claimant's submission – that "*substantial business activities*" exist "*on the basis of a relatively small number of activities both in terms of quantity and quality*".[517]

e. The tribunal in *9REN Holding SARL v. Spain*[518] gave the respondent's argument that the claimant lacked "*substantial business activities*" in Luxembourg short shrift, in circumstances where the claimant had leased office space, maintained bank accounts, paid taxes, and held meetings there.[519] This was notwithstanding that the claimant had only retained "*at least one locally-based employee*" in Luxembourg.[520] As the tribunal put it: "*Bricks and mortar*

514 *Bridgestone Licensing Services, Inc v. Panama,* (**RLA-30**), para 302.
515 *NextEra v. Spain,* (**RLA-74**), para 257.
516 *NextEra v. Spain,* (**RLA-74**), para 257.
517 *NextEra v. Spain,* (**RLA-74**), para 260.
518 *9REN Holding SARL v. Spain*, ICSID Case No. ARB 15/15, Award, 21 May 2019.
519 *9REN Holding SARL v. Spain,* (**RLA-82**), paras 180-182.
520 *9REN Holding SARL v. Spain,* (**RLA-82**), para 180.

are not of the essence of a holding company, which is typically preoccupied with paperwork, board meetings, bank accounts and cheque books".[521]

f. As the Respondent itself highlights, in *Aris Mining Corporation v. Colombia*[522] the tribunal was easily convinced that the claimant was engaged in "*substantial business activities*" in Canada, on account of the fact that it had (*inter alia*) performed core corporate functions in Toronto; rented office space and employed eight full-time employees there; and held several bank accounts in Canada.[523] Again, though, this degree of activity is not necessary to establish the requisite "*substantial business activities*". Indeed, the tribunal found that that requirement was "*amply satisfied*";[524] that the claimant's activities in Canada went "*well beyond*" that of a mere "*shell*" company;[525] and that it accordingly had "*no doubt*" that such activities rendered ineffective Colombia's attempt to deny benefits under the relevant investment treaty.[526] Moreover, it concluded, too, that:

   i. The word "*no*", which qualifies "*substantial business activities*", makes clear that the enquiry is not whether the territory in question is the jurisdiction with which a claimant has the most substantial connections; it merely dictates that the claimant must have some "*substantial business activities*" in the relevant territory;[527]

   ii. Where an investment treaty contains no limitations on the nature of the "*business*" – as was the case in *Aris Mining Corporation v. Colombia* and as is true of the AANZFTA in this instance – there is no requirement that the activities in the territory in question be of the same nature as

521 *9REN Holding SARL v. Spain,* (**RLA-82**), para 182. This was endorsed by the tribunal in *Mercuria Energy Group Ltd v. Poland* (**Exh. CLA-203**), para 571.
522 ICSID Case No ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, (**RLA-80**).
523 *Aris Mining Corporation v. Colombia,* (**RLA-80**), para 139.
524 *Aris Mining Corporation v. Colombia,* (**RLA-80**), para 139.
525 *Aris Mining Corporation v. Colombia,* (**RLA-80**), para 141.
526 *Aris Mining Corporation v. Colombia,* (**RLA-80**), para 141.
527 *Aris Mining Corporation v. Colombia,* (**RLA-80**), para 136.

those that the company conducts in other jurisdictions.[528] In the tribunal's words: "*a company engaged overseas in natural resource exploration and development* [need not] *conduct similar resource exploration or development at home, in order to satisfy the requirement of having substantial business activities there. It is entirely consistent … for such a company to locate coordinating or support functions in its home State, or to use its home State as a hub for investment and financing activities that make possible the operational activities in other places. Either way, the activities in the home State must be examined on their own merits – separate from the activities undertaken in other jurisdictions …*".[529] Consequently, the Respondent's contentions that certain of the Claimant's operations in Singapore are in "*unrelated industrial sectors*",[530] and that this is somehow relevant to the "*substantive business operations*" analysis, are without foundation and must be rejected.

464. In all of the above awards and decisions, the tribunals held that the requirement that there be some "*substantial business activities*" in the territory in question had been met (often comfortably so). It is informative, therefore, to contrast them with the decision in *Pac Rim Cayman LLC v. El Salvador*,[531] in which the respondent's denial of benefits objection was successful. In that case, the tribunal found that the claimant was only a "*passive actor*" with "*slender*" activities in the relevant territory.[532] It pointed to the fact that the business had no employees; did not lease any office

528 *Aris Mining Corporation v. Colombia,* (**RLA-80**), para 138.
529 *Aris Mining Corporation v. Colombia,* (**RLA-80**), para 138. Thus, the tribunal was unpersuaded by Colombia's argument that the claimant had to show mining activities within Canada, simply because its public-facing statements focused on such activities; according to the tribunal, the claimant's activities in Canada were undoubtedly "*business*" in nature, even if that business was essentially investment management and financing, to support a different type of business (i.e., mining operations) carried out in Colombia by affiliated entities: *Aris Mining Corporation v. Colombia,* (**RLA-80**), para 140.
530 SoPo, [225-226].
531 ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, (**Exh. RLA-33**).
532 *Pac Rim Cayman LLC v. El Salvador,* (**Exh. RLA-33**), para 4.68.

space; and had no bank account.[533] Whilst the tribunal recognised that a "*traditional holding company*" could meet the "*substantive business activities*" condition,[534] it concluded that the claimant was not such an entity but, rather, "*more akin to a shell company with no geographical location for its nominal, passive, limited and insubstantial activities*".[535]

465. It is correct that the tribunal in *Pac Rim Cayman LLC v. El Salvador* also held that although the group of companies of which the claimant (as a subsidiary) formed part did have substantial business activities in the territory in question, the "*substantial business activities*", for such purposes, had to be attributable to the "*enterprise*" itself (i.e., the claimant).[536] A similar decision was reached, too, in *Plama Consortium Ltd v. Bulgaria*, the tribunal in that matter finding that an absence of "*substantial business activities*" on the claimant's own part could not be "*made good*" by reference to the activities of the parent company that owned or controlled the claimant.[537]

466. The Claimant can readily demonstrate the necessary "*substantive business operations*" in Singapore by pointing to the activities of its Engineering Subsidiaries and the JVA in Singapore.[538] In so doing, the Claimant is not – unlike the claimants in *Pac Rim Cayman LLC v. El Salvador* and *Plama Consortium Ltd v. Bulgaria* – relying on the collective operations of a group of equivalent entities (of which the Claimant is one) or the activities of its parent company. Instead, it is referring to "*substantive business operations*" carried out by the Claimant itself in Singapore, via those Engineering Subsidiaries and pursuant to the Claimant's continuing role in the JVA.

467. Again, the key question, in this regard, is whether "*substantive work*" is being done for the Claimant in Singapore, and it matters not whether it is being undertaken by permanent employees of the Claimant itself, on the one hand, or contractors (as per

533 *Pac Rim Cayman LLC v. El Salvador,* (**Exh. RLA-33**), para 4.69.
534 *Pac Rim Cayman LLC v. El Salvador,* (**Exh. RLA-33**), para 4.72.
535 *Pac Rim Cayman LLC v. El Salvador,* (**Exh. RLA-33**), para 4.75.
536 *Pac Rim Cayman LLC v. El Salvador,* (**Exh. RLA-33**), paras 4.63, 4.66-4.67.
537 *Plama Consortium Ltd v. Bulgaria,* (**Exh. RLA-73**), para 169.
538 SoPo, [230].

NextEra v. Spain)[539] or other third parties (as in *Bridgestone Licensing Services, Inc v. Panama*, for example, where the claimant's engagement of external lawyers in the relevant territory was held to be an indication of "*substantial activities*"),[540] on the other. In any event, though, as noted above and explained further below, the Claimant itself conducts "*substantive business operations*" from a physical office in Singapore and the Claimant itself employs hundreds of employees in Singapore, has its ongoing role in the Joint Venture, holds substantial government licences and has received large COVID-19 payments from the Singaporean Government, and these matters are only a part of the total picture.

468. As such, the Respondent's attempted invocation[541] of the tribunal's decision in *Littop Enterprises Ltd v. Ukraine*[542] does not assist.

469. Further, the Claimant does not contend, in response to the Respondent's third preliminary objection, that the simple holding of shares is sufficient to demonstrate "*substantial business activities*" (or "*substantive business operations*"). Moreover, in *Littop Enterprises Ltd v. Ukraine* the tribunal was apparently influenced by the fact that the claimant companies could not show that they employed any personnel or held a premises in the territory in question.[543] The Claimant by contrast, can.

The Claimant's "*substantive business operations*" in Singapore

470. Applying the above principles to the facts in this case, it is submitted that the only objective conclusion open to the Tribunal is that the Claimant does have "*substantive business operations*" in Singapore.

"Substantive business operations": Applicable Principles

539 *NextEra v. Spain,* (**RLA-74**), para 257.
540 *Bridgestone Licensing Services, Inc v. Panama,* (**RLA-30**), paras 279, 302.
541 SoPo, [233].
542 SCC Case No. V 2015/092, Final Award, 4 February 2021, (**Exh. RLA-83**).
543 *Littop Enterprises Ltd v. Ukraine,* (**Exh. RLA-83**), paras 629-630.

471. In the light of the above, the Claimant respectfully submits that, in assessing whether it has "*substantive business operations*" in Singapore, in accordance with Article 11(1)(b) of Chapter 11 of the AANZFTA, the Tribunal should apply the following principles:

    a. "*Substantive*" means "*of substance*" and "*not merely of form*" (i.e., being real and not apparent or illusory).[544]

    b. "*Substantive*" does not mean "*large*".[545] It is the "*materiality*" and not the "*magnitude*"[546] – or, put another way, the quality and not just the quantity[547] – of the operations that matters.

    c. Accordingly, "*substantive*" does not impose a higher threshold than "*substantial*". If anything, it is less exacting; alternatively, it is effectively the same (but certainly not more burdensome).

    d. Similarly, there is very little to differentiate between "*operations*" and "*activities*". Again, though, the former does not entail a more stringent standard than the latter.

472. This requirement should be considered separately from 'ownership' and 'control' under Article 11(1)(b).

473. The Claimant relies on the activities of its Engineering Subsidiaries and its continuing role in the JV Agreement in Singapore, and regard may be had to such activities insofar as they are the means by which the Claimant itself carries out "*substantive business operations*" in Singapore.[548]

474. The Claimant's physical presence in Singapore, and employment of hundreds of people and use of contractors or other third parties to do "*substantive work*" for it in

544 *Limited Liability Company AMTO v. Ukraine,* (**Exh. RLA-72**).
545 *Limited Liability Company AMTO v. Ukraine,* (**Exh. RLA-72**).
546 *Limited Liability Company AMTO v. Ukraine,* (**Exh. RLA-72**); *Big Sky Energy Corporation v. Kazakhstan,* (**Exh. RLA-85**).
547 *NextEra v. Spain,* (**Exh. RLA-74**).
548 *NextEra v. Spain,* (**RLA-74**); *Bridgestone Licensing Services, Inc v. Panama,* (**Exh. RLA-30**).

Singapore, demonstrate that the Claimant's business in Singapore is a substantive business.[549]

475. The Respondent is not entitled to deny the Claimant the benefits of Chapter 11 of the AANZFTA.

The Claimant's "substantive business operations" in Singapore

476. The Claimant as set out above has "substantive business operations" in Singapore where the Claimant was incorporated back in January 2019 and conducts business activities and has meetings from a physical office.

477. The Claimant and its Joint Venture has participated in the Joint Venture, 90 per cent of which is owned by the Claimant from early 2020 which business is now 100% owned by the Claimant.

478. The Claimant has had over 200 employees in every year since early 2020, to whom it has paid retirement savings and pension contributions (as required under Singaporean law).

479. The Claimants day-to-day decision making is undertaken in Singapore by the Claimant's Singapore resident directors who are the sole signatories of the Claimant's bank accounts.

480. The Claimant holds substantial Government licences and has received during the COVID-19 period large Singaporean Government payments which recognise the Claimant's substantial business activity in Singapore.

481. Applying the above principles to the facts in this case, it is submitted that the only conclusion available to the Tribunal is that the Claimant does have "*substantive business operations*" in Singapore.

549 *Limited Liability Company AMTO v. Ukraine,* (**Exh. RLA-72**); *Masdar Solar & Wind Cooperatief UA v. Spain,* (**Exh. RLA-81**); *9REN Holding SARL v. Spain,* (**Exh. RLA-82**); *Aris Mining Corporation v. Colombia,* (**Exh. RLA-80**).

Conclusion

482. For the reasons set out above the Tribunal is invited to reject the Respondent's submissions on this issue. (See, SoPo, paras 260-262.)

C. Necessary Procedural Requirements

483. It follows that the pre-requisites for the Respondent's denial of the benefits of AANZFTA Chapter 11 (including its dispute resolution provisions) to the Claimant have not been satisfied and the Claimant's claim must be dismissed on this basis. (see, SoPo, paragraphs 260-262.)

484. The Respondent purportedly denied benefits to the Claimant by correspondence dated 22 December 2020[550] and 24 June 2021[551]. This was after the Respondent had on 29 March 2019 approved the Claimant as a foreign company carrying business in Australia and after the Respondent had admitted the Claimant's investments[552]. The Respondent has not satisfied the test for denying benefits. At all material times, the Claimant has had and continues to have a substantial business operating in Singapore.

D. Conclusion: The Respondent has not Denied the Benefits of Chapter 11 of the AANZFTA to the Claimant and its Investments

550 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**).
551 Letter from the Office of International Law of the Attorney-General's Department of Australia to Volterra Fietta dated 24 June 2021, (**Exh. C-155**).
552 [redacted] WS, [83]-[86]; Application for registration as a foreign company with the Australian Securities & Investments Commission, (**Exh. C-97**); Certificate of Registration of a Foreign Company - Zeph Investments Pte Ltd, (**Exh. C-482**).

485. In conclusion, for all the reasons given above and in light of the factual evidence produced by the Claimant the conditions necessary for the Respondent's denial of benefits to the Claimant and its investments have not been met.

486. The Tribunal is respectfully invited, therefore, to reject the Respondent's third preliminary objection and not to dismiss the Claimant's Claim.

SECTION VI: ABUSE OF PROCESS

A. Amendment Act was not Foreseeable

487. **The following section answers the Respondents Objection that the Claimant has brought its claim under AANZFTA as an Abuse of Process**.

Synopsis

488. The Respondent's fourth objection to jurisdiction is based on the principle of abuse of right.[553] Essentially, the Respondent says that the restructuring was an impermissible manoeuvre to gain protection of the AANZFTA in circumstances where the dispute before the Tribunal was objectively foreseeable to a reasonable commercial actor in the Claimant's shoes.

489. The Claimant's position in response to this allegation is straightforward. First, the Restructuring was effected for a genuine commercial purpose, which was to provide the Mineralogy group and Mr Palmer with significant potential financing, investment and tax advantages. These reasons are addressed in detail in the following parts of this Section.

490. Secondly, as this Section explains, there is no abuse of right regardless of the purpose of the Restructuring because at the time of the restructuring the specific dispute before this Tribunal was not in existence, nor was it objectively foreseeable as a reasonable prospect. In the absence of a foreseeable and likely dispute the Restructure was a legitimate act of corporate planning.

491. Indeed, as this Section details, there is no fine line analysis needed regarding the Claimant's knowledge (objectively assessed) as to the prospect of termination of the

553 SoPo, [16 and 264].

State Agreement arbitration by means of the *Amendment Act*. That is because Western Australia, uncontrovertibly, did not conceive of the prospect of termination of the arbitration by amending legislation until May 2020[554] and, having done so, went to extraordinary lengths to keep termination by such legislation a secret, even from members of the Western Australian government. To now suppose that the Claimant, objectively speaking, nevertheless ought to have foreseen termination of the State Agreement arbitration as a reasonable prospect 16 months before Western Australia even conceived of it, is absurd.[555]

492. Moreover, as set out in the table[556] below, Western Australia's successful efforts to keep the *Amendment Act* a secret between May – 11 August 2020 was achieved by means of a contemporaneous course of deception planned by Western Australia to appear to comply and participate in the third damages phase of the State Agreement arbitration and an associated mediation. That deception was designed to keep the Claimant and Mineralogy believing that the Western Australian government would not interfere, but rather would cooperate, with the arbitral process when that was in fact untrue. As will be illustrated below, these serious allegations are not a matter of supposition or assumption by the Claimant. They are made in reliance on explanations of Western Australia's modus operandi given by the architects of the fraudulent conduct themselves: Western Australia's Attorney-General Quigley and Premier McGowan.

493. Importantly, given Western Australia's successful efforts to dupe the Claimant and Mineralogy into believing that Western Australia would genuinely participate in arbitration under the Arbitration Agreement, the Respondent cannot now contend that a reasonable investor ought to have foreseen that a dispute would arise from legislation being prepared in secret. The first that the Claimant, or any objective investor in its position, could have known of or anticipated the measure at issue in this treaty arbitration was when the Bill for the *Amendment Act* was introduced to the Western Australia legislature at 5 pm on 11 August 2020. It cannot be an abuse

554 See item 5 of the Table in paragraph 547 below.
555 See item 5 of the Table in paragraph 547 below.
556 See paragraph 547 below.

to have restructured, for treaty protection or otherwise, some 19 months before that date.

494. Accordingly, the abuse argument fails.

495. To articulate the argument, it is necessary to recall the essential factual aspects relevant to this objection.

The Restructuring

496. The Claimant was incorporated as a Singaporean company on 21 January 2019 under the name Mineralogy International Pte Ltd.[557] On 29 January 2019, the Claimant was inserted into the Mineralogy ownership structure via a share swap whereby the Claimant acquired from MIL 100% of the shares in Mineralogy, and as consideration, issued an identical number of shares to MIL, such that MIL became the 100% shareholder of the Claimant.

497. The Respondent in its SoPo has assumed that, despite the existence in the AANZFTA of an express denial of benefits clause, the Respondent is entitled to mount a general law abuse of process argument in addition to a denial of benefits argument. For a State party to have the luxury of "two bites of the cherry" in this manner is not something specified or recognised in the AANZFTA and, for the reasons mentioned below, should not be permitted by the Tribunal.

498. The Claimant's primary position is that the presence of an express denial of benefits clause in Article 11 excludes the application of a general law abuse of process doctrine. In summary, that is because in circumstances where the Treaty parties have already recognised and specifically addressed the "vice" of "treaty shopping" by including an express "denial of benefits" clause in the relevant treaty, that specific provision should be regarded as "covering the field".

557 Mineralogy International Pte Ltd would subsequently change its name to Zeph Investments Pte Ltd in December 2019.

499. That being so, the Tribunal, if satisfied that nothing in the "denial of benefits" clause disentitles the Claimant to the benefits of the AANZFTA, should not permit the Respondent then to have recourse to a more general doctrine of abuse and put the Claimant through a second inquisition. Had such a possibility been intended by the parties to the AANZFTA, it would have been reflected in the language of that treaty. To the contrary, by including an express denial of benefits clause in the AANZFTA, the parties to that treaty evinced a clear intention to make that clause the sole mechanism for dealing with the "vice" of "treaty shopping".

500. Alternatively, should the Tribunal consider that there is any ambiguity on this point, it is significant that the Respondent not been able to point to any *travaux préparatoires* which might shed light on the purpose of Article 11. Such material, if it existed at all, would be in the possession of the Respondent's Department of Foreign Affairs and Trade. It is therefore appropriate to infer that there is no such material supporting the Respondent's position, for otherwise the Respondent would have referred to it in the SoPo.

501. For these reasons, the Respondent should not be permitted to mount a general law abuse of process argument in addition to the denial of benefits argument provided for in Article 11. Rather, the Respondent should be confined to the mechanism specifically included in the AANZFTA for dealing with the issue of possible "treaty shopping", namely the express denial of benefits clause in Article 11.

502. Nevertheless, against the contingency that the Tribunal takes a different view and permits the Respondent to run a general law abuse of process argument in addition to its denial of benefits arguments, this Response contains a detailed rebuttal of the Respondent's abuse of process allegations, demonstrating that those allegations are entirely unfounded.

Not Foreseeable

503. It was not foreseeable at the time the Claimant was incorporated in Singapore in January 2019 that the Claimant's Subsidiaries would enter the Arbitration Agreement in the future. The Arbitration Agreement is an agreement between the Claimant's

Subsidiaries and two other parties, being the Hon. Michael McHugh AC, KC (as arbitrator) and the State of Western Australia. The Claimant and related parties obviously had no knowledge in January 2019 of whether either or both Mr McHugh or the Respondent's State of Western Australia would agree to enter into the Arbitration Agreement in July 2020.

504. In fact, it was not until the Second Award was made by Mr Michael McHugh on 11 October 2019 that the Claimant and its subsidiary companies knew that they even had a right to claim damages in the State Agreement Arbitration.[558] The Claimant notes that the State of Western Australia appealed the Second Award to the Supreme Court of Western Australia only to have the State's appeal against the Second Award dismissed[559]. Any suggestion that in January 2019 some ten months earlier that even such matters were foreseeable is simply absurd.

505. The Claimant was aware at the time, through its preparation for the State Agreement Arbitration and by reference to material filed in the Supreme Court of Western Australia by the Respondent State of Western Australia, that its claim for damages would amount to approximately $30,000,000,000 (thirty billion dollars)[560]. The State had, inter alia by appealing the Second Award to the Supreme Court of Western Australia, given every indication that it was complying and would comply with an orthodox outcome in the State Agreement Arbitration, and would respect and honour any award made by the distinguished domestic arbitrator, being a former Justice of the High Court of Australia. This was further confirmed by the State of Western Australia entering into the Arbitration Agreement on 8 July 2020[561] and shortly thereafter the Mediation Agreement[562].

558 Second Arbitral Award (**Exh. C-443**).
559 *The State of Western Australia v Mineralogy Pty Ltd* [2020] WASC 58, (**Exh. CLA-8**).
560 Affidavit of William Albert Preston, filed in Supreme Court of Western Australia dated 12 July 2013, at paras 28, 40, 51 and 53, (**Exh. C-410**).
561 Arbitration Agreement dated 8 July 2020, (**Exh. C-242**).
562 Mediation Agreement executed by the State of Western Australia on 5 August 2020(**Exh. C-266**); Mediation Agreement counter-signed by the Mediator on 6 August 2020, (**Exh. C-273**).

506. Up until the introduction of the Bill for the *Amendment Act* at 5.00 p.m. on 11 August 2020, and subsequent passing by the Western Australian Parliament of the *Amendment Act* on 13 August 2020, the State of Western Australia had to all outward appearances been proceeding with the State Agreement Arbitration before Mr Michael McHugh in accordance with the terms of the State Agreement, had executed the Arbitration Agreement on 8 July 2020 and then, just 9 days before the passing of the *Amendment Act*, had executed the Mediation Agreement with Mineralogy Pty Ltd (Mineralogy) and International Minerals.

507. The Respondent asserts that the *Amendment Act* was foreseeable, at least as a possibility, because of certain letters written in the context of an entirely different matter which in any event was not a dispute. For reasons which will be explained later, that is entirely incorrect. Parliament passing a law is merely one type of mechanism by which a measure might be brought into law and implemented. As [redacted] evidence demonstrates at paragraph 8 and 9 of the [redacted] WS[563], Mr Palmer knew of the existence of free trade agreements since 2003 and expanded on his knowledge as inter alia a member of the Parliament of Australia and a member of the House of Representatives Standing Economics Committee and of the Joint Select Trade and Investment Growth Committee during the period from 2013 to 2016[564]. However, the point is that the nature and substance of the measure in this case, and the dispute arising from it (as defined in the Notice of Intent), was not and never could have been foreseen at any time prior to 5.00 p.m. on 11 August 2020.

B. Substance of a Measure

508. The mechanism by which a measure is introduced into law is not the measure or the dispute itself. The measure at the heart of a dispute is the substance of what is imposed by, for example, the *Amendment Act*.

563 [redacted] WS, paras 8 and 9.
564 [redacted] WS, para 11.

509. The dispute is centred upon a measure which involved, *inter alia*, the termination of the Arbitration Agreement[565] and the resultant termination of a contractual entitlement (arising out of the Arbitration Agreement) to have an entitlement to damages heard on and from 30 November 2020 and determined by a particular date, being on or before 12 February 2021[566].

510. Western Australia had diligently complied with the State Agreement for years by following the requirements of the State Agreement for arbitration and had signed the Arbitration Agreement and the Mediation Agreement just days before the *Amendment Act*. In fact, Western Australia had dishonestly deceived the Claimant and its subsidiaries (as well as the Arbitrator and the Mediator, both being distinguished retired judges) by engaging in a charade to pretend that they would comply with Western Australia's obligations under the Arbitration Agreement, while at the same time drafting and planning the enactment of the *Amendment Act* in secret.[567]

511. As already noted, the *Amendment Act* inter alia terminated the Arbitration and abolished the Arbitration Agreement. It thereby destroyed the valuable contractual right to have damages heard and determined pursuant to the State Agreement Arbitration which was then on foot and which the *Amendment Act* also destroyed.

512. The radical and extreme nature of this measure, its shocking assault on rule of law norms, and the complete secrecy surrounding the preparation of the legislation introduced at 5.00 p.m. on 11 August 2020 are such that the dispute which is the subject of this arbitral proceeding could never have been foreseeable prior to that date and time.

C. Amendment Act

565 Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 10, (**Exh. C-1**).
566 Email from Mr McHugh to Claimant's Subsidiaries and the Respondent's Western Australia and its enclosure: signed minute of directions, p 5 (**Exh. C-384**).
567 See the table in paragraph 547 below, and in particular items 6, 16, 26, 27 and 28.

513. The *Amendment Act* terminating inter alia the State Agreement Arbitration and the Arbitration Agreement was not foreseeable (and even the execution of the Arbitration Agreement in July 2020 could not be foreseeable at the time the Claimant was incorporated some 18 months earlier). In fact, the State of Western Australia had, by its deceptive conduct, done all that it could by dishonest means of luring Mineralogy, the Claimant's wholly-owned subsidiary, into a false sense of security that Western Australia would honour the terms and conditions of the arbitration set up under the State Agreement and more particularly under the July 2020 Arbitration Agreement (i.e. the dishonesty is demonstrated by the State's execution of the Arbitration Agreement and the Mediation Agreement and the State's subsequent pretence that it would be honouring those agreements, including by sending correspondence to Mineralogy which furthered that deception).[568] This was all done while Western Australia was in its own words "*never intending to honour these agreements*". Prior to the introduction of the *Amendment Act* into the Western Australian Parliament on 11 August 2020 there had been no prior indication that Western Australia would not comply with its contractual obligations in respect of the State Agreement Arbitration. Indeed, to the contrary, the State of Western Australia had actively sought to convey the impression (to the Claimant's Subsidiaries, the Arbitrator and the Mediator) that it would be complying with all of its obligations.

514. As demonstrated in the Notice of Arbitration, and the matters set out hereunder the *Amendment Act* was developed in secret so that Mineralogy and its directors would never know of its existence (even as a possibility) at any time before it was introduced in the Parliament and urgently enacted and hence it was not in any way foreseeable.[569]

515. The Respondent is facing an impossible battle with its abuse of process argument (even assuming that, despite the existence in the AANZFTA of a denial of benefits clause specifically to deal with any abuses of process, the Respondent has

568 Letter dated 5 August 2020 from State of Western Australia to Claimant's Subsidiaries proposing a directions for a procedural hearing in the State Agreement arbitration on 26 August 2020, (**Exh. C-398**).
569 Notice of Intent, pp. 10, 11, 15-18, 625-636, 791 – 804, (**Exh. C-63**).

purportedly mounted a general law abuse of process argument on top of a denial of benefits argument, which is not specified in AANZFTA and which the Claimant, for reasons detailed above does not accept that the Respondent is entitled to do).

516. The Respondent has argued, in the Objections, that the Claimant and its associates have engaged in an "abuse of rights" by transferring national economic interests to a foreign company (i.e. Claimant) to seek treaty protections under the AANZFTA. But the relevant principle, as described in ***Philip Morris v Australia***[570] at [554], is as follows:

> *" … the initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) 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*." [Emphasis added]

517. The reference to "a specific dispute" is very significant. In this context, it can only mean the specific dispute articulated in the Claimant's Notice of Arbitration (also treated as Statement of Claim) arising out of the enactment of the *Amendment Act* in 2020 and its destruction of valuable rights, particularly the contractual right to have damages assessed in accordance with the Arbitration Agreement. That specific dispute was not foreseeable at any time prior to 5.00 p.m. on 11 August 2020 when the Western Australian Attorney-General, John Quigley, rose to his feet in the Western Australian Parliament to introduce the Bill for the *Amendment Act*.[571]

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570 PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, (**RLA-65**)**.**

571 Western Australia Parliamentary Hansard, 11 August 2020, p. 4, (**Exh. C-429**); Extracts from Court Book in Federal Court of Australia defamation proceeding between Mr Clive F Palmer and Mr Mark McGowan (Premier of Western Australia), Affidavit of Mark McGowan sworn 26 March 2021, pp. 134 & 136, (**Exh. C-135**); Extracts from Court Book in Federal Court of Australia defamation proceeding between Mr Clive F Palmer and Mr Mark McGowan (Premier of Western Australia), Affidavit of J Quigley sworn 25 March 2021, p. 115, (**Exh. C-135**); Transcript of press conference interview 12 August 2020, pp. 1, 7 & 9, (**Exh. C-465**); NSD912/2020 Transcript, XXN of J Quigley, 9 March 2022 and 8 April 2022, pp. 16, 21-23, 25 and 27, (**Exh. C-136**); NSD912/2020 Transcript, XXN of M McGowan, 9 March

Indeed, Mr Quigley and others in the government of Western Australia had gone to great lengths to ensure that it would be impossible for anyone associated with the Claimant or its subsidiaries to foresee the measure imposed by the *Amendment Act*. This was achieved by a deliberate and elaborate process of secrecy and deception.

518. Set out below is a summary of the objective factual evidence relied upon by the Claimant, that evinces the chronology relevant to the secret preparation, introduction and passing of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) introduced to the Western Australian Parliament on 11 August 2020 and passed into law on 13 August 2020, some twenty months after the Claimant was incorporated and how that was not only unforeseen but completely unforeseeable at the time the Claimant was incorporated on 21 January 2019.

D. Approach Adopted in these Submissions

519. As stated in *Carlos Sastre v United States* inter alia:[572]

> "*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. …*"

520. The Claimant takes issue with the Respondent's Objections and submits that the Respondent's witness statements (almost exclusively being speculative, ill-informed statements of opinion) provided by the Respondent are not relevant to questions of fact and no weight should be given to them by the Tribunal. The Claimant, in stark contrast, intends to deal with each of the Respondent's objections by making persuasive submissions based on evidence of the facts to establish jurisdiction so that the Tribunal may comfortably be satisfied that the burden of proof (to the extent that it falls upon the Claimant) has been discharged by the Claimant.

2022, pp. 8-12, (**Exh. C-136**); Transcript of press conference interview, 12 August 2020 ,p. 9, (**Exh. C-465**).

572 ICSID Case No. UNCT/20/2, Award on Jurisdiction, 21 November 2022, (**Exh. CLA-204**).

E. Respondent's Chronology

521. The chronology set out by the Respondent in its objections is highly misleading. In particular, it is not a chronology in respect of the actual dispute that the Tribunal is empowered to deal with in accordance with the UNICTRAL Arbitration Rules of 2021, AANZFTA and the Claimant's Notice of Arbitration/Statement of Claim.

F. Timing

522. As the Notice of Arbitration specifically defines the dispute as being the measure imposed by the enactment of the *Amendment Act* on 13 August 2020, inter alia terminating the Arbitration Agreement, and that measure breaching Articles 6 and 9 of AANZFTA, much of the Respondent's contentions set out in the Objections, including the Respondents Chronology, that relate to matters prior to the enactment of the *Amendment Act* have no relevance at all because the dispute which is the subject of the Notice of Arbitration/Statement of Claim, could not have been foreseen at any time prior to 11 August 2020, and accordingly those matters do not warrant a response from the Claimant.

523. The Respondent raises the CITIC letters in its Objections but, the CITIC letters merely evince [redacted] knowledge of the existence of investor-State agreements and nothing more. As [redacted] confirms in his [redacted] WS at paragraphs 139 to 140[573], the CITIC matter was a matter between Mineralogy and CITIC not the Respondent (including the Respondent's State of Western Australia). It was a proceeding in the Supreme Court of Western Australia and it has since been determined by the Supreme Court of Western Australia in favour of Mineralogy[574]. The CITIC matter is not addressed or referenced at all in the *Amendment Act*. The Respondent's attempt to elide the CITIC controversy with the current dispute has no basis in fact. The CITIC controversy was a controversy between the Claimant and CITIC whereas the CITIC controversy was subject to proceedings in the Supreme Court of Western Australia.

573 [redacted] WS at para 139 to 140.
574 *Sino Iron Pty Ltd v Mineralogy Pty Ltd* [2023] WASC 56, (**Exh. CLA-70**).

The CITIC Parties were seeking to acquire land from Mineralogy without making any payment. The Supreme Court of Western Australia dismissed the proceeding.

524. As [redacted] also confirms, there has never been an arbitration in respect of the CITIC matter and no arbitration in respect of such matter was ever threatened commenced or held.[575]

525. [redacted] notes in his [redacted] WS at paragraph 28[576] that the State Agreement had always provided that it could be amended by consent and that no proposal had ever been sought to do so by the Respondent at any time since 2008 and, notes the 1996 paper of former Western Australian Premier Mr Colin Barnett, extracts from which are set out later in this Response, and which inter alia states as follows:

> *"Unlike other statutes of Western Australia that can be changed by Parliament,* ***State Agreement provisions can only be amended by mutual agreement by the parties thereto****"*.[577]
>
> [Emphasis added]

526. In January 2019, Mr Barnett's position was the orthodox position accepted at that time by Mineralogy and indeed the community of Western Australia.

527. The CITIC matter was a matter wholly unrelated to any arbitration and not in any way related to the Dispute before this honourable Tribunal.

G. Respondent's Failure to Produce Factual Evidence

528. The Respondent has failed to produce any factual evidence that the execution of the Arbitration Agreement in July 2020, the Mediation Agreement or the measures implemented by the *Amendment Act* were foreseen or even foreseeable when the Claimant was incorporated on 21 January 2019. The Respondent's submissions and

575 [redacted] WS at para 140.
576 [redacted] WS at para 28.
577 The Hon. Colin Barnett, *State Agreements*, AMPLA Yearbook 1996, pp. 314-327, (**Exh. C-104**)

the Respondent's case is made up of unfounded inferences, speculation and supposition.

H. Notice of Arbitration

529. **The dispute is as defined in the Claimant's Notice of Arbitration: the measure imposed by the passage of the *Amendment Act* is the measure denying justice to Mineralogy the Claimant by elimination of its rights to the Arbitration Agreement and the arbitral process and available remedies**.

I. Tribunal Limits

530. The Claimant's Notice of Arbitration states clearly that the dispute submitted to arbitration is whether the measures imposed by the enactment of the *Amendment Act* constituted a breach / breaches of the treaty.[578]

531. Throughout its SoPo, the Respondent has sought to reframe the dispute submitted to arbitration:

    a. *The acts of which Zeph complains in its Amended Notice of Arbitration constitute the latest chapter in this longstanding dispute.*[579]

    b. *…WA ultimately adopted the very approach…against which the insertion of Zeph into the corporate structure was intended to provide:*

578 Notice of Arbitration at para 2: "*The dispute is being submitted to arbitration pursuant to … AANZFTA and arises out of the enactment of the … 2020 Amendment Act, passed by the Western Australian Government on 13 August 2020.*"; Notice of Arbitration at para 4: "*The Claimant's Notice of Intent ….is incorporated herein by reference…";* Notice of Intent dated 20 October 2022, (**Exh. C-63**) at para. [6.1], lines 451 to 455: *"The dispute to be submitted to arbitration under the AANZFTA arises out of the enactment of the 2020 Amendment Act on 13 August 2020. This Act terminated the 2020 Arbitration Agreement and thereby breached articles 6 and 9 of the AANZFTA. The dispute between the Claimant and the Commonwealth first arose on 13 August 2020."*
579 SoPo, [284].

a unilateral adjustment of Mineralogy's rights under the State Agreement through legislation.[580]

c. *What matters…is that…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."* [581]

*(*Underline emphasis added*)*

Jurisdictional Position of the Tribunal

532. The Tribunal ought to be wary of the Respondent's crafty attempt to reframe the dispute. To mis-characterize the dispute as the Respondent would have it, would be inappropriately to decide upon a matter different from that which is actually advanced by the Claimant. As the US Court of Appeals for the Third Circuit has observed: *"An arbitrator oversteps these limits, and subjects his award to judicial vacatur…when he decides an issue not submitted to him."* [582]

533. The Claimant is entitled to put its case as it sees it. A claimant or plaintiff stands or falls with the case it elects to bring, and not some hypothetical case which it might have brought. The Tribunal in *Urbaser v Argentina* correctly recognised that *"it is for Claimants to state the claims they are submitting to this arbitral jurisdiction…[and] for them to say what they consider to be the "dispute" arising between them and the Republic of Argentina."*[583] The Tribunal held that the respondent had *"chose[n] to distort the terms of [Urbaser's] claims"*, and had founded its jurisdictional challenge upon those mischaracterised claims. [584]

580 SoPo, [302].
581 SoPO, [316].
582 *Sutter v Oxford Health Plans* 675 F.3d 215, 219-20 (3d Cir. 2012), (**Exh. CLA-205**)**.**
583 *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic,* ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, (**Exh. CLA-206**), para 235.
584 Ibid, para 232.

534. Similarly, in *Philip Morris*, the claimant argued that Australia had inaccurately summarised its claim as *"referring to a pre-existing dispute concerning the threat of passing plain packaging legislation,"* when in fact it had *"made it clear that its claims [arose] from the enactment and enforcement of the TPP Act"*.[585] Philip Morris relied upon *Urbaser* in support of its contention that it was for the claimant to define the dispute, and that *"in order to identify the subject of the dispute, the Tribunal must examine Claimant's pleadings to determine which acts or omissions…breached the BIT and form the basis for its claims."* [586] The Tribunal appears to have implicitly accepted Philip Morris' position, as it concluded that the *"critical date"* upon which the dispute materialised was "*the date when the State [adopted] the disputed measure, which in this case [was] the date of enactment of the TPP Act, as before that moment the Claimant's right could not be affected."*[587]

535. The AANZFTA also confirms that the "dispute" is to be framed by the claimant, not the respondent. While the term *"Investment Disputes"* is not expressly defined in a definitional section of Chapter 11, its meaning is set out in Article 18 (Scope and Definitions). Article 18.1 provides that Section B applies to *"...disputes between a Party and an investor of another Party concerning an alleged breach of an obligation of the former under Section A which causes loss or damage to the covered investment of the investor."* Appropriately, the meaning of "dispute" is framed by reference to the breach of the treaty as alleged by the claimant. This is an entirely orthodox and unsurprising position.

536. The dispute in this case, as defined by the Claimant's allegations, "is that the measures imposed by the *Amendment Act* breached the Claimant's rights, *inter alia*, by extinguishing Mineralogy's and IM's rights to have their dispute with Western Australia determined by arbitration in accordance with the Arbitration Agreement." Other historical tensions, differences of views, disagreements or disputes between the Claimant /Mineralogy/IM and Western Australia existing before the passage of

585 *Philip Morris Asia v Australia* (Award on Jurisdiction and Admissibility) PCA Case No 2012-12 (17 December2015, (**RLA-95**), paras 386-387 (underline emphasis in original).
586 Ibid, para 386.
587 Ibid, para 533.

the *Amendment Act* are, taken at their highest, relevant context to whether the *Amendment Act* dispute might, objectively, have been foreseen by Mineralogy. But it is the *Amendment Act* dispute on which the foreseeability inquiry must focus, and it is wrong to suggest that a dispute about the *Amendment Act* dispute existed before the Act was passed into law.

537. A Tribunal in deciding whether a party has jurisdiction to bring a claim under a treaty must restrict itself to considering the claim, and the dispute it relates to the treaty in question. In this case AANZFTA is the relevant treaty.

538. In *Urbaser v Argentina*,[588], ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, at paragraph 235, the Tribunal emphatically stated the trite principle:

> *235. The Tribunal notes at the outset that it is for Claimants to state the claims they are submitting to this arbitral jurisdiction. It is for them to say what they consider to be the "dispute" arising between them and the Republic of Argentina*.

539. And the Tribunal, in dismissing one of the objections of the Respondent, recognised that the objection related to a claim not before the Tribunal, at [241] stating:[589]

> *241. However, in this regard as well, Respondent objects to Claimants' legal standing as to a claim that is not before this Tribunal. Respondent objects that Claimants have no legal standing to claim for legal rights based on contract while Claimants have clearly stated that their claim does not comprise any such claim. Respondent's objection is therefore equally moot in this regard and dismissed by the Tribunal.*

588 *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic,* ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, (**Exh. CLA-206**).

589 *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic,* ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, (**Exh. CLA-206**).

540. In the current arbitration before this Tribunal the dispute starts in accordance with the Claimant's Arbitration Notice and relief with the measures imposed by the passing of the *Amendment Act* on 13 August 2020, and that is the only relevant dispute in this case. Any other dispute pre-dating that time is not relevant to the consideration by the Tribuna, and nor is the Tribunal empowered to consider such matters.

541. Considering that the seat for this Arbitration is Geneva, reference should also be made to the Swiss Federal Court of Civil Law.

542. Article 190(2)(c) of the Swiss Federal Act on Private International Law (PILA) provides:[590]

> *(2) An arbitral award may be set aside only:*
>
> *(c) Where the arbitral tribunal ruled beyond the claims submitted to it, or failed to decide one of the claims.*

543. The provision necessarily requires the claims to be framed by the Claimant as the Claimant is the party that ultimately submits the dispute for arbitration. In the case of Decision 4A_296/2019 of 13 November 2019,[591] the Swiss Federal Court stated:

> *4.1*
>
> *…*
>
> *Pursuant to the jurisprudence of the Federal Tribunal, there will be no violation of the principle of ne eat iudex ultra petita partium if the claim that is the subject of the litigation is, in legal terms, merely analysed differently – wholly or in part – from the parties' arguments, provided that it is covered by the relief requested (BGE 120 II 172 at 3a p. 175; Judgment 4A_440/2010 of January 7, 2011, at 3.1, not published in BGE 137 III 85 et seq; 4A_284/2018 of October 17, 2018 at 3.1 4A_508/2017 of January 29, 2018 at 3.1; 4A_50/2017 of July*

590 (**Exh. CLA-207**).
591 (**Exh. CLA-208**).

11, 2017 at 3.1; 4A_678/2015 of March 22, 2016 at 3.2.1; each with references; see also BGE 130 III 35 at 5 p. 39). However, the arbitral tribunal is bound by the subject matter and the scope of the relief requested, particularly if the claimant itself qualifies or limits its claims in formulating the relief requested (Judgements 4A_284/2018 of October 17, 2018 at 3.1; 4A_580/2017 of April 4, 2018 at 2.1.1; 4A_508/2017 of January 29, 2018 at 3.1; 4A_50/2017 of July 11, 2017 at 3.1; 4A_678/2015 of March 22, 2016 at 3.2.1; each with references).

544. In the case of Decision 4A_516/2020 of 8 April 2021, the Swiss Federal Court stated:[592]

5.3. Art. 190(2)(c), PILA allows for an award to be appealed "when the arbitral tribunal has ruled beyond the claims that were before it". This refers to decisions that award more ("ultra petita") or differently ("extra petita") than what was requested (ATF 116 II 639 at 3a, p. 642; judgments cited above 4A_430/2020 at 6.1; judgment 4P.260/2000 of November 11, 2018, at 5a). The private autonomy inherent in the law of obligations has as its procedural corollary that the parties freely decide the subject-matter of the dispute (the principle of disposition; see ATF 141 III 596 at 1.4.5 p. 605; judgment 4A_329/2020 of February 10, 2021, at 4.2). Art. 190 (2)(c) of the PILA protects this principle in an area that is strongly influenced by private autonomy (see judgment 4P.143/2001 of September 18, 2001, at 3c/bb; Cesare Jermini, Die Anfechtung der Schiedssprüche im internationalen Privatrecht, n. 413; Wolfgang Wiegand, Iura novit curia vs. ne ultra petita [...], in Rechtsetzung und Rechtsdurchsetzung, Festschrift für Franz Kellerhals zum 65. Geburtstag, 2005, p. 133-134 and p. 143).

…

Moreover, Art. 190(2) PILA is influenced by Article V(1) of the New York Convention of June 10, 1958, on the Recognition and Enforcement of Foreign Arbitral Awards (RS 0.277.12), a provision which, in its letter c), guarantees the

592 (**Exh. CLA-209**).

principle of ne eat judex ultra petita partium (Christian Oetiker, in Zürcher Kommentar, vol. II, 3rd ed. 2018, no. 16 to Art. 190 PILA).

J. Additional Facts and Evidence – Foreseeability

545. Set out below in a table are the additional facts and cross-referenced evidence which prove conclusively that the relevant dispute was not foreseen or even foreseeable at the time the Claimant was incorporated in January 2019.

546. The Arbitration Agreement was not entered into until 8 July 2020. The Claimant could not have possibly known or anticipated in January 2019 that the Claimant's subsidiaries, the Hon. Michael McHugh AC KC and the State of Western Australia would agree to enter into an Arbitration Agreement 19 months into the future, appointing Mr McHugh to determine damages in the State Agreement Arbitration when it was not until 11 October 2019 that the Second Award was delivered which first established that the Claimant could claim any damages in the State Agreement Arbitration. Nor could the Claimant have known or anticipated that having entered into the Arbitration Agreement on 8 July 2020, the State of Western Australia would bring in the *Amendment Act* just one month later to terminate on 13 August 2020 the Arbitration Agreement and the Arbitration then being carried on under it. The *Amendment Act* was prepared in secret as the evidence demonstrates, and extraordinary measures were undertaken to ensure that the Claimant or its subsidiaries had no notice of it and could not have anticipated it.

547. Additional relevant facts are set out below in a table. Each relevant fact in the table been numbered to assist the tribunal in referencing it.

Item.	**Date**	**Fact**	**Evidence Ref.**
1	21 January 2019	Zeph Investments Pte. Ltd. was incorporated in the Republic of Singapore.	ACRA, Business profile for Zeph Investments Pte. Limited, dated 20 October 2020,

			Annexure A, Exhibit 2 to the Claimant's Notice of Intention to Submit Dispute to Arbitration, (**Exh. C-63**), p. 53. ACRA, Certificate Confirming Incorporation of Company, dated 21 January 2019, Annexure A, Exhibit 10 to the Claimant's Notice of Intention to Submit Dispute to Arbitration, (**Exh. C-63**), p. 111. Constitution of Mineralogy Pte Ltd, dated 21 January 2019, appearing as Annexure A, Exhibit 11 to the Claimant's Notice of Intent to Submit Dispute to Arbitration, dated 20 October 2020, (**Exh. C-63**), p.112.
2	29 January 2019	Share Purchase Agreement executed, whereby Zeph Investments Pte. Ltd. acquires all the shares in Mineralogy Pty Ltd from Mineralogy International Limited.	Share Purchase Agreement, dated 29 January 2019, appearing as Annexure A, Exhibit 20 to the Claimant's Notice of Intent to Submit Dispute to Arbitration, dated 20 October 2020, (**Exh. C-63**), p.168. Share transfer form between Mineralogy International Limited as Seller and Mineralogy International Pte.

			Ltd. as Buyer, dated 29 January 2019, appearing as Annexure A, Exhibit 20 to the Claimant's Notice of Intent to Submit Dispute to Arbitration, dated 20 October 2020, (**Exh. C-63**), p. 181.
3	31 January 2019	Zeph Investments Pte. Ltd. acquired GCS Engineering Service Pte. Ltd., Visco Engineering Pte. Ltd., and Visco Offshore Engineering Pte. Ltd.	GCS Engineering Service Pte. Ltd, Financial Statements Year ended 30 June 2019, (**Exh. R-63**)**,** p. 16. Visco Engineering Pte. Ltd., Financial Statements Year ended 30 June 2019, (**Exh. R-64**), p. 17. Visco Offshore Engineering Pte. Ltd., Financial Statements Year ended 30 June 2019, (**Exh. R-65**) p. 17. 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**).

4	24 January 2020	Zeph Investments Pte. Ltd. entered into a Joint Venture Agreement with One Kleenmatic Pte. Ltd. and Kleen Venture Pte. Ltd. In the definitions section of the JV Agreement, the term "Manager" means the "First Party" which is the Claimant (see page 3 of **Exh. C-469**). Relevantly, clause 3.2 of the JV Agreement establishes the "joint venture". Clause 3.2 of the JV Agreement states: "The Parties acknowledge that with effect on and from the Commencement Date, the Parties have been associated as a joint venture for the following purposes: (a) To carry out all business previously carried out before the date hereof by the Second Party and the Third Party and all assets of such Parties are from the date hereof Joint Venture Property. (b) To do any further act or carry out any further business as decided by the Committee." Clause 5 of the JV Agreement sets out the ownership interests of the "joint venture" as follows: a. First Party (the Claimant): 90% (Participating Interest) b. Second Party (OK): 5% (Participating Interest) c. Third Party (KV): 5% (Participating Interest). (See page 6 of **Exh. C-469**.) In clause 9 of the JV Agreement, it is noted that only the Manager has the power to contract for and on behalf of the "joint venture" (see page 7 of **Exh. C-469**). Clause 10 of the JV Agreement described the meaning of "Joint Venture Property" and in that regard the Claimant has a 90% participating interest in all Joint Venture	Joint Venture Agreement dated 24 January 2020, (**Exh. C-469**).

		Property (see pages 7 and 8 of **Exh. C-469**). Joint Venture Property includes the use of the names Kleenmatic and Kleen Venture (see pages 7 and 8 of **Exh. C-469**), so it is unsurprising that the businesses would continue to operate under and/or utilise those names, many instances of which were helpfully identified by the Respondents witness Mr Bruno Vickers (see paragraphs 33, 38, 41, 85, 92, 94, 95, 97, 98 and 101 of the Witness Statement of Mr Bruno Vickers dated 19 January 2024 (the **Vickers WS**). In fact, it was in the best commercial interests of the Claimant to continue trading in those existing names. It should also be noted the Respondent's witness Mr Vickers identified two vehicles were owned and registered by the Claimant (see paragraphs. 34(d) and 36(c) of the Vickers WS). Clause 12 of the JV Agreement establishes a JV Committee (see page 8 of **Exh. C-469**). Clause 13 of the JV Agreement sets out the functions of the JV Committee as follows: "The Committee shall be authorised to make all decisions on the nature and extent of and the management of Joint Venture Activities including varying any decision previously made by the Committee and varying or vetoing any decision, commitment or other action of the Manager and directing the Manager on the conduct of the Joint Venture Activities. All decision of the Committee shall be binding on the Parties." (See page 8 of **Exh. C-469.**) The voting of the Committee is dealt with under clause 15(b) of the JV Agreement where it states "Resolutions of the Committee may be passed by a majority vote" (see page 9 of **Exh. C-469**). With the Claimant holding a 90% Participating Interest in the "joint venture", it is clearly in control of the joint venture and could make all decisions	

		(see pages 6 and 9 of **Exh. C-469**). This, combined with the fact that the Claimant is the Manager and was the only party that could commit the "joint venture" to a contract (see clause 9 of the JV Agreement) (see page 7 of **Exh. C-469**), means that effectively the Claimant was the dominating party operating the "joint venture". Each of the parties to the "joint venture" were carrying on a substantial business in Singapore and operating that business on their own behalf. Clause 16(c) of the JV Agreement states as follows: "The following provisions shall apply to meetings of the Committee: … (a) Each Party shall cast its votes as a block vote proportionate to the Party's Percentage Interest and exercisable by the member representing each Party." (See page 9 of **Exh. C-469.**) As the Claimant has at all times since the establishment of "joint venture" on 24 January 2020 held a 90% Participating Interest, it could make binding decisions for all of the parties at any time and the Manager (also the Claimant) was authorised to make decisions for the Committee from time to time (see Clauses 5, 9 and 13 on pages 6, 7 and 8 of **Exh. C-469**).	
5	23 May 2020	The Attorney General for Western Australia and the Premier of Western Australia exchanged text messages (commencing at 7:02 am), stating: **Quigley**: I must be a bit OCD! I have been awake since 4.15 thinking of ways to beat big fat Clive and his arbitration claim for 23.5 billion in damages remembering the turd has pulled off 2 big wins in arbitration	Text messages between John Quigley and Mark McGowan, (**Exh. C-432**).

		before former High Court justice Michael McHugh. **The solution is to found in an amendment to legislation** obstensibly [sic] to protect us Re any dispute with Venues West/2 feet one heart dispute over zip line / stadium roof walk which amendment for that purpose is merely a Trojan horse as within the very small legislative amendment will be a poison pill for the fat man. Can't wait for full day light when I can discuss with our brainiac SG to check I am not having a mid nite fantasy. It's such a neat solution obstentially [sic] to solve one almost non existent problem but the side wind could drop the fat man on his big fat arse ! Can't wait to speak with Josh. We lawyers get off on strangest things Eh ? Ps been giving heaps of thought to PCO too and have good partial solution but will need your support. Hey are you glad me single again ... not making love in sweet hours before dawn instead worrying how to defeat Clive! 😂😂😂😂. **McGowan:** Let's discuss the $23 billion claim We need to really sort out what to do. I don't' want to let Parker know or any journo before we r ready. **Quigley:** Absolutely secrecy of essence and it in any event it is to protect us on Zip Line / Optus embroglio 😂😂 😂 Maybe 6 word amendment to state agreement act then again maybe 3 words 😂	
6	2 July 2020	The State of Western Australia commenced drafting the Amendment Act in secret (estimated. See: Item 16, below).	"*Transcript of ABC Radio Perth - Breakfast"*, dated 13 August 2020, appearing as

			"Annexure F" to the Claimant's Notice of Intent to Submit Dispute to Arbitration, dated 20 October 2020, (**Exh. C-63**), p. 587.
7	6 July 2020	The Claimant's Subsidiaries executed an Arbitration Agreement and emailed a copy to the Domestic Arbitrator and the State of Western Australia.	Email from Claimant's Subsidiaries to Domestic Arbitrator, attaching executed Arbitration Agreement, (**Exh. C-239**).
8	9 July 2020	The State of Western Australia executed the Arbitration Agreement and emailed a copy to the Claimant's Subsidiaries and the Domestic Arbitrator. The Domestic Arbitrator, former High Court of Australia Justice Michael McHugh AC KC executed counterparts to the Arbitration Agreements executed by the Claimant's Subsidiaries and the State of Western Australia, returning copies by email on the same day.	Email from the State of Western Australia to the Claimant's Subsidiaries and the Domestic Arbitrator, attaching an executed Arbitration Agreement, (**Exh. C-241**). Email from Micheal Mc Hugh A C K C to the State of Western Australia and the Claimant's Subsidiaries, attaching counterparts to the executed Arbitration Agreement, (**Exh. C-242**).
9	5 August 2020	The Mediation Agreement was executed by the State of Western Australia.	(**Exh. C-266**).
10	6 August 2020	The Mediation Agreement was executed by the Claimant's Subsidiaries and the former Chief Justice of Western Australia, the Hon. Mr Wayne Martin AC KC (as Mediator) and circulated among the parties.	(**Exh. C-269**); (**Exh. C-273**).

11	11 August 2020	The *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Bill 2020* (WA) was introduced into the Legislative Assembly of the Parliament of Western Australia by the Attorney-General for Western Australia at about 5.00 p.m. that day (i.e. after every court in Australia had closed).	Witness statement of [redacted], sworn 13 February 2023, para 241
12	11 August 2020	*Hansard* of the Legislative Assembly, 11 August 2020: **Quigley, Attorney General, at p. 5499: The McGowan Government accepts that the bill is unprecedented. It contains a number of provisions and measures that are not usual.**	*Hansard*, Parliamentary Debates, Legislative Assembly & Legislative Council, 11-13 August 2020, (**Exh. C-429**), p. 4599 (pdf. p. 8)
13	12 August 2020	The Premier of Western Australia, and the Attorney General of Western Australia, held a press conference and stated, *inter alia*: Premier: I also need to say this; **from Western Australia's perspective, this bill is specific to this issue, and this issue alone.** … Premier: But obviously **I didn't reveal, ah, this matter before last evening, because we didn't have our legislation ready.** And we – what we know about Mr Palmer is, he will employ legions of lawyers to try and undermine our efforts, whatever efforts we go to, ah, to protect the State. So ah, that's, ah, that's the problem. **So, we couldn't reveal it. And we had to do it after 5:00 pm yesterday in the Parliament** to ensure, ah, that we protected, ah, Western Australians … Premier: **I accept this bill is unprecedented.** …	(**Exh. C-465**).

		Attorney-General: As is normal in contested hearings, he also directed that there be a mediation in or – on or about 26th of September [2020]. And at that mediation, the parties then negotiate, what are you prepared to offer/ what are you prepared to take? **And the State of Western Australia's position: we don't offer $1, and never will. So we'd be going along to mediation saying, "We don't offer you $1**" … Premier: So while we couldn't brief, ah, anyone really, before yesterday, um, because of the sensitivity and confidentiality and risk associated with this matter, ah, leaking, ah, we would like to see these laws through the Parliament, as this week.	
14	12 August 2020	*Hansard* of the Legislative Assembly, 12 August 2020: **Harvey, Leader of the Opposition, at p 4780**: … The Premier said that this is urgent legislation that needs to be passed immediately. **We were notified of this legislation only at five o'clock last night**. The Premier spoke to me and the Leader of the Nationals WA, Hon Mia Davies, in the corner of the chamber. A lot of people wearing suits were racing around the corridors of Parliament. **We had a sense that something was up but we had no idea what that might be—no idea at all**. **We were given no prior advice that something as unforeseen as this bill would be coming to Parliament**. The Leader of the Nationals WA and I were not given the benefit of a confidential briefing. We evidently do not have that level of trust with the Premier on matters	*Hansard*, Parliamentary Debates, Legislative Assembly & Legislative Council, 11-13 August 2020, (**Exh. C-429**), p. 4779 (pdf. p. 12).

		such as this, which could affect the future of Western Australians should a $30 billion lawsuit brought by an individual be successful. We were not given that level of trust, yet the Premier has asked for our cooperation to declare this bill urgent. As I said, we received it at five o'clock last night and we were expected to get through the consultation process with potentially injured parties. We are supposed to understand the ramifications. Ordinarily, with legislation like this, we would get independent legal advice to inform our decisions and help us understand the ramifications of what we are doing in Parliament when we pass legislation like this, but we have had no time to do that. The longstanding tradition in this place is that state agreements are passed through this place on the understanding of the trust placed in the government and the Premier of the day that the negotiations have been done in good faith with all parties to the agreement. … **Harvey, Leader of the Opposition, at p 4793:** … It was read in at five o'clock yesterday afternoon and we are considering it now, less than 24 hours later. It will be passed by the end of the sitting this evening. … **Davies, Leader of the Nationals, at p. 4794**: … Today, less than 24 hours after we were advised by the Premier of this action, we find ourselves debating the Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Bill 2020, which will have significant ramifications for the state's finances	

		and our relationship with state agreement holders into the future. It is a very significant situation to find ourselves in. From the outset, I state that the Nationals have had no opportunity to test with our own legal counsel the facts presented by the Attorney General yesterday or the State Solicitor and his cohort of colleagues last night. There simply has not been time. For the benefit of posterity and the record in this house, we should be clear that the first that we were made aware of the government's intention to pursue this matter was an urgent call to the chamber at 4.50 pm yesterday, followed by a conversation with the Premier behind the Chair in the chamber, which was interrupted by the Attorney General commencing his second reading speech. There was very limited opportunity for us to scrutinise the legislation. We were then offered a briefing by the State Solicitor and his associates, including external counsel who have been involved in the creation of this bill. That took place at seven o'clock last night. … **Davies, Leader of the Nationals, at p. 4766: It is worth taking some time to discuss the conventions for amending state agreements, because there is a convention**… In the simplest terms, it is expected that if a state agreement is to be varied, the government or the proponent is to submit a draft to the other party for consideration, and the two parties are to work together to reach a mutual agreement on the variation…	

		The government obviously believes there is a real chance that his case will be successful; otherwise, we would not be considering such extraordinary legislation… … It is an extraordinary and unprecedented approach and I am deeply uncomfortable with some of the things that we are being asked to do in such a short period. … **Katsambanis, member for Hillarys, at p. 4800:** The mechanism this government is using is **unprecedented.** The provisions in the bill have rarely if ever been used in any Westminster Parliament. A series of provisions removes legal entitlements that have come to be accepted as part of the customary law of our state, of our nation and of western democracies…We are being asked to approve such provisions that in many ways can be described as draconian and have been described as draconian by commentators since this bill was introduced yesterday… **I do not think that anyone elected to this place would have ever thought that they would be contemplating this sort of provision in a piece of legislation in the Parliament of Western Australia. It is extraordinary and unprecedented**. … **Blayney, Member for Geraldton, at p. 4814**: For as long as I have been here, I have been touched that state agreements are sacrosanct; they are not to be touched unless agreed to beforehand by both parties.	

		… **Quigley, Attorney General, at p. 4820:** Although the Leader of the Opposition said that the opposition will support this Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Bill, as did the Leader of the National Party, all members expressed both surprise and concern at the late notice the opposition was given about the introduction of this bill and the short amount of time they had to consider the bill before it was debated in the chamber today. There were and are reasons for this, and I will briefly outline them again. I stress that it was the same for cabinet because, on behalf of the public of Western Australia, w**e could not risk Mr Palmer getting any advance wind of what was coming by way of a legislative response** to his outrageous claim of $30 billion against the taxpayers of Western Australia. **Such was the level of secrecy—if I can say that—or security that even the State Solicitor vacated his office and worked on this at home, so that the office would not generally know what was happening**. Senior Parliamentary Counsel, Mr Lawn, was brought into the loop, and the Premier and I. **Even the Treasurer, who is one of my closest friends, did not know any of this at all**. It was kept absolutely tight until Friday night, when a small group of ministers knew so that we could plan the coming week, but not cabinet generally. Cabinet then held an emergency cabinet meeting at 4.00 pm yesterday, and at about 4.10 pm it was informed of the situation. The State Solicitor was in the cabinet meeting to brief the cabinet.	

		… **Quigley, Attorney General, at p. 4821** During question time, the Leader of the Opposition asked a rhetorical question: why the urgency? I will not deal with each of the clauses that we will be dealing with during the consideration in detail stage, but for a moment I will refer to the operative provisions for an arbitration or award. Proposed section 10, to be found on page 19 of the bill, states — (1) Any relevant arbitration that is in progress, or otherwise not completed, immediately before commencement is terminated. (2) Any relevant arbitration arrangement, and any relevant mediation arrangement, connected with a relevant arbitration terminated under subsection (1) are terminated. … (4) The arbitral award made in a relevant arbitration and dated 20 May 2014 is of no effect and is taken never to have had any effect. When is the commencement? It is upon assent, in clause 2. I can disclose to members why we brought this bill in at 5.00 pm last night. We brought this bill in when we knew that every courthouse and every registry in the country was closed and the doors locked, and there was	

		no chance to make an application to the court on that day. The significance of that is to be found in proposed section 7 of the bill, the definition section. I take members to the bottom of page 7 of the bill, which states — ***introduction time*** means the beginning of the day on which the Bill for the amending Act is introduced into the Legislative Assembly; The introduction time is the beginning of yesterday, because we anticipated that as soon as Mr Palmer got wind of this bill, he would do what his lawyers had failed to do for six years for the 2014 award, and failed to do for the award of 11 October 2019, referred to on page 20 of the bill under proposed section 10(6). They had failed to register it with a Supreme Court. Under the Commercial Arbitration Act, once it is registered with a Supreme Court, the award can be enforced. We could not take the risk of giving him a heads-up that this bill was coming so that he could rush into court to register it. We would be failing the people of Western Australia if we did that. It was not to take the opposition by surprise, and it was not to take my party by surprise; it was to protect the interests of every Western Australia. … **Quigley, Attorney General, at p. 4824:** He is paid in US dollars and that is as good as gold. There is no criticism. We want to take members through this and we want to explain to the chamber and to the public of Western Australia that it is the very best legal advice of Mr Joshua	

		Thomson, SC, our Solicitor-General. If anyone followed the proceedings conducted in the Federal Court last Monday week, they would know that Mr Thomson, SC, is the best Solicitor-General in Australia, beyond question. He creamed it. He got Palmer's witness to agree that his expert opinion was flawed because it was just based on assumptions and was worthless. It is on Mr Thomson's advice that this was the best way to protect ourselves during the intervening period between yesterday when I stood up and introduced the bill— remember, it **was just after five o'clock when we knew that every courthouse in Australia had its doors locked;** yesterday was the introduction day— and tomorrow, which should be the assent day, now that the members of the other place know that proceedings have commenced in New South Wales and that any delay they cause puts at risk every Western Australian. The urgency now has become patently obvious and pressing. That is a bit of a long explanation for the definition of the introduction time. Although it is only two and a half lines and reads easily, we have to know how that interlaces with the bill and what extra protections this Parliament will give the people of Western Australia upon the passage of this legislation.	
15	12 August 2020	The *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Bill 2020* (WA) was passed by the Legislative Assembly.	Witness statement of [redacted], sworn 13 February 2023, para 243.
16	13 August 2020	The Attorney-General for Western Australia participated in an interview on ABC Perth Radio and stated, *inter alia*:	"*Transcript of ABC Radio Perth - Breakfast"*, dated 13

		We got that legislation into the Assembly on Tuesday night while all the courts were locked. … Had he got a whisper and made his move to the court then we would have been in all sorts of difficulty 'cause once the matter is before the court the independence of the courts are protected by Chapter 3 of the Constitution. … This legislation has been drafted **over the last six weeks in secret**[593] by the best legal minds in this city. The Solicitor-General of Western Australia Mr Joshua Thompson SC, our incredible State Solicitor Nick Egan and his legal team at the State Solicitors' Office. Mr Egan even left the office and worked at home to keep it – to keep the job secret so people in – in his office wouldn't know. And then after we prepared the legislation, two weeks ago we sent it off to the firm that the Liberal Party normally use, Clayton Utz … …	August 2020, appearing as "Annexure F" to the Claimant's Notice of Intent to Submit Dispute to Arbitration, dated 20 October 2020, (**Exh. C-63**), p.587.
17	13 August 2020	**Hon R. Mazza (Agricultural):** I am not convinced of the urgency of the Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Bill 2020 going through today. **My understanding is that the bill was introduced into the Assembly at 5.01 pm to make sure that the judiciary on the east coast was shut**. It was explained to me in my briefing, which was only 24 hours ago, that **the government was very concerned about this bill being seized by the courts. Therefore, it introduced it into the Assembly after the courts on the east coast**	*Hansard*, Parliamentary Debates, Legislative Assembly & Legislative Council, 11-13 August 2020, (**Exh. C-429**), p. 4881 (pdf. p. 69).

593 Six weeks before this date is 2 July 2020. See also, Affidavit of J Quigley, sworn 25 March 2021 in Federal Court of Australia proceeding NSD912/2020, (**Exh. C-135**), p.115, [7]

		had closed so that Mr Palmer did not have an opportunity to have the court seize it. That has been done.	
18	13 August 2020	The *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Bill 2020* (WA) was passed by the Legislative Council and received Royal Assent on the same day, thereby becoming the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2020* (WA).	Witness statement of [redacted], sworn 13 February 2023, para 243.
19	14 August 2020	The State of Western Australia sent correspondence to Mr McHugh AC KC, stating, *inter alia*: 1. Pursuant to section 10(1) of the *Iron ore Processing (Mineralogy Pty Ltd) Agreement Act 2020* (WA), the arbitration …is terminated. 2. Pursuant to section 10(2) of the Act the arbitration agreement dated 8 July 2020 [i.e. the 2020 Arbitration Agreement] is terminated.	Letter from Western Australia State Solicitor's Office to the Hon. Michael McHugh AC QC, dated 14 August 2020, (**Exh. C-430**).
20	14 August 2020	The State of Western Australia sent correspondence to the Hon. Wayne Martin AC KC, stating, *inter alia*: 1. Pursuant to section 10(2) of the *Iron ore Processing (Mineralogy Pty Ltd) Agreement Act 2020* (WA), the mediation agreement dated 7 August 2020 … is terminated.	Letter from Western Australia State Solicitor's Office to the Hon. Wayne Martin AC QC, dated 14 August 2020, (**Exh. C-431**).
21	19 August 2020	The Law Society of Western Australia released a Media Statement criticising the *Iron Ore Processing (Mineralogy Pty. Ltd) Agreement Act* and stating, inter alia, that: *"The new law is unprecedented and extreme"*.	Media Statement on the Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Act, (**Exh. C-129**).
22	October 2020	*Brief*, a bi-monthly journal of The Law Society of Western Australia, published an article titled "*Extraordinary But Not Without Foundation: The WA Government's Response*	*Brief*, *Extraordinary But Not Without Foundation: The WA Government's Response to an*

		to an Unprecedented Threat", authored by the Attorney-General of Western Australia.	*Unprecedented Threat,* John Quigley (Attorney General of Western Australia), (**Exh. C-128**).
23	20 October 2022	Notice of Intent to submit a dispute to arbitration was submitted to the Respondent.	(**Exh. C-63**).
24	December 2020	The Western Australian Bar Association published a response to the Attorney-General's asserted justifications for the *Iron Ore Processing (Mineralogy Pty Ltd) Amendment Act 2020*, criticising both those responses and the "extraordinary" legislation itself.	(**Exh. C-130**)**.**
25	25 March 2021	The Attorney-General of Western Australia swore an affidavit in Federal Court of Australia Proceeding NSD912/2020. In that Affidavit, the Attorney-General deposed, *inter alia:* [6] In or about July and August 2020, I had carriage of the preparation of the *Iron ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Bill 2020* (**Amendment Bill**). [7] Given the objective of the Amending Bill was to protect the State against a $30billion damages claim by Mr Palmer, **it was necessary to act quickly and without notice to Mr Palmer. Had Mr Palmer known of the Government's intentions it is certain that he would have sought to thwart its passing**, including, by for example registering the arbitral awards in an Australian Court. [8] When I appeared on ABC radio on the morning of 13 August 2020, and made the comments set out at paragraph 53 and 54 of the First Palmer Affidavit, the	Affidavit of J Quigley, sworn 25 March 2021 in Federal Court of Australia proceeding NSD912/2020, (**Exh. C-135**), p. 115, paras 7–9. , (**Exh. C-500**)

		Amending Bill had, on the night of 11 August 2020, successfully been introduced to and read in to the Legislative Assembly. The Legislative Assembly passed the Amending Bill on 12 August 2020. I was particularly pleased that the introduction of the Amending Bill to the Legislative Assembly had occurred without any notice to Mr Palmer. That is why I said: "***Had he got a whisper of what I was about last week, or what the Government was about last week, or even Monday or even Tuesday morning, Tuesday afternoon, had he got a whisper and made his move to the court, then we would have been in all sorts of difficulty****, 'cause once the matter is before the court the independence of the courts are protected by Chapter 3 of the Constitution."* [9] I am no stranger to colourful and flamboyant language and **the passages from the ABC radio interview**, as set out in paragraphs 53 and 54 of the First Palmer Affidavit, **reflect my excitement at the fact that confidentiality of the Amending Bill had been maintained up until its introduction into the Legislative Assembly, and that neither Mr Palmer nor Mineralogy or IM had successfully prevented its introduction.**	
26	26 March 2021	The Premier of Western Australia swore an affidavit in Federal Court of Australia Proceeding NSD912/2020. In that Affidavit, the Premier deposed, *inter alia:*	Affidavit of M McGowan, sworn 26 March 2021 in Federal Court of Australia proceeding NSD912/2020, (**Exh.**

		[67] During the relevant period, **I was focused on ensuring that the bill that became the Amending Act was prepared in complete confidence and secrecy until it was introduced to the Legislative Assembly of Western Australia**, which ultimately occurred on the evening of Tuesday 11 August 2020. The reason I was concerned to ensure that **the preparation of the bill that became the Amending Act was a secre**t, was because I was intent on protecting the State from the $30 billion Damages Claim by Mr Palmer and his companies, and **did not want anyone, particularly Mr Palmer, to learn of the preparation of the bill so that steps could be taken to defeat it**. … [78] **In about July 2020, the Attorney General and I approved the preparation of the bill that would become the Amending Act. This was prepared in secret and very few people were aware of its existence**. The purpose of the Amending Act was to terminate any arbitration involving the State and the Mineralogy Parties concerned with the Balmoral South Project, decisions regarding it by the Honourable Colin Barnett, and the conduct of the State connected with those decisions (defined in the Amending Act as a "disputed matter"). The Amending Act also provided that, amongst other things, the State had no liability in respect of the arbitrations or connected with a disputed matter. The bill which would become the Amending Act was introduced by the government into the Legislative Assembly on the evening of 11	**C-135)**, p. 134, para 67; p. 136, para78; (**Exh. C-499**).

		August 2020. Subsequently, at approximately 11.10pm Western Australian time on 13 August 2020, the Amending Act received Royal Assent.	
27	9 March 2022	The Premier of Western Australia gave evidence in Federal Court of Australia Proceeding NSD912/2020, while under cross-examination, the premier gave *inter alia* the following sworn evidence: Q: According to Mr Quigley [the Attorney-General of Western Australia], the legislation had been crafted over the last six weeks in secret. Do you see that? A: Yes. Q: And he names the Solicitor General, Mr Thomson, the State Solicitor, Mr Egan as being two of those who were involved? A: Yes. Q: And he says Mr Egan left the office at work – and worked at home to keep the job secret, so that the people in his own office wouldn't know. And, as far as you know, is all of that correct? A: Yes. … Q: **… when Mr Quigley said that the legislation had been crafted over the last six weeks in secret, do you agree with that assertion, that is, as to how long it had been underway?** [Objection] His Honour: No, I will allow that. A: **I can't recall the exact length of time. Whether it was six weeks, eight weeks, I couldn't be exact,**	Transcript of Federal Court of Australia Proceeding NSD912/2020, 9 March 2022 (Day 5), Cross-examination of the Premier of Western Australia, (**Exh-136**), pdf. p. 8, L45**;** pdf. p. 9, L35**;** pdf. p. 12, L21**;** pdf. p. 21, L33**.**

		but it – it – it had – it was a relatively short period of time. Q: Okay. And I don't expect that you can nominate the precise day when it started, but the period you just nominated was perhaps six weeks, perhaps eight weeks. Is that right? I mean is that approximately your recollection? A: It – it may – it may have been five weeks, six weeks, seven weeks, eight weeks. It was a relatively short period of time. Q: Okay. Well, from 11, 12 or 13 August, back six weeks is basically 1 June or 31 May or some date like that. Does that help you? A: No, I think it's 1 July. Q: 1 July; quite right. 1 July or 30 June or a date like that. Does that help you? Would it have been underway, at least, by a date in June, do you think? A: It - it - it - it may have been June, it may have been July. I- I couldn't tell you exactly. … Q: Now, we discussed this morning about approximately when the legislation which ultimately became the Amendment Act was embarked about in terms of its genesis and preparation. Do you remember that this morning? A: Yes. Q: And Mr Quigley said six weeks before it was introduced - or approximately six weeks, and you said, "I think perhaps six to eight weeks"? A: I think I said five to eight weeks.	

		Q: Five to eight weeks, all right. And that range would bring us back to very early July or about mid-June. Is that right? If - - -? A: Yes. Q: Yes. Now, when did you and Mr Quigley first discuss the plan to bring in legislation along the lines of what ultimately turned out to be the Amendment Act? A: My recollection is when we learnt of the $30 billion bill, which would have been much earlier in the year. I think it was in March or February we learnt about the $30 billion being the amount. Up until then, it - it wasn't front and centre in my thinking that there was this threat to the State. Q: I see. And from about March, are you saying? Or that approximate time? A: I would have thought so. Around then. Q: Yes. You and Mr Quigley were talking about a possibility of formulating some legislation that might do the job, as it were? A: Yes, in conjunction with our legal advisers. Q: Yes, but you were thinking in terms of legislation? A: Yes. Q: You were thinking in terms of an Act of Parliament? A: Yes.	
28	9 March 2022	The Attorney-General of Western Australia gave evidence in Federal Court of Australia Proceeding NSD912/2020, while under cross-examination, the premier gave *inter alia* the following sworn evidence:	Transcript of Federal Court of Australia Proceeding NSD912/2020, 9 March 2022 (Day 5), Cross-examination of

		Q:	Then, at lines 34 and following, you talked about how secret you had been about it?	the Premier of Western Australia, (**Exh-136**), pdf. p. 21, L33**;**
		A:	Correct, sir.	
		Q:	You said that only a few — only the premier and yourself had known about it last week?	
		A:	I said that, sir.	
		Q:	Was that correct?	
		A:	No, sir. I discussed it with legal advisors. But apart from that, nobody else. Not my chief of staff or anybody.	
		Q:	At any rate, the secrecy was such that, with very, very few exceptions, none of the members of parliament knew that this legislation was about to be tabled?	
		A:	Certainly not — not even any minister.	
		Q:	So thank you. I'm not meaning to interrupt you. But no non-ministers and, indeed, almost no ministers. Is that right?	
		A:	No ministers, apart from - I got permission from the premier to proceed to prepare a submission for the Cabinet.	
		Q:	And when you say no ministers knew, you mean up to when? Up to what point?	
		A:	The- the premier, obviously, is a minister. On the Friday- on the Friday evening prior to - the Friday evening prior to the week that it happened.	
		Q:	Yes?	
		A:	So I don't - I can't help you with the date at the moment. But the Friday evening prior to it happening. I think it was Friday, not the Monday evening. But it was shortly before	

		the Cabinet meeting. I think there was one - maybe another minister informed in a meeting. Q: Right. And is your memory that the Cabinet meeting, about which I don't want to ask you any questions. Right? A: No. Q: Just timing - was on the Friday night or the Monday night. Is that right? A: No, sir. Q: Well, when - when was it? A: The Cabinet meeting was at about 4.15 pm on the Tuesday of the introduction. Q: So until that moment, 4.15 pm on the Tuesday of the introduction - - - ? A: Four o'clock or 4.15, sir. Q: No Cabinet ministers knew about it, except yourself, the premier and maybe one or two others. Is that right? A: I think it was the leader of the House and possibly - I'm testing my memory now. Possibly the leader of the government in the - the leader of the government in the Legislative Assembly. HIS HONOUR: Do both those persons hold ministerial offices as well as their parliamentary position ? A: They do, sir. Q: I'm sorry, your Honour. But I didn't hear the answer to that. HIS HONOUR: Yes. The leader- the leader of the Legislative Assembly and the leader of the Legislative Counsel are also ministers of the Crown. ...	

		Q: When, to your knowledge, was the first time that any non-government member of the house - of either house was informed about this Bill? A: I'm really searching- 4.15. Sorry. don't know. think when stood up in the - from memory, when stood up in the assembly. Q: Right. And what about government backbenches? A: That's what I'm saying, sir. Q: Well, okay. So government - - -? A: 1 can't remember there being a caucus meeting between- there's usually- the normal run of things is a cabinet meeting. Cabinet makes the decision. Then it goes to caucus. And I can't remember there being a caucus meeting convened between 4.15 and five o'clock when I rose. Q: Right. So probably, in your memory, your own government backbenchers didn't know until you stood up in the House? A: I believe that to be the - from recollection, I - I believe that to be the case. Q: Right. And the same would apply to the - everyone in the opposition and the crossbenchers, I presume? A: Absolutely, without a doubt.	
29	6 March 2023	Mr Josh Wilson MP made following statements in the Australian Parliament: a. Investor-state dispute settlement (ISDS) tribunals *"have severe shortcomings in terms of their integrity"*;	

		b. ISDS cases are *"dangerous dodgy legal actions"* used *"to attack sensible public policy"*; c. ISDS clauses in free trade agreements are *"dangerous"*; and d. d. The current Australian Labor government will not support the ISDS system because it is *"a system that subjects Australia to enormously expensive legal action in dodgy tribunals with no appeal processes"*.	
30	28 March 2023	Notice of Arbitration was submitted to the Arbitration.	
31	30 March 2023	Mr Josh Wilson MP made following statements in the Australian Parliament: a. The system of ISDS is a "*dodgy international tribunal system*"; b. ISDS is open to being used to "*rip off*" a State, "*override public policy*" and "*undermine Australian sovereignty*"; c. ISDS is in fact being used in this case "*to rip off WA*" and "*to do Clive Palmer's bidding*" (even though neither Western Australia nor Clive Palmer is a party to the ISDS proceedings); d. The former government (now the opposition) should be criticised because it allegedly "l*oves investor-state dispute settlement arrangements, the dodgy system known as ISDS*" and its members have "*brought motions supporting ISDS*" (implying that the current Labor government opposes the whole system of ISDS); and	

		e. ISDS tribunals are "*dodgy tribunals*".	
32	28 April 2023	The Respondent issued a Response to the Claimant's Notice of Arbitration.	(**Refer to Exh. C-494**.)
33	19 June 2023	This Tribunal is Constituted.	(**Refer to Exh. C-545.**)
34	21 June 2023	Mr Josh Wilson MP made following statements in the Australian Parliament: a. Mr Wilson MP said that ISDS clauses pose "*risks to Australia*"; b. Mr Wilson MP acknowledged that previously "*I've described as dodgy*" the ISDS system and that "*it is dodgy in the well-established Australian meaning of the term because it's inconsistent, it lacks transparency and, in many instances, it displays a range of other judicial shortcomings*"; c. Mr Wilson MP also sought to characterise the ISDS system as a threat to the "Australian community", asserting that "*The Australian community has good reason to be wary of ISDS mechanisms, because they're unnecessary and they're dangerous*"; d. Mr Wilson MP wrongly asserted that this arbitration involved a challenge to "*the legitimate laws and policies of sovereign nations*"; and e. Mr Wilson MP made it clear that he is "*not going to be silent*" and stated, "*I'll continue to speak up in relation to the risks posed by the unnecessary and dangerous ISDS system*".	(**Exh. C-12.**)

K. The Incorporation of the Claimant – the Clear Commercial Basis for the Steps Taken and Complete Lack of Connection with this (Unforeseeable) Dispute

Key Steps Taken in Restructuring

548. Set out below are the key events that were taken including the decision to restructure in Singapore and the evidence available to the Tribunal in considering these matters. Direct evidence is available from the [redacted] WS[594], the [redacted] WS and the [redacted] WS, the [redacted] WS. The factual implementation of the restructure is also set out in Annexure A of the NOI.[595]

L. Introduction

549. In this section the Claimant addresses the contention that the incorporation of the Claimant in Singapore was carried out with a view to establishing a corporate structure which would enable the Claimant to take advantage of investor-state dispute resolution provisions. That contention is simply incorrect. First, not only was this dispute wholly unforeseeable (for reasons set out elsewhere in these submissions) – with the dispute only arising on 13 August 2020[596] and thus some 19 months after the incorporation of the Claimant on 21 January 2019[597] – but it also ignores the clear factual evidence and the true commercial rationale and motivation for the incorporation of the Claimant.

550. The evidence and facts set out in the following witness statements are relevant to this section and the Tribunal is respectfully invited to read them in full:

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594 [redacted] WS at paras 113 to 139.
595 Notice of Intent, (**Exh. C-63**).
596 *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA), (**Exh. C-1**).
597 Certificate of Incorporation for Zeph Investments Pte Ltd, (**Exh. C-70**).

a. Witness Statement of [redacted] dated 13 January 2023 (Annexure 3C to Amended Notice of Arbitration) ("[redacted] **WS**"),

b. Witness Statement of [redacted] dated 22 March 2023 (Annexure 2C to Amended Notice of Arbitration) ("[redacted] **WS**"), at paragraphs 113 to 139,

c. Witness Statement of [redacted] dated 4 March 2024 ("[redacted] **WS**"), and

d. Fifth Witness Statement of [redacted] dated 14 March 2024 ("[redacted] **WS**").

551. The Mineralogy Group Structure Memorandum with exhibits is also relevant to this section[598].

M. Background

552. It is crucial to place the decision to incorporate the Claimant in Singapore in its full commercial context. When considered in that light this decision was plainly taken for perfectly proper commercial reasons, after years of deliberation (rather than an ad hoc reaction to a dispute or foreseeable future dispute).

553. The possibility of incorporation in Singapore was first considered during 2008[599]. That year a number of individuals attended a meeting in Singapore in September 2008[600]. In particular, the following individuals and professional firms were in attendance: Mr Palmer, [redacted] (including [redacted] and [redacted] [redacted] (including [redacted] (including [redacted] (including [redacted]) and [redacted] (including [redacted]

598 Mineralogy Group Structure Memorandum with exhibits (Annexure A to the Notice of Intent), (**Exh. C-63**), pp. 41 - 330.
599 [redacted] WS, para 49.
600 [redacted] WS, para 49.

[redacted] and [redacted])[601]. Details of the meeting are set out in a Draft Agenda document[602] exhibited to the [redacted] WS.

554. As [redacted] explains, during the course of that meeting he invited the professionals to comment on the best approach to raising funds and whether funds could be raised in Singapore by an Australian incorporated company[603]. The matter was discussed by the meeting attendees and the consensus was that it would be better to have a Singapore incorporated company raising debt finance[604]. In summary, it was explained by the representatives of professional firms who attended the meeting that individual participants in any debt syndicate raising large amounts of capital would require a legal sign off from an independent law firm familiar with the regulatory regime applying to any borrower as well as the laws and regulations applying to any banks involved in respect of any fundraising[605]. The professionals (banks and law firms) further advised that both conditions could be met in Singapore if the borrower was incorporated in Singapore, by experienced lawyers operating in that market[606]. The professionals also advised that if an Australian vehicle was to be used, and if the funds were to be raised in Singapore, it would require a sign-off from both Singapore registered lawyers and lawyers from Australia, in respect of each syndicate member[607]. That approach was inefficient as it would have the effect of doubling the number of lawyers and bankers involved in the transaction and risked leading to (unnecessary) disagreement and uncertainty[608]. Instead, the professionals advised that it was far better to have one legal team in respect of each syndicate team member[609]. Mr Palmer explains in his fifth witness statement that he accepted that advice at the time and since the time of that meeting has always held that view.[610]

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601 [redacted] WS, para 49.
602 Project Blast: Prospectus Drafting Session, Meeting Agenda, 4 September 2008, (**Exh. C-491**).
603 [redacted] WS, para 50.
604 [redacted] WS, para 50.
605 [redacted] WS, para 50.
606 [redacted] WS, para 50.
607 [redacted] WS, para 50.
608 [redacted] WS, para 50.
609 [redacted] WS, para 50.
610 [redacted] WS, para 50.

Hence, when the question of raising significant funds became an imminent issue, Mr Palmer naturally favoured the incorporation of a Singapore company[611].

N. Evidence of the Incorporation of the Claimant and Associated Matters - Further Evidence in Respect of Restructuring from 14 December 2018 to 29 January 2019

555. In addition to the evidence set out in:

a. The [redacted] WS dated 13 January 2023 and the exhibits referred to therein (**Exh. C-157** to **Exh. C-168**);

b. The [redacted] WS dated 22 March 2023 at paragraphs 113 to 139;

c. The [redacted] WS dated 4 March 2024 and the exhibits referred to therein (**Exh. C-71**, **Exh. C-384**, and **Exh. C-470** to **Exh. C-475)**; and

d. The [redacted] WS dated 14 March 2024 at paragraphs 48 to 72,

the following evidence sets out the activities which took place in respect of the corporate restructuring referred to in this response.

N-I: Interposition of Mineralogy International Limited (NZ)

556. On 14 December 2018, MIL was incorporated in New Zealand.[612]

557. On 16 December 2018, by a resolution of sole director, MIL resolved:[613]

611 [redacted] WS, para 50.
612 Company Extract of Mineralogy International Limited, NoI, Annexure A, Exhibit 1 p 50, (**Exh. C-63**).
613 Record of Resolution of Sole Director, Mineralogy International Limited, 16 December 2018, NoI, Annexure A, Exhibit 4, p 86 (**Exh. C-63**).

(x) The Company would acquire 100% of the issued share capital in Mineralogy Pty Limited (ACN 010 582 68o) (Mineralogy) and become its new parent company as part of a corporate reconstruction.

(xi) To issue new ordinary shares in the Company (Consideration Shares) as sole consideration for the purchase of fully paid ordinary shares in Mineralogy from Clive Frederick Palmer (CFP), River Crescent Pty Ltd (ACN 010 210 778) (River Crescent), and Closeridge Pty Ltd (ACN 010 560 157) (Closeridge) (Existing Shareholders) and for the Consideration Shares to be equal in value and proportion to the ordinary shares in Mineralogy transferred from the Existing Shareholders to the Company.

(i.e. the Company will issue 25,400 new ordinary shares to CFP, 5,928,988 new ordinary shares to River Crescent, and 48,508 new ordinary shares to Closeridge in exchange for the same number of ordinary shares in Mineralogy from each of CFP, River Crescent and Closeridge.)

…

(xiii) To execute the share purchase agreement attached to this resolution.

558. On 16 December 2018, River Crescent Pty Ltd, by a resolution of sole director, resolved as follows:[614]

1. The Company intends to undertake a corporate restructure, which includes the transfer of all the issued shares (5,928,988 ordinary shares) in Mineralogy Pty Ltd (ACN 010 582 680) held by the Company, to Mineralogy International Limited (Company No. 7185155) (Share Transfer) in exchange for an equivalent number of ordinary shares in Mineralogy International Limited.

…

614 Record of Resolution of Sole Director, River Crescent Pty Ltd, 16 December 2018, NoI, Annexure A, Exhibit 5, p 88, (**Exh. C-63**).

4.1(c) the Share Transfer Documents be executed for and on behalf of the Company by the sole director of the Company.

559. On 16 December 2018, Closeridge Pty Ltd, by a resolution of sole director, resolved as follows:[615]

1. The Company intends to undertake a corporate restructure, which includes the transfer of all the issued shares (5,928,988 ordinary shares) in Mineralogy Pty Ltd (ACN 010 582 680) held by the Company, to Mineralogy International Limited (Company No. 7185155) (Share Transfer) in exchange for an equivalent number of ordinary shares in Mineralogy International Limited.

…

4.1(c) the Share Transfer Documents be executed for and on behalf of the Company by the sole director of the Company.

560. On 16 December 2018, Mineralogy, by a resolution of sole director, noted and resolved as follows :[616]

1.1 It is noted that the Company will be subject to a corporate restructure to interpose a new holding company incorporated in New Zealand between the Company and its shareholders (Corporate Consolidation Transaction) in circumstances of a "scrip for scrip" exchange of shares in the Company for shares in the new holding company.

2. IT WAS RESOLVED that, upon receipt of the duly executed transfer form relating to the Transfer, the Company:

(a) approve the Transfer;

615 Record of Resolution of Sole Director, Closeridge Pty Ltd, 16 December 2018, NoI, Annexure A, Exhibit 6, p 89, (**Exh. C-63**).
616 Record of Resolution of Sole Director, Mineralogy Pty Ltd, 16 December 2018, NoI, Annexure A, Exhibit 7, p 90, (**Exh. C-63**).

561. On 16 December 2018, Clive Frederick Palmer, River Crescent and Closeridge sold their shares in Mineralogy to MIL in exchange for shares issued in MIL. The Share Purchase Agreement relevantly records:[617]

> ***2.1 Sale of Mineralogy Shares***
>
> *Subject to the terms of this Agreement, each of the Sellers agrees to simultaneously sell, and the Buyer agrees to concurrently buy, the Mineralogy Shares on the Completion Date free of any Encumbrance.*
>
> *…*
>
> ***2.3 Consideration***
>
> *In sole consideration for the sale of the Mineralogy Shares under clause 2.1, the Buyer must on the Completion Date, allot and issue the Consideration Shares to the Sellers in the following proportions:*
>
> *(a) Seller 1— 25,40o fully paid ordinary shares;*
>
> *(b) Seller 2 - 5,928,988 fully paid ordinary shares; and*
>
> *(c) Seller 3 — 48,508 fully paid ordinary shares;*
>
> *such that that each of the Sellers will respectively receive a parcel of newly issued Consideration Shares in the Buyer being equal in number and value to the particular parcel of Mineralogy Shares agreed to be sold and transferred to the Buyer.*

617 Share Purchase Agreement between C Palmer, River Crescent Pty Ltd, Closeridge Pty Ltd and Mineralogy International Pty Ltd dated 16 December 2018, NoI, Annexure A, Exhibit 8, p 92, (**Exh. C-63**).

562. The transfers in respect of the sale of the shares in Mineralogy were duly recorded in Standard Australian Transfer Forms on 16 December 2018, recording the consideration paid by MIL.[618]

N-II: Interposition of the Claimant

563. On 21 January 2019, the Claimant was incorporated in Singapore by MIL. On the same day, the Accounting Corporate Regulator Authority of Singapore issued a certificate confirming the Claimant's incorporation.[619]

564. On 29 January 2019, MIL, by a resolution of directors, resolved to appoint Mr Palmer and Mr Mashayanyika as representatives to act on behalf of the company. [620]

565. On the same day, by a resolution of the Claimant's sole shareholder (MIL), the Claimant was authorised to issue shares.[621]

566. On 29 January 2019, the Directors of MIL resolved, among other things, as follows:[622]

> *1. The Company intends to undertake a corporate restructure, which includes the transfer of all the issued shares (6,002,896 fully paid ordinary shares) in Mineralogy Pty Ltd (ACN 010 582 680) held by the Company, to Mineralogy International Pte. Ltd. (Registration No. 201902599N) in exchange for an equivalent number of fully paid ordinary shares in Mineralogy International Pte. Ltd. being issued to the Company (Share Transfer).*

618 Standard Australian Share Transfer Forms 16 December 2018, NoI, Annexure A, Exhibit 9, p 108, (**Exh. C-63**).
619 Certificate Confirming Incorporation of Company dated 21 January 2019, Exhibit 10, p 111 (**Exh. C-63**); Business profile of Zeph Investments, NoI, Annexure A, Exhibit 2, p53, (**Exh. C-63**).
620 Record of Resolution of Directors, Mineralogy International Limited, 29 January 2019, Exhibit 12, p 153, (**Exh. C-63**); Certificate of Appointment 29 January 2019, NoI, Annexure A, Exhibit 13, p 155, (**Exh. C-63**).
621 Sole Member's resolution of the Claimant dated 29 January 2019, NoI, Annexure A, Exhibit 14, p 156, (**Exh. C-63**).
622 Record of Resolution of Directors of Mineralogy International Limited, 29 January 2019, NoI, Annexure A, Exhibit 15, p 157, (**Exh. C-63**).

…

3. Approval of the Share Transfer

IT WAS RESOLVED that:

(a) it is in the best interests of the Company to enter into the Share Transfer Documents and carry out the Share Transfer;

(b) the Company approves the Share Transfer Documents subject to any amendments approved by the directors; and

(c) the Share Transfer Documents be executed for and on behalf of the Company by any two directors of the Company.

567. On 29 January 2019, the Directors of the Claimant resolved to acquire all of the shares in Mineralogy from MIL.[623] The Directors of the Claimant at meeting of directors noted:[624]

(v) As part of a corporate reconstruction, the Company intends to acquire 100% of the issued shares in Mineralogy Pty Limited (ACN 010 582 680) (Mineralogy) and become its new parent as part of a corporate restructure (the Corporate Restructure).

(vi) Pursuant to the attached share purchase agreement that sets out the Corporate Restructure (the SPA), the Company shall issue new ordinary shares in the Company (Consideration Shares) as the consideration for the purchase of all of the fully paid ordinary shares in Mineralogy from Mineralogy International Limited (Company No. 7185155) (MIL or Existing Shareholder) and for the Consideration Shares to be equal in value and number to the

623 Ordinary Resolution of the Claimant, 29 January 2019, NoI, Annexure A, Exhibit 17, p 163, (**Exh. C-63**)**;** Consent to Accept Short Notice by Mineralogy International Limited, 29 January 2019, Annexure A, Exhibit 18, p165, (**Exh. C-63**); Ordinary Resolution of the Claimant, 29 January 2019, NoI, Annexure A, Exhibit 18, p 166, (**Exh. C-63**).
624 Minutes of Meeting of Directors of the Claimant, 29 January 2019, NoI, Annexure A, Exhibit 16, p 158, (**Exh. C-63**).

ordinary shares in Mineralogy transferred from the Existing Shareholder to the Company.

(i.e. the Company will issue 6,002,896 new fully paid ordinary shares to MIL in exchange for the transfer of the same number of ordinary shares in Mineralogy from MIL.)

…

(x) In relation to the Share Transfer, pursuant to the authority granted by the Sole Member of the Company under the sole Member's resolution passed on 29 January 2019 pursuant to Section 184G(1) of the Companies Act, Chapter 50 of Singapore (the Act):

a) The Company's ordinary shares proposed to be issued shall be denominated in Australian Dollars.

b) As consideration for the Sale Shares, the Consideration Shares be allotted and issued to MIL.

c) The Consideration Shares shall be credited as fully paidup and shall on issue rank pari passu in all respects with the existing ordinary share in the capital of the Company;

d) Allen & Gledhill LLP (A&G) be authorised to lodge with the Registrar of Companies the relevant notice(s) in the prescribed form in connection with the proposed allotment and issue;

e) A new share certificate in respect of the Consideration Shares be issued to MIL and the Common Seal of the Company be affixed thereto in accordance with the Constitution of the Company; and

f) The Secretary or any authorised representative of the Company be authorised to enter the particulars of the allotment and issuance in the Company's registers and file any other appropriate notice(s) or documents with the Accounting and Corporate Regulatory Authority of Singapore (ACRA).

…

(xii) To authorise one or more of the Company directors to execute the SPA for the purchase of all of the Mineralogy fully paid ordinary shares from MIL and the buy-back of the Original Share.

568. On 29 January 2019, MIL sold all of the shares in Mineralogy to the Claimant pursuant to a share purchase agreement dated 29 January 2019. The share purchase agreement dated 29 January 2019, relevantly provides:[625]

A. The Seller is the registered holder of Mineralogy Shares, being all of the issued fully paid shares in the capital of the Company.

B. Subject to and on the terms of this Agreement, the Seller agrees to simultaneously sell to the Buyer and the Buyer agrees to concurrently purchase from the Seller, the respective parcel of Mineralogy Shares held by the Seller in sole consideration and exchange for the issue of the Consideration Shares in the Buyer to the Seller such that the Seller will receive a parcel of newly issued Consideration Shares in the Buyer being equal in number and value to the parcel of Mineralogy Shares agreed to be sold and transferred to the Buyer on the terms and conditions set out in this Agreement.

…

2.1 Sale of Mineralogy Shares

Subject to the terms of this Agreement, the Seller agrees to simultaneously sell, and the Buyer agrees to concurrently buy, the Mineralogy Shares on the Completion Date free of any Encumbrance.

…

2.3 Consideration

625 Share Purchase Agreement between Mineralogy International Limited and the Claimant dated 29 January 2019, NoI, Annexure A, Exhibit 20, p 168, (**Exh. C-63**).

In sole consideration for the sale of the Mineralogy Shares under clause 2.1, the Buyer must on the Completion Date, allot and issue the Consideration Shares to the Seller, such that the Seller will receive a parcel of newly issued Consideration Shares in the Buyer being equal in number and value to the particular parcel of Mineralogy Shares agreed to be sold and transferred to the Buyer.

569. The transfers in respect of the sale of the shares in Mineralogy from MIL to the Claimant were duly recorded in Standard Australian Transfer Forms on 29 January 2019, recording the consideration paid by the Claimant to MIL.[626]

N-III: Applications for Duty Assessment Exemptions from Queensland and Western Australia

570. On 21 August 2019, the Claimant, MIL and Mineralogy applied for an exemption pursuant to section 262 of the *Duties Act 2008* (WA) from the Commissioner of State Revenue for the State Government of Western Australia in respect of the transactions constituting the reconstruction of the corporate group.[627]

571. On 27 August 2019, the Claimant, MIL and Mineralogy applied for an exemption pursuant to section 411 of the *Duties Act 2001* (Qld) from the Commissioner of State Revenue for the State Government of Queensland in respect of the transactions constituting the reconstruction of the corporate group.[628]

626 Standard Australian Share Transfer Form, 29 January 2019, NoI, Annexure A, Exhibit 21, p 181, (**Exh. C-63**).
627 Application for exemption pursuant to section 262 of the Duties Act 2008 dated 21 August 2019, NoI, Annexure A, Exhibit 23, p 211, (**Exh. C-63**); Relevant Consolidation Transaction and Landholder Acquisition forms dated 19 August 2019, NoI, Annexure A, Exhibit 25, p 275, (**Exh. C-63**).
628 Application for exemption pursuant to section 411 of the Duties Act 2001 dated 27 August 2019, NoI, Annexure A, Exhibit 22, p 182, (**Exh. C-63**); Form OSR D3.3 and Form OSR F10.1 submitted to Queensland's office of state revenue dated 26 August 2019, NoI, Annexure A, Exhibit 24, p 241, (**Exh. C-63**).

572. On 8 October 2019, the Office of State Revenue for the State Government of Queensland granted an exemption to the Claimant, MIL and Mineralogy for the transactions constituting the reconstruction of the corporate group.[629]

573. On 14 February 2020, the Office of State Revenue for the State Government of Western Australia granted an exemption to the Claimant, MIL and Mineralogy for the transactions constituting the reconstruction of the corporate group.[630]

N-IV: Bona Fide Rationale for Incorporating in Singapore (Coal Funding)

574. [redacted] explains the commercial rationale and motivation for the Claimant being incorporated in Singapore[631]:

a. *First*, he states that the decision to incorporate the Claimant in Singapore was not a corporate decision but one taken by him as the sole beneficial shareholder of the group[632] and:

i. To the extent that any of the companies needed to participate in that decision, those matters are fully set out in Annexure A of the Notice of Intent.[633]

ii. The Tribunal's attention is respectfully directed to the authorisations involved in the restructuring, which inter alia include, "shareholder resolutions, company minutes, Director appointments, Share Purchase Agreements, share transfer forms and tax rollover elections"[634]

629 Commissioner Assessment Notice issued by the Queensland Office of State Revenue dated 8 October 2019, NoI, Annexure A, Exhibit 26, p300, (**Exh. C-63**).
630 Duties Assessment Notice issued by the Western Australian Office of State Revenue dated 14 February 2020, NoI, Annexure A, Exhibit 27, p 319, (**Exh. C-63**).
631 [redacted] WS, paras 114 to 136; [redacted] WS, paras 48 to 72.
632 [redacted] WS, para 51.
633 Mineralogy Group Structure Memorandum with exhibits (Annexure A to the Notice of Intent), (**Exh. C-63**), pp. 41 – 330.
634 Id., pp. 44 – 46.

iii. The reason and commercial motivation for Mr Palmer's decision in early June 2018 to restructure was to obtain funding for a major coal project, such funding being no longer available in Australia. The other reason for the restructure was to provide a better tax structure and to enhance cashflow and international investment.[635] The coal project aspects are dealt with below in subparagraphs b. to d. while the tax aspects and motivation for the restructure are addressed immediately following in paragraph "N-V".

b. *Second*, the evidence set out in paragraphs 114 to 134 of the [redacted] WS, together with the evidence in (i) the [redacted] WS[636] ([redacted] being an individual with vast experience including as CEO of [redacted] in Australia from 1998 to 2003) and (ii) the [redacted] WS, explains the timing and rationale for the decision:

i. The Claimant's subsidiaries were seeking to develop a coal mining project in Queensland, following extensive exploration in the area[637].

ii. Once Mr Palmer had received a copy of the letter from the Queensland Premier to the Australian Prime Minister dated 12 December 2017[638] whereby the Premier vetoed the provision of one billion dollars of funding to the Adani Coal Project in Queensland (a coal project being developed next to the Claimant's subsidiaries' coal project in Queensland), and taking into account the prevailing financial conditions in Australia, Mr Palmer realised that no funds could be raised for the coal project domestically[639]. This was a great disappointment to him as the sole beneficial shareholder of the

635 Annexure A to the NOI, (**Exh. C-63**); [redacted] WS at paras 48 to 72.
636 [redacted] WS, paras 16 to 37.
637 [redacted] WS, para 10.
638 Letter, Premier of Queensland to Prime Minister of Australia dated 12 December 2017, (**Exh. C-166**).
639 [redacted] WS, para. 52.

group[640]. It became apparent that Mineralogy's subsidiaries could lose their entire investment of over one hundred million dollars in the coal project if no funding was available[641].

iii. Mr Palmer realised at that time there was no other commercial choice but to seek funding offshore[642]. That analysis was supported and reinforced by conversations with [redacted] – who explains that in March 2018 he made Mr Palmer aware of the 'Coal-Fired Power Funding Prohibition Bill 2017'[643].

iv. [redacted] adds that he 'advised' Mr Palmer in late March 2018 that it would "*become increasingly difficult in the future for Waratah to obtain funding from Australian banks or the government support necessary to finance and develop Waratah's coal portfolio*." [644] [redacted] confirms that he expressly "*suggested the restructuring of the Mineralogy group of companies so they could utilise such funds by making investments offshore to have a wider ambit of opportunities. I pointed out that investments made could be leveraged and establish links with international banks necessary for the financing of the coal projects*." [645] [Emphasis added]

v. [redacted] explains that he advised Mr Palmer that "*it was critical if Waratah wanted to proceed to raise money for its coal business that the group should establish itself in one of the major top financial centres of the world. I suggested the group should be restructured and based in Singapore. The Waratah Coal project needed to raise billions of dollars for its development and at the time there had been some negative developments for the funding of new coal projects in Australia, and I*

640 [redacted] WS, para 52.
641 [redacted] WS, para 52.
642 [redacted] WS, para 53.
643 [redacted] WS, paras 16-17.
644 [redacted] WS, para 18.
645 [redacted] WS, para 18.

advised Mr Palmer that Mineralogy should act as soon as possible. I suggested to him at that time that a restructure should be undertaken to optimise international investment, cash flow, finance and trading opportunities for the exploration of investment in Australia and internationally." [646] [Emphasis added]

vi. [redacted] also explains that he advised Mr Palmer that "*if he wanted to raise large amounts of cash it would be better to be located in one of the world leading financial markets …*"[647] (noting that this meant somewhere other than Australia). [redacted] then explained that Singapore would be suitable and in fact "*also suggested to Mr Palmer that any new Singapore holding company should be active in commerce in Singapore*." [648]

vii. [redacted] then assisted in advising on and considering the tax advantages of the Singapore structure[649].

viii. [redacted] also played a role in relation to the New Zealand aspect – a point he discussed and explored with Mr Palmer at this time[650]. That led to him advising a structure with a Singapore company "*in turn … owned by a company in New Zealand*…"[651].

ix. For his part, [redacted] also took the view that Singapore was the closest world financial centre to Australia which had access to global finance sources[652].

x. It is significant that the discussions with [redacted] lasted for some time (see for example his reference to the 'Global Financial Centers 24'

646 [redacted] WS, para 19.
647 [redacted] WS, para 21.
648 [redacted] WS, para 22.
649 [redacted] WS, paras 27-28.
650 [redacted] WS, paras 24 and 31.
651 [redacted] WS, paras 32, 33 and 36.
652 [redacted] WS, para 53.

report which he discussed with Mr Palmer in November 2018[653]). That illustrates that the restructure was driven entirely by commercial considerations and was not some sort of bad faith or hasty 'knee-jerk' reaction to any alleged dispute or foreseeable potential dispute.

xi. Significantly, [redacted] evidence and [redacted] evidence is supported by the statement of [redacted]. Amongst other things [redacted] deposes to the fact that in July 2018 Mr Palmer informed him of the decision to restructure the group "*to seek funding for the Waratah Coal Project in Singapore*" [654]. He explains that Mr Palmer even instructed him to "*commission an independent financial paper suitable for presentation to banks and other sources of funds in Singapore*" [655]. Mr Harris, an experienced professional, says that he considered that it was "*a positive move to restructure the group to assist in seeking to obtain offshore finance.*" [656] The independent financial report was received from [redacted], a leading economic analyst, in September 2018 ([redacted] **Reports**[657]) and inter alia sets out important information for any fundraising by bankers.

xii. [redacted] impressive experience in the coal industry includes analysis of demand and supply of thermal, metallurgical and coking coal in all countries, the development of cost models for open pit and undergrounds coal mining, economic and financial analysis of coal

653 [redacted] WS, paras 35 and 36.
654 [redacted] WS, para 11.
655 [redacted] WS, para 11
656 [redacted] WS, para 12.
657 [redacted], Analysis of China First Coal Project - Option 1, Report, pp 3 - 6 (**Exh. C-472**);
[redacted], Analysis of China First Coal Project - Option 1, Tables, Excel Format, (**Exh. C-473**); [redacted], Analysis of China First Coal Project - Option 2, Report, (**Exh. C-474**);
[redacted] Analysis of China First Coal Project - Option 2, Tables, Excel Format, (**Exh. C-475**).

projects in Australia and analysis of transportation costs in all major international thermal and coking coal trades[658].

xiii. [redacted] was commissioned to prepare a report for coal financing in respect of Waratah Coal's coal project in Queensland (the **Coal Project**), as stated in the [redacted] WS (at paragraph 13). The [redacted] Reports were delivered in September 2018 and carried a description of the Coal Project and a full financial analysis of the capital and operating costs and revenues as well as market, project and life depreciation.

xiv. Reference is made generally to the [redacted] WS, paragraphs 13 to 15 and in particular exhibits **Exh. C-472**, **Exh. C-473**, **Exh. C-474**, and **Exh. C-475**, which are copies of the [redacted] report (and appendices) (the [redacted] **Reports**). [redacted] is an economics expert.

xv. Each of [redacted] reports sets out the financial analysis for the Coal Project and inter alia includes major parameters which would be considered by bankers. An extract is set out below and is an extract of Option 1 of the [redacted] Reports:

[redacted] *Report - Option 1 Analysis (extract)*[659]

"Project Life and Depreciation

If resources were unlimited, the project would be evaluated over an economic life of 40 years after construction. In practice the project is evaluated over a period 28 years, since this is the date at which the initial resource of 937.5m tonnes of raw coal would be extracted. Assets are depreciated over 20 years for commercial purposes and over 10 years for tax purposes.

Financial Structure

Long-term loans are assumed to be equal to 100% of the fixed and working capital cost and are received in the first year of the project. Loan principal is not repaid until the first year of full operation (2023). The interest rate is 5.5% above LIBOR (London interbank offer rate, currently about 2.5%). For the purpose of analysis, an interest rate of 8.0% was used. Interest

658 [redacted], Analysis of China First Coal Project - Option 1, Report, pp 3 - 6 (**Exh. C-472**); [redacted] CV, (**Exh. C-505**).
659 [redacted], Analysis of China First Coal Project - Option 1, Report, pp 3 - 6 (**Exh. C-472**).

is not paid until the first year of full operation (2023), but is capitalised and added to the debt for repayment later. From 2023 the accumulated debt is repaid in equal payments over a 10-year period. An initial fee of 1.5% of the total value of the loan is paid to the lender for arrangement and management.

Discounted Cash Flow

The method of assessment for the project is analysis of the discounted cash flows. It is well understood that a given nominal amount of money received today is worth more than the same amount received in the future. The difference is known as the time value of money and is an underlying principle used for the valuation of businesses. In effect, businesses are valued according to the level of future cash flows they can generate and the timing of, and risk associated with, those cash flows. This discounted cash flow (DCF) method is also considered as the most complete way to evaluate a project, since over the life of the project it:

(1) *takes account of all capital costs and operating costs to take the mineral and convert it to a marketable product*

(2) *calculates revenue from the sale of the product*

(3) *calculates the cash flows for the project*

(4) *expresses the present value of those cash flows as a monetary value, using any selected rate of discount considered appropriate for valuation.*

Results

Assuming that the project has the following schedule, the results of the financial analysis are shown in Excel Table 3. Excel Table 4 presents a complete calculation of financial flows over the project life.

Year 1 – Approvals – 2019
Year 2 – Commence Construction – 2020 Year 3 – Continue construction – 2021
Year 4 – Complete construction – 2022; and
Year 5 – Coal production commences and Project receives first income - 2023.

The return on equity capital before tax is at least 58% per year[660]. The net present values (NPV) shown represent the net present value of total project cash flows using a discount rate. For example, at 8% discount the NPV after tax in Year 1 is US$ 17.97 billion. If the NPV is calculated at Year 6 (2023), it increases to US$ 30.18 billion.

China First Coal Project – Financial Results

Item		***US$***
Return on equity before tax	*%*	*58.0%*

660 Positive equity cash flows are so large that there is no rate of discount that will reduce them sufficiently to permit an accurate measure of the internal rate of return, [redacted], Analysis of China First Coal Project - Option 1, Report, pp 3 - 6 (**Exh. C-472**).

Return on equity after tax	*%*	*55.0%*
NPV after tax at 8% in Year 1 = 2018	*$m.*	*17966*
NPV after tax at 8% in Year 6 = 2023	*$m.*	*30176*
NPV after tax at 8% in Year 11 = 2028	*$m.*	*31711*
NPV after tax at 8% in Year 16 = 2033	*$m.*	*31365*

It also indicated that

- *the long-term debt service cover ratio[661] over the life of the loans is in the range of 1.6 to 4.1 and is positive in all years after construction; and*
- *the loan life cover ratio[662] is 2.8 to 7.2*

These financial ratios indicate that long-term debt can be comfortably serviced.

Sensitivity Analysis

To test the sensitivity of the project to changes in key factors the Base Case presented in this report has been varied by changing up and down by 30% each of the following:

- *operating costs*
- *capital costs*
- *selling prices*
- *exchange rates*

Those results are shown in Table 5, which takes the data from Table 3 as the Base Case.

Those results are summarised in the table below and the chart, using the net present value after tax as a key indicator.

This shows, for example, that at a discount rate of 8% a reduction in operating costs by 30%, with all other items unchanged, increases the NPV from US$ 17.97 billion in the Base Case to US$ 27.18 billion.

The chart below shows how the NPV for the project changes with variations to key items of cost and revenue. It shows that the project is sensitive to the key variables in the following descending order of importance:

- *selling price*
- *operating costs*
- *exchange rate*
- *capital costs.*

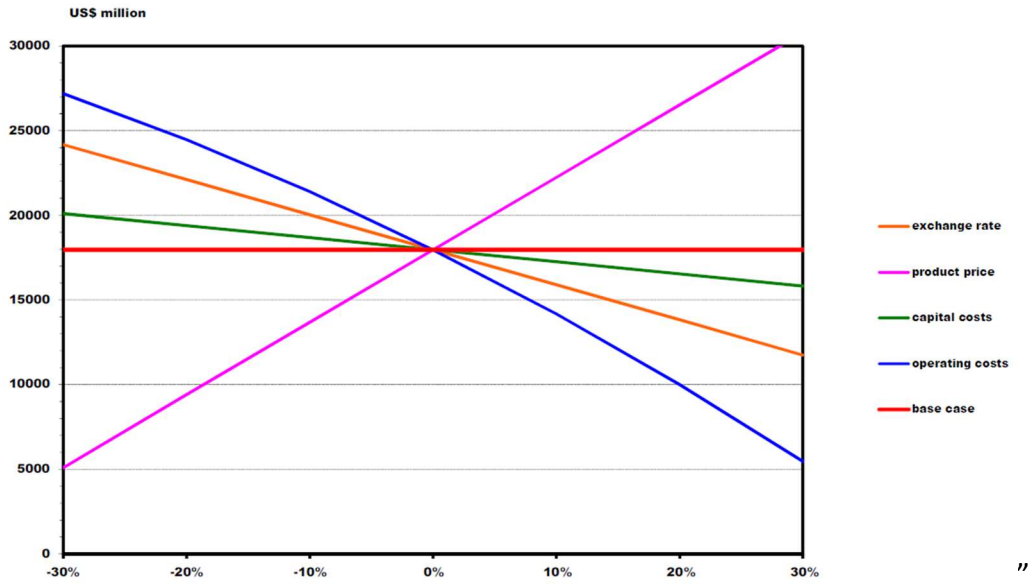
661 Cash flow from operations less tax as a ratio to the debt interest and principal payments in each year, [redacted], Analysis of China First Coal Project - Option 1, Report, pp 3 - 6 (**Exh. C-472**).

662 The net present value of cash flows over the remaining life of loans as a ratio to the total of outstanding loans in any year, [redacted], Analysis of China First Coal Project - Option 1, Report, pp 3 - 6 (**Exh. C-472**).

China First Coal Project
Sensitivity of Net Present Value After Tax

Item		***8.0%***
Base Case	*$m.*	*17966*
Operating Costs - 30%	*$m.*	*27178*
Operating Costs + 30%	*$m.*	*5463*
Capital Costs - 30%	*$m.*	*20104*
Capital Costs + 30%	*$m.*	*15825*
Selling Prices - 30%	*$m.*	*5086*
Selling Prices + 30%	*$m.*	*30797*
Exchange Rate - 30%	*$m.*	*24172*
Exchange Rate + 30%	*$m.*	*11744*

China First Coal Sensitivity:
NPV After Tax at 8% and Key Variables



"

xvi. It should be noted that the [redacted] Reports annexed a series of spreadsheets which analysed all of the relevant parameters which included costs, operating and configuration of the coal project. It is significant that this work was commissioned in July 2018 and

completed in September 2018 to be used in Mineralogy's activities in Singapore. In that regard, [redacted] gives a detailed explanation of the financial strategy and the timing of its implementation in the [redacted] WS at paragraphs 126 to 137.

c. *Third*, to underscore the commercial rationale – and by way of example of the types of factors taken into account at that time (including by reference to recently published material) – the Claimant refers to exhibit **Exh. C-492**. This is a publication by the Respondent's Department of Foreign Affairs and Trade titled "Invested: Australia's Southeast Economic Strategy to 2040" dated September 2023, which under the heading "Financial Services" which states that "Singapore stands out in Southeast Asia as a financial services hub and is ranked by the Global Financial Centres Index (GFCI) as the third-largest financial centre globally"[663]. [redacted] also refers to Singapore's ranking as a top financial centre (indeed, it was ranked at number 4 in 2018 by the very same Global Financial Centres Index relied upon by the Respondent's abovementioned publication[664]); and

d. *Fourth*, as [redacted] explains, the purpose of going to Singapore was multifaceted: (i) it enabled the Claimant to seek funding from Singaporean banks and financial institutions; and (ii) it enabled the Claimant to appoint a Singapore-based entity to arrange and coordinate the fundraising worldwide[665], and (iii) it enabled him to become a resident of Singapore and to save as set out below $90 million which would otherwise be paid in tax to the Respondent. Further:

663 The Commonwealth of Australia's Invested: Australia's Southeast Asia Economic Strategy to 2040, Chapter 11, p.128, (**Exh. C-492**); [redacted] WS, para 53.
664 [redacted] WS, paras 35–36; The Global Financials Centres Index 24, (**Exh. C-168**).
665 [redacted] WS, para 55.

i. [redacted] sets out the reasons why Singapore arrangers and the involvement of Singapore banks were fundamental to any fundraising[666];

ii. He also states that most financial institutions were dealing with large amounts of capital and in this case he was anticipating a raising in the vicinity of eight billion dollars;[667]

iii. He was conscious that this would normally involve firms with global credit committees consisting of representatives from the main global financial centres and in this regard he was aware that it had been common practice to have representatives from the top financial centres of the world such as New York, London, Singapore and Hong Kong[668];

iv. [redacted] further states that by utilising a Singapore arranger, there were advantages (including the fact that an arranger would have good contacts with Singaporean representatives within international banks and financiers who would all play a role in necessary approvals from global credit committees)[669];

v. Consistent with its desire to access foreign funding, the Claimant notes that the size of the market for coal financing internationally was substantial and is, for example, documented in a current report as being over US$1.5 trillion[670]. This global study shows coal financing is currently available globally and can be accessed from financial markets

666 [redacted] WS, para 55.
667 [redacted] WS, para 55.
668 [redacted] WS, para 55; The Global Financials Centres Index 24, (**Exh. C-168**).
669 [redacted] WS, para 56.
670Banktrack.org article titled "Who is still financing the global coal industry?" dated 15 February 2022, (**Exh. C-493**).

like Singapore through the use of financial arrangers[671]. As a contrast, no finance was available in Australia for new coal projects; and

vi. As to the requirements for such an arranger the Claimant refers to the evidence of [redacted] (the Claimant's expert in these proceedings). [redacted] has held senior roles at three major investment banks in Singapore, including roles specifically focused on financing natural resources projects. [redacted] discusses the financing process at pages 29-32 of his First Report (albeit in an iron ore context). This description reaffirms the views of [redacted] and [redacted] as to the manner in which international finance is raised.

N-V: Bona Fide Rationale for Incorporating in Singapore (Tax and Cash Flow)

575. Mineralogy already had retained earnings of over $370,212,390 as at June 2018[673] and as [redacted] points out in the [redacted] WS in paragraphs 62.

576. [redacted] explains that, if such funds were distributed to him while he was an Australian tax resident by way of dividends, he would be required to pay approximately $90 million in personal taxation in respect of the dividend[674]. It was also true that in future years such retained earnings when distributed would incur a similar rate of tax if such dividend were paid to him while he was an Australian Tax resident[675]. This matter is set out in a letter from [redacted].[676]

671 Ibid.
672 Expert Witness Statement of [redacted] dated 27 March 2023 ("[redacted] **Report**").
673 [redacted] Report.
674 [redacted] WS at para 62.
675 [redacted] WS at para 62.
676 Letter from [redacted], 4 March 2024 (**Exh. C-495**).

577. As set out in the [redacted] WS in paragraph 128, [redacted] confirms that if such dividend were distributed to him at a time when he was a tax resident of Singapore but paid to a jurisdiction outside Singapore no tax would be payable.

578. In the [redacted] WS in paragraphs 62 to 66 [redacted] confirms that in early June 2018 the ability to become a Singapore resident at any time in the future would allow him to structure dividend payments in respect of the then current retained earnings of approximately $370,212,390 so as they would not become taxable, saving him $90 million. He confirms that such savings was a strong reason he decided as the sole beneficial shareholder of the group to restructure in June 2018 in Singapore.[677]

579. Evidence confirming [redacted] position is set out in a letter from [redacted] to Mr Palmer which inter alia states:[678]

> "*The position in respect of the difference between Mr Palmer being a resident of Singapore compared to Australia is best summarized using the example as follows. If Mr Palmer elected to have a franked dividend of $370 million paid by way of a credit to his bank account in a tax free jurisdiction such as Monaco while he was an Australian resident he would be required under Australian tax law to pay an additional $90 million in Australian tax. If Mr Palmer was a resident solely of Singapore at the time such dividend payments were made to Monaco he would not be required to pay any tax in Singapore (or Australia). This is because in Singapore such dividends are only taxed in Singapore if the dividends are actually paid into a Singapore bank account.*"[679]

580. The [redacted] Report by [redacted] at paragraph 6.2 confirms the amounts of retained earnings available to be paid out by way of dividend up to June 2019 as follows:

> "*For the years ended 30 June 2019, I have calculated retained profits at $35.55 million).*"

677 [redacted] WS at para 62.
678 Letter from [redacted], 4 March 2024 (**Exh. C-495**).
679 Letter from [redacted] 4 March 2024 (**Exh. C-495**).

581. The [redacted] Report by [redacted] at paragraph 6.3 confirms the amounts of retained earnings available to be paid out by way of dividend up to June 2020 as follows:

> "*For the years ended 30 June 2020, I have calculated retained profits at $207.17 million).*"

582. These figures are further supported by the audited accounts of Mineralogy for the year ending 30 June 2019 and the year ending 30 June 2020[680]. The timing when a dividend would be paid out was in Mr Palmer's decision making hands in 2019 and 2020 as the sole director of Mineralogy.[681] The retained earnings as at 30 June 2019 and 30 June 2020 could be declared at any time in the future and if Mr Palmer was then a resident of Singapore, then at that time he would not be subject to any tax in Australia or Singapore if the funds were actually paid to an account located in a tax free jurisdiction.[682]

583. A tax saving of $90 million or more was a strong commercial reason for the decision to restructure when it was made in June 2018 by Mr Palmer.[683]

584. For Mr Palmer to obtain $90 million tax saving by being a resident of Singapore, he would at the appropriate time have to obtain Singapore permanent residency.

585. It was clear to Mr Palmer in early June 2018 that Mineralogy's results for the year ended 30 June 2018 when added to previous retained profits would be in the vicinity of $370,000,000. No tax would be required to be paid on any of the retained earnings until such time as they were distributed by way of dividend. Considering the amount of Mr Palmer's tax rate at around 47%, it was important to Mr Palmer that he considered how he would obtain residency in the future in Singapore.

680Financial Report of Mineralogy Pty Ltd for the financial year ended 30 June 2019, (**Exh. C-476**); Financial Report of Mineralogy Pty Ltd for the financial year ended 30 June 2020, (**Exh. C-477**); [redacted] WS paras 43, 44 and 122(e).

681 ASIC Current and Historical Company Extract for Mineralogy Pty Ltd dated 14 February 2024, (**Exh. C-479**).

682 [redacted] WS para 61.

683 [redacted] WS para 62.

586. Mr Palmer understood in early June 2018 that he could only be sure of obtaining residency in Singapore in the future if he or one of his Companies had a substantive investment in Singapore or a Singapore corporation and/or that he could be a director or employee of such a company before a dividend was declared and that if that dividend was paid into a tax free jurisdiction such as Monaco, such payments would be tax free.

587. The two Singapore programmes that he could have used to obtain permanent residency in Singapore so as to be relieved of the requirement to pay AU $90,000,000 tax in the future in Australia, which matters were confirmed by [redacted], as follows[684]:

Singapore PR Scheme for Individuals Working in Singapore

588. The Professionals/Technical Personnel & Skilled Worker scheme (or simply "PTS scheme") is for foreign professionals who are working in Singapore at the time of applying for permanent residence. The PTS scheme is the easiest and most assured route to attaining PR in Singapore.

589. The key requirement is that the applicant must be working in Singapore at the time of application. This means the foreign professional must first relocate to Singapore on a work visa of the type known as Employment Pass or Entrepreneur Pass, Personalised Employment Pass or S Pass.

Singapore PR Scheme for Investors

590. Mr Palmer could also apply for Singapore permanent residence through an investment scheme known as the Global Investor Programme ("**GIP scheme**"). As stated in the [redacted] WS at paragraph 63(b)(i), under this scheme, he could apply for Permanent Residence for himself and his immediate family members by starting

684 Letter [redacted] to Zeph Investments, RE: Singapore PR Schemes, (June 2018, January 2019) dated 8 March 2024, (**Exh. C-496**).

a business with a minimum investment of SG $2.5 million, or investing a similar sum in an established business in Singapore.

591. In 2018 under the GIP scheme, an investor could choose from two investment options:

    a. Option A: Invest at least SG $2.5 million in a new business startup or expansion of an existing business operation; or

    b. Option B: Invest at least SG $2.5 million in a GIP-approved fund.

592. Apart from the minimum funds he invested, he also met all criteria and he had a good business track record.

593. Mr Palmer determined in June 2018 that if he implemented a restructure he could incorporate a new company in Singapore. The new company could seek the coal funding and he could be a director of that company as it established new businesses or invested further in Singapore. Subsequently the new Singapore company (the Claimant) appointed Mr Palmer as a director in early 2019 and subsequently established the JV agreement, and JV business, Mr Palmer acquired the Engineering Companies.

594. Mr Palmer determined in the first week of June 2018 that considering the need to obtain funding for the Coal project and the ability to improve his cash flow and the tax advantages of being able to use the new company to obtain residency at a time of his choosing, it was important to proceed with the commercial decision to restructure in Singapore and that the benefits it would provide were overwhelming. Obtaining benefits of AU $90,000,000[685] is obviously a sound commercial reason to undertake on offshoring alone.

O. The Timing of the Restructure

685 Letter from [redacted] to Zeph Investments dated 4 March 2024.

595. Following Mr Palmer's decision to restructure in June 2018 in Singapore, he received additional advice from [redacted] on 4 August 2018 as to the appropriate structure, being a holding company in New Zealand owned by Mr Palmer followed by a Singapore company owned by the New Zealand company and that the Singapore company would then acquire Mineralogy[686]. Notwithstanding, Mr Palmer decided to proceed in November 2018 with establishing two structures, both involving companies being incorporated in Singapore, owned by him directly, and another involving a New Zealand company which he would own and which would be available to be the owner of the Singaporean incorporated company, which would follow [redacted] advice, if he ultimately concluded that that was the best structure[687].

596. Consequently, Mr Palmer gave instructions to two different groups to incorporate companies in Singapore which were wholly owned by him and which could be used by him if required[688]. Mr Palmer's instructions to [redacted] a Singapore based accounting firm were given on or before 30 November 2018 (see **Exh. C-501**)[689] and his instructions to eminent Singapore legal firm [redacted] were given on 30 November 2018 (see **Exh. C-502**)[690]. Subsequent to these instructions, the following two Singapore companies were incorporated by him:

    a. Iron Holdings Pte Ltd (see **Exh. C-503**)[691], and

    b. Empowerment Investments Asia Pte Ltd (see **Exh. C-504**)[692].

686 [redacted] WS, paras 132 and 133; [redacted] WS at para 110; [redacted] WS at paras 32 to 34.
687 [redacted] WS, para 135; [redacted] WS at para 110.
688 [redacted] WS at paras 111.
689 Email from [redacted] to [redacted] dated 30 November 2018 with the subject heading 'Incorporation of SG Company', (**Exh. C-501**); [redacted] WS at para 111.
690 Emails between [redacted] and [redacted] LLP) dated 30 November 2018 with the subject heading 'Establishing a new company in Singapore', (**Exh. C-502**); [redacted] WS at para 111.
691 Iron Holdings ACRA Business Profile, (**Exh. C-503**); [redacted] WS at para 111(a).
692 Empowerment Investments Asia Pte Ltd, ACRA Business Profile, (**Exh. C-504**); [redacted] WS at paras 111(b).

597. Each of Iron Holdings Pte Ltd and Empowerment Investments Asia Pte Ltd was set up and owned directly by Mr Palmer (see **Exh. C-503** and **Exh. C-504**)[693].

598. It was then planned that one of Iron Holdings Pte Ltd or Empowerment Investments Asia Pte Ltd would be used for implementation of the restructure. However, following [redacted] advice[694], it was decided to incorporate a company in New Zealand and with the assistance of eminent New Zealand law firm [redacted], on 14 December 2018, Mineralogy International Ltd (**MIL**) was incorporated in New Zealand (see **Exh. C-98**).

599. The current shareholders of MIL are River Crescent Pty Ltd, Closeridge Pty Ltd and Mr Palmer (see **Exh. C-506**)[695].

600. Pursuant to the advice received from [redacted][696], MIL had to be first incorporated before it could become the holding company of the Claimant.

601. Following incorporation of Iron Holdings Pte Ltd, Empowerment Investments Asia Pte Ltd and Mineralogy International Ltd, Mr Palmer took his annual holidays and returned on or about 14 January 2019 and he noted that the lawyers he was dealing with in Singapore were also taking their end of year break[697]. Mr Palmer did not perceive any urgency in the incorporation or the restructure, at that time[698]. In any event, before any financing could begin, Mineralogy was awaiting the outcome of very significant proceedings in the High Court of Australia. As a result of the end of year holiday period, the Claimant was incorporated on 21 January 2019[699] as a wholly owned subsidiary of the New Zealand company (Mineralogy International Ltd).

693 Iron Holdings Pte Ltd, ACRA Business Profile, (**Exh. C-503**)**;** Empowerment Investments Asia Pte Ltd, ACRA Business Profile, (**Exh. C-504**).
694 [redacted] WS, paras 27, 32 and 36.
695 Company Extract for Mineralogy International Limited, dated 19 February 2024, (**Exh. C-506**).
696 [redacted] WS, paras 27, 32 and 36.
697 [redacted] WS at para 115.
698 [redacted] WS at para 115.
699 ACRA Certificate of Incorporation, 21 January 2019, (**Exh. C-70**).

602. Around 14 January 2019, Mr Palmer conferred with [redacted] as to the benefits of the tax structure and [redacted] advised Mr Palmer to subsequently effect the restructure to obtain those objectives. The tax objectives of the restructure have subsequently been confirmed by international tax and accounting practitioners BDO[700]. As the New Zealand company (MIL) had been incorporated on 14 December 2018, it was able to become the shareholder of a Singapore incorporated company as envisioned in the [redacted] structure, and that structure was subsequently implemented, with the Claimant (Zeph Investments Pte Ltd, originally named Mineralogy International Pte Ltd) being incorporated on 21 January 2019 (see **Exh. C-70**) with the New Zealand company (MIL) as its shareholder[701].

603. Subsequently, the Claimant acquired Mineralogy[702].

604. [redacted] states that the other Singapore registered companies, Iron Holdings Pte Ltd and Empowerment Investments Asia Pte Ltd were not ultimately utilised in the restructuring and the restructure was carried out in accordance with [redacted]s advice[703].

P. The Decision to Incorporate in Singapore and Impact of the Arbitrations

Introduction

605. This part addresses alleged the impact of the arbitrations on the decision to incorporate in Singapore and steps to be taken in Singapore. The facts mentioned below are relevant to a range of the jurisdictional issues – but are particularly

700 Letter from [redacted], 4 March 2024 (**Exh. C-495**)
701 ACRA of Singapore Certificate of Incorporation of the Claimant, 21 January 2019, (**Exh. C-70**); [redacted] WS at para's 116.
702 Share transfer form between Mineralogy International Limited as Seller and Mineralogy International Pte. Ltd as Buyer, dated 29 January 2019, NoI, Annexure A, Exhibit 21, (**Exh. C-63**), p 181.
703 [redacted] WS at para 118.

important in the context of the Respondent's wholly unjustified, ill-founded and improper abuse of process arguments.

606. As set out in [redacted] Witness Statement[704] and as explained below, the decision to restructure was taken on a bona fide basis and was taken at a time when the measures imposed by the *Amendment Act* were entirely unforeseeable.

607. The background to the decision to incorporate in Singapore is set out above. This part addresses the timing of steps taken.

Timing of the Steps Taken in Singapore

608. [redacted] explains[705] that he made the decision to restructure in June 2018 having discussed matters with [redacted]. [redacted] further explains that, all else being equal, he would have proceeded immediately with the fund raising following the restructure in February 2019.[706]

609. Following the restructure in February 2019, the Chinese Government-owned companies (CITIC) had lodged an application for special leave in the High Court of Australia appeals against the Royalty Judgment.[707] This application was to seek leave to appeal judgements of the Western Australian Supreme Court and the Western Australian Court of Appeal.[708] Once the Royalty Judgement was certain and no longer subject to appeals the very substantial revenue of over $400 million dollars a year could be used as security in any proposed fundraising.[709] So as to provide the best chance of a successful fund raising , no applications or appointments could sensibly be undertaken with any arrangers or Singapore banks until the appeals were

704 [redacted] WS at paras 113 - 139.
705 [redacted] WS at para 135.
706 [redacted] WS at para 51.
707 Application for Special Leave to Appeal against judgment in *Sino Iron v Mineralogy* [2019] WASCA 80 dated 26 July 2019, (**Exh. C-549**).
708 WASC Judgment: *Mineralogy Pty Ltd v Sino Iron Pty Ltd & Ors (No 16)* [2017] WASC 340, (**Exh CLA-5**); Court of Appeal Judgment: *Sino Iron Pty Ltd & Ors v Mineralogy Pty Ltd* [2019] WASCA 80, (**Exh. CLA-6**).
709 [redacted] WS at paras 118, 120 – 121, 131 and 137.

resolved.[710] It was determined that the prudent course was to await the outcome of the appeal process.[711]

610. In February 2020, the High Court of Australia finally refused special leave to the Chinese State-owned companies to further appeal against the Royalty Judgment.[712] The Chinese State-owned companies had previously been unsuccessful in their appeal to the Western Australian Court of Appeal.[713] The Claimant then considered if it was the right time for the Claimant to pursue a fund raising but, before the Claimant made a decision, the Claimant wanted to consider the High Court Judgment and understand how long it would be before Mineralogy and International Minerals had an award under the State Agreement Arbitration (defined in the Notice of Intent)[714]. The Claimants assessment in April 2020 was that the State Agreement Arbitration should be heard before the end of 2020 and an award made soon after.[715]

611. [redacted] advised the Claimant in or around April 2020 that the Claimant should not appoint a Singapore arranger or advisor until after an award was made in the State Agreement Arbitration, because the damages that would be awarded to Mineralogy in the State Agreement Arbitration were likely to be in the tens of billions of dollars and the Claimant's subsidiary Mineralogy may then be able to fund coal projects internally or, at the very least, would be in a better position to approach banks.[716]

612. On 26 June 2020, Mr McHugh gave procedural directions that a hearing in the State Agreement Arbitration would commence on 30 November 2020 for 15 business days

710 [redacted] WS at paras 118, 120 – 121, 131 and 137.
711 [redacted] WS at paras 118, 120 – 121, 131 and 137.
712 [redacted] WS at para 137; *Sino Iron Pty Ltd & Ors v Mineralogy Pty Ltd* [2020] HCA Trans 10, (**Exh. CLA-7**).
713 [redacted] WS at para 137; Court of Appeal Judgment: *Sino Iron Pty Ltd & Ors v Mineralogy Pty Ltd* [2019] WASCA 80, (**Exh. CLA-6**).
714 [redacted] WS at para 137.
715 [redacted] WS at para 137.
716 [redacted] WS at para 138.

and that he would deliver his award in the State Agreement Arbitration on or before 12 February 2021.[717]

613. Mr Palmer signed the State Agreement Arbitration Agreement on behalf of Mineralogy and International Minerals (as a director of both companies) on or about 6 July 2020.[718] The State of Western Australia and Mr McHugh signed the Arbitration Agreement on 8 July 2020.[719] At the time the Claimant's Subsidiaries signed the Arbitration Agreement, the Claimant expected the arbitration would proceed as agreed and that Mr McHugh would deliver his award before February 2021. Mineralogy and International Minerals were participating in the arbitration in good faith and had no reason to believe that Western Australia would not do the same. Indeed, the Claimant knew that the state was required to act as a "model litigant" and therefore expected Western Australia's conduct in the arbitration to comply with this obligation.

614. The State Agreement Arbitration was still proceeding as at 11 August 2020 and until 5pm on this date, the Claimant believed at that time that the State Agreement Arbitration would proceed to an award in the normal course.

615. Also, by 11 August 2020, a mediation of the matters which were the subject of the State Agreement Arbitration had been arranged. On or about 5 August 2020, the State of Western Australia executed a counterpart of the Mediation Agreement between itself, Mineralogy, International Minerals and a former Chief Justice of Western Australia, the Hon. Wayne Martin AC KC as mediator.[720]

616. Mr Palmer signed the Mediation Agreement on behalf of Mineralogy and International Minerals (as a director of both companies) on or about 6 August 2020. At the time he signed the Mediation Agreement, the Claimant's Subsidiaries and the

717 Annexure D to the Notice of Intent, (**Exh. C-63**).
718 [redacted] WS at para 255.
719 Annexure D to the Notice of Intent, at pp 481 – 499, (**Exh. C-63**).
720 Annexure D1 to the Notice of Intent, at pp. 501 – 514, (**Exh. C-63**).

Claimant itself expected the mediation to proceed as agreed and for Western Australia to participate in that mediation.

617. By reason of the enactment only a week later of the *Amendment Act* no mediation was able to be held.

618. That was important because, as [redacted] had explained and advised[721], it was sensible to wait to see what damages would be awarded to Mineralogy in the State Agreement Arbitration as those sums could then be used "*to fund WC coal projects internally or, at the very least, would [place the company] in a better position to approach Singapore banks*".[722]

619. It is also important to take account of the procedural chronology of the State Agreement Arbitration. [redacted] addresses this in both the [redacted] WS at paragraphs 253-261 and the [redacted] WS. The key events were as follows:

    a. On 18 December 2019, the State of Western Australia, on behalf of the parties (including Mineralogy and International Minerals), sent a minute of consent orders to the arbitrator.[723] On 20 December 2019, the arbitrator issued the consent orders commencing the arbitration under the State Agreement.[724]

    b. In the period up to May 2020 the parties commented on and ultimately agreed to the terms of the Arbitration Agreement.[725]

    c. On 26 June 2020 Mr McHugh gave procedural directions that a 15-day hearing in the State Agreement Arbitration would commence on 30 November 2020 and he would aim to deliver his award on or before 12 February 2021.[726]

721 [redacted] WS at paragraph 138.
722 [redacted] WS at paragraph 138.
723 Email from the Respondent's WA to Mr McHugh and its enclosure (agreed procedural directions, 18 December 2019, (**Exh. C-299**).
724 Directions made 20 December 2019 , in Domestic Arbitration, (**Exh. C-171**).
725 [redacted] WS at para 12.
726 Annexure D to the Notice of Intent, (**Exh. C-63**).

d. Mr Palmer signed the State Agreement Arbitration Agreement on behalf of Mineralogy and International Minerals on 6 July 2020. Western Australia also signed in July.[727]

e. By 11 August 2020 the parties to the State Agreement Arbitration had arranged a mediation – with Western Australia executing the mediation agreement on 5 August 2020, with Hon Wayne Martin AC KC as mediator. Mr Palmer signed the Mediation Agreement on 6 August 2020.[728] The Claimant at all times expected that the Respondent State of Western Australia would act in good faith as a model litigant. As the passing of the *Amendment Act* the Claimant was duped by the conduct of the Respondent which was dishonest conduct in bad faith in entering into the Mediation Agreement so as to mislead the Claimant and to provide the Claimant with a false sense of security.

f. Mr Palmer became aware for the first time of the proposed legislation, that would become the 2020 *Amendment Act*, on 11 August 2020.[729]

620. As explained elsewhere herein, the chronology set out above means that the Respondent's contentions about abuse of process are not only misconceived and without foundation but also means that the Respondent should never have sought to advance those arguments in the light of WA's conduct in secretly preparing and subsequently promulgating the *Amendment Act*:

a. The Respondent took part in the State Agreement Arbitration and/or signed the Mediation Agreement in bad faith – knowing that it was intending at the same time to legislate in a manner wholly inconsistent with (i) its obligations as a party to the arbitration and/or Mediation Agreement and/or (ii) the representation that it would mediate in good faith.

727 [redacted] WS at para 255; Arbitration Agreement executed by Min and IM on 6 July 2020 (**Exh. C-239**); Arbitration Agreement executed by the State of WA on 8 July 2020 (**Exh. C-241**); Arbitration Agreements counter-executed by the Arbitrator and delivered to the parties on 17 July 2020 (**Exh. C-242**)
728 [redacted] WS at para 258.
729 [redacted] WS at paragraph 262.

b. It cannot possibly be said now that it was foreseeable that a party to an arbitration or mediation agreement of that nature would take such unprecedented steps after signing those agreements with the Claimant's subsidiaries and two distinguished retired judges.

c. By contrast, the steps being taken in relation to the Claimant and its business in Singapore were bona fide, rational and proper – especially in light of the chronology set out above, the commercial issues in play and the tax implications.

Q. Status of the Respondent's Expert Evidence

621. The Claimant notes that the Respondent has sought to rely on expert evidence on this issue and makes the following points about that:

a. *First*, the Claimant respectfully submits that this is a factual matter. The Claimant has adduced factual and documentary evidence to explain the timing motivation, commercial rationale and bona fide basis for the incorporation of the Claimant in Singapore[730];

b. *Second*, with respect, the Respondent has not adduced evidence from an individual with experience of mining deals in Singapore (and certainly not of the magnitude and scale of those carried out historically by Mr Palmer and/or contemplated as at 2018). The Claimant therefore relies on [redacted] evidence and will invite the Tribunal to treat Professor Lys' evidence[731] as irrelevant and/or to accord it no weight;

c. *Third*, insofar as [redacted] evidence is concerned, it has been his experience that large scale financings of this nature are normally negotiated by individuals familiar with each other and with a history of working on deals of this

730 [redacted] WS, paras 114 to 139; [redacted] WS, paras 15 to 37; [redacted] WS, paras 8 to 12; [redacted] WS at paras 48 to 72.
731 Lys Report dated 20 January 2024.

magnitude[732]. Mr Palmer was conscious of this prior to the decision to incorporate in Singapore. In order for the venture to be a success, Mr Palmer was aware meetings could be held socially in Singapore with some of the key players who are regularly involved in large financings and often work as a network[733]. The Respondent's experts take no account of this commercial reality in their academic opinion evidence[734];

d. *Fourth*, in making this submission the Claimant will refer to Mr Palmer's experience – including the award of 20 June 2012 from the Australian publication 'Government Magazine' for 'Entrepreneur of the Decade'[735] and his objective success (leading to his status as an ultra-high net worth individual[736]); and

e. *Finally*, and whilst this will be a matter for submissions in due course, it is noted that the Respondent's expert in New Zealand, Mr Daniel Kalderimis, provided an opinion report.[737] The Tribunal is directed to paragraph 2 of the Kalderimis Report wherein he states "as a practising commercial dispute resolution lawyer, I am not a regulatory specialist"[738]. He also states that he is "not a corporate lawyer"[739]. Accordingly, with the greatest respect to Mr Kalderimis as a highly experienced and well-respected dispute resolution lawyer, no weight should be given to his statement and, given Mr Kalderimis' self-confessed lack of expertise in the area he purports to opine on, it should be treated as inadmissible and/or accorded no weight.

732 [redacted] WS, para. 59.
733 [redacted] WS, para 59.
734 [redacted] WS, paras 58 and 59.
735 Award, "Entrepreneur of the Decade" to Mr Clive F Palmer, (**Exh. C-65**).
736 Australian Financial Reviews 2023 Rich List, (**Exh. C-481**).
737 Kalderimis Report.
738 Kalderimis Report, para 2.
739 Kalderimis Report, para 14.

Additional Response to the Respondent's Allegation that the Claimant's Claim is an Abuse of Process

A. Status of the Respondent's Expert Evidence

Synopsis

622. **In addition to the matters set out in Sections I and II in this Response, the Claimant's invocation inter alia of Article 20 of Chapter 11 of AANZFTA is within the scope of the Tribunal's jurisdiction, and the Claimant's claim is not an abuse of process.**

623. The Claimant's claim to the benefits of the AANZFTA does not amount to an abuse of process because:

a. The passage of the *Amendment Act* and the consequent termination of the State Agreement Arbitration (including the Arbitration Agreement and Mediation Agreement) by Western Australia was not foreseen, and could not possibly have been foreseen, by the Claimant at the time of the restructure; and

b. The existence of a real commercial rationale for the Claimant to exist in the ownership chain of the investment (the Australian Companies) reinforces the absence of abusive conduct in the bringing of the claims.

624. The dispute is, *inter alia*, about a series of profound wrongs brought about by measures imposed by the *Amendment Act* on 13 August 2020 (including an expropriation of the Claimant's investment without any compensation, a denial of justice, and a range of other shocking and draconian measures which trampled on the Claimant's rights and the rule of law) and the consequent breach of the Arbitration Agreement, and the dispute is not about damages for breach of the State Agreement. The Claimant relies, *inter alia*, on the Witness Statements of [redacted][740],

740 [redacted] WS.

[redacted][741], [redacted][742] and the NOA in responding to the Respondent's Objections.

B. The Claimant's Claim does not Constitute an Abuse of Process

Response to the Respondent's Points – Distinct Disputes

625. The dispute that this Tribunal has been asked to determine (FTA Claim) is entirely distinct from the State Agreement Arbitration before Mr McHugh. These disputes are based on two entirely separate events/breaches: the State Agreement dispute was based on a breach of the State Agreement, while the dispute the subject of this Arbitration ("**FTA Claim**") is based on the *Amendment Act*. The State Agreement dispute is, at its core, a breach of contract dispute historically remediable by domestic arbitration, while the FTA Claim concerns fundamental breaches of international law through measures imposed by legislation, including but not limited to an expropriation, denial of justice and discrimination.

626. When looked at in this way, it is clear that the dispute for Mr McHugh in the State Agreement Arbitration is entirely separate from the dispute brought before this Tribunal and that the Claimant cannot possibly have anticipated the Respondent's breaches, including unlawful expropriation of investments and a total denial of justice by means of the passage of the *Amendment Act*, at the time of the Claimant's investment in January 2019.

627. Of course, the domestic dispute at issue in the State Agreement Arbitration arose in 2012 prior to the restructure in which the Claimant became the direct owner of Mineralogy. However, there is no doubt that the restructure (January 2019) occurred well before there was any possibility that the Claimant or its subsidiaries knew or could have known about the preparation, promulgation or enactment of the

741 [redacted] WS, [redacted] WS and [redacted] WS.
742 [redacted] WS.

Amendment Act. In January 2019, the Respondent was complying with its obligations to arbitrate the State Agreement Dispute under the State Agreement and participating in the hearing which resulted in the Second Award on 11 October 2019 which was still circa seven months away at the time of the incorporation of the Claimant. The Arbitration Agreement was circa 19 months in the future, and the commencement of drafting of the Act was circa 17 months away (June 2020). Given the secrecy in which the Act was developed, and its extraordinary nature, coupled with Western Australia's (ostensible) active ongoing agreement to arbitration under the Arbitration Agreement and Mediation Agreement in July and August 2020, the first that the Claimant could have known, or could have conceived of the *Amendment Act*, was on 11 August 2020 when it was introduced to the Western Australian Parliament.

628. The Western Australian Government quite deliberately gave no advanced warning of its intention to pass the *Amendment Act*.[743] This distinguishes the present case from many other abuses of right cases.[744] Consequently, the FTA Claim could not have been foreseen in any sense until the *Amendment Act* was introduced to the Western Australian Parliament in August 2020, some 20 months after the restructuring. The extent to which the *Amendment Act* was wholly unforeseeable is further highlighted by the fact that the Western Australian Government had been complying the with State Agreement Arbitration procedure for a number of years (to all outward appearances) and right up until the time the *Amendment Act* was introduced in the Parliament. The Government had participated in the second State Agreement Arbitration, received the Second Award, and challenged that Award in the Western Australian Supreme Court. After the challenge failed, and arbitration was commenced under the Arbitration Agreement, at no time did the Claimant conceive that the Respondent would legislate the Award out of existence and remove all liability for its own clear breaches of the State Agreement. It is not an understatement to say that legislation in the nature of the *Amendment Act* is totally unprecedented

743 See the table in paragraph 547 below, and in particular items 6, 16, 26, 27 and 28.
744 *Philip Morris Asia Limited v. The Commonwealth of Australia,* PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, (**Exh. RLA-95**).

in a Western democracy and to say that the Claimant was anticipating the Act for over 18 months (i.e., since January 2019) is fanciful. The Respondent's conduct was in bad faith and contrary to its requirement to act as a model litigant and as a consequence it should not be making any objection in relation to abuse of process.

629. This is especially so given that, following the Supreme Court's decision to uphold the Second Award, Western Australia signed the Arbitration Agreement in July 2020 (and the Mediation Agreement in August 2020). All indications at the time were that Western Australia would continue to participate in the arbitration under the Arbitration Agreement and would comply with any award made under the Arbitration Agreement. Put another way, a removal by legislation of Mineralogy's rights under the Arbitration Agreement (which had been entered into only into a month earlier) was not foreseeable at any time prior to the time of the *Amendment Act*, let alone in January 2019.

630. The State Agreement by its terms may be varied by the consent of the parties to it. In the period of over 60 years since State Agreements had been introduced, the Respondent's State of Western Australia had never changed a State Agreement other than by consent.

631. Indeed, in 1996, Colin Barnett, later Premier of Western Australia, wrote a significant article.

632. That article, entitled "State Agreements",[745] referred to the following:

    a. Since 1952, the State *"has facilitated development of major resource projects"* through the use of State Agreements.[746]

745 The Hon. Colin Barnett, *State Agreements*, AMPLA Yearbook 1996, pp. 314-327, (**Exh. C-104**).
746 Ibid., pp. 315-316.

b. *"Given the logistics of such projects, the State … sought to establish a legal framework under State Agreements in which major resource development was recognised, encouraged, assisted and promoted"*.[747]

c. *"An important feature of State Agreements is that they, unlike all other statutes of the Parliament of Western Australia, are facilitating documents. Other statutes perform regulatory functions of one sort or another …. Whereas other statutes are able to be changed at will,* ***the provisions of State Agreements are only able to be changed by mutual agreement in writing between the parties to each State Agreement****. State Agreements therefore* ***provide certainty that ground rules for the life of each agreement project cannot be changed unilaterally****"*.[748] [Emphasis added]

d. *"Although State Agreement provisions are not capable of being changed unilaterally, State Agreements do not fetter the power of Parliament to repeal the ratifying Acts. It is testimony to the importance of State Agreements that* ***no Parliament has even attempted such unilateral repeal action****"*.[749] [Emphasis added]

e. In relation to 'inviolability": *"Unlike other statutes of Western Australia that can be changed by Parliament,* ***State Agreement provisions can only be amended by mutual agreement by the parties thereto****"*.[750] [Emphasis added]

f. *"State Agreement Acts demonstrate government support for a particular project with rights, and obligations of each party being negotiated,* ***mutually agreed*** *and clearly defined"*.[751] [Emphasis added]

633. While bluster and bluffing are part of everyday commercial negotiation and political theatre, no person could have foreseen measures remotely resembling those imposed by the *Amendment Act*, or measures with anything like that nature or effect,

747 Ibid.
748 Ibid., p. 317.
749 Ibid.
750 Ibid.
751 Ibid.

involving, *inter alia*, unilateral repudiation of the Claimant's rights by an extraordinary and unprecedented Act of Parliament being enacted in breach of the rule of law by a Western Democracy. The Respondent has not produced any evidence that any changes to the State Agreement were ever requested or proposed to be made by consent to the Claimant. It can only be concluded that the Respondent's State of Western Australia has acted in bad faith.

634. The Claimant is on the right side of the timing criterion – i.e. the dispute which is the subject of this arbitral proceeding was not in any way foreseeable at the time it was decided to carry out the restructure in June 2018 as the evidence confirms. Any objective analysis of the facts of this case demonstrates that the FTA Claim could not have been foreseen at the time of the restructure and that there was a genuine commercial rationale and motivation for the restructure.[752] On any objective analysis, the dispute at the heart of the FTA Claim cannot have been foreseeable and the abuse of right objection must fail.

752 *Mobil Corporation et al. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010 (**Exh. RLA-92**).

The Law

Legal Response to the Respondent's Points

Introduction

635. The Respondent's final preliminary objection is that the Claimant's invocation of Article 20 of Chapter 11 of the AANZFTA is outside of the Tribunal's jurisdiction, and/or that the Claimant's claim should be declared inadmissible, because it is an abuse of process.

636. There is no merit whatsoever in this objection and, if anything, the Respondent's advancing of this ground of objection should itself be treated as an abuse of process for the reasons set out below.

The Respondent's Position

637. The Respondent alleges that it is well established that it is an abuse of process for an investor – having restructured its investment to fall within the scope of protection of an investment treaty – to file a claim in relation to a dispute that was already existing, or foreseeable, as at the time of that restructuring.[753]

The Claimant's Position

638. For all the reasons set out in the preceding sections of this Response and more below, the Respondent's final preliminary objection is unsustainable and must be rejected.

639. Indeed, the Claimant's primary stance is that – insofar as the Tribunal concludes that the conditions for the Respondent's denial of benefits have not been met, on the basis that the Claimant does have "*substantive business operations*" in Singapore, and thus dismisses Respondent's third preliminary objection – it is not, in those

753 SoPo, [265].

circumstances, properly open to the Respondent to argue, or the Tribunal to hold, that the Claimant's claim is nevertheless an abuse of process.

640. As detailed further below, one prerequisite for a finding of abuse of process is that the sole, or alternatively principal, objective of the relevant restructuring was to gain access to the protections of an investment treaty.

641. As has been recognised in the relevant previous arbitral decisions mentioned in this Response – and as the Respondent itself acknowledges in its Objections[754] – it would necessarily be implicit in any such conclusion as to abuse of process that it was not the objective of that restructuring to perform any economic activity in the State in question, and that the investor had no real intention of doing so.

642. However, the carrying out of "*substantive business operations*" in that State – particularly in the form of maintaining a physical office, employing employees, holding bank accounts – is plainly irreconcilable with any finding that the purpose of the relevant restructuring was not to engage in any economic activity in Singapore, or that the investor had no real intention of doing so.

643. In the event, then, that the Tribunal concludes (as it is respectfully submitted it should) that the Claimant has (at all material times) had such "*substantive business operations*" in Singapore, for the purposes of the Respondent's denial of benefits objection, it cannot realistically be maintained that the purpose of the incorporation of the Claimant (and its acquisition of shares) was not to perform any economic activity in Singapore, or that it had no real intention of doing so.

644. The remainder of the Claimant's Response to the Respondent's abuse of process objection is as detailed below.

645. The Claimant's response to this final preliminary objection is set out in the preceding sections of this Response, and in summary includes but is not limited to the following:

754 SoPo, [279 and 281(c)] (citing the tribunal in *Cascade Investments NV v. Turkey*, ICSID Case No. ARB/18/4, Award, 20 September 2021, (**Exh. RLA-98**)).

a. The decision to restructure was first taken back in June 2018, having been under consideration for many years previously;[755]

b. The Claimant was then incorporated in Singapore on 21 January 2019, and acquired its shares in Mineralogy, on 29 January 2019;[756]

c. That decision was taken on a bona fide commercial basis, as the Claimant's factual evidence establishes. The Respondent's challenge to the bona fide evidence adduced by the Claimant requires it to advance a case of bad faith against several individuals. That case is improper considering the evidence and should be withdrawn forthwith. It is also a particularly startling stance for the Respondent to adopt given the conduct of the individuals involved in the secret preparation and hasty enactment of the *Amendment Act*;

d. That submission is supported by the fact that there can be no question of any abuse of process when the enactment of the *Amendment Act* which is the measure triggering the Dispute did not occur until 13 August 2020:

    i. The dispute in this Arbitration concerns – as the Respondent itself implicitly concedes[757] – the introduction of a "*unilateral legislative measure*", i.e., the *Amendment Act* and not some broader dispute. The *Amendment Act* (in summary) served at that specific point in time to create a series of extraordinary and unprecedented outcomes which*, inter alia*, included:

        1. Terminating the Arbitration Agreement and the Third State Agreement Arbitration which was previously being undertaken pursuant to its terms.

755 [redacted] WS [114]-[129]; [redacted] WS at paras 49, 50 and 69.
756 Share Purchase Agreement, dated 29 January 2019, NoI, Annexure A, Exhibit 20, (**Exh. C-63**), p 168-180; Share transfer form between Mineralogy International Limited as Seller and Mineralogy International Pte. Ltd as Buyer, dated 29 January 2019, NoI, Annexure A, Exhibit 21, (**Exh. C-63**) p 181.
757 SoPo, [300].

2. Extinguishing Western Australia's liability, as established in the First Award and the Second Award.

3. Requiring the Claimant's Subsidiaries (and/or third parties including Mr Palmer and his family) to indemnify Western Australia and/or the Respondent for any loss, liability, or expenditure incurred as a result of proceedings commenced in respect of the First State Agreement Arbitration, Second State Agreement Arbitration, and the Third State Agreement Arbitration conducted pursuant to the Arbitration Agreement.

4. Prohibiting International Arbitration or Court proceedings.

5. Denying natural justice.

6. Exempting politicians and public servants from the operation of the criminal law.

ii. The *Amendment Act*, however, was not introduced until 11 August 2020, i.e., long after the decision to restructure was taken and some 20 months after the Claimant's incorporation in Singapore. Further:

1. The Claimant had no prior notice of the *Amendment Act* and no means of foreseeing it even as a possibility;

2. Indeed, the Claimant's Subsidiaries (including Mineralogy) and Western Australia had entered into the Arbitration Agreement on 8 July 2020 and then on 5 August 2020 entered into the Mediation Agreement in respect of the Arbitration then being carried on under the Arbitration Agreement. Thus, whilst the *Amendment Act* was being drafted in secret (as referred in earlier parts of this Response) by the Government of Western Australia – a fact that is conspicuously absent from the 173 pages and 353 paragraphs of the Respondent's SoPo – the Claimant was busy preparing,

in good faith, for the anticipated mediation pursuant to that Mediation Agreement; and

3. At the time of the Claimant's Subsidiaries' entry into the Arbitration Agreement and the Mediation Agreement, there is simply no way that the Claimant could have known or anticipated that those agreements would be abruptly and extraordinarily terminated by way of the *Amendment Act* (or any similar piece of unprecedented legislation). At the time the Claimant's Subsidiaries commencement of the Third State Agreement Arbitration, there is simply no way that the Claimant could have known or anticipated that the Arbitration would be abruptly and extraordinarily terminated by way of the *Amendment Act* (or any similar piece of unprecedented legislation).

e. Although an abuse of process may arise where a claimant makes or restructures its investment in order to gain access to a dispute with a host State that is foreseeable, even though it has not yet crystallised, that is simply not the case here:

    i. When the decision to restructure and incorporate the Claimant in Singapore was taken or implemented, the Second Award had not been made and the State Agreement arbitration leading to the Second Award was still ongoing (and the Arbitration Agreement and the Mediation Agreement had not been negotiated, signed or agreed). As the Second Award had not been made, the Claimant's Subsidiaries did not know if they could even claim any damages in the State Agreement Arbitration. The Arbitration Agreement was between the Claimant's Subsidiaries, the Hon. Michael McHugh AC KC, and the State of Western Australia. Likewise, the Mediation Agreement was between the Claimant's Subsidiaries, the former Chief Justice of Western Australia the Hon. Wayne Martin AC KC and

the State of Western Australia. There was no way the Claimant could have known on the date of incorporation on the 21 January 2019 that each of those independent parties would agree 20 months in the future to enter into agreements with its future subsidiaries, much less that the State of Western Australia would subsequently abruptly destroy those agreements by such extraordinary and unprecedented legislation, which had been planned and prepared in utmost secrecy.

ii. Indeed, at that time, the need for a new arbitration – to determine the damages to which the Claimant's Subsidiaries were entitled as a result of Western Australia's breaches of its obligations under the State Agreement was not even yet apparent; and

iii. Nor could the Claimant have foreseen, back in June 2018 or in January 2019 (before the Claimant had even acquired shares in Mineralogy), that the Claimant's future Subsidiaries were to prevail and receive the Second Award on 11 October 2019 – which, ultimately, they did – and the Claimant could not know or anticipate that Western Australia might seek to neutralise that outcome by having its Parliament enact the *Amendment Act*, which ran completely contrary to the rule of law in a Western democracy;

f. The Respondent's position is entirely misconceived. The present dispute between the Claimant and the Respondent concerns violations of the Claimant's rights under international law as per the AANZFTA and is a discrete matter. The dispute as set out in the Notice of Arbitration is squarely that Western Australia enacted the *Amendment Act* to destroy the Claimant's rights inter alia under the Arbitration Agreement;

g. Additionally, further to the earlier submissions, and insofar as <u>foreseeability</u> is concerned:

i. An abuse of process arises only when a party can foresee a "*specific future dispute*" as a "*very high probability*"[758] or at least as a "reasonable prospect" a mere "*possible controversy*" is not enough. It cannot sensibly be said that, as at June 2018 or January 2019, the Claimant could or should have foreseen the specifics of its current dispute with the Respondent as a "*very high probability*" ; and

ii. Moreover, in *Pac Rim Cayman LLC v. El Salvador*, it was held that it was only when the claimant actually learned of the government's *de facto* ban on mining in El Salvador that the dispute became a high probability; and, similarly, it was found in *Philip Morris v. Australia* that there was only a "*reasonable prospect*" that a specific dispute would arise after the government's announcement of its decision to introduce the relevant legislation.[759] The key date in this instance, then, is that on which the Claimant actually found out about the *Amendment Act*, i.e., 11 August 2020 when the Bill for that Act was introduced (which, again, was long after the January 2019 restructuring); and

h. Detailed and cogent evidence has been produced on the Claimant's behalf – and not only from [redacted], [redacted] and [redacted] but others referred to elsewhere in these submissions – as to why the decision to restructure was taken back in 2018.[760]

646. As set out further below, no such contrary evidence of fact has been produced by the Respondent in the present matter. In the interests of completeness and to assist the Tribunal, however, the Claimant has adduced evidence in the NOA and in this Response, which clearly demonstrates that its decision to restructure back in June 2018 was taken for commercial reasons.

758 *See*, for example, *Pac Rim Cayman LLC v. El Salvador,* (**Exh. RLA-33**), para 2.99.
759 *Philip Morris v. Australia,* (**Exh. RLA-95**), para 586.
760 [redacted] WS at para 48 to 72]**;** [redacted] WS [114]-[139]; [redacted] WS; [redacted] WS.

Standard of Proof

647. As to the standard of proof, the Respondent's Objections contain a single submission, expressed in very general terms, as to the evidential approach that is adopted by arbitral tribunals more widely.[761] The Respondent does not tackle the standard to be applied to its abuse of process objection, in particular.

648. The relevant principles, in this respect, are as follows:

    a. The threshold for finding an abuse of process is high.[762]

    b. It is only in very exceptional circumstances that a tribunal may not exercise a jurisdiction which it otherwise possesses, on the grounds of abuse of process.[763]

    c. There can certainly be no presumption of an abuse of process.[764]

649. Although the above does not mean that a different standard of proof applies, "*more persuasive evidence*" may be required in order for a tribunal to be satisfied that the burden of proof in relation to an alleged abuse of process has been discharged.[765]

650. The Respondent has produced only very limited factual evidence to support its abuse of process objection.

761 SoPo, [23].
762 *See*, for example, *Renée Rose Levy v. Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, (**Exh. RLA-96**) para 186.
763 *See*, for example, *Renée Rose Levy v. Peru*, (**Exh. RLA-96**), para 186; *Alverley Investments Ltd v. Romania* (**Exh. RLA-71**), para 365.
764 *See*, for example, *Certain German Interests in Polish Upper Silesia (Germany v. Poland)* (1926) PCIJ Serie A No. 7 (**Exh. CLA-210**), 30; *Renée Rose Levy v. Peru*, (**Exh. RLA-96**), para 186; *Alverley Investments Ltd v. Romania* (**Exh. RLA-71**, para366.
765 *See*, for example, *Alverley Investments Ltd v. Romania* (**Exh. RLA-71**), para 366 (referring to *Libananco Holdings Co. Ltd v. Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, §125).

651. The task for a tribunal is to look at all the factual evidence and decide whether, on the balance of probabilities, the evidence, and in particular evidence of the facts, is sufficient.

652. It is the Claimant's position that the Respondent has not produced sufficient factual evidence to prove any abuse of process by the Claimant.

653. It should be noted that the test is very sensitive in each case as it was found in *Chevron Corporation & Texaco Petroleum Corporation v The Republic of Ecuador*, the following issues are relevant[766]:

    a. *'in all legal systems, the doctrine*[] *of abuse of rights* [is] *subject to a high threshold' and* '[i]*t is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim*.'

    '[t]*he high threshold also results from the seriousness of a charge of bad faith amounting to abuse of process*.'

654. Likewise, in *The Rompetrol Group NV v Romania*[767]

    a. it was held that the respondent's objection based on abuse of process was 'evidently a proposition of a very far-reaching character,' and that 'so far-reaching a proposition needs to be backed by some positive authority in the Convention itself, in its negotiating history, or in the case-law under it."

655. In, *Philip Morris* it was held that '*the threshold for finding an abusive initiation of an investment claim is high*'.[768]

656. The restructuring in January 2019 was motivated by the matters set out in the section of these submissions that explains the decision to restructure.

766 *Chevron Corporation & Texaco Petroleum Corporation v The Republic of Ecuador*, UNCITRAL/PCA, Interim Award (1 December 2008) para 143, (**Exh. CLA-211**).
767 *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Decision on Jurisdiction and Admissibility (18 April 2008) para 115, (**Exh. CLA-212**).
768 *Philip Morris Asia*, Award, (**Exh. RLA-95**) para 539.

657. Indeed, the restructuring occurred well before the Second Award had even been issued in October 2019 (and prior to WA's seeking leave to appeal to the Supreme Court of Western Australia as a result). The Claimant had no reason to suspect, then, that the process for resolving the State Agreement arbitration was under any threat of State action (by way of the *Amendment Act* or otherwise).

Reasonable Foreseeability

658. As a starting point, a dispute will be foreseeable, in the context of an alleged abuse of process, if it was either actually and subjectively foreseen by the investor[769] or it was objectively foreseeable to the investor.[770]

659. The questions for the Tribunal, therefore, are two-fold: (1) with what degree of probability must the dispute be foreseeable; and (2) precisely what must be foreseeable? Taking each in turn:

660. As to the first question, and although the Respondent presents the answer as straightforward in its summary of the applicable principles,[771] the relevant previous arbitral practice does not sing with one voice on this issue.[772] In *Pac Rim Cayman LLC v. El Salvador*, for instance, the tribunal considered that a dispute must have been foreseeable "*as a very high probability*".[773] The tribunal in *Renee Rose Levy v. Peru* said that *Pac Rim* strikes a fair balance between the need to safeguard an investor's right to invoke a bilateral investment treaty's protection, in the context of a

769 *See*, for example, *Philip Morris v. Australia* (**Exh. RLA-95**), para 587; *Cascade Investments NV v. Turkey* (**Exh. RLA-98**), para 343.
770 *See*, for example, *Philip Morris v. Australia* (**Exh. RLA-95**), para 539; *Alverley Investments Ltd v. Romania* (**Exh. RLA-71**), para 378.
771 i.e., "[a] *dispute will be reasonably foreseeable for this purpose … when there is a reasonable prospect that a measure which may give rise to a treaty claim will materialise*": SoPo, [281(c)] (emphasis added).
772 As the tribunal in *Alverley Investments Ltd v. Romania* observed: *see*, (**Exh. RLA-71**), para 379.
773 *Pac Rim Cayman LLC v. El Salvador* (**Exh. RLA-33**), para 2.99 (emphasis added). *See*, also, *Lao Holdings LV v. Laos* (**Exh. CLA-213**), para 76 (referring to the "*moment when things have started to deteriorate so that a dispute is highly probable*" (emphasis added)).

legitimate corporate restructuring, and the need to deny such protection where conduct is abusive.[774]

661. The tribunals in *Philip Morris v. Australia* and *Alverley Investments Ltd v. Romania* concluded that a dispute is foreseeable when there is a "*reasonable prospect*" that the relevant measure, which may give rise to a treaty claim, will materialise.[775] It is well-established, through these cases, and seemingly common ground[776] that it is not enough for a dispute to be foreseeable as a mere "*possible controversy*".[777]

662. Unsurprisingly, the Respondent advocates for the "*reasonable prospect*" formulation.[778] However, the Claimant submits that the "*very high probability*" test is the correct approach. It agrees with the tribunal in *Renée Rose Levy v. Peru* that it strikes a fair balance between the need to safeguard an investor's right to invoke a bilateral investment treaty's protection, in the context of a legitimate corporate restructuring, and the need to deny such protection where conduct is abusive[779] (especially in view of the high threshold for showing an abuse of process).

663. The difference between these two standards, is not material in the present matter: as at June 2018 or January 2019 the Claimant could not even have foreseen this specific dispute with the Respondent as a "*reasonable prospect*", let alone as a "*very high probability*". In this regard, it is noted that in both *Pac Rim Cayman LLC v. El Salvador* and *Philip Morris v. Australia* – in which the tribunals applied the "*very high probability*" and "*reasonable prospect*" formulations, respectively – the conclusion was similar: it was only after the claimant actually learned of, or the respondent announced, the relevant legislative measure that the requisite degree of foreseeability arose.

774 *Renee Rose Levy v. Peru* (**Exh. RLA-96**), para 185.
775 *Philip Morris v. Australia* (**Exh. RLA-95**), para 554; *Alverley Investments Ltd v. Romania* (**Exh. RLA-71**), para384.
776 *See*, SoPo, [273].
777 *See*, for example, *Pac Rim Cayman LLC v. El Salvador* (**Exh. RLA-33**), para 2.99.
778 *See*, SoPo, [281(c) and 305].
779 *Renée Rose Levy v. Peru* (**Exh. RLA-96**), para 185.

664. Finally, in terms of this first question, the Claimant further acknowledges that – again, as per *Renée Rose Levy v. Peru* – "*the closer the acquisition of the investment is to the act giving rise to the dispute, the higher the degree of foreseeability will normally be*".[780]

665. As to the second question, the relevant jurisprudence is much clearer. Arbitral tribunals have consistently held that it must be a "*specific future dispute*" that is foreseeable (as opposed to a "*vague general controversy*"): *see*, for example, *Pac Rim Cayman LLC v. El Salvador*;[781] *Alapli Elektrik BV v. Turkey*;[782] *Renée Rose Levy v. Peru*;[783] *Philip Morris v. Australia*;[784] *Alverley Investments Ltd v. Romania*.[785] Particularly apt in the present case, is *Tidewater v Venezuela*, where the Tribunal found that the existence of a separate commercial dispute did not mean that the investment treaty dispute at issue was foreseeable. The Tribunal confirmed that the treaty dispute was new and distinct from an ordinary commercial dispute.[786] Also apt (because of the findings of the Swiss Federal Tribunal) is *Clorox v Venezuela*, where the Tribunal held that a speech by the President of Venezuela signalling the State's intention to implement new price control measures on some products was too vague to have made foreseeable the specific price control measure that was eventually implemented. This finding was endorsed by the Swiss Federal Tribunal.[787]

Conclusion: Applicable Principles

666. Drawing the above threads together, the Claimant respectfully invites the Tribunal, in assessing whether its claim constitutes an abuse of process as the Respondent alleges, to apply the following principles:

780 *Renée Rose Levy v. Peru,* (**Exh. RLA-96**), para187.
781 *Pac Rim Cayman LLC v. El Salvador,* (**Exh. RLA-33**, para 2.99.
782 ICSID Case No. ARB/08/13, Excerpts of Award, 16 July 2012, (**Exh. RLA-46**).
783 *Renée Rose Levy v. Peru,* (**Exh. RLA-96**), para 185.
784 *Philip Morris v. Australia,* (**Exh. RLA-95**), para 554.
785 *Alverley Investments Ltd v. Romania,* (**Exh. RLA-71**), para 385.
786 *Tidewater et al. v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5, Decision on Jurisdiction, 8 February 2013, para 191 (**Exh. RLA-93**).
787 *Clorox Spain SL v Venezuela*, Decision of the Swiss Federal Tribunal, 20 May 2022 (**Exh. CLA-182**).

a. It is not an abuse of process to bring an investment claim following a corporate restructuring that was justified independently of the possibility of bringing such a claim;[788]

b. Gaining access to the protections of an investment treaty must have been the principal,[789] if not the sole,[790] purpose of the restructuring, for a specific claim under that treaty to be abusive. In the Claimant's case, its restructuring took place for multiple purposes including but not limited to obtaining funding for its major coal project and millions of advantages in tax restructuring;

c. Where a restructuring is carried out in relation to a pre-existing dispute, it is not appropriate to classify such a situation as an abuse of process at all; rather, in that situation, a tribunal will ordinarily lack jurisdiction *ratione temporis;*[791]

d. In any event, the pre-existing dispute must be the same as the dispute that is the subject of the investment claim, for any such abuse of process argument to arise;[792]

e. As to future disputes, actual and subjective foresight on the investor's part is not required; objective foreseeability is sufficient;

f. A future dispute must have been objectively foreseeable by the investor as a "*very high probability*"[793] or, at least, as a "*reasonable prospect*".[794] It is not

788 *Philip Morris v. Australia* (**Exh. RLA-95**).
789 *Phoenix Action Ltd v. Czech Republic* (**Exh. RLA-91**); *Renée Rose Levy v. Peru*, (**Exh. RLA-96**).
790 *Philip Morris v. Australia* (**Exh. RLA-95**); *Alverley Investments Ltd v. Romania* (**Exh. RLA-71**).
791 *Lao Holdings LV v. Laos* (**Exh. CLA-213**); *Philip Morris v. Australia* (**Exh. RLA-95**); *Alverley Investments Ltd v. Romania* (**Exh. RLA-71**).
792 *Tidewater Inc v. Venezuela* (**Exh. RLA-93**).
793 *Pac Rim Cayman LLC v. El Salvador* (**Exh. RLA-33**); *Lao Holdings LV v. Laos* (**Exh. CLA-213**); *Renée Rose Levy v. Peru* (**Exh. RLA-96**).
794 *Philip Morris v. Australia* (**Exh. RLA-95**); *Alverley Investments Ltd v. Romania* (**Exh. RLA-71**).

enough for a future dispute to be objectively foreseeable as a mere "*possible controversy*";[795]

g. The closer the investment is to the act giving rise to the dispute, the higher the degree of foreseeability will normally be;[796] and

h. It must be a "*specific future dispute*" that is foreseeable (as opposed to a "*vague general controversy*").[797]

C. Abuse of Process: Applying the Principles to the Facts

667. The relevant facts and the Claimant's intention behind the restructuring are set out in the foregoing sections of this Response. This dispute with the Respondent was not in existence, and was not in any way foreseeable, as at the date of the restructuring.

The Date of the Restructuring

668. The decision to restructure in June 2018 and the implementation of the restructuring in January 2019 was not motivated by the protections set out in the AANZFTA. It simply did not occur to anyone associated with the Claimant (or the Claimant's Subsidiaries), at the time of that decision to restructure, that a claim under the AANZFTA might materialise in respect of a dispute that did not even arise until the enactment of the 2020 *Amendment Act* (nearly two years later).

669. Indeed, the restructuring occurred well before the Second Award had even been issued in October 2019 (and prior to Western Australia seeking leave to appeal to the Supreme Court of Western Australia as a result). The Claimant had no reason to suspect, then, that the process for resolving the State Agreement dispute was under any threat of State action (by way of the *Amendment Act* or otherwise). On the contrary, all indications at that time were that Western Australia would continue to

795 *Pac Rim Cayman LLC v. El Salvador* (**Exh. RLA-33**).
796 *Renée Rose Levy v. Peru* (**Exh. RLA-96**).
797 *Pac Rim Cayman LLC v. El Salvador* (**Exh. RLA-33**); *Alapli Elektrik BV v. Turkey* (**Exh. RLA-46**); *Renée Rose Levy v. Peru, (***Exh. RLA-96**) ; *Philip Morris v. Australia* (**Exh. RLA-95**); *Alverley Investments Ltd v. Romania* (**Exh. RLA-71**).

participate in good faith in the process of resolving the State Agreement dispute under domestic law.

Key Additional Factual Points – Foreseeability

670. At the time of the Claimant's subsidiaries' entry into the Arbitration Agreement, on 8 July 2020, there is simply no way that the Claimant could have known or anticipated that the Arbitration Agreement would be signed and then would be abruptly and extraordinarily terminated by way of the *Amendment Act*.

671. On or around 5 August 2020, and in accordance with the directions as ordered in the Arbitration then being carried out under the terms of the Arbitration Agreement the Claimant's subsidiaries and the Respondent's State of Western Australia entered into the Mediation Agreement.

672. That same day, 5 August 2020, Western Australia wrote to the Claimant's Subsidiaries in respect of the Arbitration then being carried out under the terms of the Arbitration Agreement, proposing that a directions hearing as proposed by the arbitrator take place on 26 August 2020.[798]

673. It subsequently emerged, of course, that at that very same moment in time the Respondent's State of Western Australia was in secret drafting the *Amendment Act*; and had been doing so since on or around 20 June 2020, i.e., prior to both the Arbitration Agreement and the Mediation Agreement. In this regard:

    a. John Quigley, the Western Australia Attorney-General, stated in an interview on ABC Radio in Perth, given on 13 August 2020 (just prior to the passing of the *Amendment Act*):

        This legislation has been drafted over the last six weeks in secret by the best legal minds in this city. The Solicitor-General of Western Australia Mr. Joshua Thompson SC, our incredible State Solicitor Nick Eagan and

798 Email from the Respondent's Western Australia to Claimant's Subsidiaries and its enclosure: minute of directions, (**Exh. C-398**).

his legal team at the State Solicitors' office. Mr Eagan even left the office and worked at home to keep it … .to keep the job secret so people in ... in his office wouldn't know.[799]

b. Mark McGowan, the former Premier of WA, has confirmed that he and Mr Quigley approved the preparation of the bill that would become the *Amendment Act* "[i]*n about July 2020*".[800]

674. In executing the Arbitration Agreement and Mediation Agreement, therefore, Western Australia positively misled the Claimant and its subsidiaries (as well as two distinguished retired judges) as to its intention to participate, in good faith, in the State Agreement Arbitration. It follows that the introduction of the *Amendment Act*, which is the legislative measure at the heart of this dispute, could not reasonably have been foreseen by the Claimant, even on the eve of the introduction of that measure in 2020 (much less when the decision to restructure was taken back in 2018, or when the Claimant was incorporated in Singapore in January 2019).

675. On the contrary, as at July/August 2020, the Claimant was busy preparing, in good faith, for the anticipated mediation pursuant to the Mediation Agreement.

676. On 12 August 2020, during the debate in the Parliament of Western Australia in respect of the *Amendment Act*, Liza Harvey, the then Leader of the Opposition, stated that she and her party had only been notified of the legislation at 5pm the previous day and that "[w]*e were given no prior advice that <u>something as unforeseen as this bill</u> would be coming to Parliament*".[801]

677. The Claimant's invocation of Article 20 of chapter 11 of AANZFTA is within the scope of the Tribunal's jurisdiction, and the Claimant's claim is not an abuse of process.

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799 Transcript of ABC Perth Radio interview of John Quigley, 13 August 2020, (**Exh. C-127**), p5. (emphasis added).

800 Affidavit of M McGowan, sworn 26 March 2021 in Federal Court of Australia proceeding NSD912/2020, (**Exh. C-135**), p. 134, para 67; p. 136, para 78; (**Exh. C-499**)**.**

801 Hansard, Parliamentary Debates, Legislative Assembly & Legislative Council, (**Exh. C-429**), p. 4780.

D. Conclusion: The Claimant's Claim does not Constitute an Abuse of Process

678. In conclusion, and for all the reasons set out above, the Claimant's claim does not constitute an abuse of process (in the manner alleged by the Respondent or at all).

679. The Tribunal is respectfully invited, therefore, to reject the Respondent's final preliminary objection and grant the relief the Claimant seeks and not to dismiss the Claimant's Claim in this Arbitration, which should proceed to a hearing on the merits.

SECTION VII: CONCLUSION

680. In summary the Claimant has proven its entitlement to make its claims under the AANZFTA. The Respondent's grounds should be rejected when the facts are properly evaluated against the provisions of the AANZFTA and international law.

681. The evidence clearly demonstrates inter alia that:

a. The decision to restructure was made in June 2018 for bona fide commercial reasons over two years before the measure the subject to the dispute was undertaken by the Respondent in August 2020;

b. The Claimant has substantive business operations in Singapore employing hundreds of people before and since the measure;

c. The Claimant's Australian subsidiary, Mineralogy, retained over 240 million Australian dollars in Australia which could have been paid out by Mineralogy to the Claimant by way of dividend but was not, in 2019 and 2020, before the measure was made by the Respondent. Under the terms of AANZFTA such funds are an investment in the Respondent's territory; and

d. The Claimant has made substantive investments in the territory of the Respondent and a Singapore Corporation is entitled to the protection which AANZFTA provides.

682. The Claimant respectfully submits the Tribunal, after considering the evidence set out in the NOA, and the evidence and matters in this Response, should grant the Relief requested by the Claimant and allow this important and important claim to proceed to a full hearing of the merits.

SECTION VIII: RELIEF

Orders which Respectfully should be made in respect of the Respondent's Objections

683. The Tribunal is respectfully requested to:

a. DISMISS the objections set out in the Respondent's Statement on Preliminary Objections dated 22 January 2024;

b. DECLARE that the claims submitted by the Claimant are within the Tribunal's jurisdiction;

c. DECLARE that the claims submitted by the Claimant are admissible;

d. ORDER that the Respondent bear all costs on an indemnity basis of and incidental to the Respondent's Statement on Preliminary Objections dated 22 January 2024, including the Claimant's costs of legal representation and assistance in relation thereto, pursuant to Article 42 of the UNCITRAL Rules, together with interest on those costs; and

e. FIX a date and time for a directions hearing for the merits phase of this arbitration as swiftly as possible.

[redacted]

Director and Representative
Zeph Investments Pte Ltd (the Claimant)
14 March 2024