

In the matter of an arbitration
under the Arbitration Rules of
the United Nations Commission
on International Trade Law (2021)

PCA Case No. 2023-40

Permanent Court of Arbitration
Peace Palace
The Hague
The Netherlands

Day 1

Monday, 16 September 2024

Hearing on Preliminary Objections

Before:

PROFESSOR GABRIELLE KAUFMANN-KOHLER
MR WILLIAM KIRTLEY
PROFESSOR DONALD MCRAE

ZEPH INVESTMENTS PTE LTD

Claimant

-v-

THE COMMONWEALTH OF AUSTRALIA

Respondent

BRYCE WILLIAMS, registrar and legal counsel,
LILIA MENDOZA-ROSALES, assistant legal counsel, and
BENJAMIN CRADDOCK, senior case manager, appeared for
the Permanent Court of Arbitration.
Tribunal Secretary: LUKAS MONTOYA

Transcript produced by Trevor McGowan,
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Trevor McGowan CR

APPEARANCES

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GEORGE SPALTON KC, counsel and Claimant party assisting
DR ANNA KIRK, counsel and Claimant party assisting
KRIS BYRNE, counsel and Claimant party assisting
MICHAEL SOPHOCLES, counsel and Claimant party assisting
ANNA PALMER, counsel and Claimant party assisting
BALJEET SINGH, administrator, Claimant party assisting
and director
DANIEL JACOBSON, counsel and Claimant party assisting
THOMAS BROWNING, counsel and Claimant party assisting
JONATHAN SHAW, counsel
EMILY PALMER, director
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LEANNE McCORMACK, administrative assistant
DOMENIC MARTINO, corporate advisor to the Claimant
SANDRA MARTINO, assistant to Mr Martino
NUI HARRIS, director of Claimant's subsidiary company
REGINA NOMMENSEN, assistant to Mr Harris
YEVHENIYA SOPHOCLES, counsel
SCOTT BIRKETT, expert witness
GEORGE SOKOLOV, Claimant party assisting

FOR RESPONDENT

DR STEPHEN DONAGHUE KC, Solicitor-General of Australia
SAMUEL WORDSWORTH KC, Essex Court Chambers
PROFESSOR CHESTER BROWN, 7 Wentworth Selborne Chambers
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<p>08:42 1 Monday, 16 September 2024 2 (9.25 am) 3 THE PRESIDENT: Good morning to everyone. I see that we are 4 all eager to start and we are all ready before the 5 actual time for the start. Since this is being 6 streamed, I think we should not start before the time 7 for those who are watching remotely; it would not really 8 be fair. So we'll just wait five more minutes. 9 (Pause) 10 (9.30 am) 11 THE PRESIDENT: The Peace Palace bell just rang 9.30. I am 12 pleased to open this hearing and welcome you all here. 13 Let's just, for the record, establish who is in the 14 room. I also welcome all those who we are not seeing 15 and who are not in the room, but who are participating 16 remotely. 17 You of course have the Tribunal: Mr Kirtley on my 18 left, Professor McRae on my right; the Secretary of the 19 Tribunal, Mr Montoya, on my far right; and Mr Williams, 20 who is the representative of the PCA, on my far left. 21 We have the court reporter, the Opus technicians and 22 the technicians who handle the transmission. 23 For the Respondent -- and I'm starting with the 24 Respondent here because on preliminary objections, the 25 Respondent is in a position of claimant, so to say -- we</p> <p style="text-align: center;">Page 1</p>	<p>09:33 1 thank you. 2 MR CLARKE: I think we had Ms Annie Tan as well. 3 I am also joined by counsel assisting the 4 Solicitor-General: Ms Penelope Bristow; Mr Jeremy Shirm 5 of the Department of Foreign Affairs and Trade; and 6 finally, my colleagues from the Office of International 7 Law: first, Ms Lucy Martinez, Mr Kyle Dickson-Smith, 8 Mr Charles Light, Ms Stephanie Brown and Ms Erin Manuel. 9 Madam President, if I may, we do have a PowerPoint 10 slide presentation this morning which we have provided 11 electronically, but we do have some hard copies 12 available in the room in case any of the members of the 13 Tribunal, the Secretary, the PCA or indeed the Claimant 14 would prefer a hard copy. We're just handing those up 15 now. 16 THE PRESIDENT: Thank you. 17 So let me turn to the Claimant now for the 18 introduction. Should I give you the floor, Mr Palmer, 19 to introduce those who are here with you, or do you want 20 each of them to introduce him- or herself? 21 MR PALMER: I think it's best that they introduce 22 themselves. I am Clive Palmer, I'm the representative 23 and director of the Claimant in the arbitration. 24 DR KIRK: Dr Anna Kirk from Bankside Chambers, counsel 25 assisting.</p> <p style="text-align: center;">Page 3</p>
<p>09:31 1 have the Solicitor-General of Australia, Dr Donaghue KC. 2 Would you like to introduce those of your delegation 3 or do you wish that each person introduces him- or 4 herself? 5 DR DONAGHUE: Mr Clarke will introduce the delegation, if 6 that's suitable to the Tribunal. 7 THE PRESIDENT: Fine, thank you. 8 MR CLARKE: Thank you. Good morning, Madam President and 9 members of the Tribunal. 10 I am Jesse Clarke, the general counsel of the Office 11 of International Law at the Attorney-General's 12 Department. As you already noted, I am joined by the 13 Solicitor-General of Australia, Dr Stephen Donaghue KC, 14 and our counsel team: Mr Samuel Wordsworth KC, 15 Professor Chester Brown, Dr Naomi Hart and 16 Dr Esme Shirlow. 17 Joining from Western Australia is the 18 Solicitor-General of Western Australia, 19 Mr Craig Bydder SC, and Ms Annie Tan, senior assistant 20 state solicitor of the Western Australian 21 State Solicitor's Office. 22 THE PRESIDENT: If people who are in presence could just 23 raise their hand, so we can put names on faces, it would 24 be nice. 25 So Mr Solicitor-General of Western Australia. Good,</p> <p style="text-align: center;">Page 2</p>	<p>09:34 1 MR BYRNE: Kris Byrne, counsel assisting. 2 MR SOPHOCLES: Michael Sophocles, lawyer assisting the 3 Claimant. 4 MR SHAW: Jonathan Shaw, lawyer assisting the Claimant. 5 MS A PALMER: Anna Palmer, counsel assisting the Claimant. 6 MR SHERIDAN: Declan Sheridan, director of the Claimant. 7 MS E PALMER: Emily Palmer, director of the Claimant. 8 MR BROWNING: Thomas Browning, Claimant party assisting. 9 MR JACOBSON: Daniel Jacobson counsel assisting. 10 MS SINGH: Baljeet Singh, administrator Claimant party 11 assisting and director of the Claimant. 12 MS McCORMACK: Leanne McCormack, administrative assistant. 13 MR HARRIS: Nui Harris, director of Waratah Coal. 14 MRS SOPHOCLES: Yevheniya Sophocles, assisting the Claimant. 15 MR BIRKETT: Scott Birkett, expert witness from BDO. 16 MR MARTINO: Domenic Martino, corporate advisor to the 17 Claimant. 18 MR PALMER: George Sokolov was to come; he's in Australia 19 watching online. He's assisting us in the arbitration. 20 So he's there. I thought I should just point that out. 21 (Pause) 22 THE PRESIDENT: As you know, the agenda of this hearing is 23 to address the preliminary objections. We will proceed 24 in accordance with Procedural Order No. 5. Some of the 25 rules that we will follow are also in Procedural</p> <p style="text-align: center;">Page 4</p>

09:37 1 Order No. 1.
 2 On transparency and confidentiality, we will follow
 3 the annex to Procedural Order No. 3. If a participant
 4 wishes to raise an issue that is confidential, then
 5 he/she should mention it at the start, and then the feed
 6 will be cut until it is either determined that the
 7 matter is, in reality, not confidential or we have
 8 completed the discussion of the confidential matter.
 9 Since the Tribunal may not always know when this is
 10 the case, please mention so expressly. The same shall
 11 apply when a confidential matter comes up with a witness
 12 or expert, or you think that the witness/expert will now
 13 respond with something that is confidential: you may
 14 wish to flag it.
 15 We will follow the schedule that is attached to
 16 Procedural Order No. 5. So today we will hear opening
 17 arguments, a maximum of 3 hours for each party. You
 18 know the time allocation over the entirety of the
 19 hearing, which is 9.5 hours for the Respondent and 6.5
 20 for the Claimant. That includes, of course, the time
 21 for the opening arguments and for the answers to
 22 Tribunal questions, and closing remarks on the last day.
 23 Is there anything that is unclear, or any comments
 24 that a party would wish to raise before we give the
 25 floor to the Respondent for the opening argument?

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09:40 1 common to Australia's preliminary objections.
 2 Mr Sam Wordsworth KC will address the "no investor" and
 3 "no investment" objections. The Solicitor-General will
 4 then return to address the denial of benefits objection.
 5 Professor Chester Brown will address the abuse of
 6 process objection. Finally, Dr Esme Shirlow will
 7 address estoppel and acquiescence.
 8 I will now hand over to the Solicitor-General.
 9 Thank you, Madam President.
 10 DR DONAGHUE: Good morning, Madam President and members of
 11 the Tribunal.
 12 (Slide 3) This is a claim said by the Claimant to be
 13 worth AUD 300 billion or €182 billion. That is
 14 an incredible figure. It makes this the largest
 15 investor-state dispute settlement claim ever brought.
 16 The sheer size of the claim makes this proceeding
 17 one of great significance to Australia. It meant
 18 Australia had no choice but to divert very significant
 19 public resources to defending the claim. That was
 20 necessary because any claim for AUD 300 billion must be
 21 taken seriously, even if -- as is the case here, for
 22 reasons that we will develop over the course of the
 23 morning -- it is a claim with weak jurisdictional
 24 foundations.
 25 The Tribunal has witnessed firsthand, ever since

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09:38 1 Mr Donaghue, Mr Clarke?
 2 DR DONAGHUE: Not on our part.
 3 THE PRESIDENT: No, I don't see anything.
 4 Mr Palmer, on your side?
 5 MR PALMER: Not on our part, Madam President.
 6 THE PRESIDENT: Good. Excellent. Then we may start.
 7 We have received a paper copy of the Respondent's
 8 PowerPoint, and we also understand that it has been
 9 uploaded on the platform. You are welcome to start.
 10 (9.39 am)
 11 Opening submissions on behalf of Respondent
 12 MR CLARKE: Thank you very much, Madam President.
 13 Before we begin, like you, I would just like to
 14 greet all of those who are watching this hearing live
 15 from the public webcast. It is important that this
 16 hearing is a transparent process, particularly given the
 17 public interest from Australians watching back home.
 18 I want to thank the Tribunal and the Permanent Court of
 19 Arbitration for the efforts taken to facilitate
 20 a transparent and open hearing.
 21 (Slide 2) The opening statement by the Respondent
 22 this morning will be structured as follows. The
 23 Solicitor-General will make some introductory
 24 observations, including as to the state of the evidence,
 25 and will provide an overview of the main facts that are

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09:41 1 this proceeding was commenced, that the proceeding has
 2 been personally managed at every stage by the Claimant's
 3 representative, Mr Palmer. Mr Palmer is an Australian
 4 citizen. He is one of Australia's richest people and
 5 he has a high public profile in Australia, having been
 6 a Member of the Australian Parliament for nearly
 7 three years, and having founded an Australian political
 8 party, the United Australia Party, which was formerly
 9 known as Clive Palmer's United Australia Party.
 10 Mr Palmer's wealth derives substantially from
 11 Australian company Mineralogy Proprietary Limited, which
 12 he wholly owns through a corporate structure that now
 13 includes the Claimant, Zeph Investments.
 14 There is no dispute that the Claimant is wholly
 15 owned and controlled by Mr Palmer. As a consequence,
 16 there is no dispute that this is a claim brought by
 17 a foreign company after that company was interposed into
 18 an existing corporate structure between a valuable
 19 Australian company and the prominent Australian citizen
 20 by which that company is ultimately owned and
 21 controlled.
 22 It is therefore perhaps not surprising that this
 23 case -- an enormous claim by a company owned by
 24 a national of one state against that national's own
 25 state -- has generated significant public interest

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09:43 1 around the world, both in the mainstream media and in
 2 the investor-state academic community.
 3 That interest reflects the fact that global
 4 attitudes to the rules-based trading system are in flux.
 5 The outcome of this dispute will focus attention on
 6 whether the existing framework for investor-state
 7 arbitration truly reflects the intention of parties to
 8 treaties such as AANZFTA and the many treaties in
 9 similar terms. For that reason, in our submission, this
 10 Tribunal has been charged with a heavy task.
 11 As this case has proceeded, it has acquired four
 12 exceptional features, which we wish to emphasise at the
 13 outset, which are particularly extraordinary in
 14 combination.
 15 The first is: despite the extensive evidential case
 16 that Australia has assembled in support of its
 17 preliminary objections, the Claimant has left that case
 18 largely unaddressed in its pleadings and unanswered in
 19 its evidence. Yet the evidence that the Claimant has
 20 largely ignored is of a comprehensive and serious kind.
 21 It includes evidence from five experts and one fact
 22 witness.
 23 By way, for the moment, just of very brief summary,
 24 the first expert is Professor Thomas Lys, who is the
 25 Eric L Kohler Professor Emeritus at Kellogg School of

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09:45 1 Professor Lys was not called for cross-examination."
 2 That passage could equally be written in this case.
 3 The second expert Australia relies upon is
 4 Mr George Rogers, whose experience, stretching back to
 5 1989, includes having structured, lent and advised on
 6 several US billion dollars' worth of mining project
 7 finances in projects all over the world. Having set up
 8 the mining project finance business of Investec Bank in
 9 London in 2013, he set up his own mining project finance
 10 consultancy. And his first and supplementary expert
 11 reports address, again in detail, Zeph's claim that it
 12 was incorporated for the purpose of pursuing financing
 13 in Singapore for Australian coal projects. His evidence
 14 has been almost totally ignored by the Claimant.
 15 The third expert is Mr Daniel Kalderimis KC,
 16 a New Zealand barrister of more than 20 years' standing,
 17 whose report addresses whether Zeph has presented
 18 a plausible rationale for the incorporation of
 19 Mineralogy International Limited in New Zealand in order
 20 to pursue lithium exploration or exploitation.
 21 The fourth expert is Professor Graeme Cooper, who
 22 has practised in Australian tax law for more than
 23 30 years, taught tax at a variety of prestigious
 24 universities, advised numerous states and international
 25 organisations. His evidence addresses the tax rationale

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09:44 1 Management at Northwestern University. He is
 2 a specialist in accounting, economics, corporate
 3 governance and negotiation. He has been a faculty
 4 member of the Kellogg School since 1981, and he became
 5 an Emeritus Professor in 2015.
 6 Both Professor Lys's first report and his
 7 supplementary report are lengthy and detailed documents,
 8 and they cover a range of issues, including the scope of
 9 Zeph's business operations in Singapore, the business
 10 purpose of the restructuring, Zeph's arguments on
 11 retained earnings and the involvement of Zeph's
 12 directors in Mineralogy.
 13 It is, we submit, of some note that the tribunal
 14 that decided Philip Morris v Australia, which is
 15 Exhibit RLA-95, was significantly assisted by
 16 Professor Lys. One passage from the award of that
 17 tribunal, at paragraph 583, which addressed
 18 Professor Lys's evidence on the purpose of a corporate
 19 restructuring, has particular resonance in this hearing
 20 today. Having set out the background of unpersuasive
 21 witness evidence by the claimant in that case, the
 22 tribunal said:
 23 "Against this background, the expert report of
 24 Professor Lys does carry weight, especially as it
 25 remains un rebutted by other expert evidence, and

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09:47 1 that Zeph has put forward for its incorporation in
 2 Singapore, including by identifying tax risks that the
 3 restructure created for the Mineralogy Group as a whole
 4 in Australia.
 5 The fifth expert is Associate Professor
 6 Stephen Phua, who has for more than 30 years taught
 7 Singaporean and international tax law at the National
 8 University of Singapore, and who has advised local law
 9 firms and the Singaporean Government on tax matters.
 10 His opinion questions the asserted advantages put
 11 forward by Zeph under Singaporean tax law for the
 12 relevant restructure.
 13 Finally, Australia presents as a fact witness
 14 Mr Bruno Vickers, the managing director of JS Held LLC
 15 in Singapore, who has over 15 years' experience in
 16 investigations and business intelligence. He provides
 17 a detailed account of his investigations into Zeph's
 18 alleged business operations in Singapore.
 19 Madam President, members of the Tribunal, these
 20 witnesses, the five experts and the one fact witness,
 21 address issues which are relevant to each of Australia's
 22 preliminary objections, and the experts provide
 23 persuasive independent evidence in support of those
 24 objections.
 25 It is in that context that the second of the four

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09:48 1 exceptional features that I identified arises, which is
 2 that the Claimant has chosen not to cross-examine any of
 3 Australia's witnesses; not one.
 4 The Claimant was, of course, entitled to make that
 5 choice, having regard to paragraph 6.7 of Procedural
 6 Order No. 1. But that paragraph does not mean that the
 7 [Claimant]'s choice not to challenge the evidence of any
 8 of Australia's witnesses is without any consequence. To
 9 the contrary, that choice has the significant
 10 consequence that Australia's evidential case is, in
 11 substance, unchallenged.
 12 The decision to proceed in that way cannot
 13 reasonably be attributed to a lack of resources on the
 14 Claimant or Mr Palmer's part, such that the very clear
 15 inference is that the Claimant had no answer to that
 16 evidentiary case, and indeed feared that its position
 17 would indeed go backwards if it sought to cross-examine
 18 Australia's witnesses.
 19 The third exceptional feature of the case is that
 20 less than two days after Australia communicated that it
 21 was exercising its right to call eight of the Claimant's
 22 witnesses for cross-examination, the Claimant entirely
 23 withdrew the evidence of four of those witnesses for the
 24 purposes of this jurisdictional hearing.
 25 That eleventh-hour decision is, we say, remarkable.

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09:51 1 that there were references to the evidence of these
 2 witnesses in the pleadings concerning preliminary
 3 objections, that statement is inexplicable.
 4 The position became no clearer at the pre-hearing
 5 video conference, where the Claimant stated only that
 6 it had:
 7 "... deemed [the four witnesses] not to be any more
 8 relevant to the case as we are presenting it to the
 9 Tribunal."
 10 The reality is that, far from becoming irrelevant,
 11 the evidence of the four witnesses that the Claimant has
 12 withdrawn went directly to matters of ongoing evidence
 13 to the Claimant's attempt to answer Australia's
 14 preliminary objections.
 15 To give you for now just one example, Mr Martino had
 16 given an account of advice he claimed to have given to
 17 Mr Palmer concerning the reasons for the restructure
 18 that resulted in the interposition of Zeph into the
 19 corporate structure in January 2019, including as to the
 20 reasons to carry out that restructure urgently. We
 21 would have tested Mr Martino's evidence on that topic by
 22 cross-examination. Yet immediately upon us advising the
 23 Claimant of that fact, the Claimant advised us that
 24 Mr Martino's evidence had been withdrawn.
 25 The result is that Mr Palmer gives an uncorroborated

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09:49 1 It leaves large parts of the Claimant's written
 2 pleadings, which refer to the now-withdrawn witness
 3 statements, unsupported. Indeed, it leaves the Claimant
 4 in this proceeding almost entirely reliant on the
 5 uncorroborated evidence of Mr Palmer himself. That's
 6 really all you have from the Claimant. (Pause)
 7 (Slide 4) The Claimant has failed to give the
 8 Tribunal any plausible exploration for the withdrawal of
 9 these four witnesses. The explanation, you will recall,
 10 proffered in the letter dated 21 August 2024, only a few
 11 weeks ago, which you can see extracted on the screen,
 12 was with respect to two witnesses:
 13 "The witness statements of Mr ... Martino and
 14 Mr ... Harris were sworn prior to the Respondent's
 15 admissions made in the Reply on Preliminary Objections
 16 and, accordingly, their relevance for the purposes of
 17 the Hearing has been largely reduced ..."
 18 Zeph has never informed the Tribunal what the
 19 alleged admissions it says rendered Mr Martino and
 20 Mr Harris's statements irrelevant actually are, and
 21 Australia certainly does not accept that it has made any
 22 admissions which have that effect. As for Mr Migliucci
 23 and Mr Sorensen, the Claimant stated in the same letter
 24 that their witness statements were "intended for the
 25 merits and damages stage of the Arbitration". But given

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09:52 1 account of the meeting in March 2018 when he says he
 2 received advice from Mr Martino about the restructure,
 3 while at the same time the Tribunal is deliberately
 4 deprived of the opportunity to hear about the same
 5 advice from the person who is said to have given it.
 6 Throughout this opening, Australia will provide
 7 other examples where the evidence of the non-appearing
 8 witnesses would have been relevant, and obviously so.
 9 We respectfully submit that the Tribunal should take
 10 a very dim view of the Claimant's attempt to curate the
 11 facts so that Mr Palmer himself can completely control
 12 the factual narrative he contends that the Tribunal
 13 should accept.
 14 The fourth and final exceptional feature of this
 15 case is the complete absence of contemporaneous
 16 documents of the kind one would expect to exist if the
 17 factual contentions that Zeph is advancing were true.
 18 Where, for example, are the contemporaneous
 19 documents that support Zeph's case that it was
 20 incorporated as part of a restructured design to
 21 facilitate access to coal financing in Singapore, or,
 22 for that matter, to achieve tax benefits? Literally no
 23 such documents have been filed or produced,
 24 notwithstanding orders from the Tribunal that would have
 25 required such documents to be produced.

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09:54 1 The result of the four matters I've just identified
 2 is that the ambit of the factual contest in this
 3 preliminary hearing is reasonably confined. You're not
 4 going to hear very much evidence. But critically,
 5 that's not because there is substantial agreement
 6 between the parties as to the facts; there's not. It's
 7 because the Claimant has largely vacated the field,
 8 leaving Australia's case completely unanswered.
 9 Indeed, in our submission, the Claimant has left the
 10 Tribunal with a purposely incomplete and unverified
 11 narrative of key steps, including the reasons those
 12 steps were taken. In a claim said to be worth
 13 AUD 300 billion, that is demonstrably inadequate.
 14 There can, we submit, be no explanation for the
 15 Claimant's decision to rest its case entirely upon the
 16 uncorroborated evidence of Mr Palmer, other than that
 17 it was unable to do better.
 18 Madam President, members of the Tribunal, that's the
 19 first part of the opening remarks I am giving.
 20 I propose now to turn to what we submit really happened
 21 in this case concerning the transposition of the
 22 extremely valuable Australian company Mineralogy to the
 23 supposed Singapore investor Zeph, and to identify some
 24 facts that are common to many of our preliminary
 25 objections.

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09:55 1 In assessing the circumstances in which the Claimant
 2 came to be incorporated in Singapore in circumstances of
 3 apparent urgency in January 2019, and then to be
 4 interposed into the Mineralogy corporate group and to
 5 make immediate attempts to create the appearance of
 6 substantive business operations in Singapore by
 7 acquiring existing Singaporean companies, one needs to
 8 go back to late 2018.
 9 At that time, various long-standing tensions between
 10 Mineralogy and the State of Western Australia concerning
 11 the State Agreement were coming to a head. The relevant
 12 State Agreement had been made between Mineralogy and the
 13 WA Government way back in 2002 and it had been amended
 14 in 2008. That's an agreement that is given force by
 15 legislation, by Western Australian legislation.
 16 In 2012, the WA Government had declined to approve
 17 Mineralogy's Balmoral South Iron Ore Project proposal,
 18 a proposal that was made under that State Agreement, and
 19 that in turn precipitated a serious long-term decline in
 20 relations between Mineralogy and the Western Australian
 21 Government; a decline that was manifest in numerous
 22 ways, including a prolonged arbitral proceeding in
 23 Australia before a domestic arbitrator, Mr McHugh.
 24 Another manifestation of those declining relations
 25 arose in the context of what was initially a commercial

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09:57 1 dispute between Mineralogy and a Chinese state-owned
 2 company called CITIC, which had submitted mine
 3 continuation proposals continued to extend the life of
 4 an ongoing project, the Sino Iron Project, in a manner
 5 that could only occur if Mineralogy was prepared to
 6 submit a proposal to the WA Government under the
 7 State Agreement.
 8 Over a period of several years, Mineralogy declined
 9 to submit that proposal, and that led CITIC to seek to
 10 involve and gain the support of the Western Australian
 11 Government.
 12 The proposed response of the Western Australian
 13 Government introduced a new and highly relevant
 14 additional dimension to the already long-running
 15 tensions between Mineralogy and the WA Government
 16 concerning Mineralogy's rights under the State
 17 Agreement, because it was at that point that Western
 18 Australia raised the prospect that it might unilaterally
 19 legislate to amend the State Agreement to Mineralogy's
 20 detriment.
 21 I'm going to take you now to a series documents that
 22 show this occurring, from November onwards.
 23 (Slide 5) So you can see on the screen (R-130): on
 24 3 November 2018, The West Australian newspaper reported
 25 statements by the then Premier of Western Australia,

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09:58 1 Mr McGowan, and by the opposition leader of Western
 2 Australia, in which the Premier was reported as being
 3 open to:
 4 "... changing the State Agreement governing the Sino
 5 Iron Project to break the impasse between [the] operator
 6 CITIC Pacific and tenement owner Clive Palmer."
 7 The article quoted Premier McGowan as saying that,
 8 "The State is considering its options".
 9 (Slide 6) Almost immediately, a couple of days
 10 later, on 6 November 2018, Mineralogy wrote to
 11 Premier McGowan asserting that it was inappropriate for
 12 Parliament to intervene in a commercial dispute (R-132).
 13 (Slide 7) But then, a few weeks later, in the
 14 Parliament of Western Australia, the Premier stood up
 15 and made the following statement (R-133):
 16 "State agreements are an important instrument ...
 17 but there is a responsibility on the beneficiary,
 18 Mineralogy, to do the right thing. I noted the recent
 19 comments of the opposition leader and his offer to help
 20 the government do all he can to sustain the project
 21 including altering the state agreement. I thank the
 22 opposition leader for this commitment. It appears we
 23 are as one on this issue ... Clive Palmer and Mineralogy
 24 are now on notice."
 25 That's 29 November 2018.

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<p>09:59 1 (Slide 8) The next day, 30 November 2018, Mineralogy 2 engages Allen & Gledhill, a Singaporean law firm, to 3 begin the process of incorporating a private company in 4 Singapore. In those instructions (C-502), as you can 5 see highlighted on the screen, it emphasised that "time 6 is of the essence", and that Mineralogy was "looking to 7 move very quickly". 8 As we will develop over the course of the morning, 9 none of the explanations that the Claimant now asks the 10 Tribunal to accept provide any explanation for that 11 obvious urgency. Mr Palmer claims in his evidence that 12 in a meeting in March 2018, Mr Martino advised him that 13 "we should move as fast as we could". But if Mr Martino 14 did say that, and if he provided any explanation for 15 that advice, Mr Palmer has not shared it. We would have 16 asked Mr Martino about that, but of course his evidence 17 was withdrawn. 18 But in any event, even if that advice was given in 19 March 2018, it was clear that it wasn't followed, 20 because nothing happened until late November 2018, 21 immediately after Premier McGowan's statements in 22 Parliament. As subsequent events show, this was not 23 simply a coincidence. 24 (Slide 9) In particular, again only days later, 25 2 December 2018, Mineralogy again expressed disagreement</p> <p style="text-align: center;">Page 21</p>	<p>10:02 1 earlier, it asserted in the first paragraph of the 2 letter -- we've extracted the first paragraph, but you 3 can see it under the heading on the slide -- it asserted 4 that it "engage[d] in substantive business operations in 5 New Zealand" and that it "has an active and continuous 6 link with that country's economy", such that it was 7 "entitled to ... protections ... under ... (AANZFTA)". 8 That specific phrase, "substantive business 9 operations", rather than "substantial business 10 activities", of course has a familiar ring to it. 11 The letter stated that if the WA Government 12 proceeded to amend the State Agreement, that would cause 13 significant loss and damage to Mineralogy, and as such 14 to MIL, and it warned that this would breach Australia's 15 obligations under AANZFTA. 16 (Slide 11) MIL further wrote in the letter -- and 17 we'll be taking the Tribunal back to this letter in more 18 detail at subsequent points: 19 "If your Government alters by legislation the terms 20 of the State Agreement as you have foreshadowed to 21 Parliament, Mineralogy inter alia will have lost its 22 royalty income under existing agreements and court 23 judgments and the benefit of the exclusive tenure it 24 currently enjoys ... It cannot be a proper purpose to 25 take from an Australian an Australian asset ..."</p> <p style="text-align: center;">Page 23</p>
<p>10:01 1 with the approach of the WA Government towards the State 2 Agreement, in correspondence to Premier McGowan, and it 3 took the step of publishing that letter, Exhibit R-136, 4 in a full-page advertisement in The West Australian 5 newspaper. We haven't put it on the slide, but that's 6 Exhibit R-137. 7 Less than two weeks later, on 14 November, 8 Mineralogy International Limited, or "MIL", was 9 incorporated in New Zealand, pursuant to the directions 10 of Mr Palmer. And two days after that, on 16 November, 11 it engaged in a share swap by which the new shell 12 company, MIL, obtained a very valuable 6 million or so 13 shares in the Australian company Mineralogy by issuing 14 the same number of shares in itself to the previous 15 owners in Mineralogy in proportion to their previous 16 shareholdings. 17 Those shares issued of MIL were of no value. 18 Mr Wordsworth will be returning to that point very 19 shortly. 20 (Slide 10) Then on 18 January 2019, which is in the 21 quite brief period of time when MIL was the direct owner 22 of the Australian company Mineralogy, MIL wrote to the 23 Premier of Western Australia. And you can see again 24 an extract on the slide (R-44). 25 Even though MIL had been incorporated only a month</p> <p style="text-align: center;">Page 22</p>	<p>10:03 1 This is MIL writing this: 2 "... and in effect give it to a Chinese Government 3 owned entity for a commercial purpose for that party to 4 commercially exploit." 5 (Slide 12) "We put you and your government on notice 6 of MIL's claim inter alia under AANZFTA for prompt, 7 adequate and effective compensation should you, your 8 Government or the Parliament of Western Australia take 9 any steps to expropriate, either directly or indirectly, 10 Mineralogy's interests or rights in Western Australia 11 ... If your Government proceeds with amending 12 legislation, MIL will immediately make a claim for \$45Bn 13 against the Commonwealth ..." 14 So that threat of proceedings is made in 15 January 2019. 16 (Slide 13) A copy of that letter was sent to the 17 Commonwealth Minister for Energy, Mr Angus Taylor 18 (R-45). So the letter is sent to the Western Australian 19 Government, but it's copied to the Federal Government. 20 The covering letter to Mr Taylor repeated that MIL 21 was a New Zealand company: 22 "... which engages in substantive business 23 operations in New Zealand and which ... [was] entitled 24 to the protections offered to investors under ... 25 (AANZFTA)."</p> <p style="text-align: center;">Page 24</p>

<p>10:04 1 It asserted that Premier McGowan had "threatened to 2 unilaterally repudiate certain rights of Mineralogy" 3 under the State Agreement, which would result in a major 4 loss of MIL's investments, and would amount to: 5 "... many billions of dollars which under the terms 6 of the AANZFTA would immediately become due and payable 7 by the Commonwealth of Australia." 8 We submit that, particularly given the references in 9 the first paragraphs of both this letter and the 10 previous letter to the denial of benefits test, it is 11 evident that the possibility that Australia might deny 12 benefits under AANZFTA was front of mind for Mr Palmer 13 and MIL at the time these letters were written. 14 (Slide 14) Then, again just days later, 15 22 January 2019, The Australian newspaper, which is 16 a national broadsheet newspaper in Australia, reported 17 that the following statement was made by Mr Palmer 18 (R-46): 19 "Mr Palmer said the move offshore meant Mineralogy 20 would be able to claim compensation from the Australian 21 government under the investor protection provisions of 22 the Australia-[New Zealand] free-trade agreement. He 23 vowed to launch a damages claim if West Australia 24 Premier Mark McGowan carried through with his threat 25 to legislate in favour of Chinese giant CITIC's</p> <p style="text-align: center;">Page 25</p>	<p>10:07 1 like to meet ... at 10am on Monday in relation to [the] 2 incorporation of this new company." 3 (Slide 18) Later on the Sunday, at 4.52 pm, 4 a partner from Allen & Gledhill enquired about the 5 business plan for the new entity, and said, "When do you 6 need the entity by?" 7 (Slide 19) Later on Sunday night, 9.43 pm, 8 Mr Mashayanyika advised that: 9 "The new entity will be acquiring established 10 businesses in Singapore and we require [it] to be 11 incorporated tomorrow Monday 21st ..." 12 (Slide 20) Allen & Gledhill responded at 11.10 pm on 13 the Sunday night, "not[ing] the urgency of the 14 incorporation ... by tomorrow" (R-549). 15 (Slide 21) And Zeph was actually incorporated on the 16 Monday, the following day, as you can see from the 17 certificate of incorporation (C-70). 18 (Slide 22) Now, again around the same time, 19 Mr Sorensen, a long-term advisor to the Claimant, then 20 a partner at PwC, also referred to the urgency of the 21 incorporation of Zeph in contemporaneous emails. He 22 also referred in those emails, as you can see extracted 23 on the slide (R-775), to whether any delay would be 24 consistent with what were identified as "broader asset 25 protection aims". That is plainly a reference to the</p> <p style="text-align: center;">Page 27</p>
<p>10:06 1 interests in the \$US10bn Sino Iron project in the 2 Pilbara." 3 (Slide 15) There were a range of other articles 4 published in due course, as you can see on the slide, 5 reflecting the same statements. And Mr Palmer has never 6 denied making the statement that the move offshore meant 7 Mineralogy could claim compensation under AANZFTA. 8 In any case, the letters speak for themselves. They 9 directly link the incorporation of MIL and its insertion 10 into the ownership chain above Mineralogy to the attempt 11 to obtain treaty protection. And not only that: they 12 also display a contemporaneous awareness of the denial 13 of benefits test that they would need to overcome in 14 order to obtain that protection. 15 (Slide 16) Now, I've been talking about MIL. But 16 around the same time as that press report was published, 17 the incorporation of Zeph was being pursued with 18 urgency. Here you can see an email (R-817) sent at 19 8.05 pm on the night of 19 January, which is a Saturday. 20 Instructions were sent to Singaporean law firm Allen 21 & Gledhill to incorporate a new company. 22 (Slide 17) At 6.03 am the following morning, Sunday 23 morning, Allen & Gledhill were advised that 24 Mr Mashayanyika, who was the chairman of MIL: 25 "... [would] be travelling to Singapore and would</p> <p style="text-align: center;">Page 26</p>	<p>10:08 1 investment treaty protection purpose, given the 2 escalating dispute with Western Australia, and the 3 absence of any other apparent basis on which 4 interposition of a shell company above Mineralogy would 5 provide any asset protection benefit. 6 In light of those emails, the Respondent called 7 Mr Sorensen for cross-examination, but of course, again, 8 the Tribunal is now deprived of the opportunity to hear 9 from him on this issue. 10 In all the circumstances, the Tribunal should infer 11 that the reason for the urgency associated with the 12 incorporation of Zeph was that Mr Palmer had realised 13 that he had made a mistake, and that the incorporation 14 of MIL in New Zealand would not provide the investment 15 treaty protection that had been sought. 16 (Slide 23) That mistake was identified publicly in 17 the Australian press on 23 January, when press reports 18 highlighted -- and you can see the headline, "Palmer's 19 NZ move looks like a flop" -- that Australia and 20 New Zealand had, by an exchange of letters, agreed that 21 Chapter 11 of AANZFTA did not create rights or 22 obligations between Australia and New Zealand. So 23 a New Zealand company was not an appropriate vehicle for 24 an investor-state claim, or not a possible vehicle. 25 On 29 January 2019, only about a week after it was</p> <p style="text-align: center;">Page 28</p>

10:10 1 incorporated in Singapore, Zeph acquired all of the
 2 shares in Mineralogy in a share swap with MIL. The
 3 approximately 6 million shares in the valuable company
 4 Mineralogy were swapped for approximately 6 million
 5 newly issued shares in the Claimant; and again, the
 6 shares of the Claimant were of no value. Again,
 7 Mr Wordsworth will return to this issue shortly.
 8 (Slide 24) Lest there be any doubt that the
 9 interposition of Zeph was related to the attempt to
 10 obtain investment treaty protection, on 4 February -- so
 11 again, only days after it becomes incorporated into the
 12 group -- correspondence from MIL, the New Zealand
 13 company, noted that its interest in Mineralogy was now
 14 held via Zeph, which at that point in time was called
 15 Mineralogy International Proprietary Limited, which was
 16 said to be:
 17 "... a Singapore registered company, which engages
 18 in substantive business operations in Singapore and
 19 which has an active and continuous link with that
 20 country's economy."
 21 A claim made just days after the company was
 22 created. And it was said to make it entitled to bring
 23 an investment claim, this time under the
 24 Singapore-Australia Free Trade Agreement.
 25 In addition to the unambiguous terms of that

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10:11 1 4 February letter, the timing of this letter strongly
 2 supports the inference that the purpose of the
 3 restructure and the insertion of Zeph into the corporate
 4 chain was to attract treaty protection in relation to
 5 the possible unilateral amendment of the State Agreement
 6 that Western Australia had threatened.
 7 (Slide 25) The Claimant's internal documents confirm
 8 that although that letter was not sent until 4 February,
 9 it was actually drafted in the lead-up to the share swap
 10 which saw Zeph interposed between MIL and Mineralogy.
 11 You can see that from the draft which you now have on
 12 the slide, which is dated 24 January, so before the
 13 interposition.
 14 It's apparent that the draft was incomplete. So the
 15 author can't, as you can see in the top text box,
 16 remember the name of the company. But nevertheless, the
 17 letter threatens proceeding under the
 18 Singapore-Australia Free Trade Agreement even before
 19 Zeph had acquired any interest in Mineralogy.
 20 What's more, the Claimant itself recognises that
 21 this letter is connected to the share swap because this
 22 letter was produced to Australia in response to document
 23 request 3, which sought correspondence "in relation to
 24 the Mineralogy Group restructure".
 25 (Slide 26) Contemporaneous press reports at the

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10:12 1 time, around the time of the share swap, in our
 2 submission, accurately recognised what had occurred,
 3 with The Australian reporting that Mr Palmer had
 4 "shifted his corporate headquarters" from the
 5 "unoccupied" office in New Zealand to Singapore in
 6 an attempt to revive his threat to sue Australian
 7 taxpayers for AUD 45 billion (R-142), after he found
 8 that a New Zealand company could not make an investment
 9 treaty claim against Australia under AANZFTA.
 10 Subsequently, and well before the passage of the
 11 Amendment Act, upon which Zeph bases its claim, on
 12 14 March 2019, 20 March 2019, 15 October 2019 and
 13 25 November 2019, MIL, Mineralogy and the Claimant
 14 repeatedly wrote to Australia invoking relevant free
 15 trade agreements to protest against unilateral action on
 16 the part of the Western Australian Government that would
 17 impact on Mineralogy's rights under the State Agreement.
 18 Now, the Claimant has rejected the suggestion that
 19 any of these letters that I've just shown the Tribunal
 20 threatened investment treaty proceedings in response to
 21 the Western Australian Government's suggestion that
 22 it might legislate to amend the State Agreement. And
 23 we'll show you that submission.
 24 (Slide 27) In the SODPO at paragraph 523,
 25 the Claimant argues:

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10:14 1 "... the CITIC letters merely evince Mr Palmer's
 2 knowledge of the existence of investor-State agreements
 3 and nothing more."
 4 With great respect, that claim is absurd. For
 5 example, the statement, "If your Government proceeds
 6 with amending legislation, MIL will immediately make
 7 a claim for \$45Bn against the Commonwealth" -- that's
 8 a quote from Exhibit R-44, the letter of 18 January --
 9 is in its terms a threat to commence investment treaty
 10 proceedings.
 11 Madam President, members of the Tribunal, the facts
 12 I have just outlined are relevant to many of Australia's
 13 preliminary objections because they demonstrate very
 14 clearly what was really going on when Zeph was urgently
 15 incorporated into the Mineralogy Group in January 2019.
 16 We now propose to develop each of our preliminary
 17 objections, and with the Tribunal's permission, I will
 18 hand over to Mr Wordsworth KC to deal with the first
 19 two. Thank you.
 20 THE PRESIDENT: Thank you.
 21 MR WORDSWORTH: Madam President, members of the Tribunal,
 22 thank you very much.
 23 (Slide 28) I will be developing the first two of
 24 Australia's preliminary objections.
 25 (Slide 29) First, that Zeph is not an "Investor of

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10:15 1 a Party" as defined by Article 2(d) of Chapter 11 of
 2 AANZFTA. Zeph has not made an investment in the
 3 territory of Australia because it has not made any form
 4 of active contribution.
 5 Second, that Zeph has not established the existence
 6 of a protected investment under Chapter 11. It's unable
 7 to demonstrate any of the inherent characteristics of
 8 an investment, most obviously in the form of the absence
 9 of contribution or of risk.
 10 These objections fall to be considered against the
 11 exceptional factual background that you've just heard
 12 outlined by the Solicitor-General. And although the
 13 parties have referred to many of the past cases in their
 14 pleadings, in none of these was a tribunal looking at
 15 closely analogous facts.
 16 As Mr Palmer said to The Australian newspaper, as
 17 you've just seen at slide 14, MIL was incorporated so
 18 that:
 19 "... Mineralogy would be able to claim compensation
 20 from the Australian government under the investor
 21 protection provisions of the [AANZFTA]."
 22 That's R-[46]. So no contribution is suggested
 23 there.
 24 (Slide 30) As to what happened next, MIL obtained
 25 from Mr Palmer and his wholly owned companies the very

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10:19 1 as directors of Zeph, and Zeph cannot point to a single
 2 document showing any actual step taken by it -- taken by
 3 Zeph -- to invest returns in Mineralogy.
 4 (Slide 32) Against that backdrop, I turn to the
 5 first question, focusing on the correct interpretation
 6 of Article 2(d). And focusing on that definition, the
 7 key phrase on which the parties are focusing is "make,
 8 is making, or has made an investment".
 9 (Slide 33) To make an investment, in its ordinary
 10 meaning, is to make some form of contribution, most
 11 obviously of capital, in order to acquire an asset. And
 12 consistent with that interpretation, one can see from
 13 Article 8(1), which is the provision concerning free
 14 transfers, that the treaty-drafters saw the importance
 15 of ensuring the free transfer of, specifically,
 16 "contributions to capital, including the initial
 17 contribution".
 18 So they undoubtedly envisaged that there would be
 19 an initial contribution. That's a point on context that
 20 Zeph has completely blanked in its written pleadings.
 21 (Slide 34) Zeph has taken the position -- and this
 22 is paragraph 262 of its SODPO -- that "the verb 'make'
 23 has little or no substantive meaning in its own right",
 24 and that it just takes its meaning from the word
 25 "investment".

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10:17 1 valuable 6 million or so shares in Mineralogy by
 2 swapping newly issued shares in MIL. MIL had a value of
 3 just \$1. And you can see that from the relevant
 4 resolution of 16 December 2018 (C-63):
 5 "The Company has no assets and liabilities other
 6 than the share capital of 1 fully paid redeemable share
 7 of NZD \$1 ..."
 8 So MIL had nothing of intrinsic value to contribute
 9 to Mineralogy, and did not contribute anything of value.
 10 (Slide 31) Then Zeph -- newly incorporated, as
 11 you've just seen, a few weeks later -- acquired the
 12 shares in Mineralogy from MIL through an exchange of
 13 shares with MIL. And again, as you can see from the
 14 slide, Zeph had a value of \$1 only. You can see that
 15 from the resolution of what was then called Mineralogy
 16 International Pte Limited of 19 January 2019 (C-63).
 17 Thus, Zeph acquired the very valuable shares without
 18 contributing anything of intrinsic value. Any value in
 19 the Zeph shares came solely from the value of the
 20 Mineralogy shares, the Australian company Mineralogy.
 21 If anything, that is the reverse of a contribution.
 22 Although Zeph says that it contributed in other
 23 ways, namely through management of Mineralogy and
 24 investing returns, all that happened is that existing
 25 Mineralogy directors and personnel were also appointed

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10:20 1 (Slide 35) You can see at paragraph 279 it is also
 2 saying that mere "passive ownership ... is sufficient".
 3 But that is to deny the word "make" any effet utile
 4 and it's plainly wrong. To make an investment is not
 5 the same as to have, to own or control, to acquire or to
 6 hold an investment; all terms that the treaty parties
 7 could have used, but did not use. Just as, for example,
 8 to have or acquire a meal is not the same as to make
 9 a meal. The word "meal" is not somehow all-defining.
 10 And the same is true when it comes to the word
 11 "investment". The actual verb used is critical to
 12 meaning, and it is not a mere connective, as Zeph is
 13 suggesting.
 14 (Slide 36) One can test the point another way. If
 15 the formula "to make an investment" just takes its
 16 meaning from the word "investment" -- that's Zeph's
 17 case -- then it would be easy just to slot in the treaty
 18 definition of "investment" in Article 2(c), which you
 19 will recall refers to "every kind of asset owned or
 20 controlled by an investor". But then if you try and
 21 slot that in, it just doesn't work, because "to make
 22 every kind of asset owned or controlled by an investor",
 23 it just doesn't make sense.
 24 This identifies that the treaty-drafters had
 25 something else in mind in Article 2(d): that is, to

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10:22 1 "make" an investment in the ordinary sense of the word,
 2 to make some form of contribution, to acquire an asset.
 3 All this is confirmed by context and object and
 4 purpose. Article 2(c), as you can see, defines the term
 5 "investment" using different concepts: "owned or
 6 controlled by an investor". And it would make no sense
 7 if to "make" an investment was just to mean to own or
 8 control an investment, as that's already within the term
 9 "investment".
 10 (Slide 37) The same basic point applies to
 11 Article 2(a) as to which Zeph seeks to rely on the words
 12 "established, acquired or expanded". But these words
 13 address a temporal issue. An investment is thus covered
 14 irrespective of whether it came into being, was acquired
 15 by the investor or was enlarged after AANZFTA came into
 16 force. The requirement in Article 2(d) to "make"
 17 an investment addresses a different issue, and that's
 18 why a different word is used.
 19 (Slide 38) Zeph also seeks to make a point in the
 20 footnote, footnote 4, by reference to "seeks to make".
 21 Again, that's just addressing a different issue.
 22 An investor which has not yet made a concrete investment
 23 must have more than an abstract desire to do so in order
 24 to benefit from protection under Chapter 11. No great
 25 surprise there.

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10:25 1 Article 2(d) requires no active steps and that the mere
 2 passive holding of an investment is enough. One can see
 3 that, for example, at paragraphs 132 to 135.
 4 But Zeph also now includes a section where it seeks
 5 to give at least some limited meaning to the word
 6 "make", saying that this does require an activity, but
 7 merely in terms of participating in the relevant
 8 transaction. You can see that at paragraphs 158 through
 9 to 166. That would be a very major shift in position.
 10 (Slide 40) We've put up on the slide for you to see
 11 and compare paragraphs 265 to 266 and 279 of the SODPO
 12 of March 2024 -- and you can see those are all saying in
 13 one way or another that mere holding or passive
 14 ownership is enough. Please compare that with the Zeph
 15 Rejoinder of August 2024 at paragraph 165, by way of
 16 example, where there is a reference to "the requirement
 17 to have 'made an investment'", with mere holding being
 18 distinguished.
 19 So it is now accepting that the verb "to make" does
 20 have some meaning, which is a critical change in its
 21 case. Of course, it wishes to confine that meaning by
 22 saying, "It's enough if we just entered into this share
 23 swap, we signed some documents, we issued some shares",
 24 and it says, "There's no need for us to make an actual
 25 contribution".

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10:24 1 (Slide 39) As to object and purpose, Zeph has said
 2 that the primary purpose of AANZFTA is investor
 3 protection. But that is plainly wrong. Chapter 1 of
 4 AANZFTA sets out this free trade agreement's objectives.
 5 Article 1(c) states the objective to:
 6 "... facilitate, promote and enhance investment
 7 opportunities among the Parties through further
 8 development of favourable investment environments ..."
 9 There's no need for specifically favourable
 10 environments for investment opportunities if investments
 11 do not engender risk; that is, some form of contribution
 12 that could be lost in an unfavourable environment.
 13 Article 1(d) then speaks of:
 14 "... strengthening, diversifying and enhancing
 15 trade, investment and economic links among the
 16 Parties ..."
 17 Investment and economic links between the AANZFTA
 18 state parties are not strengthened and enhanced if there
 19 is just a formal change in corporate structure, where
 20 a party of one state comes to own or control assets in
 21 another state without making any contribution.
 22 Now, Zeph, in its recent Rejoinder, the RejPO,
 23 appears belatedly to have recognised the force of
 24 Australia's case on interpretation. In certain parts of
 25 its Rejoinder, Zeph is maintaining its position that

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10:27 1 We do hope we're going to get some clarity on what
 2 Zeph's case in fact is this afternoon. I just want to
 3 emphasise: it does really matter, because the two cases
 4 that Zeph now appears to be running are inconsistent.
 5 And if Zeph is shifting ground, then much of its
 6 argument on interpretation in the SODPO simply falls
 7 away.
 8 Take as an example the case on which Zeph has placed
 9 the most emphasis, and that's the Swiss Federal
 10 Tribunal's first decision in the Clorox case, RLA-144.
 11 The Tribunal already has our basic point that the
 12 court was looking at materially different wording,
 13 "invested by investors", in the definition of the term
 14 "investment", and there was no case there as to whether
 15 the requirements to be an investor had been met.
 16 Venezuela had conceded that, and it had to, because
 17 you may recall that relevant treaty wording, the
 18 definition of "investor", does not contain the "make
 19 an investment" wording so far as concerns corporate
 20 entities. Interestingly, it does contain that wording
 21 so far as concerns natural persons, which brings in
 22 a very nice contrast. But Clorox of course was not
 23 a natural person and did not have the benefit of the
 24 "make an investment" type wording.
 25 (Slide 41) But leaving this to one side, Zeph was

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<p>10:29 1 saying -- and you can see this from paragraph 270 of its 2 SODPO -- that Clorox supported its position that 3 "The [mere] holding of assets was sufficient", which is 4 a correct analysis of what the Swiss court's decision 5 says. And this was being used to say, by Zeph, that the 6 words "make an investment" do not require any positive 7 act, just like the words "invested by". So it's saying: 8 look at Clorox, look at its interpretation of the words 9 "invested by"; no positive act is required, mere holding 10 is sufficient.</p> <p>11 And you can see the court's analysis: we've just 12 highlighted the most relevant part at the bottom of 13 paragraph 3.4.2.7 (RLA-144).</p> <p>14 But Zeph now appears to accept, quite correctly, 15 that the "makes an investment" wording does require more 16 than mere holding, although it seeks to limit that by 17 reference to the form of action that is required. Thus, 18 it appears now to be accepting our case that Clorox is 19 distinguishable. Clorox, it says, "invested by": mere 20 passive holding enough. Our wording, "make 21 an investment", some action is required: mere passive 22 holding is not enough. Which is it saying? We wait to 23 see.</p> <p>24 But if Zeph now accepts that the "made by 25 an investor" language does indeed require more than</p> <p style="text-align: center;">Page 41</p>	<p>10:32 1 capital". And the tribunal specifically found that 2 treaties with different wording were "inapposite" and 3 "of limited use"; that's paragraphs 170 and 172.</p> <p>4 Then PAO Tatneft, RLA-51 at entry 10, a judgment on 5 which Zeph relies heavily in both its pleadings. But 6 not only is the "invested by" wording materially 7 different, as the table shows, the judge expressly 8 distinguished this from the "make an investment" 9 formulation. And we refer you in particular to 10 paragraphs 78 through to 80.</p> <p>11 (Slide 44) It's useful to turn back to the other 12 English court judgment that the parties are referring 13 to: that's Gold Reserve (RLA-44). Zeph is now embracing 14 this case in support of its changed position in the 15 RejPO, for example at paragraph 162. And you can see 16 the relevant treaty definition (RLA-44, paragraph 15) is 17 analogous:</p> <p>18 "(g) 'investor' means ... 19 [a person] who makes the investment in the territory 20 of [the host state] ..."</p> <p>21 In due course, we invite you to focus on the 22 persuasive reasoning from paragraph 32 to paragraph 35, 23 all of which is passed over by Zeph.</p> <p>24 On the slide, you can see the interim conclusion in 25 the judge's reasoning (paragraph 37):</p> <p style="text-align: center;">Page 43</p>
<p>10:31 1 a passive holding, the only question is: what positive 2 action is required? Is it the mere participation in 3 a share swap with relation to Zeph shares of no value? 4 That's Zeph's case. Or is some form of actual 5 contribution required? That's Australia's case.</p> <p>6 Now, there are many cases on this point that the 7 parties have deployed, and we've tried to put those down 8 in a more convenient form for you at slides 42-43. And 9 of course we are identifying whether this has the "make 10 an invest[ment]" type language, or does it have the 11 different "invested by" language; and we are also 12 identifying whether some form of active contribution was 13 in fact made by the investor, and what the outcome was.</p> <p>14 I can just say a few words on the entries concerning 15 cases on which Zeph places particular weight in its 16 pleadings. You'll see on the next page (43) we have 17 Clorox, which I've already looked at; that's entry 12. 18 And the point there is: different wording. It's all 19 about the meaning of "invested by investors" in the 20 "investment" definition.</p> <p>21 Then Sea Search-Armada v Colombia (CLA-242), that's 22 entry 16, a new authority cited by Zeph in RejPO 23 paragraph 155, and the treaty language is again 24 materially different, turning on the definition of 25 "investment" and the meaning of the words "commitment of</p> <p style="text-align: center;">Page 42</p>	<p>10:34 1 "Mere passive ownership of an asset is insufficient. 2 What is required is an active relationship between the 3 investor and the investment ... in the context of the 4 BIT in this case a person can only be one who 'makes the 5 investment' if there is some action on his part. 6 Passive holding of an asset by itself would not amount 7 to making the investment. That is so, it seems to me, 8 as a matter of the ordinary use of language." 9 Same here.</p> <p>10 The conclusion by reference to the facts is then at 11 paragraph 44. Picking that up halfway down the extract: 12 "There is no evidence that [Gold Reserve] ..." 13 That is the claimant: 14 "... made any payment or transferred anything of 15 value to Gold Reserve Corp in return for becoming the 16 indirect owner or controller of the shares in [the] CAB 17 or of the Brisas Project." 18 That's obviously the investment.</p> <p>19 There is then a reference to the absence of any 20 evidence of action at all. And the court concludes: 21 "Whilst [Gold Reserve] undoubtedly become the 22 indirect owner or controller of the shares in CAB and of 23 the Brisas Project I must conclude that it did not at 24 that time make an investment in the assets in respect of 25 which the protection of BIT was sought."</p> <p style="text-align: center;">Page 44</p>

10:36 1 Zeph is now seeking to portray this case as showing
 2 that to make an investment is satisfied by any form of
 3 activity -- that is, mere participation in the
 4 transaction -- and does not require any contribution of
 5 value. But the case doesn't say that. The court is
 6 just looking at the facts before it.
 7 Zeph also seeks to distinguish the case because the
 8 Claimant itself had not transferred any shares; it was
 9 the Claimant's parent company that had transferred the
 10 shares. But although in this case it is Zeph which
 11 issued the shares, in substance that is very similar to
 12 the transaction in Gold Reserve. As in Gold Reserve,
 13 the Claimant has not contributed anything of value.
 14 Here, Zeph was a company worth \$1 before the
 15 transaction. All of the value in the transaction came
 16 from the Mineralogy shares, which MIL held.
 17 Zeph also seeks in its RejPO to support its position
 18 that any form of activity by the investor is sufficient
 19 by reference to two other cases. These are AMF (RLA-49)
 20 and also Gramercy (CLA-86), and if I can look at those
 21 briefly.
 22 (Slide 45) You can see AMF, which is RLA-49. At
 23 paragraph 450, the tribunal finds that:
 24 "The ordinary meaning of ['make an investment'] ...
 25 indicates that the investor has to act and effectively

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10:39 1 no value -- is sufficient.
 2 (Slide 47) Zeph also refers to Gramercy v Peru,
 3 CLA-86. And again, this helps Australia. The
 4 conclusion is at paragraph 606 of the award, following
 5 on from a summary of the Alapli case and also KT Asia.
 6 You can see it says:
 7 "These cases are inapposite; they refer to corporate
 8 restructurings where shell corporations acquire the
 9 investment for a nominal price, from a national of the
 10 host State or a third-party investor who does not
 11 benefit from the treaty."
 12 Those are, in essence, what has happened here. So
 13 of course this doesn't cut across our position that mere
 14 participation in a transaction, without a contribution
 15 of value, does not amount to making an investment.
 16 Against that backdrop on the law, can I turn to the
 17 current facts. Zeph actually says, "Well, in any event,
 18 we have made a contribution", and it puts that in three
 19 different ways. It says, "We've made the initial
 20 acquisition in shares in Mineralogy, we've invested in
 21 terms of management and we've reinvested returns".
 22 If I can look at those in turn, starting, of course,
 23 with the initial acquisition. As you've seen, Zeph
 24 acquired its shares in Mineralogy, as a result of two
 25 share swaps, without contributing anything of value.

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10:37 1 engage in the action of making the investment."
 2 We submit that must be right.
 3 At paragraph 453, reference is made to previous
 4 cases in which there had not been an active investment.
 5 These included:
 6 "... where a company did not make any payment or
 7 transfer anything of value in return for becoming the
 8 indirect owner or controller of the shares in the
 9 company that owns the investment ..."
 10 Then on the next slide (46), paragraph 456, you can
 11 see there's a reference to Standard Chartered Bank and
 12 the Alapli v Turkey case, where:
 13 "The ... tribunal ... [stated] that in order to
 14 establish the activity of investing, [a tribunal] 'must
 15 find an action transferring something of value (money,
 16 know-how, contacts, or expertise) from one
 17 treaty-country to another'.
 18 Then the key facts are at paragraph 457:
 19 "Claimant, a German company, itself purchased the
 20 Aircraft from Fischer Air by transferring the purchase
 21 price to the Czech company's account ..."
 22 So the facts are completely different: there was
 23 a real contribution of value, and the case does not
 24 establish that mere participation in a transaction --
 25 let's say the mere issue of shares in a company that has

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10:40 1 Zeph now has three primary lines of argument.
 2 First, it relies heavily on a statement in Australia's
 3 ROPO, paragraph 64, that:
 4 "... Australia does not dispute that the share swap
 5 was both lawful and effective ..."
 6 That so-called "admission" adds nothing.
 7 Article 2(d) requires that a putative investor make
 8 an investment. So the fact that we don't dispute that
 9 Zeph is the legal owner is neither here nor there.
 10 Second, Zeph insists that the new shares it issued
 11 to MIL were in fact of value, but it provides no
 12 evidence of this. For example, it asserts at RejPO
 13 paragraph 149 that, "It is incorrect to say that the
 14 shares had no value", but notably, there is no reference
 15 to any evidence in support.
 16 At RejPO paragraph 168, Zeph appears to be relying
 17 on the face value of the consideration shares that it
 18 had issued, which is approximately AUD 6 million. But
 19 of course, face value tells one nothing. Zeph's paid-up
 20 capital, its actual value before the transaction, was
 21 \$1, as you've already seen from R-536, the board minute
 22 of 29 January 2019. The Zeph shares acquired value only
 23 as a result of the transaction with MIL.
 24 (Slide 48) This is further confirmed in the evidence
 25 of Professor Lys. And you can see in particular at

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10:42 1 paragraph 37 -- I don't have time to take you through it
 2 all:
 3 "Because the Consideration Shares represent
 4 ownership of an enterprise with no assets and no
 5 intrinsic value immediately prior to the restructuring
 6 transaction, they have zero value outside of this share
 7 exchange."
 8 All this is intuitive: this is what you'd be
 9 expecting, you'd be understanding. Professor Lys is
 10 confirming this from his expert point of view, and of
 11 course he is not being challenged through
 12 cross-examination.
 13 Instead, and tellingly, Zeph is seeking to take out
 14 of context something that Australia has said on adequacy
 15 of consideration. But all Australia said -- and this is
 16 ROPO paragraph 61(a) -- was:
 17 "Contrary to Zeph's suggestion, Australia does not
 18 rely on any argument concerning the adequacy of the
 19 consideration provided by Zeph. Its argument is that
 20 Zeph was required to make an active contribution, which
 21 cannot be achieved if Zeph provided nothing of value."
 22 So of course there is no admission there.
 23 Third, and defensively, Zeph argues that it is
 24 immaterial whether the shares it issued to MIL were of
 25 any value, because what matters instead is that it

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10:45 1 "In light of these facts, the Tribunal finds
 2 unconvincing the Claimant's assertions that there
 3 occurred a 'real exchange of value', that '... there was
 4 a transfer between Clorox International and
 5 Clorex España and that 'This is a transfer for valuable
 6 and real consideration'.
 7 So the point there: the SPV was found not to have
 8 made an investment, despite having taken what Zeph would
 9 call an "active step", in terms of issuing shares to the
 10 US company, and that's because those shares had no
 11 intrinsic value.
 12 I turn to the second contribution engage alleged,
 13 which is through what Zeph calls "active management",
 14 which is based on the fact that five of the Claimant's
 15 directors also have roles in Mineralogy.
 16 Notably, Zeph has not put forward a single case in
 17 support of the argument that when personnel of the
 18 locally incorporated investment company -- here
 19 Mineralogy -- are subsequently also appointed to some
 20 position in the alleged investor -- here Zeph -- this
 21 somehow amounts to a contribution by the investor.
 22 Plainly this is completely different to the situation
 23 where you have a foreign investor who is coming in and
 24 is contributing by way of some specific individual
 25 know-how or expertise.

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10:44 1 actively participated in the transaction, such that the
 2 investment wasn't purely passive. But that's the
 3 argument on the law I've already addressed. The key
 4 point is that no foreign investor ever contributed
 5 anything of value.
 6 Factually, there is actually a helpful analogy to be
 7 drawn to the facts of Clorox (RLA-148), because of
 8 course the Swiss courts overturned the award, but it's
 9 still useful to focus on what the facts showed, and
 10 hence what the outcome would have been had there been
 11 a requirement to make a contribution under the treaty
 12 language, as we say there is here; completely different
 13 treaty language.
 14 (Slide 49) The basic facts are at paragraphs 827 and
 15 828, if I can just summarise these for you now. One
 16 sees a Spanish SPV being incorporated so as to acquire
 17 the shares in the Venezuelan investment vehicle in
 18 exchange for issuing shares in itself to a US parent
 19 company, and all the value in the SPV then comes from
 20 the US parent company in the transfer of the valuable
 21 investment.
 22 You can see the conclusion, the tribunal's response
 23 to that set of facts, which plainly is analogous to what
 24 we have here. So Clorox España was found not to have
 25 made an investment, despite having -- sorry:

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10:47 1 What we have is just individuals who were already
 2 involved in Mineralogy, usually over a period of years
 3 or even decades, and then in 2019 or later their being
 4 appointed to the board of Zeph, but thereafter still
 5 continuing at Mineralogy.
 6 The most obvious example is Mr Palmer himself, who
 7 has been involved in Mineralogy since the 1980s and has
 8 served almost continually as a Mineralogy director. He
 9 was just appointed as a director of Zeph on
 10 23 January 2019, but of course that doesn't mean
 11 he hasn't remained heavily involved in Mineralogy.
 12 As we've already highlighted in our ROPO at
 13 paragraph 67, the same basic point applies to all the
 14 other five individuals, who we do note have not been
 15 tendered as witnesses, ready to explain firsthand how
 16 specifically, as Zeph officers, they have contributed
 17 anything material to Mineralogy.
 18 (Slide 50) Now, that leaves Zeph's third alleged
 19 form of contribution, and this is the alleged making of
 20 an investment through returns and dividends invested by
 21 the Claimant into Mineralogy. You can see that is
 22 exactly how Zeph is putting its case at SODPO
 23 paragraphs 303 and 358(g): an "invest[ment] by the
 24 Claimant into Mineralogy".
 25 (Slide 51) Now, the two provisions that Zeph is

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10:49 1 relying on are Article 2(c), and you see that:
 2 "For the purposes of the definition of investment in
 3 this Article, returns that are invested shall be treated
 4 as investments ..."
 5 Then Article 2(j):
 6 "... return means an amount yielded by or derived
 7 from an investment, including profits, dividends,
 8 interest, capital gains ..."
 9 This gives rise to two separate questions. First,
 10 are there returns in this case that meet the definition
 11 or requirements of Article 2(j); and second, even if
 12 yes, is the further requirement of Article 2(c) met,
 13 i.e. are those returns that are invested?
 14 So as to Article 2(j), as you see, there must
 15 already be a qualifying investment in existence, as
 16 follows from any plain reading of the words: "an amount
 17 yielded by or derived from an investment". And in this
 18 case, there is no prior covered investment by Zeph,
 19 either through the share swap or the supposed management
 20 of Mineralogy, thus there can be no returns within the
 21 meaning of Article 2(j). And notably, Zeph does not
 22 engage with this point.
 23 But it is an important point because, stepping back,
 24 Zeph wishes to deploy this as a sort of get-out-of-jail
 25 card. It would have no need to rely on alleged returns

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10:52 1 decision or took any act in relation to those profits,
 2 such that it could say that it had invested these sums
 3 in Mineralogy.
 4 (Slide 52) Now, looking at the Mineralogy
 5 constitution, you can see at clause 31.1 -- this is
 6 C-563:
 7 "The Company in general meeting may declare
 8 a dividend if, and only if the directors have
 9 recommended a dividend and such dividend shall not
 10 exceed the amount recommended by the directors."
 11 So of course a dividend must be declared before
 12 there is any entitlement to it; it must be recommended
 13 before it can be declared. The general meeting -- that
 14 is, the shareholders -- cannot decide of their own
 15 initiative that there will be a dividend. The power is
 16 only to approve a dividend that the directors have
 17 already recommended; which, by the way, is also the
 18 default position as a matter of Australian law under
 19 Section 254U of the Corporations Act at CLA-161.
 20 Now, the difficulty for Zeph is that no positive
 21 steps were ever taken so far as concerns the profit that
 22 Zeph now relies on. This is highlighted in
 23 Professor Lys's second report at paragraphs 54 to 56,
 24 but the basic facts are as follows.
 25 In 2019, Mineralogy's directors did not recommend

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10:50 1 if it had already succeeded in showing that it has made
 2 an investment through its acquisition of shares or
 3 through management. But it fails in that. And if it
 4 fails in that, as we say it does, this reliance on the
 5 treatment of returns under Articles 2(j) and 2(c)
 6 doesn't help it at all.
 7 So Zeph's case on returns falls at the very first
 8 hurdle. There's just no investment on which
 9 Article 2(j) can bite.
 10 Moving to the second hurdle, Article 2(c) is
 11 concerned with returns that "are invested". And as it
 12 accepts -- I showed you the relevant passages at
 13 slide [51] -- it must be Zeph itself as the investor
 14 which is investing. It cannot be enough for a claimant
 15 to point to an asset within the host state that is
 16 generating and retaining profits, without any action at
 17 all from the investor. After all, Article 2(c) is
 18 concerned with assets owned or controlled specifically
 19 by an investor, which of course is a person who must
 20 make an investment.
 21 Turning briefly to the facts, Zeph relies on the
 22 profits that were made by Mineralogy in 2019 and 2020
 23 that were not paid to it by way of dividends. But
 24 it can point to no evidence that it ever had any
 25 entitlement to these funds, nor that it ever made any

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10:54 1 any dividends, so Zeph, as a shareholder, was not
 2 entitled to any dividends. There is therefore no sum
 3 that it obtained, or was entitled to obtain, by way of
 4 a return that was available to it to reinvest. This
 5 means that in its RejPO at paragraph 181, it's just
 6 wrong to state that it had "forgone" a dividend, because
 7 there was nothing for it to forgo.
 8 Then in 2020, the Mineralogy directors did recommend
 9 a dividend -- that's of approximately AUD 8.1 million --
 10 but it's not suggested that those sums were reinvested
 11 by Zeph. And of course the same point applies: Zeph
 12 wasn't entitled to any dividend beyond those sums
 13 because nothing more was recommended and declared. So
 14 again, there was no return which it could have
 15 reinvested.
 16 Zeph's answer appears to be that it was somehow
 17 engaged in the decision-making processes of Mineralogy
 18 because when Mr Palmer was acting as a director of
 19 Mineralogy, he was acting as Zeph, or was in any event
 20 entitled to act in the best interests of Zeph as
 21 a matter of clause 22.3 of the Mineralogy constitution
 22 (C-563), which you can see on the screen.
 23 We can obviously explore that a bit with Mr Palmer.
 24 But we note that the position that Mr Palmer was acting
 25 as Zeph, when he was in fact acting as a director of

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10:55 1 Mineralogy, is not supported by a single document.
 2 Further, the clause 22.3 entitlement for Mineralogy
 3 to act "in the best interests of [Zeph] and in a manner
 4 which is contrary to the best interests of [Mineralogy]"
 5 does not somehow mean that Mineralogy directors are
 6 acting as Zeph. To the contrary, it highlights that
 7 these are separate legal entities with separate
 8 interests.
 9 And the Claimant's expert Mr Dunning KC doesn't
 10 suggest otherwise; indeed, he supports our position that
 11 it could only be Mineralogy directors acting under this
 12 provision. We refer you to paragraphs 4, 7 and 10 of
 13 his report. That's why there is no need for us to call
 14 him for cross-examination.
 15 Indeed, one notes in the sidelines that if the
 16 Mineralogy directors were acting in the interests of
 17 Zeph, and these contradicted what the interests of
 18 Mineralogy would be -- and that's one of the premises of
 19 clause 22.3 -- then that is the opposite of Zeph making
 20 a contribution to Mineralogy: it is Mineralogy making
 21 some sacrifice as to its interests for Zeph, the reverse
 22 of a contribution.
 23 Curiously, you will have seen from the Rejoinder
 24 that there's also a great weight being placed by the
 25 Claimant on what Mineralogy could have done and how

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10:58 1 the fundamental point that is developed in Australia's
 2 pleadings is that the term "investment" should be given
 3 its ordinary meaning, and that the meaning is not simply
 4 "asset".
 5 Now, that is known from the text of Article 2(c).
 6 Footnote 3, which is contained in Article 2(c), states:
 7 "For greater certainty, investment does not mean
 8 claims to money that arise solely from:
 9 (a) commercial contracts for sale of goods or
 10 services; or
 11 (b) the extension of credit in connection with such
 12 commercial contracts."
 13 This is said to be "For greater certainty". It is
 14 a clarification of what is already built into the
 15 definition, rather than the exception to what would
 16 otherwise be an all-encompassing definition. So that
 17 makes clear that, even absent the clarificatory
 18 footnote, assets such as a claim to money under
 19 a commercial contract for the sale of goods or services
 20 would not qualify as an investment. And that's exactly
 21 what one would expect, because such assets would not
 22 fall within the ordinary meaning of "investment", given
 23 the lack of any inherent characteristics.
 24 Now, Australia has pointed to this, and to other
 25 textual indicators, at paragraphs 101 and 102 of its

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10:57 1 dividends could have been recommended by its directors.
 2 But that of course is all hypothetical. The question
 3 for this Tribunal is whether returns were reinvested,
 4 not whether this could have happened.
 5 Finally, one last point on "no investor". One could
 6 posit a situation where there is no investment through
 7 acquisition of shares in a local company, but a claimant
 8 has later made contributions which it says are
 9 themselves independently qualifying investments. In
 10 those circumstances, of course, the Claimant would have
 11 to show that the criteria in the treaty are met. That's
 12 not how Zeph is putting this limb of its case; and if it
 13 did, it would fail, for all the reasons we've already
 14 given.
 15 (Slide 53) I turn now to the "no investment"
 16 objection. The relevant provision that the Tribunal has
 17 already seen is Article 2(c):
 18 "... investment means every kind of asset owned or
 19 controlled by an investor, including but not limited to
 20 the following ..."
 21 The following of course being a non-exclusive list
 22 of forms of asset.
 23 Australia's key contention is that the term
 24 "investment" connotes certain inherent characteristics,
 25 including particularly of contribution and risk. And

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11:00 1 ROPO, including Article 8(1)(a), which, as you recall,
 2 lists transfers to include, at the very first
 3 sub-provision, "contributions to capital, including the
 4 initial contribution", treating it as a given that there
 5 will be an initial contribution to the investment.
 6 Zeph does not engage with those paragraphs of our
 7 ROPO, but it does say that Article 2(c) does not refer
 8 to inherent characteristics. But that's just ignoring
 9 the particular language we rely on, as well as the
 10 significant number of cases, including recent ones, that
 11 have taken an ever more focused look at what is entailed
 12 by an "every kind of asset"-type definition, and have
 13 found that the inherent characteristics of an investment
 14 must still be taken into account.
 15 We have set these cases out in our SOPO at
 16 paragraphs 188 and 193, and ROPO, 104 to 106. We have
 17 also listed them out at the table at slides 54 and 55,
 18 including showing the relevant treaty language.
 19 For now, I draw attention to two cases with
 20 materially similar language to that in Article 2(c) of
 21 Chapter 11.
 22 (Slide 56) The first of these is Nova Scotia
 23 v Venezuela, RLA-64. You see the definition at
 24 paragraph 75: "'investment' means any kind of asset",
 25 followed by a non-exhaustive list.

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<p>11:02 1 (Slide 57) Then at paragraph 77, the tribunal begins 2 its helpful explanation as to why the tribunal must do 3 more than simply look to the list of examples offered. 4 Then at paragraph 78, it gives three reasons: 5 "First, the list of examples in Article I(f) is 6 clearly non-exhaustive on its own terms. The open-ended 7 nature of this part of the purported definition of 8 investment calls for recourse to inherent features." 9 The same point here. 10 (Slide 58) Then paragraph 79: 11 "Second, the interplay between Article I(f) and 12 Article I(g) of the BIT, and the terms 'investment' and 13 'investor' generally, support the necessity of recourse 14 to inherent features. 'Investor' operates as a gateway 15 for 'investment.' The 'investor' 'make[s] the 16 investment." 17 Of course, again, the same point here. 18 "The Tribunal does not see the terms 'investor' and 19 'investment' as separate and pertaining only to <i>ratione</i> 20 <i>personae</i> and <i>ratione materiae</i> respectively. By its 21 plain meaning, the language in the BIT makes it 22 necessary to address the question of what it is to 23 'make' an investment. This question in turn requires 24 recourse to the inherent features of an investment." 25 Of course, the same reasoning applies so far as</p> <p style="text-align: center;">Page 61</p>	<p>11:05 1 a tribunal could evaluate the qualifications of other 2 forms of assets outside the illustrative list." 3 And importantly, it notes: 4 "The same is true for the common formulation in 5 other BITs, which defines 'investment' sweepingly as 6 'every kind of asset.' Unless some intrinsic meaning is 7 assigned to the term, such general formulations risk 8 permitting even transactions that bear none of the 9 traditional hallmarks of investment to qualify as such." 10 We know the treaty parties in this case were 11 concerned to eliminate coverage in relation to such 12 transactions. 13 (Slide 61) If I can ask you in due course to look at 14 the remaining paragraphs of that, including, of course, 15 the reference to what is required. 16 (Slide 62) It is also useful to point you -- it's 17 not just referring to the need for contribution at 18 paragraph 237 (RLA-67), but also: 19 "What matters is the economic reality of the 20 contribution in consideration of all the relevant 21 circumstances, not the formal arrangements used. 22 An investor could ... borrow money from third parties to 23 make an investment. What matters is that the investor 24 is the one ultimately bearing the financial burden of 25 the contribution."</p> <p style="text-align: center;">Page 63</p>
<p>11:03 1 concerns Articles 2(c) and (d) of Chapter 11. And we 2 refer you in time to look at <i>Komaksavia v Moldova</i>, 3 a 2022 case, at RLA-63, at paragraphs 148 and 153 and 4 following, for analogous reasoning. 5 The third reasoning of the Tribunal is at 6 paragraph 80, rejecting the argument that the existence 7 of an inherent meaning is dependent on the choice of 8 arbitral forum, i.e. whether it's an ICSID case or not. 9 (Slide 59) And paragraph 84 sets out the Tribunal's 10 view as to what is required, and you see there the 11 reference to "contribution ... and risk". 12 (Slide 60) If I can take you very briefly to the 13 2023 decision in <i>Rasia v Armenia</i> (RLA-129), another case 14 with a non-exclusive list of assets; but here, 15 interestingly, the definition is referring to "every 16 kind of investment", not "every kind of asset". But the 17 tribunal didn't see this as determinative. It saw as 18 most important, again, the fact of the non-exclusive 19 nature of the list of assets, just as we see here. 20 If I can ask you in due course to look with great 21 care at paragraph 373, explaining the tribunal's 22 persuasive reasoning, looking at <i>Romak</i> and saying that: 23 "... unless the term 'investment' is given some 24 inherent meaning, the non-exclusive nature of the asset 25 list in most BITs provides no benchmark by which</p> <p style="text-align: center;">Page 62</p>	<p>11:06 1 Which sheds light on why risk is also relevant. 2 A party doesn't assume risk unless it bears some 3 financial burden. The mere possibility of receiving 4 a return does not mean that an investor has assumed 5 risk. 6 (Slide 63) One can get that from <i>KT Asia</i> 7 <i>v Kazakhstan</i>, RLA-68 (paragraphs 218-219), and you can 8 see there the same basic reasoning in relation to risk: 9 "As a general matter, an investment through the 10 acquisition of equity in a corporation entails the risk 11 that the value of the equity decreases or is even 12 completely lost. Such a risk certainly qualifies as 13 an investment ... 14 The difficulty here is that <i>KT Asia</i> has made no 15 contribution and, having made no contribution, incurred 16 no risk of losing such (inexistent) contribution." 17 And that is what's identified as the relevant risk. 18 (Slide 64) One can see the same point in <i>Komaksavia</i> 19 <i>v Moldova</i>. Paragraph 175 actually is also relevant to 20 the issue of contribution; while paragraph 177, on the 21 next slide (65), deals with the issue of risk. 22 I skipped over by mistake <i>Rand v Serbia</i>; that's 23 slide 62. I think perhaps -- this is obviously a case 24 that the President knows very well. 25 THE PRESIDENT: You quoted it.</p> <p style="text-align: center;">Page 64</p>

11:08 1 MR WORDSWORTH: I quoted it, thank you.
 2 So then one turns very briefly to the application to
 3 the facts of this case.
 4 As to contribution, the relevant facts are the same.
 5 As I've already addressed in relation to whether Zeph
 6 has made an investment, there has been no contribution.
 7 As to risk, Zeph's case is that it assumed risk
 8 simply by owning shares, given that the potential return
 9 from those shares is a matter of uncertainty. But
 10 exposure to uncertainty is not the same as an assumption
 11 of risk, as the various cases persuasively identify.
 12 We refer you also to the second report of
 13 Professor Lys (paragraphs 220-221), which explains what
 14 is required for a risk from his economist's point of
 15 view, at slide 66. As he explains:
 16 "... Zeph only faces the risk that it may lose the
 17 value of the Consideration Shares it exchanged for the
 18 'parcel of Mineralogy shares.' However ... that risk is
 19 inconsequential ... [as] the consideration shares issued
 20 by Zeph had no value ..."
 21 So Zeph is also unable to show risk.
 22 And because no contribution, no risk, one never
 23 really needs to get to the question of duration. So for
 24 this reason also, Zeph is unable to show an investment.
 25 Madam President, that concludes my submissions.

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11:32 1 letterbox or shell companies in the relevant
 2 jurisdiction.
 3 (Slide 69) So, for example, in AMTO v Ukraine,
 4 RLA-72 at paragraph 69, the tribunal said that the
 5 purpose of a denial of benefits provision at issue in
 6 that case was:
 7 "... to exclude from protection investors which have
 8 adopted a nationality of convenience. Accordingly,
 9 'substantial' in this context means 'of substance, and
 10 not merely of form'. "
 11 (Slide 70) In the same vein, an APEC International
 12 Investment Agreements Negotiators Handbook (RLA-153)
 13 observes that, at page 26:
 14 "Without a Denial of Benefits clause, nationals of
 15 the host State may incorporate an entity in the other
 16 Contracting Party, so as to take advantage of the
 17 protection afforded by the treaty against their own
 18 country."
 19 That, of course, is precisely what Australia
 20 contends has occurred here.
 21 In considering the proper interpretation and
 22 application of Article 11 of AANZFTA, Australia urges
 23 the Tribunal to bear the above purpose in mind, because
 24 if the effect of a denial of benefits clause can be
 25 circumvented simply by incorporating a shell company,

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11:10 1 I suspect now may be a convenient moment for a break.
 2 THE PRESIDENT: Absolutely. Thank you.
 3 Shall we take a 20-minute break now, is that fine,
 4 and resume in 20 minutes? Good.
 5 (11.10 am)
 6 (A short break)
 7 (11.31 am)
 8 THE PRESIDENT: So we are ready to resume. (Pause)
 9 I give the floor to the Respondent to continue with
 10 the next objection.
 11 DR DONAGHUE: (Slide 67) Thank you, Madam President, members
 12 of the Tribunal. I will now be addressing the denial of
 13 benefits objection.
 14 (Slide 68) The starting point, of course, is the
 15 text of Article 11, which the Tribunal can see on the
 16 screen, or the relevant part of which you can see on the
 17 screen. Ultimately, the determinative question to which
 18 that text directs attention is whether the Claimant had
 19 "substantive business operations" in Singapore as at the
 20 relevant date.
 21 In discussing provisions of the kind that you see on
 22 the screen, numerous decisions of investment tribunals
 23 have recognised that the effect of these type of
 24 provisions is that investors are effectively prevented
 25 from seeking treaty protection simply by incorporating

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11:33 1 and then having that shell company purchase or enter
 2 into a joint venture with an existing local business in
 3 order that the shell company can then claim the existing
 4 activities of the existing business as its own, then
 5 that provides a blueprint for rendering denial of
 6 benefit clauses completely ineffective in achieving
 7 their purpose.
 8 That points, we submit, to a construction of the
 9 substantive provisions of Article 11(1)(b) that can't be
 10 circumvented in such a transparent way.
 11 Article 11(1)(b) contains both a procedural
 12 notification requirement and then two substantive
 13 requirements.
 14 (Slide 71) As to the procedural notification
 15 requirement, we say it was satisfied by Australia
 16 providing notification to both Zeph and the Government
 17 of Singapore of its exercise of its entitlement to deny
 18 the benefits of Chapter 11 to Zeph and its investments.
 19 That occurred by way of the two letters that you can see
 20 on the screen, C-153 and C-155, as is addressed in the
 21 SOPO at paragraphs 260 to 262, and I say no more
 22 about it.
 23 There are two substantive conditions in
 24 Article 11(1)(b), and we address them in turn. The
 25 first is also straightforward; that is, whether or not

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11:35 1 the words "owned or controlled" in Article 11(1)(b) are
 2 satisfied. And those words, we contend, must be
 3 interpreted as including indirect ownership or control,
 4 for the reasons developed in the SOPO at paragraphs 213
 5 to 217.
 6 The Claimant did not deny in its SODPO that it is
 7 ultimately owned or controlled by Mr Palmer, who is
 8 a national of Australia and therefore a national of the
 9 denying party. Instead, at paragraph 373, it stated
 10 that this was "irrelevant" and that it did not have to
 11 contest that issue.
 12 (Slide 72) But then, as you can see on the slide, in
 13 paragraph 128 of its Rejoinder, at 128(e), the Claimant
 14 accepts that it is ultimately owned by Mr Clive Palmer.
 15 In our submission, that is clearly sufficient to satisfy
 16 the first substantive condition.
 17 The second substantive condition is that which
 18 I identified a few moments ago as the determinative one,
 19 which is whether the Claimant has "substantive business
 20 operations" in Singapore.
 21 In assessing whether the Claimant satisfies this
 22 requirement, we submit it is important to recall the key
 23 facts that I have taken the Tribunal to already this
 24 morning, including the numerous letters sent shortly
 25 after the incorporation of Zeph, which not only

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11:38 1 other asserted rationales for the restructure creating
 2 Zeph, but they were purchased two days after it was
 3 included in the group.
 4 Now, in its SODPO at paragraph 89(d)(iv), Zeph
 5 acknowledges that it paid SGD 3.6 million for these
 6 companies. As you will see from Professor Lys's
 7 statement, that was 15 times the book value of their
 8 combined equity before the purchase.
 9 (Slide 74) And Zeph acquired those companies without
 10 conducting any due diligence, at a time when Australia's
 11 investigator, Mr Vickers, concludes that it is probable
 12 that they had already ceased to have any significant
 13 business operations. Mr Vickers says that in
 14 paragraph 83(b) of his witness statement, and the
 15 Claimant has chosen not to cross-examine Mr Vickers on
 16 that conclusion, which we contend the Tribunal should
 17 accept.
 18 The acquisition of the engineering companies is
 19 analysed in detail by Professor Lys, who explains why
 20 their purchase was not a commercially viable decision,
 21 and who, like Mr Vickers, concludes that the companies
 22 were already failing when Zeph bought them, well prior
 23 to any effect of the Covid pandemic.
 24 (Slide 75) As Professor Lys put it, and you can see
 25 the quote on the screen (expert report, paragraph 527),

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11:36 1 expressly invoked treaty protection but also, you will
 2 recall, contained express assertions, drafted in the
 3 language of Article 11(1)(b), asserting that both MIL
 4 and Zeph had, days after they were created, substantive
 5 business operations in the relevant jurisdictions.
 6 Those letters, we contend, make plain that Mr Palmer
 7 was aware of the need for a company to have substantive
 8 business operations in its state of incorporation if it
 9 was to obtain investment treaty protection under
 10 AANZFTA. It's that awareness that provides the only
 11 plausible explanation for the fact that only a few days
 12 after acquiring shares in Mineralogy, Zeph sought to
 13 create the appearance that it did have substantive
 14 business operations by cloaking itself in the
 15 pre-existing activities of existing Singaporean
 16 companies. Specifically, on 31 January 2019, two days
 17 after its interposition into the Mineralogy Group, Zeph
 18 acquired three Singaporean engineering companies.
 19 Now, I'll address the acquisition of those companies
 20 in a little more detail later in this part of the
 21 opening. But for now, it is sufficient to note that all
 22 three of companies had been in the business of providing
 23 contract maintenance in Singaporean shipyards. They had
 24 nothing to do with mining, they had nothing to do with
 25 coal finance, they had nothing to do with any of the

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11:39 1 in the last sentence:
 2 "... from an operational perspective ... [the
 3 acquisition of these companies] makes no ... sense at
 4 all."
 5 Again, the complainant has chosen not to test these
 6 conclusions, which strongly support the inference that
 7 the only plausible explanation for Zeph's acquisition of
 8 those companies is that it was a poorly executed attempt
 9 to defeat the denial of benefits clause in Article 11.
 10 The attempt to provide the appearance of substantive
 11 business operations in Singapore is also the only
 12 plausible explanation for why, about a year later, in
 13 January 2020, Zeph entered into a joint venture with
 14 Kleenmatic, a Singaporean office-cleaning business.
 15 Again, I'll address this in more detail later in this
 16 part of the opening.
 17 But like the acquisition of the engineering
 18 companies, the joint venture is explicable only as
 19 an attempt to subvert the plain intent of the parties to
 20 AANZFTA in agreeing to Article 11. It's just an attempt
 21 to re-badge the activities of an existing Singaporean
 22 business as substantive business operations of Zeph
 23 itself. We submit there's no other explanation for the
 24 holding company of a substantial Australian mining
 25 company -- which was established in Singapore, we are

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<p>11:40 1 told to assist in coal financing or to gain personal tax 2 benefits for Mr Palmer -- to get into the business of 3 office cleaning. 4 The belated suggestion of Mr Palmer that this was 5 an effort to diversify operations and seek further 6 business opportunities cannot be taken seriously. It is 7 addressed in detail by Professor Lys in his first report 8 at paragraphs 579 to 592. And again, his evidence has 9 not been tested and indeed not been addressed on this 10 point by the Claimant at all. 11 Can I turn then to the law concerning 12 Article 1(1)(b), where, as I've noted, Australia 13 contends the decisive consideration is that, for the 14 reasons I'm going to develop, the Claimant itself, Zeph 15 itself, had no operations in Singapore that are capable 16 of being properly characterised as genuine or authentic 17 business operations. 18 Before developing that point, the Tribunal will note 19 that "substantive business operations", the phrase in 20 11(1)(b), differs from the much more common reference to 21 "substantial business activities" in denial of benefits 22 clauses in other treaties. The Tribunal will have noted 23 the debate between the parties in the written pleadings 24 about whether the term "substantive" sets a more onerous 25 threshold than "substantial", or whether the words may</p> <p style="text-align: center;">Page 73</p>	<p>11:43 1 owned or controlled by a national of the respondent 2 state. 3 While the tribunal said that in the context of 4 determining where the claimant's real seat was located 5 for the purpose of determining whether there had been 6 an investment within the meaning of the Romania-Cyprus 7 BIT, its reasoning is more generally applicable. 8 (Slide 77) In particular, the tribunal said at 9 paragraph 250, which you can see on the screen: 10 "If ... all that is happening is that a Romanian 11 investor is recycling funds into an existing Romanian 12 investment through a holding company in Cyprus which 13 really is no more than a paper façade, it is difficult 14 to see such an operation as something within the 15 contemplation of the parties to the BIT. That makes it 16 particularly important to scrutinise the evidence to see 17 whether the Cyprus holding company is exercising some 18 form of effective management and not simply discharging 19 formalities." 20 These comments are pertinent to the present case 21 given that prior to the restructure, Mr Palmer owned 22 Mineralogy through his two Australian holding companies, 23 and the share swap transaction that Mr Wordsworth has 24 already addressed seems to be the very kind of 25 transaction that the Alverley tribunal had in mind.</p> <p style="text-align: center;">Page 75</p>
<p>11:42 1 be used interchangeably, or whether "substantial" is 2 more exacting than "substantive". 3 (Slide 76) Happily, we consider you can be spared 4 any further debate on that point, because the Claimant 5 in the SODPO, in the extract you can see on the screen 6 (paragraph 458(a)), recognises that the term 7 "'substantive' may connote 'authenticity and 8 genuineness'", and that its "plain meaning" is "having 9 substance; being real as supposed to apparent". And the 10 Claimant in its Rejoinder reiterates or confirms that 11 interpretation. 12 The Respondent agrees that the question the Tribunal 13 should ask itself in applying Article 11(1)(b) is 14 whether the Claimant's business operations in Singapore 15 are genuine, authentic and of substance. So there 16 appears to be no meaningful difference between the 17 parties on this point. 18 The test that I have just identified is consistent 19 with the award of the ICSID tribunal in Alverley 20 v Romania, RLA-71, that being a tribunal which was 21 chaired by Sir Christopher Greenwood. The Alverley 22 tribunal said that it is appropriate to exercise 23 particular care in assessing the genuineness of 24 a putative investor company's connection to its state of 25 incorporation if that company is in fact ultimately</p> <p style="text-align: center;">Page 74</p>	<p>11:44 1 The Claimant, you will have noted, says that 2 Alverley was not a case which concerned the application 3 of a denial of benefits provision; which, as I've said, 4 Australia had already expressly noted in its SOPO at 5 paragraph 223. We say that does nothing to diminish the 6 force of the tribunal's analysis. 7 (Slide 78) The Claimant has also referred in its 8 SODPO at paragraph 455 to the ICSID tribunal's decision 9 in Gran Colombia v Colombia, RLA-80. This is a case 10 that Australia likewise already discussed in its SOPO at 11 paragraph 226, albeit under the different name of 12 Aris Mining v Colombia. There (paragraph 137) -- and 13 again it's on the screen -- the tribunal said: 14 "A business activity may not be mere cursory, 15 fleeting or incidental, but must be of sufficient extent 16 and meaning as to constitute a genuine connection by the 17 company to its home State ... The connection between the 18 company and the home State cannot be merely a sham, with 19 no business reality whatsoever, other than an objective 20 of maintaining its own corporate existence." 21 (Slide 79) Next, and importantly, the ICSID tribunal 22 in Pac Rim v El Salvador (RLA-33), in upholding a denial 23 of benefits objection, held that a substantial business 24 activities requirement is concerned only with activities 25 that are attributable to -- and you can see the language</p> <p style="text-align: center;">Page 76</p>

11:46 1 there three lines down -- "the 'enterprise' itself".
 2 Thus, as the Pac Rim tribunal explained by reference to
 3 the equivalent of Article 11(2)(b):
 4 "... [the] first condition ... relates not to the
 5 collective activities of a group of companies, but to
 6 activities attributable to the 'enterprise' itself; here
 7 the Claimant. If that enterprise's own activities do
 8 not reach the level specified by CAFTA Article 10.12.2,
 9 it cannot aggregate to itself the separate activities of
 10 other natural or legal persons to increase the level of
 11 its own activities: those would not be the enterprise's
 12 activities for the purpose of applying CAFTA
 13 Article 10.12.2."
 14 (Slide 80) Importantly, the Claimant has accepted --
 15 and you can see that from the extract that you've got on
 16 the screen from the SODPO at paragraphs 465 to 466 --
 17 that:
 18 "It is correct that the tribunal in Pac Rim ... held
 19 that although the group of companies of which the
 20 claimant (as a subsidiary) formed part did have
 21 substantial business activities in the territory in
 22 question, the 'substantial business activities' ... had
 23 to be attributable to the 'enterprise' itself ..."
 24 So given that quite correct acceptance in the SODPO,
 25 the debate between the parties is not as to the

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11:48 1 "shell companies could be denied benefits but not,
 2 for example, firms that maintain their central
 3 administration or principal place of business in the
 4 territory of, or have a real and continuous link with,
 5 the country where they are established.""
 6 Finally on the law, as to the requirement that the
 7 Claimant have "business operations" in Singapore, as
 8 opposed to "business activities", Australia submits that
 9 the term "operations" refers to a more significant form
 10 of continuous physical presence than merely having
 11 activities. We say that in SOPO, paragraph 222. The
 12 Claimant disputes this, for reasons we contend are
 13 unconvincing, in SODPO at paragraph 458. But
 14 ultimately, whichever test is applied, the Tribunal
 15 should conclude that that test is not satisfied by
 16 artificial arrangements of the kind in issue here.
 17 Madam President, members of the Tribunal, before
 18 coming in a little more detail to the evidence
 19 concerning the Claimant's alleged operations in
 20 Singapore, can I say something brief about the point in
 21 time at which the existence of such operations falls to
 22 be assessed.
 23 (Slide 82) The Claimant has said that 13 August 2020
 24 is relevant date, because that's the date of the
 25 enactment of the Amendment Act, which the Claimant

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11:47 1 applicable legal test, but simply as to whether or not
 2 the Claimant itself, Zeph itself, had substantial
 3 business activities at the relevant date, as opposed to
 4 whether some other company had such activities.
 5 We say that's significant because even if the
 6 engineering companies were not already defunct by the
 7 time they were purchased by Zeph -- and we say the
 8 evidence shows they were -- but even if they weren't,
 9 any business activities in which those companies engaged
 10 would not have been relevant because they would not have
 11 been activities of Zeph itself. The same is true for
 12 the business activities of the Kleenmatic companies, for
 13 the same reason.
 14 (Slide 81) Next, in Bridgestone Licensing Services
 15 v Panama, RLA-30, the ICSID tribunal agreed at
 16 paragraph 291 with the United States' non-disputing
 17 party submission, and you can see it extracted on the
 18 screen. The US had argued, from paragraph 290, about
 19 halfway through the quote, that:
 20 "'While it has long been U.S. practice to omit
 21 a precise definition of the term 'substantial business
 22 activities' in order that the existence of such
 23 activities may be evaluated on a case-by-case basis, the
 24 United States has indicated in, for example, its
 25 Statement of Administrative Action on the NAFTA that

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11:50 1 alleges is the breach of the treaty. The Respondent
 2 submitted that the date for making this assessment must
 3 be, at the latest, the date on which the Claimant sought
 4 to avail itself of the protection of Chapter 11 of
 5 AANZFTA, which was 14 October 2020, which was the date
 6 it submitted its [written request for] consultation. So
 7 there's not much difference between them. We say, at
 8 the latest, 14 October; the Claimant says
 9 13 August 2020.
 10 We submit that ultimately it doesn't matter which of
 11 those dates is chosen, because the Claimant had no
 12 substantive operations at either of those dates. But on
 13 any view of it, events that occurred after October 2020
 14 are irrelevant and must be disregarded. That's on the
 15 view of both parties. Anything after October 2020 is
 16 irrelevant.
 17 Can I commence my examination of the evidence with
 18 Mr Palmer's claim, which was made in his first witness
 19 statement at paragraphs 36 and 37, that:
 20 "During the 2020 calendar year, the Claimant
 21 conducted its business operations from two offices in
 22 Singapore located at:
 23 A. 80 Genting Lane ... and
 24 B. 1 Joo Koon Way ...
 25 These addresses were, respectively, you can see from

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11:51 1 the evidence, the premises of the engineering companies,
 2 first, and the Kleenmatic companies, second.
 3 (Slide 83) The unchallenged evidence of Mr Vickers
 4 at paragraphs 23 through to 51 of his statement is that
 5 the Claimant did not, at the relevant time, have
 6 a visible presence at either of those locations.
 7 Indeed, Mr Vickers found no evidence of a visible
 8 physical presence in Singapore at all. For example --
 9 and you can see on the screen -- he found no evidence of
 10 a website, a shopfront, public contact details, social
 11 media accounts for the company, visible employees or
 12 press reporting about the company, all of which are
 13 things he says he would have expected to find.
 14 The Claimant chose not to cross-examine Mr Vickers
 15 on these conclusions, and it hasn't otherwise denied
 16 them or led any evidence that would establish the
 17 contrary; being, of course, evidence that the Claimant
 18 should have been peculiarly well placed to provide if
 19 there really was evidence of a physical presence at the
 20 relevant time.
 21 As to the location of Zeph's directors, at all times
 22 the majority of the Claimant's board of directors had
 23 been based in Australia. The Claimant seeks to make
 24 much of the fact that it has two Singaporean directors,
 25 these people being the two people who have for many

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11:52 1 years been running the Kleenmatic business. It's
 2 a family business and they've been running it for many
 3 years. They are now directors of Zeph.
 4 While it's no doubt true that those two resident
 5 Singaporean directors make operational decisions in
 6 relation to the Kleenmatic business, there is no
 7 evidence at all that they make decisions in relation to
 8 the Claimant itself, in relation to Zeph. Indeed, it's
 9 not even clear the contrary is asserted.
 10 (Slide 84) In fact, the contemporaneous documents
 11 from the time of Zeph's incorporation make it clear that
 12 it was the intention of Mr Palmer and those established
 13 in the establishment of Zeph that Zeph would be managed
 14 from Australia, not from Singapore. For example, you
 15 can see the email on the screen from Mr Sorensen sent in
 16 January, so around the time of the incorporation; just
 17 a day after the incorporation of Zeph. Mr Sorensen
 18 wrote:
 19 "... we will also need to ensure that all meetings
 20 for the interposition of Mineralogy International
 21 Pte Ltd ..."
 22 That's Zeph.
 23 "... are held in Australia, with the chairperson
 24 also located in Australia for each meeting ...
 25 We need to be able to clearly demonstrate that the

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11:53 1 interposition resolutions were made in Australia and
 2 that the majority of the directors are Australian
 3 resident to ensure Australian tax residency is
 4 established for [Zeph]."
 5 Now, Mr Sorensen was obviously concerned to ensure
 6 that Zeph should have Australian tax residency, and to
 7 that end he sought to ensure that all the critical
 8 decisions were made in Australia.
 9 (Slide 85) This is a topic addressed in some detail
 10 by Professor Cooper. Mr Sorensen's concern was no doubt
 11 because, as Professor Cooper explains, the insertion of
 12 the Claimant into the chain of ownership of Mineralogy
 13 may have had highly adverse tax consequences for the
 14 Mineralogy Group if the Claimant was not an Australian
 15 tax resident.
 16 To avoid those consequences, it was necessary to
 17 ensure that "the 'management and control' of Zeph" --
 18 and I'm quoting there from the highlighted passage at
 19 29 -- "never be allowed to happen [from] Singapore".
 20 Zeph was never to be allowed to be managed or controlled
 21 from Singapore. That, as Professor Cooper explains,
 22 meant -- and you see this at the top of paragraph 31 in
 23 the quote -- "Mr Palmer might walk a tight-rope" in
 24 trying to establish investor protection based on
 25 presence in Singapore, whilst not triggering adverse tax

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11:55 1 consequences in Australia.
 2 Again, the Claimant has not sought to challenge
 3 Professor Cooper's evidence in this regard. And that,
 4 we say, is not surprising because it seems that
 5 Mr Sorensen was himself conscious of the importance of
 6 avoiding the very adverse tax consequences that
 7 Professor Cooper explains.
 8 We referred to Mr Sorensen's email in our ROPO at
 9 paragraphs 206 and 234, and we wanted to ask him about
 10 this email exchange with Mr Palmer and to explore the
 11 advice that Mineralogy was receiving about the pros and
 12 cons of inserting a Singaporean company into the chain
 13 of ownership above Mineralogy. But notwithstanding the
 14 fact we'd expressly referred to that issue in the ROPO,
 15 which should have alerted the Claimant to the issue,
 16 Mr Sorensen was one of the witnesses who was withdrawn,
 17 apparently because his evidence was not relevant.
 18 (Slide 86) What Mr Sorensen's interventions show was
 19 that, far from the Claimant managing Mineralogy from
 20 Singapore, the reverse is true, and must remain true.
 21 The explanation for that is provided by
 22 Professor Cooper. I won't take you into the detail of
 23 the Australian law, but you can see the relevant
 24 definition in paragraph 3 on the screen:
 25 "A foreign-incorporated company will be

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<p>11:56 1 an Australian tax resident if it -- 2 2 '... has either its central management and control 3 3 in Australia, or its voting power [is] controlled by 4 4 shareholders who are residents of Australia." 5 5 Zeph can't satisfy that second test because 6 6 it's owned by a New Zealand company. 7 7 Professor Cooper opines that: 8 8 "... the affairs of both Zeph and MIL have been 9 9 managed ... to attract Australian residence under the 10 10 'central management and control in Australia' limb ..." 11 11 Which is consistent with Mr Sorensen's concern about 12 12 ensuring that Zeph is an Australian tax resident, but is 13 13 entirely inconsistent with its assertion that the 14 14 management of Zeph is a substantive business operation 15 15 that occurs in Singapore for Article 11 purposes. They 16 16 can't both be true. 17 17 (Slide 87) In any event, the evidence before the 18 18 Tribunal plainly establishes that the person who manages 19 19 and controls both the Claimant and Mineralogy was and is 20 20 Mr Palmer himself. This is emphatically asserted by 21 21 Mr Palmer in, for example, his sixth witness statement 22 22 at paragraph 61. And it's plain that that occurs from 23 23 Australia, not from Singapore. 24 24 Can I come then to explain in a little more detail 25 25 the Singaporean engineering companies, and return to the</p> <p style="text-align: center;">Page 85</p>	<p>11:58 1 SGD 3.5 million. As Professor Lys notes: 2 2 "... the record contains no evidence of any due 3 3 diligence or valuation ... that preceded the acquisition 4 4 of those three firms which, based on my experience, is 5 5 contrary to what I would expect." 6 6 (Slide 90) At paragraph 338, he states: 7 7 "... my analysis of the financial statements does 8 8 not provide any support for paying SGD \$3.5 million for 9 9 those three engineering firms." 10 10 And indeed, at paragraph 343, he goes on to state: 11 11 "... my review of their financial statements 12 12 indicates that their value was substantially less than 13 13 SGD \$3.5 million, which incidentally is almost 15 times 14 14 the book value of their combined equity shortly before 15 15 the purchase." 16 16 (Slide 91) Professor Lys concludes at paragraph 348: 17 17 "In summary, my review of the documents in the 18 18 record, including the financial statements of the three 19 19 engineering firms and Zeph, indicate no business or 20 20 economic purpose to the transactions: the three 21 21 engineering firms were losing money and offered no 22 22 synergies to Mineralogy. Moreover, the financial 23 23 outlook for at least two of the three engineering firms 24 24 at the acquisition date seems bleak, further raising the 25 25 question of what the real reason was for acquiring these</p> <p style="text-align: center;">Page 87</p>
<p>11:57 1 Claimant's assertion that it had substantive business 2 2 operations in Singapore as a result of its acquisition 3 3 of those companies. 4 4 We submit it's plain on the evidence that those 5 5 companies did not have substantive business operations 6 6 in August 2020, not least because all three went into 7 7 voluntary liquidation in October 2020. But as I've 8 8 already said, the unchallenged evidence is that they 9 9 probably did not have substantive business operations by 10 10 the end of 2018 -- that is, before they were acquired -- 11 11 meaning that even when they were acquired, they could 12 12 not have helped the Claimant to show that it had 13 13 substantive business operations in Singapore, even if it 14 14 was entitled to count the business operations of those 15 15 companies, which it wasn't because of Pac Rim. 16 16 (Slide 88) The Claimant acquired the engineering 17 17 companies only about a week after its incorporation. 18 18 And Professor Lys analyses the acquisition in detail in 19 19 his statement, in terms that are unchallenged. He 20 20 concludes, as you can see on the screen (expert report, 21 21 paragraph 339), that: 22 22 "... these three firms appeared to be failing when 23 23 Zeph bought them on January 31, 2019." 24 24 (Slide 89) Nevertheless, the Claimant purchased the 25 25 companies, each from the same individual, for a total of</p> <p style="text-align: center;">Page 86</p>	<p>11:59 1 three engineering firms. Ultimately, all three 2 2 investments resulted in significant losses." 3 3 The Claimant has attributed the failure of the 4 4 engineering companies to the Covid pandemic in its RejPO 5 5 at paragraph 216(c). But that is demonstrably 6 6 incorrect, given that Professor Lys's analysis of the 7 7 accounts and Mr Vickers's unchallenged evidence 8 8 concluded that they had likely failed to have 9 9 substantive business operations by the end of 2018, well 10 10 before the emergence of the pandemic. 11 11 Given all of that, we contend that the Tribunal 12 12 should accept that the evidence demonstrates that the 13 13 engineering companies are of no assistance to Zeph in 14 14 establishing that it had substantive business operations 15 15 in October 2020, because by that date they did not have 16 16 any business operations at all; and that even if they 17 17 had, it would not assist Zeph because Pac Rim 18 18 demonstrates that the analysis must focus on the 19 19 business operations of the Claimant itself, not those of 20 20 other corporate entities within its group, such as 21 21 companies it had purchased. 22 22 Can I turn then to the Kleenmatic joint venture, 23 23 which commenced in January 2020. 24 24 The Claimant did not actually acquire the Kleenmatic 25 25 businesses until August 2022, two years after what it</p> <p style="text-align: center;">Page 88</p>

12:01 1 itself says is the relevant date. So the position that
 2 is relevant is the joint venture, the contractual
 3 agreement between the companies, that commenced in
 4 January 2020.
 5 (Slide 92) As Mr Vickers explains in paragraph 92,
 6 which you can see on the slide:
 7 "... Kleenmatic is a long-standing family-owned
 8 cleaning business in Singapore that operated for
 9 approximately 20 years prior to Zeph's involvement."
 10 And the managers of Kleenmatic continue to be the
 11 same people who have managed it for many years.
 12 Analysis of the joint venture agreement demonstrates
 13 that by entering into that agreement, Zeph sought simply
 14 to adopt the existing business of the Kleenmatic
 15 companies, and we'll show the Tribunal this in due
 16 course. It's plain from the joint venture agreement
 17 that those companies were always intended to carry on
 18 exactly the same business they had carried on before,
 19 using the same employees, paid out of the same bank
 20 accounts, keeping the same business records. The
 21 business's operations remained exactly as they were
 22 before the joint venture, business operations of the
 23 Kleenmatic companies.
 24 Not only were those companies separate legal
 25 entities from the Claimant, they weren't even owned by

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12:03 1 regarded themselves as such, according to Mr Vickers's
 2 evidence.
 3 The artificiality of the Claimant asserting the list
 4 of names of its employees who were transferred from
 5 Kleenmatic to Zeph was highlighted in the document
 6 production process because when ordered to produce the
 7 employment contracts of its employees in Singapore, the
 8 Claimant produced 146 contracts, which we've listed in
 9 annexure A to our ROPO. Of those 146 contracts,
 10 140 relate to cleaners. So of Zeph's employees, 140 of
 11 the 146 are cleaners; the other 6 were management roles
 12 within the Kleenmatic business. So none had anything to
 13 do with the purported rationale for the incorporation of
 14 Zeph, such as accessing finance or matters of that kind.
 15 The Claimant also argues that it has licences from
 16 the Singaporean Government and that it carries insurance
 17 policies in Singapore. But again, we contend that
 18 doesn't assist the Claimant, as these are licences and
 19 forms of insurance necessary to carry on a cleaning
 20 business in Singapore; they don't evidence substantive
 21 business operations of the Claimant itself.
 22 Nor does it assist the Claimant that it may have
 23 been entitled to subsidies from the Singaporean
 24 Government during Covid, most of which in any event
 25 postdate the relevant date of August 2020.

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12:02 1 the Claimant: there was just a contractual joint venture
 2 agreement. There is no principal basis upon which their
 3 activities can properly be treated as if they were
 4 business operations of the Claimant itself.
 5 (Slide 93) The Claimant seeks to escape that
 6 conclusion by relying on the fact that it is the formal
 7 employer of some of the Kleenmatic workers. But this,
 8 we say, is complete artifice.
 9 Those employees -- and you can see this in the ROPO,
 10 and in particular at footnote 437, which we've blown up
 11 on the screen -- those employees were just informed that
 12 their employment would be transferred to Zeph --
 13 apparently after the fact they were informed -- while at
 14 the same time they were told that their "duties,
 15 responsibilities, remuneration, leave details" and other
 16 details "remain[ed] unchanged". The evidence shows that
 17 their salary continued to be paid by the Kleenmatic
 18 companies out of the Kleenmatic bank accounts.
 19 The Claimant does pay their compulsory Central
 20 Provident Fund contributions, which is the Singaporean
 21 Government's basic pension requirement, presumably
 22 because that's a statutory obligation that arises from
 23 the formal employment relationship. But in every other
 24 respect, at the relevant time, the employees remained in
 25 substance employees of Kleenmatic and apparently

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12:05 1 Finally, I come to the Claimant's assertion that it
 2 actively manages its investments in Australia, which
 3 constitutes business operations in Singapore. That, we
 4 contend, is simply nonsense. The Claimant does not even
 5 seek to refer to any evidence in support of that claim
 6 in its Rejoinder. In our submission, the simple and
 7 obvious fact is that the management of Mineralogy and
 8 Mr Palmer's various other Australian companies is
 9 carried out in Australia by Mr Palmer himself.
 10 Indeed, as I've already mentioned, and as
 11 Professor Cooper's evidence makes clear, this is
 12 a necessary and deliberate state of affairs because if
 13 the management of Zeph ever did occur in Singapore, that
 14 would have major adverse tax implications for the
 15 Mineralogy Group.
 16 For all of those reasons, the reality is that Zeph
 17 had no substantive business operations in Singapore as
 18 at the relevant date, notwithstanding the evidence that
 19 immediately upon its incorporation -- within two days of
 20 incorporation into the group -- it immediately attempted
 21 to create the semblance of such operations, presumably
 22 to back up the claim in the letters you've seen, the
 23 claim made immediately after incorporation, that these
 24 were firms with substantive business operations in
 25 Singapore or New Zealand.

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12:06 1 The link between those events -- the acquisition of
 2 the local business and the attempt to obtain investment
 3 treaty protection -- is made manifest in the letters
 4 themselves that had been drafted asserting that Zeph had
 5 substantive business operations in Singapore. And
 6 I showed you the draft of the 4 February letter, dated
 7 24 January. Written even before Zeph had been inserted
 8 into the chain, and before it had acquired the
 9 engineering businesses, Zeph was asserting that it had
 10 substantive business operations in Singapore. It is
 11 artifice.
 12 Thank you for your attention. Can I now pass the
 13 floor to Professor Brown to address the next objection,
 14 which is abuse of process.
 15 THE PRESIDENT: Please. Thank you.
 16 PROFESSOR BROWN: Thank you, Madam President, members of the
 17 Tribunal.
 18 (Slide 94) I will be presenting Australia's
 19 submissions on abuse of process.
 20 The crux of this objection is that the Claimant,
 21 Zeph, was created for the determinative purpose of
 22 bringing a treaty claim concerning a foreseeable and
 23 foreseen unilateral amendment of the State Agreement by
 24 the WA Parliament to the disadvantage of Mineralogy.
 25 As the Tribunal has already heard this morning,

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12:07 1 there is compelling contemporaneous evidence that the
 2 Mineralogy Group sought to incorporate -- and did
 3 incorporate -- foreign companies to take advantage of
 4 Australia's investment treaties in view of its
 5 deteriorating relationship with the WA Government in
 6 2018 and into early 2019.
 7 There is extensive independent evidence filed by
 8 Australia, with which the Claimant has not meaningfully
 9 engaged, that seriously undermines the credibility of
 10 Zeph's claim that there was any, let alone
 11 a determinative bona fide purpose for the Mineralogy
 12 Group restructure, and the insertion of MIL and Zeph
 13 into the chain of ownership of Mineralogy.
 14 It is telling that there is barely a shred of
 15 contemporaneous documentary evidence to support the
 16 purported rationale for the restructure that the
 17 Claimant has put forward. It is also telling that the
 18 Claimant has withdrawn the witnesses who it had
 19 previously claimed provided some corroboration for
 20 Mr Palmer's evidence.
 21 As this Tribunal will be well aware, it is an abuse
 22 of process for an investor to file a claim under
 23 an investment treaty following a corporate restructure
 24 that takes place when a dispute is already in existence
 25 or could be reasonably foreseen. Indeed, two of the

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12:09 1 members of this tribunal were members of the
 2 Philip Morris Asia tribunal, RLA-95, which assisted in
 3 the crystallisation of the relevant principles. These
 4 principles are now well established in investment treaty
 5 cases, and so the disagreement between the parties in
 6 respect of this objection concerns how these principles
 7 apply on the facts.
 8 None of the Claimant's submissions are sufficient to
 9 overcome clear evidence to the effect that Zeph was
 10 incorporated and acquired the Mineralogy shares at
 11 a time -- to use the words of the Philip Morris tribunal
 12 at paragraph 554 -- when there was:
 13 "... a reasonable prospect ... that a measure which
 14 may give rise to a treaty claim will materialise."
 15 To the contrary, the extensive evidence of the
 16 purpose behind the restructure reveals the abusive
 17 nature of the present claim. And as the Tidewater
 18 tribunal recognised -- that's RLA-93, at paragraph 150
 19 of its decision on jurisdiction of 8 February 2013 --
 20 it is an abuse of process for a claimant to file a claim
 21 following a restructuring when:
 22 "... the objective purpose of the restructuring was
 23 to facilitate access to an investment treaty tribunal
 24 with respect to a claim that was within the reasonable
 25 contemplation of the investor'."

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12:10 1 That includes a quote from Professor Douglas's
 2 well-known work on international law investment claims,
 3 which is RLA-86.
 4 So the Respondent accordingly submits that the
 5 Tribunal should dismiss the Claimant's claim as an abuse
 6 of process.
 7 I begin with the facts. And the Solicitor-General
 8 has already set out the salient factual background, and
 9 the detail of that is also contained in the chronology
 10 to Australia's SOPO.
 11 Not only was a treaty claim related to the State
 12 Agreement foreseen by the Mineralogy Group in late 2018
 13 and early 2019, but it specifically acted on that
 14 foresight by incorporating Zeph as the corporate vehicle
 15 to pursue that claim in the event that the WA Government
 16 adopted measures interfering with Mineralogy's rights
 17 under the State Agreement. And the Mineralogy Group
 18 foreshadowed to the Australian Government that such
 19 a claim would be filed if any such measures were
 20 adopted. And so, in circumstances where the parties had
 21 been disputing over Balmoral South since 2012, the
 22 Claimant filed the present claim once the Amendment Act
 23 was passed.
 24 Now, in these circumstances, it's neither here nor
 25 there that the Amendment Act of the WA Parliament was

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12:11 1 not adopted until August 2020. Zeph's claims in these
 2 proceedings closely mirror the terms of the letters that
 3 were sent well prior to the passage of the Act and
 4 immediately following its incorporation in Singapore.
 5 (Slide 95) You can see on the slide a letter which
 6 you've already seen earlier today, a letter that was
 7 sent by MIL in respect of Mineralogy's investment in
 8 Zeph on 4 February 2019 -- that's Exhibit R-141 -- which
 9 was sent less than one week after the Claimant acquired
 10 the shares in Mineralogy. And you can see the
 11 highlighted passage referring to "interference in the
 12 rights of Mineralogy under the State Agreement".
 13 I come then to the purpose of the restructure.
 14 Tribunals applying the principles articulated in the
 15 Philip Morris Asia award have repeatedly confirmed the
 16 importance for abuse of process objections of the
 17 purpose behind the relevant corporate restructure.
 18 (Slide 96) For instance in *Alverley v Romania*,
 19 RLA-71, the tribunal stated at paragraph 376 of its
 20 award of 16 March 2022 that:
 21 "... the correct test is whether a determinative or
 22 principal purpose was to gain the protection of the
 23 treaty."
 24 You can see that in the highlighted passage at the
 25 end of that paragraph.

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12:13 1 restructure; it made that concession in its Rejoinder at
 2 paragraphs 462 and 463. So the parties agree that the
 3 Tribunal should assess the evidence of the purpose of
 4 the restructure as at 2018 and early 2019.
 5 (Slide 97) Now, although the Claimants asserts that
 6 commercial reasons were the primary reasons for the
 7 restructuring, it now admits that investment treaty
 8 coverage was an "ancillary purpose". That is set out in
 9 the Rejoinder at paragraphs 380 and 383, which are on
 10 the slide.
 11 By reason of that concession, the parties now agree
 12 that Zeph was incorporated, at least in part, for the
 13 purpose of securing treaty protection for what were
 14 otherwise purely Australian entities. As the
 15 Solicitor-General has explained, the contemporaneous
 16 documents and the Mineralogy Group's conduct at the
 17 relevant time reveal that securing treaty protection in
 18 relation to the escalating dispute with WA was
 19 a determinative purpose of the restructure; and further,
 20 the urgency with which the restructure was undertaken is
 21 inconsistent with the alternative rationales put forward
 22 by Zeph to explain the actions of the Mineralogy Group.
 23 The reasons that Zeph invokes to explain its
 24 incorporation in 2019 and its acquisition of Mineralogy
 25 shortly afterwards are ex post rationales developed for

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12:12 1 And the *Cascade v Turkey Tribunal*, RLA-98, said at
 2 paragraph 340 and also 341 of its award of
 3 29 September 2021 that:
 4 "... a key objective ... is to derive from the
 5 evidence a conclusion as to whether an investment
 6 transaction was made for the genuine 'purpose of
 7 engaging in economic activity' in the host State, or
 8 only apparently to obtain treaty protection in the face
 9 of a looming dispute, for an investment which (prior to
 10 the transaction) would not have been entitled to such
 11 protection."
 12 The *Cascade* tribunal is there quoting the passage
 13 immediately before footnote marker 458 of the award in
 14 *Phoenix Action*, which is RLA-91.
 15 Tribunals have also confirmed that the purposes of
 16 the restructure must be assessed subjectively, by
 17 reference to what the evidence discloses to be the
 18 Claimant's actual purpose at the relevant time, and also
 19 objectively, by reference to what a reasonable investor
 20 in the Claimant's position could have had as its
 21 purpose.
 22 As to the timing for assessing purpose, Zeph appears
 23 now to have abandoned its earlier position that a 2008
 24 meeting concerning an IPO in Hong Kong is somehow
 25 relevant to assessing the reasons behind the

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12:15 1 the purpose of these proceedings. This explains why
 2 their contours have shifted even over the course of the
 3 written pleadings, and why there are no contemporaneous
 4 documents to support them.
 5 Now, this of course matters. The rationale for
 6 a given restructuring should be, insofar as concerns the
 7 investor, a well-known fact. The investor should not be
 8 casting around years after the event took place looking
 9 for reasons, and then abandoning reasons that it has
 10 suggested when they are shown to be implausible.
 11 The first of these rationales, which is the
 12 so-called "alleged coal funding rationale", arises from
 13 the proposition that Zeph was inserted into the chain of
 14 ownership of Mineralogy in order to assist in securing
 15 funding from Singapore banks to develop the coal
 16 holdings of its subsidiary Waratah Coal in Queensland.
 17 Australia's independent experts have considered this
 18 purported rationale and it does not withstand scrutiny.
 19 (Slide 98) Mr George Rogers is an independent expert
 20 with over 30 years' experience in the financing of
 21 mines. He states in his expert report
 22 (paragraph E.1.1.1) that there was:
 23 "... no basis for believing that Singapore banks
 24 would have been more likely to fund the coal projects of
 25 Singapore companies than Australian ones [in the

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12:16 1 relevant period] between December 2017 and
 2 January 2019."
 3 He also says, in the second extract on the slide
 4 (paragraph G.6.1.7), that Singapore banks had:
 5 "... no track record in arranging [or] structuring
 6 a project financing for a coal mine of any size ..."
 7 He also says (paragraph E.1.1.2) that there is:
 8 "... [no] serious basis for Mineralogy to have
 9 believed that the insertion of Zeph into the corporate
 10 structure would increase the likelihood of attracting
 11 financing from Singaporean banks, or indeed those of any
 12 nation."
 13 He also says (paragraph G.8.1.1) that:
 14 "Even the most basic research, due diligence or
 15 conversations would have told Mr Palmer and
 16 Mr Martino ..."
 17 Who also gave evidence on this issue:
 18 "... that there would be no improved access to
 19 finance by their insertion of Zeph into the corporate
 20 structure."
 21 He also said that the stated urgency would not have
 22 been for project finance-related reasons.
 23 (Slide 99) Professor Lys, an Emeritus Professor at
 24 the Kellogg School of Management at Northwestern
 25 University in Illinois, who is an expert in economics

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12:17 1 and finance, likewise considers the alleged coal funding
 2 rationale to be fundamentally flawed.
 3 In his first report, he notes at paragraphs 540 to
 4 542 that there is no evidence that the transfer of
 5 Mineralogy shares to Zeph would yield any advantage for
 6 procuring financing for Mineralogy's mining operations
 7 in Australia.
 8 At paragraphs 593 to 595, he notes that there is no
 9 evidence that any staff with the expertise necessary to
 10 realise the alleged coal funding rationale were at any
 11 time engaged by or for Zeph in Singapore.
 12 Also, in the third extract on the slide, at
 13 paragraph 529, he notes that there is a lack of
 14 contemporaneous documentary evidence supporting this
 15 claimed rationale for the restructure. And you can see,
 16 if you continue to read in the not-highlighted section
 17 of paragraph 529, the types of documents that
 18 Professor Lys would have expected to have been available
 19 and to have been produced in the course of the alleged
 20 rationale.
 21 Now, the Claimant has no substantive response to any
 22 of this expert evidence. It chose not to put on
 23 rebuttal evidence, it chose not to take the opportunity
 24 to cross-examine these experts on their evidence, and
 25 nor did it take the opportunity to file with its

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12:18 1 Rejoinder any of the types of documents that
 2 Professor Lys noted would have existed had this been
 3 a genuine, let alone a determinative, rationale for the
 4 restructure.
 5 In fact, the Claimant has specifically withdrawn
 6 most of the limited evidence it had filed in support of
 7 this rationale through its eleventh-hour decision to no
 8 longer rely on the witness statements of Messrs Martino,
 9 Harris and Migliucci. The withdrawn witness statements
 10 included purported evidence of conversations about the
 11 coal funding rationale, and they also concerned the
 12 availability of funding in Singapore.
 13 But they are no longer before the Tribunal and we
 14 are unable to test that evidence in cross-examination.
 15 This leaves the alleged coal funding rationale supported
 16 only by Mr Palmer's assertions. And the only reasonable
 17 inference for the withdrawal of those witnesses is that
 18 they would not have supported Mr Palmer's version of
 19 events.
 20 I turn then to the alleged tax rationale. Australia
 21 would first note that the contours of this rationale
 22 have shifted over the course of the proceedings.
 23 (Slide 100) We understand Zeph's current position to
 24 be that the restructure was in some way connected with
 25 an asserted plan on the part of Mr Palmer to relocate to

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12:20 1 Singapore to take up permanent residency there in order
 2 to save AUD 90 million in personal tax. This plan
 3 required him to give up his Australian tax residency, as
 4 is acknowledged in the Rejoinder at paragraph 713.
 5 Again, there is a lack of contemporaneous
 6 documentary evidence supporting this rationale. Neither
 7 Mr Palmer nor Zeph have provided evidence of having
 8 received any substantive contemporaneous advice from
 9 a tax expert as to alleged tax benefits.
 10 Mr Palmer asserts that he did his own research as to
 11 tax benefits on the internet. That is simply
 12 implausible. Indeed, it is clear that Mineralogy was
 13 receiving some advice from Mr Sorensen as to the adverse
 14 tax implications that the restructure might cause,
 15 although that advice has not actually been produced.
 16 What few documents have been produced, such as
 17 Exhibit R-600, which the Solicitor-General referred to
 18 earlier, confirm that to the extent any tax consequences
 19 were considered during the course of the restructure,
 20 the Mineralogy Group sought to preserve its existing tax
 21 status.
 22 (Slide 101) That was in R-600, which is on the
 23 screen again now: the email from Mr Sorensen dated
 24 22 January 2019, the date immediately after the
 25 incorporation of Zeph. In this email, Mr Sorensen tells

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<p>12:21 1 Mr Palmer that the new Singapore company, Zeph, and the 2 New Zealand company, MIL, both need to maintain 3 Australian tax residency. 4 As the Solicitor-General said earlier, we wanted to 5 cross-examine Mr Sorensen about this matter. But again, 6 his evidence has been withdrawn. 7 From the documents provided by the Claimant with its 8 Statement of Defence, its SODPO, Mr Palmer only sought 9 advice as to the implementation of this plan in 10 March 2024, during these proceedings. 11 This can be seen in Exhibit C-495 -- and these are 12 not, I believe, extracted on the slide. But 13 Exhibit C-495 is a short letter from Ms Sharnie Mitchell 14 of BDO, who more recently appeared as an expert witness 15 on behalf of the Claimant, on a potential AUD 90 million 16 tax saving if Mr Palmer became a tax resident of 17 Singapore. And Exhibit C-496, being a short letter from 18 Mr Louis Lim on the methods of obtaining permanent 19 residency of Singapore. 20 I don't need to take you to these letters, but both 21 of them are dated March 2024, rather than late 2018 or 22 early 2019, at the time the alleged tax rationale was 23 under consideration and was supposedly motivating the 24 Mineralogy Group restructure. 25 Australia has provided expert reports by Emeritus</p> <p style="text-align: center;">Page 105</p>	<p>12:24 1 Now, Zeph itself has not offered any evidence, any 2 witness evidence, capable of substantiating its position 3 that the restructure was motivated by tax reasons. As 4 the Respondent pointed out in its SOPO at paragraphs 340 5 and 341, there were significant deficiencies in 6 Mr Martino's evidence on this purported rationale, 7 including inconsistencies with Mr Palmer's evidence on 8 this matter. 9 And the short expert report of Ms Mitchell takes 10 matters no further. That report simply cites fragments 11 of the evidence from Professors Cooper and Phua out of 12 context and asserts, without offering any supporting 13 analysis, that tax advantages would have accrued to 14 Mr Palmer as a result of the restructure. 15 (Slide 104) Finally on this point, Zeph has 16 confirmed in its Rejoinder that Mr Palmer in fact 17 remains an Australian tax resident and that there has 18 been no activation of the restructure for the purpose of 19 obtaining tax advantages. That can be seen on the slide 20 at paragraph 513 of the Rejoinder. And the Claimant 21 says that it will get professional advice as to the 22 activation of that plan if and when that happens. 23 But Zeph's failure to activate this plan, and its 24 explanation for its failure to activate this plan, is 25 wholly inconsistent with the contemporaneous documents</p> <p style="text-align: center;">Page 107</p>
<p>12:22 1 Professor Graeme Cooper of the University of Sydney and 2 Associate Professor Stephen Phua of the National 3 University of Singapore, and the Solicitor General has 4 already referred to their expert reports. They are 5 experts in Australian and Singaporean tax law, 6 respectively, and they offer compelling evidence that no 7 tax advantages arose as a result of the restructure. 8 (Slide 102) As Professor Graeme Cooper explains in 9 his report, which you can see on the slide at 10 paragraphs 24 and 25, the insertion of Zeph into the 11 corporate chain did not give rise to any Australian tax 12 advantage for Mr Palmer. He goes on to say that the 13 restructure in fact created tax disadvantages for the 14 Mineralogy Group and an ongoing imperative to ensure 15 that the management of Mineralogy and the two new 16 international companies, MIL and Zeph, only occurred in 17 Australia. And that explains the email from Mr Sorensen 18 to Mr Palmer which we just looked at, Exhibit R-600. 19 (Slide 103) Professor Phua likewise explains that 20 the incorporation of Zeph and its insertion into the 21 chain of ownership of Mineralogy was superfluous and 22 wholly unnecessary for any alleged personal tax 23 advantage for Mr Palmer in Singapore. He also says that 24 it created potential tax disadvantages for the 25 Mineralogy Group.</p> <p style="text-align: center;">Page 106</p>	<p>12:25 1 at the time of the restructure indicating that the 2 restructure was undertaken with some urgency. 3 For completeness, with respect to the incorporation 4 of MIL in New Zealand, the Claimant elected not to 5 engage with Australia's submissions or expert evidence 6 on its alleged lithium rationale, despite now claiming 7 in its Rejoinder that it has not abandoned this 8 purported rationale as an explanation for the 9 incorporation of MIL. The Claimant simply states that 10 it's addressed in the witness evidence of Mr Martino and 11 Mr Palmer. 12 As to this, of course Mr Martino's evidence has been 13 withdrawn; and yet again, there is a lack of documentary 14 evidence as we would expect to find if it was 15 a genuinely motivated incorporation of MIL in 16 New Zealand. So the Tribunal has only the 17 uncorroborated evidence of Mr Palmer as to this alleged 18 rationale. 19 (Slide 105) Mr Palmer in his evidence and the 20 Claimant in its submissions also entirely fail to engage 21 with the expert report of Mr Daniel Kalderimis KC that 22 it was unnecessary to have a New Zealand company to 23 engage in lithium exploration. And you can see 24 a summary of Mr Kalderimis's conclusions on that issue 25 extracted on the slide.</p> <p style="text-align: center;">Page 108</p>

<p>12:26 1 So the stated reasons for the incorporation of MIL 2 as the first step in the restructure does not withstand 3 any scrutiny. 4 Madam President, members of the Tribunal, I turn 5 next to foreseeability. 6 (Slide 106) As the tribunal accepted in Pac Rim, 7 RLA-33, at paragraph 2.100, the Tribunal needs to 8 determine whether a restructure has taken place: 9 "... at a time when the investor is aware that 10 events have occurred that negatively affect its 11 investment and may lead to arbitration." 12 It's extracted on the slide on the screen. 13 And the tribunal in Cascade Investments v Turkey, 14 RLA-98, held that a dispute will be foreseeable where it 15 was subjectively actually foreseen by an investor or in 16 circumstances where: 17 "... a reasonable investor, conducting 18 an appropriate inquiry, should have understood that the 19 investment it was acquiring already faced a significant 20 risk of government action that would adversely affect 21 its rights ..." 22 The Cascade tribunal noted that in many cases, 23 specific government action is preceded by some period of 24 deteriorating relationships, and the longer the 25 relationship deteriorates, the more foreseeable adverse</p> <p style="text-align: center;">Page 109</p>	<p>12:29 1 restructuring". That's language taken from the 2 ConocoPhillips award at paragraphs [279] and 280, 3 RLA-94. 4 Now, Zeph nonetheless seeks to avoid its clear 5 statements in previous correspondence by characterising 6 the dispute at issue in these proceedings by reference 7 to the Amendment Act, which was passed by the Western 8 Australian Parliament on 13 August 2020, and which Zeph 9 contends was not foreseeable at the time it was 10 incorporated. 11 Key to the Claimant's submissions in this respect is 12 its position that the specific measure at issue in the 13 treaty claim must have been foreseen for that claim to 14 constitute an abuse of process. Yet the foreseeability 15 test for the purpose of an abuse of process objection 16 focus on the foreseeability of the dispute, and not the 17 precise measure at issue in the resulting claim. In 18 this respect, the Claimant's submissions in its 19 Rejoinder in relation to several decisions take it no 20 further forward. 21 (Slide 107) For instance the Claimant has referred 22 to the Philip Morris Asia case, which is extracted on 23 the slide, quoting at paragraph 341 of its Rejoinder -- 24 I'm sorry, this is paragraph 554 of the award 25 (RLA-95) -- that:</p> <p style="text-align: center;">Page 111</p>
<p>12:28 1 state action may become. That's from paragraphs 345 and 2 347 of the award in Cascade. 3 Now, in the present case, the restructure clearly 4 took place following such a period of deteriorating 5 relationships between Mineralogy and companies in the 6 Mineralogy Group on the one hand, and the WA Government 7 on the other. 8 By at least late 2018, to use the words of the 9 Transglobal v Panama tribunal, which is RLA-97 -- 10 this is paragraph 116 of that award, which is not on 11 a slide -- "it was clear that there was a problem" 12 between Mineralogy, which was at that time, of course, 13 wholly Australian owned, and the WA Government, in light 14 of the strongly contested positions of both parties with 15 respect to the WA Government's threat to amend 16 unilaterally the State Agreement to the detriment of 17 Mineralogy. 18 Both the timeline and the conduct of the 19 Mineralogy Group, including its engagement with 20 Australia and its invocation of investment treaty 21 protection in correspondence, unequivocally confirm that 22 it had foreseen that the Government of Western Australia 23 may take adverse state action in relation to unilateral 24 amendment of the State Agreement, and that a claim was 25 in fact "in prospect at the time[] of the</p> <p style="text-align: center;">Page 110</p>	<p>12:30 1 "... a dispute is foreseeable when there is 2 a reasonable prospect ... that a measure which may give 3 rise to a treaty claim will materialise." 4 And we entirely agree with that statement. As the 5 Tribunal will recall, the precise facts of the Philip 6 Morris case were that the plain packaging measure had in 7 fact been announced by the Australian Government. 8 Now, what the Claimant is seeking to do is to 9 conflate the need for the dispute to be foreseeable with 10 the need for the specific measure to be foreseeable, but 11 tribunals have been clear that it is only the dispute 12 that must be foreseeable. I refer to our Reply, 13 paragraphs 245 to 258. 14 (Slide 108) The Claimant also seeks to rely on the 15 choice of words of the Pac Rim tribunal, which is 16 RLA-33, which refer to the foreseeability of a specific 17 future dispute. It's worth looking at exactly what the 18 Pac Rim tribunal said in the proper context of its 19 reasons in that case. 20 At paragraph 2.96, which is not on the slide, the 21 tribunal noted that the parties had suggested three 22 possible points in time when a change of nationality can 23 become an abuse of process. And at paragraph 2.99, 24 it came up with the formula which the Claimant invokes, 25 that:</p> <p style="text-align: center;">Page 112</p>

12:32 1 "... the dividing-line occurs when the relevant
2 party can see an actual dispute or can foresee
3 a specific future dispute as a very high probability and
4 not merely as a possible controversy."
5 But that is not where the tribunal ends its
6 analysis. At paragraph 2.100, the tribunal expressly
7 accepts:
8 "... the Respondent's general submission that:
9 '... it is clearly an abuse for an investor to
10 manipulate the nationality of a shell company subsidiary
11 to gain jurisdiction under an international treaty at
12 a time when the investor is aware that events have
13 occurred that negatively affect its investment and may
14 lead to arbitration."
15 The tribunal went on to explain the policy rationale
16 behind this approach, namely that the doctrine of abuse
17 of process must preclude unacceptable manipulations by
18 a claimant acting in bad faith and fully aware of
19 an existing or future dispute.
20 This is the test that informed the tribunal's
21 decision in Pac Rim: was the investor aware of events
22 that had occurred which negatively affected its
23 investment and which may lead to arbitration?
24 The Claimant refers to other cases which are
25 similarly unavailing. The Respondent has addressed

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12:34 1 which the investor may have predicted."
2 Turning to paragraph 351, and again looking at the
3 highlighted text:
4 "... what must be reasonably foreseeable is that the
5 State will take some adverse action against the
6 investment, on account of a disagreement or conflict of
7 interests with the investor, which -- when it
8 transpires -- will impact the investor's rights and
9 therefore be 'susceptible of being stated in terms of
10 a concrete claim' ... That formulation does not require
11 foreseeability of the precise measure that the State
12 eventually adopts, just 'a measure' ... that is capable
13 of harming the investment to the degree that a treaty
14 claim could be asserted."
15 In Australia's submission, this approach of the
16 Cascade tribunal is the correct articulation of the
17 principles regarding foreseeability as they apply in
18 cases such as the present. And contrary to the
19 submissions of the Claimant, it is also the way that the
20 awards in Alverley, which is RLA-71, and Ipek, RLA-99,
21 should be understood.
22 The relevant passages from Alverley -- I won't take
23 you to them now in the interests of time, but I'd ask to
24 you look at paragraph 385 of the Alverley tribunal's
25 award at RLA-71, and paragraphs 320 and following of the

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12:33 1 these in its SOPO at paragraphs 305 to 316 and in its
2 ROPO at paragraphs 241 to 264.
3 Now, the approach adopted in the Philip Morris award
4 that a dispute must be foreseeable, not the particular
5 measure, is widely regarded as correct, and this
6 approach has been applied in subsequent cases.
7 (Slide 109) One such case is Cascade v Turkey, to
8 which I have referred a few times already. In its award
9 of 20 September 2021 -- this is RLA-98 -- the tribunal
10 provided a persuasive analysis, which it described as
11 being consistent with the approach in Philip Morris
12 Asia, of what must be foreseeable for the purposes of
13 an abuse of process objection. And there are two
14 paragraphs to which I draw your attention on the slide:
15 350 and 351.
16 If I can just look to the highlighted section in
17 paragraph 350:
18 "Logically, a domestic investor who artificially
19 imposes a foreign entity in an ownership chain in the
20 context of a developing disagreement with its own
21 government, solely to allow itself to invoke
22 an investment treaty in the event the State takes
23 adverse action against its rights, is no less guilty of
24 abuse of process because the State ultimately adopts
25 measure X against the investment, rather than measure Y

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12:36 1 Ipek award at RLA-99.
2 As to the Claimant's reliance on the decisions of
3 the Swiss Federal Tribunal in Clorox II, the Claimant
4 here again conflates the foreseeability of the dispute
5 with the foreseeability of the measure.
6 (Slide 110) If we look at the judgment of the Swiss
7 Federal Tribunal in Clorox II, which is RLA-142, we can
8 see at paragraph 5.6, which is on the slide -- this is
9 taken from the English translation; when you are looking
10 in the authorities bundle, the English translation
11 follows the original French -- the Swiss Federal
12 Tribunal held that it was not possible to infer from the
13 President's speech that, firstly, a concrete measure
14 would be adopted, you can see the first step there
15 highlighted in the sixth line of the extract; and
16 secondly, that any such measure would actually affect
17 the investment, the investment here being products
18 marketed by the investor in that case; and thirdly, that
19 the effect of the measure would be of such an extent as
20 to lead to a dispute.
21 So in other words, there was no need for an investor
22 to foresee the specific measure that would be
23 implemented, simply that something would happen.
24 This does not mean, as the Claimant suggests in its
25 Rejoinder at paragraph 354, that an abuse occurs

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<p>12:37 1 whenever it is reasonably foreseeable that a state will 2 take any measure which will result in any type of 3 investment dispute. What it means that it is no answer 4 to our objection that the Mineralogy Group did not 5 predict the passage of the Amendment Act prior to the 6 transfer of the Mineralogy shares to Zeph on 7 29 January 2019.</p> <p>8 It is instead decisive that a dispute concerning the 9 unilateral amendment of the State Agreement by the 10 Western Australian Parliament, to the detriment of 11 Mineralogy, was foreseeable. Indeed, it was actually 12 foreseen prior to January 2019. This is amply 13 demonstrated by the contemporaneous letters and public 14 statements that the Solicitor-General took you to this 15 morning.</p> <p>16 Madam President, members of the Tribunal, in these 17 circumstances, Zeph's invocation of Article 20 of 18 Chapter 11 of AANZFTA is an abuse of process and must be 19 dismissed by this Tribunal.</p> <p>20 I now ask you to give the floor to Dr Esme Shirlow. 21 Thank you.</p> <p>22 THE PRESIDENT: Thank you.</p> <p>23 DR SHIRLOW: (Slide 111) Madam President, members of the 24 Tribunal, I will address Zeph's reliance on the 25 principles allegedly relevant to estoppel, admissions,</p> <p style="text-align: center;">Page 117</p>	<p>12:40 1 That definition again applied because Zeph is 2 "a corporation formed outside the limits of the 3 Commonwealth of Australia". And you can see that 4 definition being applied in RLA-122 and R-603.</p> <p>5 The bare fact of Zeph's incorporation in Singapore 6 is, of course, not in dispute in these proceedings. 7 Australia instead says that the circumstances in which 8 the Claimant was incorporated mean that it cannot invoke 9 treaty protection.</p> <p>10 It also takes issue with whether the Claimant has 11 substantive business operations in Singapore, and ASIC, 12 FIRB and the ATO each expressed no opinion on those 13 matters. Nor did they address whether Zeph could be 14 regarded as an investor with an investment within the 15 meaning of Chapter 11 of the AANZFTA.</p> <p>16 (Slide 113) In another example, the Claimant refers 17 to the decisions of the Queensland Revenue Office, QRO 18 (CLA-167), and Revenue WA (CLA-168). Those decisions 19 were to the effect, first, that the Mineralogy Group was 20 exempt from having to pay landholder duty as a result of 21 the Mineralogy Group restructuring.</p> <p>22 Second, it was determined that foreign transfer duty 23 was payable on a subsequent purchase of residential real 24 estate in Western Australia by Mineralogy. That was on 25 the basis that Mineralogy was an entity in which</p> <p style="text-align: center;">Page 119</p>
<p>12:38 1 approbation and reprobation, unilateral acts, 2 acquiescence and good faith.</p> <p>3 The factual foundation for Zeph's reliance on these 4 principles is a grab-bag of administrative decisions, 5 often of a non-discretionary kind, by which Australian 6 authorities have applied domestic statutory definitions. 7 Those definitions are all expressed in terms that differ 8 markedly to the matters under AANZFTA that are relevant 9 to Australia's preliminary objections.</p> <p>10 (Slide 112) Specifically, the Claimant first refers 11 to the fact that Zeph was registered by the Australian 12 Securities and Investments Commission, or ASIC, as 13 a "foreign company" under the Australian 14 Corporations Act, which is CLA-161.</p> <p>15 Under Section 9 of that Act, ASIC's registration of 16 Zeph followed automatically from Zeph's application, 17 Zeph being a company that is "incorporated ... outside 18 Australia".</p> <p>19 The Claimant also refers to determinations by the 20 Foreign Investment Review Board, or FIRB, and the 21 Australian Taxation Office, the ATO. Those 22 determinations were to the effect that Mineralogy is 23 a "foreign person" within the meaning of the Australian 24 Foreign Acquisitions and Takeovers Act, which is 25 abbreviated as "FATA" and is CLA-166.</p> <p style="text-align: center;">Page 118</p>	<p>12:41 1 a company incorporated in Singapore, being Zeph, had 2 a controlling interest.</p> <p>3 Both decisions were made applying the relevant 4 domestic statutory provisions, the detail of which is 5 set out in paragraph 29 of the ROPO. But those 6 statutory tests again had nothing to do with the matters 7 relevant to Australia's preliminary objections.</p> <p>8 (Slide 114) The Claimant also refers to the 9 Respondent having reported the present claim as 10 a "contingent liability" in its federal budget papers. 11 A contingent liability is of course expressly equivocal 12 and conditional. But in any case, it was reported under 13 domestic standards, which again have nothing to do with 14 the questions before this Tribunal. For more detail on 15 the relevant domestic tests that were applied, I refer 16 you to paragraphs 19 to 30 of the ROPO.</p> <p>17 So turning first to the principle of estoppel, and 18 as Australia has explained in the ROPO at paragraphs 10 19 to 18, estoppel has been repeatedly and consistently 20 defined to require: first, clear, consistent unequivocal 21 and unambiguous statements or conduct on the part of one 22 party; second, that those statements or conduct be made 23 voluntarily, unconditionally and under authority; and 24 third, that they have induced reliance by another party, 25 causing some detriment to that party or some benefit to</p> <p style="text-align: center;">Page 120</p>

12:43 1 the party making the statements or undertaking the
 2 conduct.
 3 None of the acts or representations that Zeph
 4 invokes come anywhere close to the requirement that
 5 conduct be clear, consistent, unequivocal or
 6 unambiguous. That is because, as I have explained, none
 7 of the conduct [or] statements was made with reference
 8 to any of the requirements in AANZFTA put in issue by
 9 Australia's preliminary objections.
 10 The situation may of course be different if
 11 Australia were seeking to challenge, for example, the
 12 fact of Zeph's incorporation in Singapore or its
 13 ownership of shares in Mineralogy, assuming the other
 14 requirements of estoppel were met. But it does not
 15 challenge those facts, and so the domestic decisions on
 16 those matters have no relevant overlap with any of the
 17 matters this Tribunal needs to determine.
 18 The Claimant argues that the alleged representations
 19 need not be specific to AANZFTA in order to give rise to
 20 estoppel under international law. But the reality is
 21 that AANZFTA has specific requirements, and if
 22 a representation under domestic law has no overlap with
 23 those requirements, it plainly cannot be unequivocal or
 24 unambiguous with reference to them.
 25 The cases cited by the Claimant in support of its

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12:44 1 position on this matter or inapposite.
 2 (Slide 116) The Claimant first cites Middle East
 3 Cement v Egypt, which is CLA-174, which you can see on
 4 the slide. And while the tribunal in that case did not
 5 employ the language of estoppel, the determinations made
 6 by the domestic authorities overlapped in any case
 7 entirely with the matter that the Tribunal was required
 8 to determine in applying the investment treaty. And
 9 that matter was: who, as a matter of domestic law, owned
 10 a ship.
 11 (Slide 117) In Bankswitch v Ghana, which is RLA-119,
 12 the matter at issue before the tribunal was whether
 13 an agreement was valid and enforceable under domestic
 14 law. The tribunal held that this matter had been
 15 directly addressed in clear terms by domestic
 16 authorities, including by the Attorney-General and
 17 Minister for Justice in prior statements. And you can
 18 see the clarity of the statement extracted on that slide
 19 (paragraphs 11.82 and 11.83).
 20 The Claimant's reliance on paragraphs 117 to 118 and
 21 250 of the partial award from Eureko v Poland, which is
 22 CLA-257, is similarly misplaced. That tribunal did not
 23 even engage the principle of estoppel. It instead was
 24 analysing the application of an umbrella clause in
 25 considering whether a state was bound by a contract due

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12:45 1 to its involvement in contractual negotiations.
 2 (Slide 118) The Claimant has also sought to contend
 3 that a broader view of estoppel, which does not require
 4 detrimental reliance, should be preferred to the
 5 restrictive view, which does. However, as the
 6 Respondent has established at paragraph 17 of the ROPO,
 7 the decisions cited by the Claimant do not support its
 8 position. That is because those tribunals did not
 9 analyse the relevant submissions under the principle of
 10 estoppel, or they referred to an element of at least
 11 reliance.
 12 The International Court of Justice and investment
 13 tribunals have repeatedly emphasised that detrimental
 14 reliance is required to give rise to estoppel under
 15 international law. There is no broad principle of
 16 estoppel, and the Claimant's attempt to argue otherwise
 17 must be rejected.
 18 The requirement of detrimental reliance has fatal
 19 consequences for the Claimant's case on estoppel. This
 20 is because the Claimant has not demonstrated that it
 21 changed its position in reliance on the statements and
 22 conduct it invokes to its detriment or to Australia's
 23 benefit. And very obviously, it could not reasonably
 24 have done any such thing.
 25 The Claimant instead cites vague detriments and

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12:47 1 benefits which are unconnected to any of Australia's
 2 alleged representations. Zeph alleges, first, that due
 3 to Australia's conduct, and I quote from paragraph 685
 4 of the Rejoinder:
 5 "... the Claimant's local ... subsidiary elected to
 6 retain over \$240 million ... of dividends in Australia."
 7 But where is the evidence of this supposed election
 8 to retain dividends in reliance on Australia's conduct?
 9 There is none.
 10 As to the decisions of QRO and Revenue WA, there can
 11 be no suggestion by Zeph that it suffered any detriment
 12 as a result of being granted an exemption from the
 13 payment of landholder duty under the applicable
 14 legislation. And you can see that exemption being
 15 granted at C-63, annexes 26 and 27.
 16 Foreign transfer duty was paid by Mineralogy in
 17 respect of Mineralogy's -- not Zeph's -- purchase of
 18 a residential property in Western Australia in 2019, and
 19 the ATO separately advised Mineralogy that it may have
 20 breached the FATA because it did not seek approval from
 21 the FIRB before purchasing that same property. On
 22 31 March 2022, as Zeph acknowledges at paragraph 686 of
 23 the Rejoinder, Mineralogy transferred the property to
 24 Mr Palmer to remedy that breach and avoid the applicable
 25 duty.

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<p>12:48 1 The proposition appears to be that Mineralogy, 2 an Australian company, has somehow suffered detriments 3 relevant to these proceedings by being required to 4 comply with Australian law while operating in Australia. 5 This should be given short shrift by the Tribunal. 6 Zeph's submissions as to other nebulous detriments at 7 paragraphs 609, 612 and 692 of the Rejoinder should be 8 rejected for similar reasons.</p> <p>9 Turning then to admissions. At paragraph 560 of its 10 Rejoinder, Zeph defines the concept of "admissions" by 11 reference to Professor Bowett's well-known article on 12 estoppel and acquiescence, and that's RLA-104. In that 13 article at page 195, Professor Bowett notes that: 14 "Where one or other of the foregoing essentials of 15 a binding estoppel is absent the representation ... may 16 still be adduced in evidence as an admission to show 17 a lack of consistency or weakness in a party's 18 position." 19 Of course, to show any lack of consistency or 20 weakness in Australia's position, the alleged position 21 must be referable to a position the Respondent is taking 22 in these proceedings. An element of specificity is 23 therefore also implicit in the concept of admissions. 24 (Slide 120) This requirement is emphasise indeed the 25 Channel Tunnel partial award at paragraph 277, and</p> <p style="text-align: center;">Page 125</p>	<p>12:51 1 scrupulous counsel are entitled to make". 2 Australia is, moreover, not seeking to resile from 3 any of the statements which Zeph describes as 4 admissions. So no issue of approbation and reprobation 5 can possibly arise. 6 (Slide 123) In support of its position on unilateral 7 acts, the Claimant cites the Nuclear Tests case, which 8 is CLA-246, and the International Law Commission's 9 Guiding Principles on Unilateral Declarations, CLA-247. 10 Yet both sources expressly recognise that to constitute 11 unilateral acts, statements or conduct need to be -- to 12 quote from the ILCA Guiding Principles (paragraph 7): 13 "... stated in clear and specific terms [and] ... In 14 [the] case of doubt ... interpreted in a restrictive 15 manner." 16 (Slide 124) And as Nuclear Tests emphasises 17 (paragraph 43), the relevant declaration must be 18 articulated "publicly, and with an intent to be bound". 19 Self-evidently, Australia has made no 20 representations that have satisfied that test. 21 The Claimant's reliance on the principle of 22 acquiescence is similarly misplaced. Australia has not 23 been silent in respect of any of the matters that Zeph 24 contends to have been established through acquiescence. 25 Australia has repeatedly and consistently disputed</p> <p style="text-align: center;">Page 127</p>
<p>12:50 1 that's RLA-171 on the slide. There the tribunal 2 rejected the parties' respective reliance on alleged 3 admissions on the basis that to constitute admissions: 4 "... [they] would need to be unequivocal, and 5 unequivocally addressed to the issues before the 6 Tribunal, before they could be seriously taken into 7 account as admissions." 8 (Slide 121) Zeph itself accepts as much at 9 paragraph 563 of the Rejoinder, when it contends that 10 the statements and conduct that it invokes as the 11 relevant admissions must be "clear and unequivocal" and 12 must "be objectively construed by the Respondent for the 13 purposes of AANZFTA". 14 Obviously that test is not met so far as concerns 15 the supposed admissions made by entities like ASIC or 16 Revenue WA. Zeph also relies on purported admissions in 17 these proceedings, and these have already been addressed 18 by my colleagues. 19 Zeph's reliance on Australia's denial of benefits, 20 which it says constitutes a recognition by Australia 21 that Zeph is an investor with an investment under 22 AANZFTA, is a nonsense. In short, as the tribunal in 23 Fraport recognised at paragraph 395 -- and that's 24 CLA-176 -- an admission cannot arise out of a party 25 making "legitimate arguments in the alternative which</p> <p style="text-align: center;">Page 126</p>	<p>12:52 1 Zeph's claims to be an investor with an investment that 2 is entitled to invoke the benefits of AANZFTA. 3 For good measure, I note that the Claimant also 4 makes various scattergun allegations as to a lack of 5 good faith on the part of Australia. Plainly, in our 6 view, these are also misconceived. 7 Given the forgoing, the Respondent respectfully 8 submits that the Tribunal should reject the Claimant's 9 submissions on estoppel, admissions, approbation and 10 reprobation, unilateral acts, acquiescence and good 11 faith. 12 Thank you. That concludes Australia's opening 13 submissions. 14 THE PRESIDENT: Thank you very much for this opening 15 argument, to all of you. 16 I don't know whether my colleagues have questions at 17 this stage for counsel? 18 MR KIRTLEY: We can wait for the questions. 19 THE PRESIDENT: No questions at this stage. We might have 20 questions, as we mentioned, tomorrow night or whenever 21 is appropriate, for the closing remarks. 22 Fine. So this would be a good time for the lunch 23 break. Is it fine if we resume at 2.00? And then we'll 24 listen to the Claimant. 25 Is that fine with the Claimant?</p> <p style="text-align: center;">Page 128</p>

12:54 1 It's fine with the Respondent as well?
 2 DR DONAGHUE: Yes, thank you.
 3 THE PRESIDENT: Then have a good lunch.
 4 (12.54 pm)
 5 (Adjourned until 2.00 pm)
 6 (2.02 pm)
 7 THE PRESIDENT: I think we are ready to resume. I hope
 8 everybody had a good lunch break. And those who
 9 attended remotely, it was not lunch, but it was
 10 hopefully a good break nevertheless.
 11 Mr Palmer, you have the floor.
 12 MR PALMER: Thank you, Madam President.
 13 Before I start, I'd just like to -- it would be
 14 remiss of me to not mention that George Spalton KC is
 15 also listening online. He's someone that is assisting
 16 me in the proceedings.
 17 (2.03 pm)
 18 Opening statement on behalf of Claimant
 19 MR PALMER: Good afternoon, members of the Tribunal.
 20 I would like to open for the Claimant and also respond
 21 to the matters that Respondent has raised.
 22 The dispute which is before this Tribunal are claims
 23 caused by the Amendment Act, which is the sole cause of
 24 this dispute before this Tribunal.
 25 Firstly, it is simply impossible for the restructure

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14:04 1 Exhibit [C-]479 shows I retired from Mineralogy in
 2 October 2018, at the age of 64. And I was, as set out
 3 in Exhibit [C-]479 appointed by the Claimant as
 4 a director of Mineralogy in early 2019.
 5 My evidence set out in paragraph 33 of my first
 6 witness statement and paragraphs 39, 52 and 61 of my
 7 sixth witness statement shows that I always acted in the
 8 interests of the Claimant and Mineralogy, whose
 9 interests were aligned.
 10 No changes to the State Agreement were made by the
 11 Western Australian Government in respect of the CITIC
 12 matter in 2018 or 2019, and some five years later, no
 13 changes have been made to the State Agreement in respect
 14 of these issues. The CITIC dispute never happened: no
 15 unilateral action by the Government, no arbitration was
 16 ever taken. The matter was referred to the Western
 17 Australian Supreme Court and Mineralogy was successful
 18 in obtaining a judgment against CITIC.
 19 The parties have agreed that the Amend[ment] Act was
 20 not foreseeable at the time of the incorporation of the
 21 Claimant, and that is the relevant test. It is the
 22 Amendment Act from which all claims in this arbitration
 23 arise. It is the Amendment Act which is the heart of
 24 the dispute before this Tribunal. Other matters raised
 25 by the Respondent at the time of incorporation are

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14:03 1 to have taken place when the Claimant had any knowledge
 2 of the specific dispute, being the disputes caused by
 3 the Amendment Act, some 20 months before it was
 4 announced. All the matters referred to in 2018 and 2019
 5 can have no relevance to this arbitration. It is
 6 difficult to see how the dispute could be foreseeable,
 7 considering the arbitration agreement and the mediation
 8 agreement were signed just weeks before the introduction
 9 of the Amend[ment] Act.
 10 Respondent has admitted that the Amend[ment] Act
 11 dispute was not foreseeable. There has been no other
 12 claim made by the Claimant in respect of any other
 13 matter other than the claims caused by the Amendment
 14 Act. That's why we're here today.
 15 The share purchase agreement, which is
 16 Exhibit C-562, provides for a contemporaneous share swap
 17 on settlement, which means the shares issued by the
 18 Claimant have the same value as the shares in Mineralogy
 19 being transferred to the Claimant on the settlement.
 20 That was the basis of the agreement.
 21 I refer the Tribunal to pages 103 to 122 of the
 22 Rejoinder in respect of the Claimant's business as
 23 manager of a joint venture in Singapore, which shows
 24 this business and demonstrates the false allegations
 25 made by the Respondent in this regard.

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14:06 1 simply not relevant to the dispute that took place some
 2 20 months later because of the Amendment Act and nothing
 3 else. The dispute before this Tribunal was therefore
 4 not foreseeable.
 5 The Tribunal, in its wisdom, through the Presiding
 6 Arbitrator, stated at paragraph 35 of Procedural Order
 7 No. 4, which is Exhibit CLA-261, as follows:
 8 "... it is clear that the controversy between the
 9 Parties regarding the Foreseeability and the Restructure
 10 Requests derives from the Parties' conflicting case
 11 theories as to which foreseeable dispute, if any, is
 12 relevant to resolve the [abuse of process objection].
 13 The Claimant submits that such dispute is determined by
 14 the Amendment Act, while the Respondent argues that the
 15 dispute is determined by domestic disputes between WA
 16 and the CITIC Parties, on the one hand, and Mineralogy
 17 and WA, on the other hand."
 18 In the Claimant's view, the Presiding Arbitrator was
 19 correct: the parties do have two conflicting case
 20 theories. The Claimant's position is that the case
 21 theory of the Respondent is absolutely wrong and has no
 22 basis in fact or law. The Claimant's position is that
 23 the Respondent's case is a fantasy, a hypothesis created
 24 for the sole purpose of delaying this arbitration, to
 25 avoid a merits hearing for which the Respondent has no

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14:07 1 answer.
 2 It's a nonsense to suggest that a defendant can
 3 answer a claim brought by a plaintiff by changing
 4 a claim and answering some other matter that the
 5 Claimant has not sought judicial review on, judicial
 6 dealings with. The Claimant will not be baited by the
 7 Respondent to enter into a debate for that purpose, nor
 8 will the Claimant assist the Respondent in wasting the
 9 Tribunal's time. The Claimants will, however, deal with
 10 a couple of issues that the Respondent has raised and
 11 will set out the Claimant's case, which is based on
 12 clear facts, the Respondent's submissions, evidence and
 13 law.
 14 Before I get into the substantive part of the
 15 Claimant's opening, I want to first make a preliminary
 16 comment about my involvement and respond to two matters
 17 that have been raised in the Respondent's presentation
 18 this morning.
 19 Why I have addressed the Tribunal personally, and
 20 the Claimant's approach to the conduct of this hearing,
 21 and the Respondent's decision to question when the
 22 Claimant decided to restructure and the CITIC-related
 23 correspondence evidence.
 24 As the Tribunal will have gathered from the
 25 documents and submissions in this case, I tend to want

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14:09 1 decision not to call certain witnesses for this hearing.
 2 I took the view that in light of my evidence,
 3 Australia's admissions and revised case in their Reply,
 4 there is no need to waste anyone's time with unnecessary
 5 evidence.
 6 That is also, importantly, the approach I adopt for
 7 corporate and commercial decisions, perhaps unlike a lot
 8 of corporates which are managed by committees. I hope
 9 this is useful in the context.
 10 I would like to start, though, with two discrete
 11 points to ensure that there's no room for doubt at the
 12 onset about this. It concerns the Respondent's decision
 13 to question when the Claimant decided to restructure,
 14 and the CITIC-related correspondence in the evidence.
 15 The Claimant's primary position is, of course, that
 16 both matters are not relevant to this hearing, following
 17 the Respondent's admission that the Amendment Act
 18 dispute was not foreseeable at the time of
 19 restructuring.
 20 The time of restructuring is evidenced by the
 21 Claimant's certificate of incorporation, which is
 22 Exhibit C-70; and the share purchase agreement with
 23 Mineralogy International Limited, which is
 24 Exhibit C-562, and which Respondent has admitted at
 25 paragraph 64 of the Reply was legal and effective.

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14:08 1 to approach these matters directly so that I'm available
 2 for the Tribunal to answer any questions it may have.
 3 I take control of these matters and make decisions based
 4 on my own judgment. And it's been that way, I've
 5 conducted my affairs for over 40 years as a successful
 6 businessman, and I felt it was important that the
 7 Tribunal understands this from the outset.
 8 Moreover, I believe this affords the Tribunal with
 9 a chance to raise matters with me directly, importantly,
 10 both because I am the only person with the full and
 11 direct knowledge of the relevant facts in this case, and
 12 also because I am dismayed by the ongoing attacks on my
 13 credibility.
 14 Now, I'm eager to help the Tribunal put to bed --
 15 and in doing so, dismiss outright -- the Respondent's
 16 challenges, including those which are based on
 17 groundless attacks on my evidence, such as my rationale
 18 for incorporation of Zeph. Indeed, throughout my
 19 career, I have never faced accusations of the nature the
 20 Respondent has thrown at me in recent months, and which
 21 they continued to do so in submissions this morning.
 22 I take decisions in good faith, which I accept are
 23 often unconventional, but they are always taken with
 24 a view of resolving issues swiftly and fairly. A good
 25 example of this, which I will return to later, is the

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14:11 1 Notwithstanding the Respondent's position,
 2 it appears to be that two matters are important in the
 3 Respondent's case it wishes to present before the
 4 Tribunal. So for that reason, the Claimant will make
 5 a short submission on each of those matters, which are
 6 facts the Respondent cannot avoid.
 7 Firstly, I will address the decision I made to
 8 offshore in early June 2018. The Respondent says there
 9 are no documents, but that is not true. This matter is
 10 addressed in my evidence: in my first witness statement
 11 in paragraphs 113 to 139.
 12 (Slide 2) I refer the Tribunal to Exhibit C-166,
 13 which is a letter dated 12 December 2017 from the
 14 Premier of Queensland to the Prime Minister of Australia
 15 vetoing a funding of \$1 billion to the Adani coal
 16 project. In paragraph 123 of my first witness
 17 statement, I explain that the Adani coal project is
 18 being developed alongside the Claimant's proposed coal
 19 project in Queensland. I note that the Adani project
 20 was eventually funded through Singapore.
 21 (Slide 3) Secondly, I refer to Exhibit R-484, which
 22 is a draft bill entitled "Coal-Fired Power Funding
 23 Prohibition Bill 2017", which was legislation then
 24 currently before the Australian Parliament, inter alia
 25 banning the funding of coal projects.

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14:12 1 (Slide 4) Thirdly, I refer to Exhibit C-165, which
 2 is an article evincing that Mineralogy's own bank, the
 3 National Bank --
 4 THE PRESIDENT: Just for the transcript, it's R-165.
 5 MR PALMER: Sorry, Exhibit R-165, which is an article
 6 evincing that Mineralogy's own bank, the National
 7 Australia Bank, had made a decision not to fund any new
 8 coal projects.
 9 So in early 2018, as the evidence shows at
 10 paragraphs 119, 122 and 123 of my first witness
 11 statement, these three documents were in my possession.
 12 And it was clear, after considering the documents in
 13 June 2018, that the coal project's chances of obtaining
 14 funding of billions of dollars needed for its
 15 development in Australia were non-existent.
 16 The Claimant would submit that the decision I faced
 17 then as a director of Mineralogy and Waratah Coal,
 18 personally, was whether or not the project should be
 19 closed and the millions of dollars of investment written
 20 off, or was there some other possibility of obtaining
 21 coal funding. In short, was there a positive decision
 22 I could take, for long-term commercial reasons, to avoid
 23 this type of major significant downside by writing off
 24 the whole investment?
 25 (Slide 5) The answer can be found in Exhibit C-167,

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14:14 1 which is a news article in The Straits Times of
 2 Singapore, which confirms that coal funding was
 3 available in Singapore.
 4 Paragraphs 126 to 130 of my first witness statement
 5 further expand on why Singapore was attractive from
 6 a fundraising perspective. The Claimant submits it was
 7 a simple commercial decision, being: should the coal
 8 project be closed down, and if so, should the investment
 9 of many millions of dollars be written off; or would it
 10 be better to have a go and restructure, and see if we
 11 could raise money in Singapore? A simple,
 12 straightforward commercial decision.
 13 The Claimant submits that most commercial companies
 14 would choose life over death while there were prospects
 15 of obtaining funding offshore. And that is what
 16 I decided to do in June 2018, as the evidence I've just
 17 mentioned demonstrates, and sets out the rationale for
 18 doing so.
 19 Historically, my commercial judgment has prevailed
 20 in similar situations over the years. And the Claimant
 21 submits it was comfortable with my own judgment,
 22 especially when the only alternative was to write off
 23 the whole investment. Indeed, despite the evidence of
 24 purported experts served by the Respondent in this case
 25 criticising my approach, I note that there had been no

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14:15 1 commercial downside to that commercial decision.
 2 Pausing there leaves the Tribunal with my evidence
 3 about the rationale and the facts.
 4 (Slide 6) Second, in respect of the CITIC letters
 5 and the associated matters, I refer the Tribunal to
 6 Exhibit C-104, which is a paper written by the former
 7 Western Australian Premier Colin Barnett. I refer in
 8 particular to page 317, which I think is on the slide,
 9 which states:
 10 "An important feature of a State Agreement is that
 11 they, unlike ... other statutes of the Parliament of
 12 Western Australia, are facilitating documents. Other
 13 statutes perform regulatory functions of one sort or
 14 another ... Whereas other statutes are able to be
 15 changed at will, the provisions of State Agreements are
 16 only able to be changed by mutual agreement in writing
 17 by the parties to each State Agreement. State
 18 Agreements therefore provide certainty that ground rules
 19 for the life of each agreement project cannot be changed
 20 unilaterally."
 21 At page 321, it goes on to say:
 22 "Unlike other statutes of Western Australia that can
 23 be changed by Parliament, State Agreement provisions can
 24 only be amended by mutual agreement [of] the
 25 parties ..."

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14:16 1 I would point out that no government for over
 2 70 years had sought to change the terms of a state
 3 agreement unilaterally. The convention was they
 4 couldn't do so, by the terms of the contract and the
 5 fact that Parliament had ratified all state agreements,
 6 which had a clause saying they could only be changed by
 7 consent.
 8 The Claimant submits that I was never of the view --
 9 and no one could have imagined -- that a government
 10 could or would seek to change a state agreement other
 11 than by consent. I confirm that it was never my view,
 12 and I never expressed that view. It was also a truly
 13 remarkable and unmeritorious submission when one stands
 14 back from it.
 15 No Western Australian Government, to the best of my
 16 knowledge -- and certainly not Australia -- has ever
 17 acted in that way. If Australia is standing before the
 18 Tribunal submitting that there is some form of ongoing
 19 foreseeable risk that any of its state agreements or its
 20 international treaties could be revoked in [that]
 21 manner, [that] is remarkable. If the Respondent is
 22 truly making that submission on instructions directly
 23 from the Government, it would have the most
 24 extraordinary and immediate consequences for the
 25 Australian economy, given those watching [the] live

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14:18 1 stream, and the risk to a whole host of investment and
2 other arrangements.
3 In that context, the correspondence between
4 Mineralogy and the then Premier of Western Australia was
5 nothing more than a bluff and bluster, from Mineralogy's
6 perspective. It was a call to call the Premier's bluff,
7 which it did, as the Government never sought to change
8 the State Agreement -- by consent or otherwise -- in
9 respect of the CITIC dispute.
10 (Slide 7) The Premier backed down, and the CITIC
11 dispute -- which was between CITIC and Mineralogy, and
12 not the Government -- was ultimately determined by the
13 Supreme Court of Western Australia in Mineralogy's
14 favour. The judgment is Exhibit CLA-70.
15 Regardless, the foregoing matters are of no
16 relevance in law or fact following the Respondent's
17 admissions, which I will later refer to. The Amendment
18 Act, and the dispute flowing therefore from it, was not
19 foreseeable at the time of restructure, or indeed at any
20 time.
21 (Slide 8) Today I propose to address the following
22 matters in the Claimant's opening oral submissions.
23 Firstly, I will talk about the burden of proof and
24 the Respondent's failure to adduce any evidence which
25 could possibly satisfy the Tribunal in respect of the

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14:20 1 fall away. And this dictates that the Respondent's
2 jurisdictional challenge should be dismissed and the
3 relief the Claimant seeks should be granted.
4 (Slide 9) Before I begin the Claimant's opening
5 submission, the Claimant would like to show the Tribunal
6 part of the Claimant's investment in Australia, through
7 its shareholding in Mineralogy. In this regard, I would
8 like to share with the Tribunal a brief video of the
9 Sino Iron Project. This is Exhibit C-121.
10 The Sino Iron Project was, of course, approved by
11 the Western Australian Government under the State
12 Agreement and is the Chinese Government's largest single
13 investment outside China. I think it's helpful for the
14 Tribunal to understand the nature of the Claimant's
15 investment in Australia and the type of industry we are
16 considering. It's an existing project, operating on
17 Mineralogy's tenements, which was developed prior to the
18 enactment of the Amendment Act. It is the same as other
19 additional projects that would have been developed but
20 for the Amendment Act.
21 So if we could just play the video.
22 (Video Exhibit C-121 played)
23 This is a video of the mining pit. It's the largest
24 magnetite mining pit in the world. And you'll see the
25 trucks at the front there, which are about 15 storeys

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14:19 1 Respondent's objections to jurisdiction.
2 Secondly, I will deal with the way in which the
3 Claimant is now conducting its case, as a result of the
4 various admissions by the Respondent, and in particular
5 the key concession that the dispute before the Tribunal
6 was not foreseeable. That admission means that the
7 rationale for the restructure is no longer relevant and
8 neither the Claimant's evidence nor the Respondent's
9 evidence with respect to restructure is of any
10 relevance.
11 Thirdly, I will address a range of admissions made
12 by the Respondent which show that the Claimant is
13 an investor in Singapore, has made investments in
14 Australia and has substantive business in Singapore.
15 Fourthly, I will take the Tribunal to the actual
16 evidence which proves that the Claimant is an investor
17 in Singapore, has made investments in Australia and has
18 a substantial business in Singapore.
19 Finally, the Respondent will, for unknown reasons,
20 perpetuate before this Tribunal its ongoing attacks upon
21 me personally. Those attacks are improper, misconceived
22 and a distraction from the real issues in dispute. They
23 should simply be ignored.
24 In any event, when the law is applied to the
25 Respondent's admissions, the Respondent's objections

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14:21 1 high, each truck, to give you an idea of the scale of
2 the magnitude. And we're travelling at approximately
3 200 knots by helicopter.
4 The magnetite ore is mined; it's then crushed.
5 If you see at the right top of the screen, this is at
6 the top of three crushers, which are all about
7 15 storeys up themselves.
8 This is looking from the other side of the pit.
9 On the right side at the top, you'll see a conveyor
10 belt coming up to some buildings up the top, which we'll
11 soon fly over, which is where the magnetite ore is
12 concentrated, before it's shipped by slurry pipe on to
13 the coast, some 25 kilometres away, and through our
14 port.
15 There's a waste dump we're over now, flying back
16 over the mine. On the right-hand side, you'll see the
17 processing facilities, which we'll soon turn right and
18 fly over.
19 There are four lines of magnetic concentration where
20 the ore is concentrated. And it's split in two streams,
21 one which goes to tailings, which has waste in it, and
22 the other one which goes to the coast to be exported to
23 China.
24 There's currently in the vicinity of AUD 18 billion
25 of investment in the project to date. And the process

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14:24 1 is: the ore is first crushed in a crusher and there are
 2 three stages -- you can probably see down there -- of
 3 magnetic concentration: we pass three concentrators.
 4 Looking further ahead, there's the power station,
 5 which is a similar-size station [to that] which powers
 6 The Hague.
 7 There's recycling water there that comes back from
 8 the tailings dam. This is the tailings dam, where the
 9 waste goes to. You'll see the size by the size of the
 10 car now that you can see on the left-hand side. This
 11 takes up about 20 square kilometres of tailing storage.
 12 The Sino Iron Project and indeed Claimant's
 13 investments in Australia are much larger and more
 14 extensive than what's being briefly shown in this video,
 15 and I think it can only be appreciated and understood by
 16 a full site visit to Mineralogy's tenements in
 17 Western Australia.
 18 (Pause as video continues to play)
 19 That's it.
 20 The Respondent's jurisdictional objections cannot be
 21 allowed to deny the Claimant a hearing in this important
 22 investor-state dispute. When the correct law is applied
 23 to the relevant facts, it is clear that the Tribunal has
 24 jurisdiction to hear the Claimant's claims, and those
 25 claims should be heard on their merits.

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14:29 1 matters as clear and as focused as possible.
 2 In this context, in this hearing dealing with
 3 jurisdiction, the Claimant relies upon the Notice of
 4 Arbitration, the Claimant's Response and Rejoinder, as
 5 well as the witness statements and expert reports filed
 6 by the Claimant in this arbitration, including all my
 7 evidence which has been incorporated by cross-reference
 8 to other statements; other than, of course, for this
 9 jurisdictional hearing only, the witness statements of
 10 Domenic Martino [and] Nui Harris, and the expert reports
 11 of Graham Sorensen and Alberto Migliucci.
 12 (Slide 10) I will now turn to the burden of proof.
 13 (Slide 11) The Respondent bears the burden of
 14 proving its claims on the balance of probabilities,
 15 a burden it has not discharged. This burden is
 16 acknowledged by the Respondent at paragraph 23 of the
 17 Respondent's Statement of Preliminary Objections, which
 18 states as follows:
 19 "As to the applicable standard of proof, arbitral
 20 tribunals have frequently applied the 'balance of
 21 probabilities' standard, although there may be different
 22 ways in which this standard is expressed (such as the
 23 'preponderance of the evidence'). As recently explained
 24 by the Carlos Sastre tribunal: ..."
 25 Which is Exhibit RLA-29 at paragraph 147:

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14:28 1 I will turn in a moment to address a number of key
 2 points which I'd like to make orally. But before doing
 3 so, I'd like to emphasise on the record at the very
 4 outset that nothing in my oral submission should be
 5 treated as varying or departing from the Claimant's case
 6 in the Rejoinder, the Response and other written
 7 submissions. The Claimant's case is maintained in full.
 8 Further, to the extent that the Respondent
 9 suggests -- as it disingenuously sought to do at the
 10 pre-hearing conference in August and today -- that the
 11 Claimant has somehow changed its case or abandoned any
 12 part of its case, that is wrong. As I explained
 13 previously at the pre-hearing conference, the Claimant
 14 has simply sought to ensure that the Tribunal is not
 15 troubled with unnecessary factual testimony in
 16 circumstances where the Respondent has now made, a bit
 17 belatedly, some crucial admissions.
 18 I'm in a position to address all relevant factual
 19 matters, including any reference to the matters set out
 20 in the other statements which I incorporate into my
 21 evidence in full. All parties to arbitrations such as
 22 this have a duty to make sure they are constantly taking
 23 steps to assist the Tribunal to streamline the
 24 procedure. It is this type of obligation some lawyers
 25 often ignore, taking bad points. But I am keen to keep

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14:31 1 "... This standard requires an evaluation by the
 2 Tribunal of all the evidence produced by Claimants and
 3 Respondent on the issues at hand to determine which
 4 party's claims are more likely to be true. Thus,
 5 Claimants must present persuasive evidence of the facts
 6 to establish jurisdiction for the Tribunal to be
 7 satisfied that the burden of proof has been
 8 discharged. ... Respondent, in turn, must provide
 9 persuasive evidence of the facts that make out its
 10 objections to jurisdiction."
 11 (Slide 12) The application of this principle is
 12 illustrated in the following decisions, and they are up
 13 there for you to have a look at: Antonio del Valle Ruiz
 14 v Kingdom of Spain, which is Exhibit RLA-28, at
 15 paragraph 495; Churchill Mining decision on annulment,
 16 which is Exhibit RLA-31, at paragraph 215; Churchill
 17 Mining award, which is Exhibit RLA-32, at paragraphs 240
 18 and 244; Pac Rim decision on jurisdiction, which is
 19 Exhibit RLA-33, at paragraph 2.10; Sergei v Russia,
 20 which is Exhibit RLA-34, at paragraph 256.
 21 Whereas the Claimant has provided substantial clear,
 22 concrete evidence via facts by way of the witness
 23 statement served with each Notice of Arbitration and
 24 Statement of Claim, Response and Rejoinder, in contrast,
 25 the Respondent has provided little or no evidence of

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<p>14:32 1 facts, and failed to contest the Claimant's factual 2 evidence with any equivalent factual evidence of its 3 own. It is the Claimant's respectful submission that 4 the role of the Tribunal in considering the Respondent's 5 objections is to properly evaluate the factual evidence; 6 and/or where there are admissions, to apply the 7 provisions of AANZFTA and international law to such 8 factual admissions in reaching its conclusions. 9 The position in respect of the Respondent's evidence 10 is even less satisfactory when compared to the 11 Claimant's case and the Respondent's admissions. The 12 Respondent's evidence consists of ill-informed and 13 inadmissible opinion and speculation, often 14 transgressing wholly inappropriate, improper challenges 15 to the credibility of my evidence. 16 Consistent with the narrative in this case, the 17 Respondent spends its time attacking me personally, and 18 delaying matters with this jurisdictional challenge, 19 rather than focusing on the law and the actual facts. 20 (Slide 13) The law and the facts are against it. As 21 stated in Philip Morris v Australia, which is 22 Exhibit RLA-95, at paragraph 539: 23 "... the threshold for finding an abusive initiation 24 of an investment claim is high." 25 (Slide 14) And Clorox, which is Exhibit RLA-142, at</p> <p style="text-align: center;">Page 149</p>	<p>14:35 1 jurisdiction to hear the Claimant's claims. 2 Having addressed the burden of proof and the 3 evidence, I will now address the issues. 4 Firstly, it is appropriate to review why we are 5 here. We are here because of the Amendment Act. It is 6 the Amendment Act which created the present dispute. If 7 there was no Amendment Act, we would not be here. If 8 there was no Amendment Act, there would be no claims for 9 the Tribunal to consider, and this arbitration just 10 would not exist. 11 The claims in this arbitration are claims emanating 12 from the enactment of the Amendment Act, a piece of 13 legislation which it is common ground was not 14 foreseeable and, inter alia, terminated the arbitration 15 agreement which had only been entered into some 16 three weeks earlier. How could this possibly have been 17 foreseeable over 20 months earlier? 18 The Amendment Act is Exhibit C-1. The Claimant's 19 primary position is, therefore, that the commercial 20 rationale for the restructuring is irrelevant to the 21 abuse of process objection, because the specific dispute 22 or measure at issue in this arbitration is the Amendment 23 Act and the damage it causes, which could not be 24 foreseeable. Indeed, it is now common ground that the 25 specific measure of the Amendment Act and the resulting</p> <p style="text-align: center;">Page 151</p>
<p>14:34 1 paragraph 5.2.4, stated: 2 "It is up to the party claiming the existence of 3 after abuse of rights to allege and prove the facts ... 4 establish[ing] the foreseeability of the dispute [when 5 the investment was restructured] ..." 6 Evidence of fact in witness statements filed by the 7 Claimant from persons who were directly involved in the 8 relevant events cannot be displaced by speculative 9 opinion evidence from persons who were not 10 contemporaneously involved in the matters about which 11 they opine, who have no firsthand knowledge of any of 12 the facts. 13 In the current circumstances, the Respondent's 14 opinion evidence is nothing more than a hypothetical 15 analysis of what certain experts subjectively consider 16 might have been done differently in each case, based on 17 an expert's limited area of expertise, which, by its 18 very nature, isolates them from the context of all the 19 actual factual matters before the Tribunal, when none of 20 them have my commercial or practical business 21 experience. 22 The Respondent also misses the point that the 23 Respondent's own admissions, made during the course of 24 this arbitration, mean that once the appropriate law is 25 applied to those admitted facts, the Tribunal has</p> <p style="text-align: center;">Page 150</p>	<p>14:36 1 claims were not foreseeable at the time of 2 restructuring. 3 Before dealing with the Respondent's 4 investor/investment and substantive business and abuse 5 of process objections, it is worthwhile recalling how 6 the Amendment Act was created, and how it created this 7 present dispute. 8 On 13 August 2020, the Amendment Act was enacted by 9 the Western Australian Parliament. The object of the 10 Amend[ment] Act was to eviscerate, inter alia, 11 Mineralogy's rights by terminating the arbitration 12 agreement and the mediation agreement, which had only 13 been entered into a few weeks earlier, and the 14 Claimant's right to pursue a claim for Western 15 Australia's established breach of the State Agreement in 16 2012. 17 The Amend[ment] Act also terminated the BSIOP 18 dispute as a whole, and it absolved by legislation all 19 liability of the State of Western Australia in relation 20 to the BSIOP proposal and consequent upon the passage of 21 the Amend[ment] Act itself. 22 To recall, the Amendment Act provided inter alia for 23 the following: that the BSIOP proposal has no 24 contractual or other legal effect, Section 9; that the 25 arbitration agreement and mediation agreement are</p> <p style="text-align: center;">Page 152</p>

<p>14:37 1 terminated; that existing awards, including the first 2 and second awards, are of no effect, and taken never to 3 have had any effect, Section 10; that the State, 4 including the Crown, of Western Australia and the 5 Western Australian State Authority has no liability and 6 cannot have any liability to any person connected in any 7 way with the BSIOP proposal or the passage of the 8 Amendment Act, Sections 11 and 19; [that] there can be 9 no appeal, no review or any other challenge to the 10 State's conduct concerning the BSIOP proposal or the 11 passage of the Amendment Act; that the rules of natural 12 justice, including any duty of procedural fairness, do 13 not apply in respect of the BSIOP dispute or the passage 14 of the Amendment Act; [that] no conduct of the State 15 related to the BSIOP proposal or the passage of the 16 Amendment Act can give rise to commission of a civil 17 wrong or a criminal offence, Sections 18 and 20.</p> <p>18 Really, is it acceptable that our politicians and 19 bureaucrats are given immunity from the criminal law and 20 place themselves above the rule of law? Is it 21 acceptable that the Amendment Act take from the courts 22 their jurisdiction in respect of this particular 23 dispute?</p> <p>24 Mineralogy, International Minerals and Clive Palmer 25 must indemnify the State against any loss, cost [or]</p> <p style="text-align: center;">Page 153</p>	<p>14:40 1 own conduct.</p> <p>2 As has been said, the Western Australia legislation 3 contemplates significant departures from traditional 4 characteristics of judicial process. It abrogates 5 a court's decisional independence, conscripts it into 6 an implementation of a government plan. It prejudices 7 an issue. It compromises the court's role in quelling 8 a dispute. It renders judicial decisions not final and 9 conclusive, which is inherent by their very nature.</p> <p>10 These are fundamental and serious departures from 11 the characteristics of the judicial process, 12 significantly impairing a court's institutional 13 integrity. At risk is the judicial reputation of 14 an independent umpire in the resolution of disputes and 15 [as] upholders of the rule of law. If we effectively 16 permit this kind of treaty breach to go unsanctioned, 17 more and worse are likely to follow.</p> <p>18 Key points that the Tribunal should take into 19 account when considering the Claimant's submission are: 20 [firstly,] that the Claimant was incorporated for 21 perfectly proper commercial reasons. This is addressed 22 in my evidence: in the first Palmer witness statement at 23 paragraphs 113 to 139 and in the fifth Palmer witness 24 statement at paragraphs 48 to 72. Secondly, the 25 incorporation of the Claimant was carried out at a time</p> <p style="text-align: center;">Page 155</p>
<p>14:39 1 liability connected with the Amendment Act and the BSIOP 2 proposal, including those arising under international 3 treaties or international law, [and] any loss or cost 4 relating to the BSIOP proposal or the passage of the 5 Amendment Act.</p> <p>6 By denying the right to freedom of information, the 7 Government also took away a free press to hold 8 politicians and bureaucrats accountable. The Amendment 9 Act, of course, also created a massive sovereign risk. 10 It was and is an unprecedented piece of legislation, 11 certainly for a western democracy, in terms of the 12 manner in which it was drafted, in secret; in terms of 13 the scope and effect; in terms of the disgusting 14 communications about me and the Claimant by key 15 protagonists, which have since been discovered; and in 16 terms of its consequences.</p> <p>17 This arbitration is intended to bring the Respondent 18 to account for its multiple breaches of AANZFTA and 19 flagrant disregard for the rule of law.</p> <p>20 Background to this hearing which should be borne in 21 mind when the Respondent remarkably and improperly seeks 22 to suggest that the conduct of the Claimant's side 23 amounts to a sham, an abuse, and fails to particularise 24 or provide any evidence of such: it lies in the 25 Respondent's mouth to make such submissions, given its</p> <p style="text-align: center;">Page 154</p>	<p>14:41 1 when the Amendment Act dispute was not foreseeable, as 2 the Respondent has admitted. And thirdly, the Claimant 3 carries on a perfectly proper and substantial business 4 in Singapore and Australia, and has done so at all 5 material times.</p> <p>6 Before embarking on further analysis, the Tribunal 7 should consider the following facts: firstly, the 8 evidence meets the investor/investment test without 9 scope for any real debate; secondly, the Respondent has 10 recognised the nature and ownership of a number of 11 occasions with important and concrete consequences for 12 the Claimant and the group; thirdly, the Respondent's 13 submissions in these proceedings evince the mischief 14 which the Respondent has sought to achieve by bringing 15 these objections before the Tribunal; and fourthly, the 16 Respondent's preliminary objections are unarguable and 17 should be summarily dismissed.</p> <p>18 The Respondent's objections are contrary to several 19 important formal admissions made by the Respondent 20 during the course of these proceedings and are not 21 supported by factual evidence. Those admissions, [with] 22 which the Respondent's preliminary objections are in 23 conflict, are, on their face, clear and unequivocal, 24 such that they no longer need to be proved by the 25 Claimant, and the Respondent cannot now renege from</p> <p style="text-align: center;">Page 156</p>

<p>14:43 1 them. The Respondent is accordingly bound by such 2 admissions for the purpose of this arbitration. 3 Before proceeding further, it's important to recall 4 that a party to an arbitration is bound by omissions of 5 fact which are made in proceedings before an arbitral 6 tribunal. Once the party concedes a fact in issue, it 7 cannot contest that fact later in proceedings or take 8 any positions which conflict with the prior admission. 9 (Slide 16) Authority for that proposition is set out 10 in the Claimant's Rejoinder at paragraph 30, namely: 11 Petersen and Eton Park v Argentina, which is CLA-267, at 12 paragraph 83; Davis v City of New York, which is 13 CLA-268; and NAFED v Swarup Group of Industries, which 14 is Exhibit CLA-269, at paragraphs 8 and 14. 15 (Slide 17) As mentioned in paragraph 30 of the 16 Rejoinder, respected jurist Geoffrey Waincymer has 17 observed that "tribunals will commonly see particular 18 value in admissions against interest", given there is no 19 vested interest in making them. These observations are 20 recorded in Waincymer, Procedure and Evidence in 21 International Arbitration, which is Exhibit CLA-270, at 22 10.4.14. 23 It is also important to recall that a tribunal's 24 decision should also be consistent with any agreed 25 facts. This observation is also recorded in Waincymer,</p> <p style="text-align: center;">Page 157</p>	<p>14:45 1 enable the Tribunal to conclude that the Claimant is 2 an investor which has made a qualifying investment. 3 Some admissions by the Respondent are of fact and others 4 are of law. 5 First, at paragraph 64 of the Reply, the Respondent 6 has admitted that the share swap was both lawful and 7 effective in transferring the ownership of its shares in 8 Mineralogy to the Claimant. 9 Secondly, at paragraph 68 of its Reply, the 10 Respondent acknowledged that an investment can validly 11 be made through a cashless transaction. 12 [Thirdly], I note that in paragraph 71 of its Reply, 13 the Respondent does not deny that a share swap can 14 constitute an active contribution. I also note that it 15 is curious that at paragraph 72 of its Reply, the 16 Respondent does not question that the acquisition by way 17 of a share swap is not legitimate. 18 I note further, at paragraph 110 of its Reply, that 19 the Respondent did not dispute that Article 2(c) of 20 Chapter 11 of AANZFTA covers both direct and indirect 21 investment. 22 Against this background, the Claimant now turns to 23 consider in more detail the admissions which the 24 Respondent has made on the related issues of investor 25 and investment.</p> <p style="text-align: center;">Page 159</p>
<p>14:44 1 Procedure and Evidence in International Arbitration, 2 which is CLA-270, at 10.4.13. 3 To the extent, therefore, that those admissions are 4 inconsistent, or the Respondent's preliminary objections 5 are unsupported by any factual evidence, such 6 objections are in themselves an abuse of process and 7 should be rejected on this basis. 8 It's important to emphasise in relation to the 9 various admissions made or confirmed by the Respondent 10 that once the nature and effect of those admissions is 11 properly understood, it is clear that Respondent's 12 preliminary objections are without any substance and 13 must be dismissed. 14 Accordingly, it is not necessary for the Tribunal to 15 be burdened with the task of fact-finding on a great 16 many issues. Instead, with the benefit of the 17 Respondent's admissions, the Tribunal can readily be 18 satisfied that the Respondent's preliminary objections 19 are unfounded and should be dismissed. 20 Reference will now be made to the Respondent's 21 various submissions and what the Tribunal should make of 22 them. I will now consider the Respondent's admissions 23 in respect of the Respondent's "investment" and 24 "investor" objections. 25 Respondent has made a series of admissions which</p> <p style="text-align: center;">Page 158</p>	<p>14:47 1 It is submitted that the Respondent's admissions 2 confirm the Claimant is an investor and has a qualifying 3 investment in Australia in accordance with the terms of 4 AANZFTA. 5 (Slide 18) The Respondent's first admission, at 6 paragraph 64 of the Reply, is that: 7 "... Australia does not dispute that the share swap 8 was ... lawful and effective in transferring 9 ownership ..." 10 That's important: 11 "... in transferring ownership of the shares in 12 Mineralogy to Zeph [the Claimant]." 13 (Slide 19) AANZFTA, in Chapter 11, Article 2(c), 14 states: 15 "investment means every kind of asset owned or 16 controlled by an investor, including but not limited 17 to ... 18 (ii) shares ..." 19 In the circumstances, it's curious, to say the 20 least, for the Respondent to dispute that Claimant has 21 made an investment. The Respondent has conceded that 22 Claimant became the owner of the shares following 23 a lawful and effective share swap. The admission that 24 the share swap was lawful and effective in transferring 25 ownership of the shares [in] Mineralogy to the Claimant</p> <p style="text-align: center;">Page 160</p>

14:48 1 is necessarily an admission of ownership by the Claimant
2 of the asset, namely the Mineralogy shares. This is
3 therefore an admission of the Respondent of the
4 existence of the Claimant's investment within the
5 meaning of Chapter 11, Article 2(c) of AANZFTA.
6 (Slide 20) In the circumstances, it is also curious
7 and unsustainable for the Respondent to contend that the
8 Claimant is not an investor. This is because AANZFTA,
9 in Chapter 11, Article 2(d), as follows, states:
10 "... investor of a Party means a natural person of
11 a Party or a juridical person of a Party that seeks to
12 make, is making, or has made an investment ..."
13 (Slide 21) The Respondent's admission that the share
14 swap was lawful and effective is an admission that the
15 Claimant owns the Mineralogy shares, has made
16 an investment by the acquisition of shares in a company
17 incorporated in Australia; and accordingly, this is
18 an admission that the Claimant has made an investment in
19 the territory of Australia. By having an investment, we
20 must have an investor.
21 That being so, the Respondent has effectively
22 admitted that the Claimant is an "investor of a Party"
23 within the meaning of AANZFTA Chapter 11, Article 2(d)
24 of AANZFTA.
25 THE PRESIDENT: Mr Palmer, do forgive me for interrupting

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14:51 1 association and the Corporations Act: it's a real value.
2 So we say that it did have a real value.
3 But my point here is a little bit different. I'm
4 saying here that if we go back to the treaty, the treaty
5 says the test of an investment is actually ownership,
6 right? So in that sense, the treaty says ownership is
7 the test. The Respondent has admitted that the share
8 swap was valid and effective, but what it did do was it
9 transferred ownership.
10 Therefore, the ownership of the investment complies
11 with section 2 -- I'm not sure what it was -- of the
12 treaty [as] being a valid investment in Australia. And
13 to have a valid investment in Australia, you must have
14 an investor. So it's a little bit circular argument,
15 right?
16 I hope that --
17 THE PRESIDENT: So you are saying the test is ownership?
18 MR PALMER: Yes.
19 THE PRESIDENT: And you don't consider value as part of the
20 test?
21 MR PALMER: Well, we have to go back to the treaty.
22 THE PRESIDENT: Yes.
23 MS PALMER: The treaty should take precedence, I think,
24 prior to other matters. The treaty is quite clear on
25 its face: it says ownership is a test.

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14:49 1 you, but I would like to make sure that we understand
2 your position correctly.
3 The way I understand the Respondent is they are not
4 saying you could not have a share swap; they are saying
5 that's, in principle, a lawful transfer. They are not
6 saying that that did not become the owner. What the
7 Respondent is saying is that that made no contribution
8 because the shares it contributed as part of the share
9 swap had no value.
10 Do you want to answer that? You can do it now or
11 later. But it would be good that we have your clear
12 position on that.
13 MR PALMER: I was going to answer that. I can answer --
14 THE PRESIDENT: Okay. Then you can do it later.
15 MR PALMER: I might get to it, but I can just say quickly.
16 In essence, with the share purchase agreement, it
17 was contemplated that the share swap would take place on
18 settlement, and at settlement there would be
19 a contemporaneous exchange of shares, right? For that
20 to happen -- it was a common commercial technique -- the
21 value is normally assessed as the -- the shares are of
22 equal value, because that's where the person ending up
23 has still that same investment.
24 In this case in particular, they had a face value of
25 AUD 6 million, which was covered by the articles of

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14:52 1 Maybe I can just have a minute.
2 THE PRESIDENT: I don't want you to have to come back.
3 We can certainly read the treaty.
4 MR PALMER: If we look at Chapter --
5 THE PRESIDENT: I just wanted your answer on this value
6 issue.
7 MR PALMER: Chapter 11, Article 2(c), "investment" is "every
8 kind of asset owned or controlled by an investor,
9 including but not limited to ... shares".
10 THE PRESIDENT: Yes, but of course, then (2)(d) says "make
11 ... an investment". That's one part of the argument.
12 The other argument is that an investment in and of
13 itself implies certain characteristics, out of which
14 contribution is one; and "contribution" is contribution
15 of something of value --
16 MR PALMER: That's correct.
17 THE PRESIDENT: -- it's an allocation of resources.
18 MR PALMER: So we're saying it is something of value, right?
19 THE PRESIDENT: Yes.
20 MR PALMER: If I can just continue --
21 THE PRESIDENT: Of course. Apologies. But I thought it
22 might be better to ask for the clarification.
23 MR PALMER: There's a little bit more on it, so maybe there
24 are some more questions.
25 THE PRESIDENT: Sure.

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14:53 1 MR PALMER: In the circumstance, it's curious, to say the
 2 least, for the Respondent to dispute the claim [that the
 3 Claimant] has made an investment.
 4 The Respondent has conceded that the Claimant became
 5 the owner of the shares following a lawful and effective
 6 share swap. The admission that the share swap was legal
 7 and effective in transferring ownership of the shares in
 8 Mineralogy to the Claimant is necessarily admission of
 9 ownership of the Claimant of an asset, namely the
 10 Mineralogy shares. This is therefore an admission [by]
 11 Respondent of the existence of the Claimant's investment
 12 within the meaning of Chapter 11, Article 2(c) of
 13 AANZFTA.
 14 In the circumstances, it's also curious -- and
 15 unsustainable -- for the Respondent to contend that the
 16 Claimant is not an investor. This is because AANZFTA
 17 Chapter 11, Article 2(d) states as follows:
 18 "... [an] investor of a Party means a natural person
 19 of a Party or a juridical person of a Party that seeks
 20 to make, is making, or has made an investment ..."
 21 "... or has made an investment". So it's "or has
 22 made an investment". It's not both of them; it's one or
 23 the other, right? So I'm saying: if you have
 24 an investment, it has made an investment.
 25 The Respondent's admission that the share swap was

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14:56 1 Engineering Pte Ltd (the 'Engineering Companies'), which
 2 it acquired on 31 January 2019; and (b) participation in
 3 a Joint Venture Agreement (the 'JVA') with the
 4 Kleenmatic Companies, which it entered into on
 5 24 January 2020. It is only those activities that are
 6 relevant to whether the Claimant had 'substantive
 7 business operations' in Singapore with the meaning of
 8 Article 11(1)(b) of Chapter 11 of AANZFTA."
 9 The Respondent has thus admitted and acknowledged
 10 the existence of the Claimant's investment and
 11 businesses, the only relevant date being 13 August 2020,
 12 the date the Amendment Act became law; see paragraph 131
 13 of the Reply.
 14 Not only that, but the Respondent has formally
 15 admitted the Claimant and the Claimant's investment in
 16 Australia. On 29 March 2019, the Respondent approved
 17 the Claimant as a foreign company carrying on business
 18 in Australia, as evinced by Claimant's application for
 19 registration as a foreign company in Australia, which is
 20 Exhibit C-97, and the current and historical ASIC
 21 extract for the Claimant, which is Exhibit C-483.
 22 That issue is addressed fully in Section II of the
 23 Claimant's Response and Section Two of the Claimant's
 24 Rejoinder, which need not be repeated here, but will
 25 assist the Tribunal in understanding the matter.

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14:54 1 lawful and effective is an admission that the Claimant
 2 owns the Mineralogy shares, and as such has made
 3 an investment by the acquisition of shares in a company
 4 incorporated in Australia. And accordingly, this is
 5 an admission that the Claimant has made an investment in
 6 the territory of Australia. So by having an investment,
 7 we must have an investor. That being so, the Respondent
 8 has effectively admitted the Claimant was an "investor
 9 of a Party" within the meaning of Chapter 11,
 10 Article 2(d) of AANZFTA.
 11 By reason of these matters, the Respondent has
 12 admitted that the Claimant was an investor, has made
 13 an investment. That being so, the Respondent's first
 14 preliminary objection, in respect of "investor" and
 15 "investment", is made contrary to its own admissions.
 16 As such, the first preliminary objection cannot be
 17 maintained; it should now be dismissed by the Tribunal.
 18 I will now deal with the Respondent's admissions
 19 relevant to denial of benefits.
 20 (Slide 21) The Respondent makes a further admission
 21 at paragraph 146 of its Reply, which was as follows:
 22 "As at 13 August 2020, the Claimant's 'business
 23 operations' consisted of: (a) holding three engineering
 24 companies, being GCS Engineering Services Pte Ltd,
 25 Visco Engineering Pte Ltd, and Visco Offshore

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14:58 1 The Respondent cannot take the benefit, as it has in
 2 this case, to the tune of more than \$400,000, and then
 3 seek to deny a benefit to the Claimant.
 4 (Slide 22) The Respondent's taking of that benefit
 5 is evinced by the foreign transfer duty statement
 6 grounds WA, which is C-63, annexure A, exhibit 28 at
 7 page 322.
 8 The point is that the Respondent cannot, on the one
 9 hand, formally admit the Claimant and its investments
 10 and have notice of the Claimant's substantive business
 11 in Singapore, and yet subsequently seek to deny the
 12 Claimant the benefits of Chapter 11 of AANZFTA.
 13 Cogent factual evidence, as set out, inter alia, in
 14 the first Palmer witness statement at paragraphs 27 to
 15 82, illustrates that Claimant's business in Singapore is
 16 indeed substantive. The Respondent nevertheless asserts
 17 without any proper foundation that Claimant does not
 18 have a substantive business in Singapore. These
 19 assertions do not stand scrutiny when one has regard to
 20 the following series of admissions which the Respondent
 21 has made in its Reply.
 22 (Slide 23) First, the Respondent admitted the
 23 following at paragraph 129 of its Reply:
 24 "The key issue between the Parties is whether Zeph
 25 had 'substantive business operations' in Singapore at

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14:59 1 the relevant time."
 2 (Slide 24) Secondly, at paragraph 146 of its Reply,
 3 the Respondent acknowledges that:
 4 "As at 13 August 2020, the Claimant's 'business
 5 operations' consisted of: ... [the] engineering
 6 companies ... and ... [of the] Joint Venture Agreement
 7 ... with the Kleenmatic Companies, which it entered on
 8 24 January 2020. It is only those activities that are
 9 relevant to whether the Claimant had [a] 'substantive
 10 business' ..."
 11 Thirdly, the Respondent also acknowledged, at
 12 paragraph 146 of the Reply, that the Claimant's business
 13 operations are "activities that are relevant".
 14 (Slide 25) Fourthly, at paragraph 168 of its Reply,
 15 the Respondent said:
 16 "In the document production phase of these
 17 proceedings, the Claimant was ordered to produce
 18 employment contracts for employees of the Claimant, and
 19 records of transfer of employment or engagement
 20 contracts from One Kleenmatic and Kleen Venture pursuant
 21 to cl 24 of the JVA in the period 24 January 2020 to
 22 13 August 2020. Of the 146 employment contracts
 23 produced by the Claimant, only six related to positions
 24 which were not cleaners."
 25 So the Respondent has, by referring to such

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15:02 1 consulting advisors, Allen & Gledhill, BDO and PwC.
 2 The Tribunal should consider the uncontested
 3 evidence upon which the Claimant relies in respect of
 4 its substantive business operations in Singapore,
 5 including but not limited to annexure A, which is
 6 Exhibit C-63 of my first witness statement, at
 7 paragraphs 27 to 82.
 8 There is no sham or pretence here, as the Respondent
 9 acknowledges. The Claimant conducts proper, real,
 10 lawful, substantive, profitable business activities in
 11 Singapore. Real people doing real work rely [on] the
 12 Claimant for their employment, and indeed they have done
 13 so at all material times. Real clients pay for it.
 14 There is simply no proper basis [on] which to challenge
 15 this.
 16 There is no requirement in AANZFTA, nor in
 17 international law generally, that a field of commercial
 18 activity entered in its home state be the same or
 19 correspond to the investment in a respondent state in
 20 any way. The business activity in the home state need
 21 only be "substantive". There are no cases that discuss
 22 this exact term. A more usual investment treaty
 23 iteration in denial of benefit clauses [is] "substantial
 24 business activity".
 25 (Slide 27) In Big Sky v Kazakhstan, which is

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15:00 1 documents, admitted that it is aware that the Claimant
 2 does have 146 people working for it in Singapore.
 3 (Slide 26) Fifthly, at paragraph 170 of its Reply,
 4 the Respondent admitted that the Claimant was issued
 5 licences by the Singapore Government in order to carry
 6 on its business in Singapore.
 7 Sixthly, the Respondent admitted at paragraph 170 of
 8 its Reply that the Claimant's business was a business
 9 registered with the Singapore Government which was
 10 entitled to receive, and did in fact receive,
 11 substantial Covid-19 subsidies before and after
 12 13 August 2020.
 13 Seventhly, the Respondent further admitted, at
 14 paragraph 170 of its Reply, that the Claimant engaged
 15 three professional services firms in Singapore to assist
 16 it during that relevant period.
 17 Based on those admissions alone, it is respectfully
 18 submitted that the Tribunal should find that the
 19 Claimant has had at all relevant times a substantive
 20 business in Singapore. The Claimant respectfully
 21 submits that the Tribunal should so find. This is
 22 especially the case where the Respondent has not
 23 provided any factual evidence, or any particulars at
 24 all, to support the scandalous allegations against not
 25 just the Claimant but its highly respected legal and

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15:03 1 Exhibit RLA-85, at paragraph 286, the tribunal
 2 approaches the concept of ["substantial business
 3 activities"] this way:
 4 "... the focus is on 'substance' and not 'form' and
 5 on materiality rather than on the magnitude of the
 6 business ..."
 7 It is submitted that the same applies to the term
 8 "substantive".
 9 The Cambridge Dictionary defines "substantive" as:
 10 important, serious, or related to real facts and having
 11 real importance or value. It can be synonymous with
 12 "substantial" or "consideration". But it's primarily
 13 used to denote something of substance: real, actual, as
 14 opposed to imaginary or fictional.
 15 It is without doubt that the Claimant's commercial
 16 activity in Singapore is real and substantive. It is
 17 not a shell, nor are the activities fictitious or
 18 imaginary or exaggerated. Rather, they have proper,
 19 significant and increasing value, [in terms of both]
 20 profit and revenue, to the management and employees who
 21 derive their livelihoods from the Claimant's business in
 22 Singapore.
 23 In light of the matters to which I have referred, it
 24 will not be necessary for the Tribunal to traverse all
 25 the detailed factual evidence about this issue. But if

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<p>15:04 1 the Tribunal has any doubts, it should consider all the 2 detailed, uncontested factual evidence which 3 comprehensively demonstrates that the Claimant has 4 a substantive business in Singapore. That evidence is 5 referred to in the Claimant's Response and Rejoinder and 6 previously filed material, and I'll return to it later 7 in my remarks.</p> <p>8 The applicable legal principles are also set out in 9 the Response and the Rejoinder, and the Claimant's 10 previously filed documents, need not be repeated here.</p> <p>11 By reason of these matters, the Respondent has made 12 admissions of fact [which], together with the Claimant's 13 uncontested factual evidence, are sufficient to 14 establish the Claimant has a substantive business in 15 Singapore. That being so, the Respondent's second 16 preliminary objection, in relation to denial of 17 benefits, is made contrary to its own admissions and 18 concessions and uncontested factual evidence. As such, 19 the second preliminary objection cannot be maintained 20 and should be dismissed by the Tribunal.</p> <p>21 I will now address the Respondent's admissions in 22 relation to the Respondent's abuse of process objection.</p> <p>23 Before addressing the nature and effect of the 24 Respondent's admissions concerning the abuse of process 25 objection, it is important to emphasise again what this</p> <p style="text-align: center;">Page 173</p>	<p>15:07 1 Accordingly, the Claimant claims this arbitration 2 all arise out of the enactment of the Amendment Act on 3 13 August 2020, and the effect of that extraordinary and 4 unprecedented legislation on the Claimant's investments 5 in Australia, and upon the rights and the obligations of 6 the Claimant and its subsidiaries.</p> <p>7 In a breathtaking display of irony, having 8 acknowledged that the Amendment Act was not foreseeable 9 because of successful duplicitous actions of the 10 West Australian government officers, including its 11 Attorney-General and Premier, the Respondent accuses the 12 Claimant of an abuse of right. [This objection] cannot 13 withstand scrutiny.</p> <p>14 The test of abuse of process is a difficult test to 15 satisfy. Abuse of right is not found lightly; it is 16 an extraordinary remedy which requires proof of the 17 Respondent to a high threshold.</p> <p>18 (Slide 29) In particular, the Swiss Federal Tribunal 19 explained in <i>Clorox</i>, which is Exhibit RLA-142, at 20 paragraph 5.2.4:</p> <p>21 "It is up to the party claiming existence of 22 an abuse of rights to allege and prove the facts 23 enabling it to establish the foreseeability of the 24 dispute at the moment of the restructuring of the 25 investment ..."</p> <p style="text-align: center;">Page 175</p>
<p>15:05 1 dispute actually relates to.</p> <p>2 The UNCITRAL Arbitration Rules of 2020 (sic) set out 3 the content of a notice of arbitration. And 4 Article 3(3) of the Rules states that the claimant must 5 include details of the dispute which is the subject of 6 the arbitration. The nature and the scope of the 7 dispute is therefore determined and defined by what is 8 included and described in the notice of arbitration, and 9 defined by the claimant as the party commencing the 10 arbitration.</p> <p>11 The Notice of Arbitration was served on the 12 Respondent on 29 March 2023. It incorporated the Notice 13 of Intent dated 20 October 2022, by way of paragraph 4 14 of the Notice of Arbitration.</p> <p>15 (Slide 33) The Notice of Arbitration thereby 16 incorporates by reference, in its entirety, the Notice 17 of Intent (C-63). And the Notice of Intent defines the 18 dispute, in section 6, line 447, as follows:</p> <p>19 "The dispute to be submitted to arbitration under 20 the AANZFTA arises out of the enactment of the 2020 21 Amendment Act on 13 August 2020. This Act terminated 22 the 2020 Arbitration Agreement and thereby breached 23 Articles 6 and 9 of the AANZFTA. The dispute between 24 the Claimant and the Commonwealth first arose on 25 13 August 2020."</p> <p style="text-align: center;">Page 174</p>	<p>15:08 1 (Slide 30) In <i>Clorox v Venezuela</i>, being the award 2 dated 17 June 2021, which is Exhibit CLA-239, at 3 paragraph 447, that tribunal considered that: 4 "The object of foreseeability must be a specific 5 dispute." 6 And in paragraph 441, held that the test for 7 foreseeability: 8 "... must relate to the specific dispute as it is 9 shaped in the arbitration proceedings." 10 At paragraph 448, the tribunal held that: 11 "... foreseeability must refer to a specific type of 12 dispute, namely, not to any dispute in general, but to 13 a specific type of dispute that, eventually, proves to 14 be the one challenged by the restructured investor." 15 The restructured investor has only challenged claims 16 emanating from the Amend[ment] Act. 17 (Slide 31) Importantly, at paragraph 428, the <i>Clorox</i> 18 tribunal held that: 19 "... in the event that [a] dispute submitted to the 20 Tribunal was not foreseeable at the date of completion 21 of the corporate restructuring that allows benefiting 22 from the protection of [the] treaty, any abuse of 23 process can be excluded." 24 At paragraph 450, the <i>Clorox</i> tribunal held, in 25 considering a claim of an abuse of process:</p> <p style="text-align: center;">Page 176</p>

<p>15:09 1 "... it is important to identify the first measure 2 or practice constituting the alleged breach of the 3 Treaty and to determine whether its adoption or 4 implementation was foreseeable at the critical date." 5 In that regard, the first measure would have been 6 the Amend[ment] Act itself. 7 Accordingly, the tribunal in <i>Clorox</i> determined that 8 the test of foreseeability of the dispute must be to 9 a specific dispute, not a general dispute, and that is 10 identified by reference to a specific measure challenged 11 by an investor, or a claim that gives rise to an alleged 12 breach of the treaty. This decision was upheld and 13 endorsed by the Swiss Federal Tribunal in <i>Clorox</i>, which 14 is Exhibit RLA-142. 15 As emphasised earlier, the foreseeable dispute must 16 be specific, not general: one that is identified by 17 reference to the claim that gives rise to the alleged 18 breach of the treaty. Once the measure which 19 constitutes the alleged breach is identified, then the 20 factual context will determine when the adoption of that 21 claim was objectively foreseeable as more than a simple 22 possibility but a real prospect. 23 (Slide 32) Authorities such as <i>Tidewater</i>, 24 Exhibit RLA-93, and <i>Mobil</i>, Exhibit RLA-92, 25 <i>Aguas del Tunari</i>, Exhibit CLA-185, and <i>Clorox</i>,</p> <p style="text-align: center;">Page 177</p>	<p>15:12 1 v <i>Venezuela</i>, Exhibit RLA-142, <i>Natland v Czech Republic</i>, 2 Exhibit CLA-235, <i>Alverley v Romania</i>, Exhibit RLA-71, and 3 <i>Ipek v Turkey</i>, Exhibit RLA-99, all evidence this 4 approach. 5 It is now common ground that the enactment of the 6 Amendment Act and this dispute before this Tribunal, 7 which emanates from the Amend[ment] Act, was not 8 foreseeable at the time when the Claimant made its 9 investment in Singapore. The references to this are in 10 paragraphs 132 and 241 of the Respondent's Reply, and 11 paragraph 37 of the Procedural Order No. 4 dated 12 24 May 2024, which is set out in Exhibit CLA-261, and 13 which need not be repeated here. 14 (Slide 33) As mentioned previously, the dispute 15 before the Tribunal was defined in section 6.1 of the 16 Claimant's Notice of Intent. This was further amplified 17 in paragraph 219 of the Claimant's Response. The Notice 18 of Arbitration was served on the Respondent, as said 19 before, on 29 March 2023, and incorporated the Notice of 20 Intent dated 20 October 2022 by way of paragraph 4 of 21 the Notice of Arbitration. 22 The Notice of Arbitration incorporates by reference 23 in its entirety the Notice of Intent, as I've already 24 said; and the Notice of Intent defined the dispute in 25 section 6, from line 447, when referring to the</p> <p style="text-align: center;">Page 179</p>
<p>15:11 1 Exhibit RLA-142, illustrate that a measure giving rise 2 to the relevant treaty claim must be well defined and 3 apparent, even in circumstances when there are existing 4 disputes, or circumstances of general enmity between the 5 investor and the host state. Usually, to be 6 foreseeable, it's [if] a requisite sense of a specific 7 claim or measure is announced or in some other way 8 communicated by the government to the claimant or the 9 wider commercial world. 10 It's not enough to establish abuse to say that 11 a claimant should have anticipated or imagined 12 an adverse measure. Governments are free to act as they 13 see fit, and it is always possible for an investor to 14 imagine any number of adverse measures which 15 a government could conceivably adopt in respect of 16 a claimant's investment. This is why they seek 17 investment treaty protection, but it does not make it 18 an abuse to do so. 19 Accordingly, the critical question is whether the 20 specific measure which gives rise to the treaty claim 21 was objectively foreseeable as a reasonable prospect, 22 not a mere possibility at the time of the relevant 23 corporate restructuring. 24 The seminal case is <i>Philip Morris v Australia</i>, 25 Exhibit RLA-95; and the more recent cases of <i>Clorox</i></p> <p style="text-align: center;">Page 178</p>	<p>15:14 1 Notice of Arbitration: 2 "The dispute to be submitted to arbitration under 3 the AANZFTA arises out of the enactment of the 2020 4 Amendment Act on 13 August 2020. This Act terminated 5 the 2020 Arbitration Agreement and thereby breached 6 Articles 6 and 9 of the AANZFTA. The dispute between 7 the Claimant and the Commonwealth first arose on 8 13 August 2020 ... 9 The heart of the dispute is that the 2020 10 Arbitration Agreement made in writing and executed and 11 accepted by all parties on or about 8 July 2020 was 12 terminated by the Commonwealth in bad faith by the 2020 13 Amendment Act, in breach of the Expropriation and 14 nationalization obligations of Article 9 and all of the 15 obligations of Article 6 of AANZFTA." 16 (Slide 34) Further, at paragraph 221, the Claimant's 17 Response stated, referring to the Notice of Arbitration, 18 as follows: 19 "This dispute commenced with the passing of the 20 Amendment Act which is set out in exhibit ... C-1. The 21 date of the commencement of the dispute is the date of 22 the passing of the Amendment Act which was (as per the 23 NOA, at paragraph 2) 13 August 2020. The Claimant is 24 only seeking relief in this arbitration in respect of 25 the damages caused to it by the introduction of the</p> <p style="text-align: center;">Page 180</p>

<p>15:15 1 Amendment Act." 2 The Respondent's admissions on the abuse of process 3 issue will now be discussed. 4 (Slide 35) First, in lines 3 and 4 at paragraph 131 5 of the Reply, the Respondent said: 6 "... the Claimant's position is that 'the date is 7 13 August 2020, the date of the Amendment Act' ..." 8 And then at lines 7, 8 and 9, the Respondent 9 submitted: 10 "... the common ground between the Parties is that 11 the relevant date to be used by the Tribunal to assess 12 'substantive business operations' in this proceeding is 13 the date nominated by the Claimant -- 13 August 2020." 14 Secondly, the Respondent made a further admission in 15 line 6 at paragraph 132 of the Reply, which was to say 16 that: 17 "All that matters is the position as at 18 13 August 2020." 19 (Slide 36) Thirdly, the Respondent admitted at 20 paragraph 144(a) (sic) of the Reply that "Zeph's 21 activities must be assessed as at 13 August 2020". 22 The effect of the Respondent admitting in 23 paragraph 131, and again at paragraphs 132 and 144 of 24 the Response on Preliminary Objections, that the date of 25 the "substantive business operations" test is</p> <p style="text-align: center;">Page 181</p>	<p>15:18 1 become the Amendment Act was not approved before 2 July 2020; and that the draft bills were not only kept 3 secret, but were accessible only to a handful of 4 high-level public officials." 5 It bears emphasising again that it's now common 6 ground that the enactment of the Amendment Act was not 7 foreseeable at that time when the Claimant made its 8 investment. All in all, it is a further example of the 9 Respondent taking points on jurisdiction which it should 10 never have taken, especially when it purported to enter 11 into arbitrations in good faith prior to the Amendment 12 Act, which I note in passing is a further reason why 13 this dispute was completely unforeseeable at the date of 14 the Amendment Act, with the consequence that very 15 significant amounts of Australian taxpayer money have 16 been wasted fighting points which were bad as a matter 17 of fact and law. 18 The definition of "dispute" in the Notice of 19 Arbitration clearly states that the dispute involves the 20 termination of the 2020 Arbitration Agreement and the 21 State Agreement Arbitration by the Amendment Act. The 22 dispute defined by the Claimant is the only dispute 23 which is before this Tribunal. All of the Claimant's 24 claims arise from the passing of the Amendment Act, and 25 nothing else.</p> <p style="text-align: center;">Page 183</p>
<p>15:17 1 13 August 2020, the date that the Amendment Act was 2 enacted, it's an admission by the Respondent that 3 13 August 2020 is the date on which this dispute 4 crystallised, the date of the breach. Because 5 13 August 2020 is the date of the breach, this is 6 plainly also an admission that the dispute arises out of 7 the Amendment Act on 13 August 2020, as contended for by 8 the Claimant. This is the dispute before the Tribunal 9 in this arbitration. 10 (Slide 37) Fourthly, as earlier noted, the 11 Respondent had, at paragraphs 132 and 241 of its Reply 12 on Preliminary Objections, previously admitted that the 13 Amendment Act was not foreseeable at the time of the 14 share swap and restructuring. Respondent's admission to 15 that effect is recorded in Procedural Order No. 4, dated 16 24 May 2024, at paragraph 37, which is Exhibit CLA-261, 17 which states as follows: 18 "However, the Tribunal understands that the 19 Respondent acknowledges that the fact of the passing of 20 the Amendment Act per se was not foreseeable to the 21 Claimant at the time of the January 2019 Restructure. 22 Indeed, referring to evidence already in the record and 23 in part furnished by the Claimant, the Respondent 24 concedes that the Amendment Act was not conceptualized 25 before March-May 2020; that the draft bill that would</p> <p style="text-align: center;">Page 182</p>	<p>15:19 1 A plaintiff in a court proceeding sets out its 2 complaint, which the defendant must answer. It's not 3 open to a defendant to answer some different complaint. 4 Likewise in arbitration, it's not open to the respondent 5 to choose to answer a different complaint, other than 6 the complaint set out [by] the claimant in its notice of 7 arbitration. 8 The Respondent is purposely answering a different 9 complaint, as it is well aware. It has no answer to the 10 real complaint made by the Claimant. 11 (Slide 38) The law relevant to the issue of 12 foreseeability is discussed in detail in the Claimant's 13 Rejoinder, and previously in the Claimant's Response. 14 The references to such discussion may be found in the 15 Claimant's Rejoinder are, inter alia, as follows: 16 paragraph 71; paragraph 304; paragraphs 312 to 362; 17 paragraph 375; paragraphs 377 to 378; paragraphs 401 and 18 402; paragraphs 528 to 531; and paragraphs 535 to 547. 19 The Respondent's acceptance at paragraph 131 of its 20 Reply that all that matters is the position at 21 13 August 2020 is an admission that this is the date of 22 breach, or the date on which dispute subject to the 23 arbitration crystallised or commenced. 24 There was not and could not be any dispute over 25 measures in the Amendment Act until the Amendment Act</p> <p style="text-align: center;">Page 184</p>

<p>15:21 1 was passed, on 13 August 2020. All claims the Claimant 2 makes in this arbitration are claims first brought into 3 existence by the Amendment Act. It follows, therefore, 4 that it is the measures in the Amendment Act that are 5 subject to this dispute. The Respondent, at 6 paragraph 241 of its Reply, has not admitted that the 7 Amendment Act was not foreseeable. 8 To recap, having accepted that the dispute arose out 9 of the Amendment Act passed on 13 August 2020, the 10 Respondent is not permitted to say now that the 11 Amendment Act is not a relevant dispute [for] 12 foreseeability purposes. The Claimant submits that the 13 first measure which breaches the treaty which is before 14 the Tribunal defines the dispute. 15 (Slide 39) The reference I make to "the first 16 measure" is from the <i>Clorox v Venezuela</i> arbitration 17 award dated 17 June 2021, which is Exhibit CLA-239, at 18 paragraph 450, which says that, while it is not 19 necessary for the dispute to have materialised: 20 "... it is important to identify the first measure 21 or practice constituting the alleged breach of the 22 Treaty and to determine whether its adoption or 23 implementation was foreseeable at the [crucial] date." 24 The first measure constituting a breach of the 25 treaty in this arbitration is the Amendment Act. All</p> <p style="text-align: center;">Page 185</p>	<p>15:24 1 And that: 2 "... is necessary to assess the criterion 3 foreseeability of a dispute in a restrictive manner ..." 4 Having accepted that the dispute arose out of the 5 Amendment Act passed on 13 August 2020, the Respondent 6 is not permitted to say now that the Amendment Act is 7 not a dispute for foreseeability purposes. That being 8 so, the Respondent's third preliminary objection in 9 relation to the alleged abuse of process is made 10 contrary to its own admissions and concessions. As 11 such, the third preliminary objection cannot be 12 maintained; it should therefore be dismissed. This 13 Tribunal must now dismiss the Respondent's abuse of 14 process objections. 15 I have prepared a table, Madam President, in respect 16 of the Respondent's [ad]missions on the main points, to 17 assist the Tribunal. If I can distribute a copy of that 18 table to the Tribunal and the Respondent, it may help 19 them consider the submissions that I've made. 20 I would also submit it may well be -- we've been 21 going for an hour and a half: it may be a good time to 22 have a 20-minute break. 23 THE PRESIDENT: Yes. We are not yet exactly at 1 hour 30, 24 but we can very well take the break now. 25 Is this part of your PowerPoint that you've just</p> <p style="text-align: center;">Page 187</p>
<p>15:22 1 the claims made by the Claimant are a consequence of and 2 from the Amendment Act. 3 As the Respondent has effectively admitted both that 4 the Amendment Act dispute is the specific dispute before 5 the Tribunal in this arbitration [and] that the 6 Amendment Act as passed into law on 13 August 2020 was 7 not subjectively or objectively foreseeable to the 8 Claimant at the time of the share swap and the 9 restructuring in 2019, the critical date for the present 10 purposes, there can be no abuse of process. 11 In this arbitration, the Claimant's claims under 12 AANZFTA arise from a specific measure, being the 13 Amendment Act that gives rise to alleged breaches of the 14 treaty, which is the dispute before this Tribunal. 15 (Slide 40) In the <i>Clorox</i> arbitration, Venezuela 16 unsuccessfully appealed [to] the Swiss Federal Court 17 against the award of 17 June 2021. In dismissing 18 Venezuela's appeal, the Swiss Federal Court, in its 19 decision of 20 May 2022, which is Exhibit RLA-142, 20 agreed at paragraph 5.2.4 with the arbitral tribunal's 21 conclusions that for an abuse of process to be 22 established: 23 "... a restructuring must have been carried out with 24 a view to a specific dispute at a time when its 25 occurrence was foreseeable."</p> <p style="text-align: center;">Page 186</p>	<p>15:25 1 printed or is it something else, what you are now 2 handing out? 3 MR PALMER: No, it's not part of the PowerPoint. We weren't 4 able to put it in that format. 5 DR KIRK: We did upload it yesterday, though, as 6 a demonstrative. 7 THE PRESIDENT: Oh, that's the demonstrative that you 8 uploaded yesterday? 9 MR PALMER: Yes. 10 THE PRESIDENT: Fine. Good. 11 MR PALMER: Is it okay? 12 THE PRESIDENT: Yes. The demonstrative has nothing in -- 13 your opponents have seen it yesterday and have not 14 raised any issue, and I don't see any, because it just 15 restates matters that are in the record, if I understand 16 it correctly. 17 MR PALMER: That's right. 18 THE PRESIDENT: Just not found in this form in the record. 19 That's fine. 20 Should we take the break now? 21 MR PALMER: Yes. 22 THE PRESIDENT: Yes? Fine. Let's take 20 minutes, which 23 means we would resume at -- let's say 3.50, a little bit 24 more than 20. 25 MR PALMER: Okay.</p> <p style="text-align: center;">Page 188</p>

<p>15:26 1 (3.27 pm) 2 (A short break) 3 (3.51 pm) 4 THE PRESIDENT: So we are ready. 5 MR PALMER: Madam President, perhaps I can continue. 6 THE PRESIDENT: Yes, please. 7 MR PALMER: Firstly, I must apologise: when you asked me 8 about investor/investment earlier, I went back to my 9 work and I left out two paragraphs of my submission. 10 On reviewing it, there are two items that I should 11 bring to your attention, which I intended to bring to 12 your attention. And that was: in our Rejoinder in 13 paragraphs 147 to 157 and in our Response, 14 paragraphs 271 to 247, we set out all the information 15 about contribution, investor et cetera. At that time 16 I was about to refer the Tribunal to those paragraphs. 17 THE PRESIDENT: Thank you. 18 MR PALMER: Thanks very much. 19 So in essence, the Claimant's position is that the 20 facts are agreed, and the law should be applied to those 21 agreed facts. 22 Moving on, the Claimant is here today to establish 23 its right to have its claims heard. It's not without 24 some risk that the Claimant and even I, as the 25 Claimant's representative, are here.</p> <p style="text-align: center;">Page 189</p>	<p>15:54 1 objections that the Respondent has brought to the 2 Tribunal's jurisdiction. 3 The Tribunal has jurisdiction to hear the Claimant's 4 claim. Claimant's claims all start in time, as we've 5 said, from the passing of the Amendment Act on 6 13 August 2020 by the Western Australian Government. 7 The Claimant brings its claims because the Amendment 8 Act destroys the rule of law, and we need to protect the 9 rule of law and our system of international dispute 10 resolution by arbitration, which protects over 11 \$28 trillion of world trade and, importantly, promotes 12 peace and cooperation among nations. 13 The Claimant's Response and Rejoinder clearly set 14 out the Claimant's case. The Tribunal must apply the 15 law to the facts in reaching its conclusion, dismiss the 16 objections and grant the Claimant the relief it seeks. 17 The Respondent, in contrast to the Claimant, has not 18 provided any facts, but has made admissions upon which 19 the Claimant relies. The Respondent has always known 20 the matters the subject of the admissions, and could 21 have made them earlier; indeed, it was obliged in good 22 faith to make them earlier to the Tribunal. If the 23 Respondent was undertaking this arbitration in good 24 faith, it would have done so. 25 It's helpful to consider the impact of the</p> <p style="text-align: center;">Page 191</p>
<p>15:52 1 I refer to the Amendment Act, which requires 2 Clive Palmer and the Claimant's subsidiaries to 3 indemnify the State against any losses, costs or 4 liabilities, inter alia, including those arising from 5 international treaties or international law, and for any 6 loss or cost or liability relating to the passage of the 7 Amendment Act. These are in Sections 14, 15, 22 and 23 8 of Exhibit C-1, being the Amendment Act itself. 9 I say these things because the Tribunal needs to 10 recognise the extraordinary and unprecedented 11 circumstances of this case and the Respondent's 12 objections, which are all an ill-founded attempt to 13 avoid liability for damage caused to the Claimant by the 14 Amendment Act. The Respondent's objection are 15 themselves, in our view, an abuse of process, especially 16 in light of their own admissions, which they must have 17 known before they lodged their application for 18 a preliminary objection. 19 The Respondent's objections are consistent with the 20 respondent's conduct as can be seen in other cases, such 21 as Timor-Leste, and including Exhibit CLA-151 and 22 Exhibits C-55 to C-61, and all of the rest of the 23 matters that Claimant has raised before the Tribunal in 24 the Claimant's interim measures application. The 25 Claimant is nevertheless here to responsibly answer the</p> <p style="text-align: center;">Page 190</p>	<p>15:55 1 Respondent's admissions on this arbitration in terms of 2 costs, wasted resources, increased damages in the form 3 of interest. If the Respondent had not taken its 4 objections to jurisdiction, which it should not have 5 done, the Claimant's claim for interest alone would have 6 not increased by \$12 billion, Respondent would not have 7 incurred millions of dollars of cost at taxpayers' 8 expense, and the Tribunal would not have had to deal 9 with all the matters it has since the making of the 10 Respondent's objections in 2023. 11 The Claimant respectfully submits that it's 12 important for future arbitrations that this Tribunal 13 give a clear message that this type of delay, especially 14 when we consider Respondent's admissions and conduct, is 15 not acceptable in investor-state arbitrations. 16 The Tribunal should not allow itself to be 17 sidetracked or misled by the Respondent. It is not 18 necessary for the Tribunal to go beyond the admissions 19 that the Respondent has made. 20 The law that is applicable to those admissions and 21 the objections demonstrates that the appropriate course 22 is for the Tribunal to dismiss the Respondent's 23 objections and grant the Claimant the relief it seeks, 24 as set out in paragraph 724 of the Rejoinder, with the 25 proviso that costs should be awarded to the Claimant on</p> <p style="text-align: center;">Page 192</p>

<p>15:56 1 an indemnity basis. 2 The Claimant's submission is that it is properly 3 documented the Claimant's case in the Claimant's 4 Response, Rejoinder, and the Claimant's expert reports, 5 witness statements and the references to the law relied 6 upon. The Claimant respectfully submits that the 7 Tribunal should forthwith dismiss the Respondent's 8 objections and grant the Claimant its relief. 9 If the Tribunal nevertheless forms the view that it 10 cannot dismiss the Respondent's objections solely after 11 considering the Respondent's admissions and the law, the 12 Tribunal must read and consider all the material filed 13 and relied upon by the Claimant in this arbitration, 14 especially the Response and Rejoinder. 15 To assist the Tribunal in that process, and to the 16 extent that it is necessary, I shall now take the 17 Tribunal to some of the key factual exhibits on the 18 record to prove the Claimant's case. 19 This is another point at which the point raised 20 above can be made again: that the treaty breaches giving 21 rise to the Claimant's claims to be arbitrated are only 22 those which commenced with and are caused by the 23 Amendment Act. 24 As previously mentioned in support of the position 25 on the preliminary objections, the Claimant has produced</p> <p style="text-align: center;">Page 193</p>	<p>15:59 1 case authorities on this issue. In that regard, I refer 2 the Tribunal to the Rejoinder at paragraph 37. For the 3 present purposes, it's sufficient to note that the 4 Claimant's evidence establishes that it acquired and 5 owns shares in Mineralogy. 6 (Slide 43) The share purchase agreement, 7 Exhibit C-562, shows the Claimant's properly and 8 legitimately purchased shares in Mineralogy from 9 Mineralogy International, and the Respondent does not 10 dispute this. As the share purchase agreement sets out, 11 in consideration for the share transfer, the Claimant 12 issued to Mineralogy International 6,002,896 shares, 13 fully paid, in the Claimant. 14 (Slide 44) Exhibit C-63 at page 158 sets out 15 a meeting on 29 January 2019 at 10.00 am. The 16 Claimant's then directors, Mr Mashayanyika as chair of 17 the meeting, myself and Mr Tan, resolved to issue to 18 Mineralogy International Limited new ordinary shares in 19 the Claimant as consideration for the purchase of the 20 fully paid ordinary shares in Mineralogy. 21 The number of ordinary shares to be issued was the 22 same, and had the same value of the shares that were 23 being purchased. All necessary actions to issue the new 24 shares and to change them took place contemporaneously 25 on settlement. All other resolutions to properly</p> <p style="text-align: center;">Page 195</p>
<p>15:58 1 a large amount of factual evidence. This contrasts with 2 the Respondent's reliance on so-called "expert" 3 evidence, which amounts to little more than irrelevant 4 speculation and hypothesis. It is for this reason that 5 the Claimant maintains that Respondent's expert 6 statements are simply not relevant to the Tribunal's 7 task in this jurisdictional phase. Hypothesis and 8 generalisations simply cannot override or controvert 9 clear factual evidence of what actually happened, as 10 provide by the Claimant. 11 Investor/investment. 12 To start, the evidence establishes that the Claimant 13 is a Singapore entity with an investment in Australia. 14 The claim is therefore, prima facie, an investor with 15 a covered investment under the treaty. To establish 16 jurisdiction, the Claimant is required to prove it is 17 a company incorporated in Singapore. 18 (Slide 42) Exhibit C-70 is the Claimant's 19 certificate of incorporation as a Singaporean company. 20 This is not disputed, and satisfies the requirement of 21 Articles 2(d) and 2(f) of AANZFTA: that the Claimant is 22 a juridical person of a party. 23 The Claimant is also required to establish that it 24 has made an investment. The Rejoinder addressed the 25 meaning of the word "investment" in the context and the</p> <p style="text-align: center;">Page 194</p>	<p>16:00 1 document and approve the transaction can be found in 2 a document known as annexure A which was attached to the 3 Notice of Intent; see Exhibit C-63 at pages 153 to 168. 4 There can be no dispute -- and the Respondent 5 accepts, as was admitted in paragraph 64 of the Reply -- 6 that the transaction was both lawful and effective. The 7 Claimant acquired the Mineralogy shares and provided 8 consideration to Mineralogy International Limited for 9 that purchase. 10 It is recalled that the meaning of "investment" in 11 AANZFTA under Article 2(c) of Chapter 11 is very broad 12 and encompasses "every kind of asset", including shares. 13 The evidence is clear that the Claimant, a Singaporean 14 company, owns the shares in Mineralogy, an Australian 15 company. The Claimant paid a consideration of 16 \$6,002,896 for these shares, the same amount as the face 17 value of the Mineralogy shares; see Exhibit C-63, 18 annexure A, exhibits 11, 14 and 16. 19 There was nothing nefarious, dishonest or even 20 unusual about this transaction. This was a properly 21 documented, legitimate share swap, a common mechanism 22 used when structuring a corporate group. The share swap 23 most certainly was not a sham, as alleged by the 24 Respondent. 25 In short, the evidence establishes that the Claimant</p> <p style="text-align: center;">Page 196</p>

16:02 1 meets all the definitions of an "investor" under the
 2 treaty, and has an investment in Australia. The
 3 Respondent is unable to rebut the evidence and so, as
 4 mentioned earlier, has resorted to strained
 5 interpretations of the phrase "make ... an investment"
 6 in Article 2(d) of AANZFTA. This point is addressed
 7 separately, and discussion of the law, in the Rejoinder.
 8 But suffice to say the law is clear: the Claimant's
 9 acquisition of Mineralogy's shares is sufficient to meet
 10 any requirement of the Claimant to make an investment.
 11 I will further visit this matter in our closing and
 12 invite the Tribunal to make any questions they may have
 13 in this regard.
 14 Ongoing contribution.
 15 If we consider ongoing contributions in addition to
 16 the acquisition of the Mineralogy shares, the Claimant
 17 has not been a passive investor in Mineralogy. It has
 18 continued to invest both in terms of returns and active
 19 management.
 20 Under AANZFTA, returns that are invested are
 21 classified as a separate investment in accordance with
 22 Article 2(c). Returns are defined in Article 2(j) as
 23 amounts yielded by an investment, including profits and
 24 capital gains.
 25 (Slide 45) At paragraph 4.5 of the first Birkett

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16:03 1 statement is a table which highlights the earnings and
 2 reserve balances of Mineralogy's consolidated financial
 3 accounts for the years 2019 and 2020, which shows the
 4 retained earnings in the company.
 5 Mr Birkett confirms in his supplementary report,
 6 dated 2 August 2024, that retained profits may be left
 7 in a subsidiary company by the parent and used by the
 8 subsidiary company to further its activities. It's
 9 a normal business parlance. This is particularly
 10 an investment by the parent in the subsidiary.
 11 It is also clear that by making more funds available
 12 to Mineralogy, it was also in the best interests of
 13 Mineralogy, and of the Claimant and its investment.
 14 Moreover, in accordance with the plain words of
 15 Article 2(j) of AANZFTA, these retained profits are
 16 indeed profits that are yielded by the investment,
 17 profits shared by Mineralogy as a result of its
 18 activities. These profits are available to be
 19 distributed to Mineralogy's sole shareholder, the
 20 Claimant, through cash or other equivalents, as
 21 confirmed by Mr Birkett in his second report.
 22 (Slide 46) The Claimant must approve the annual
 23 accounts of Mineralogy in which a decision to retain
 24 profits is formalised. And the Claimant actively
 25 approved retention of these profits of Mineralogy

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16:05 1 instead of paying a dividend to the Claimant. The
 2 Claimant did so in 2019 and 2020. The resolutions
 3 signed by the Claimant are exhibited in Exhibit C-546
 4 for 2019 and Exhibit C-547 for 2020.
 5 (Slide 47) Exhibit [C-]563, clause 22.3 -- as
 6 I explained in detail in my sixth witness statement,
 7 clauses 22.3 and 29 of the Mineralogy constitution
 8 permit me, as a director of Mineralogy, to act in the
 9 best interests of the Claimant, which in any event
 10 always aligned with Mineralogy's best interests. It is
 11 in Mineralogy's best interest to have more funds
 12 available to pursue its activities, and not to have to
 13 borrow money.
 14 (Slide 48) As I confirmed in paragraph 39 of my
 15 sixth witness statement:
 16 "In deciding to recommend a dividend and/or
 17 approving the 2019 [or] 2020 Accounts, I was acting as
 18 a director of Mineralogy and the Claimant for the
 19 benefit of the Claimant in accordance with Rule 22.3 of
 20 the Mineralogy Constitution. At all times I acted in
 21 the best interests of the Claimant to ensure [that]
 22 profits of Mineralogy would be reinvested in Australia
 23 to enhance the value of the Claimant's investment in
 24 Mineralogy's business and Mineralogy shares owned by the
 25 Claimant."

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16:06 1 It is clear that the retention of profits and/or
 2 payment of dividends was undertaken in the Claimant's
 3 and Mineralogy's best interest. The dividend of just
 4 \$8 million declared in 2020 was to pay off intra-group
 5 loans between the Claimant and Mineralogy. This was
 6 clearly done in the interests of both the Claimant and
 7 Mineralogy.
 8 The act of approving the Mineralogy accounts with
 9 retained profits, and thus forgoing a dividend, is an
 10 act of investing the yields under the treaty. On the
 11 plain words of the treaty, the retained profits
 12 constitute separate investments in Mineralogy.
 13 I emphasise the use of the word "retained" profits,
 14 which means the profits were made by the company and
 15 retained within the company. And that refers directly
 16 to the treaty provision. I think that's an important
 17 point: they were retained profits. This meets both the
 18 intent and the plain meaning of the treaty provision,
 19 and it is the only plausible reading of AANZFTA.
 20 Thus, the Claimant not only made an initial
 21 investment in Mineralogy, through its purchase of the
 22 shares from Mineralogy International Limited: it also
 23 made further investments through approving the retention
 24 of profits, retained earnings to be used by Mineralogy
 25 to further its investments in Australia.

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<p>16:07 1 I'll now deal with the question of active 2 management. 3 In the Claimant's Response and Rejoinder on 4 Preliminary Objections, the Claimant provides details of 5 a number of senior executives that have roles in both 6 the Claimant and Mineralogy. In that regard, I refer to 7 the Response at paragraphs 74 to 81 and paragraphs 248 8 to 249, [and] the Rejoinder at paragraphs 120 to 127. 9 The economic reality of these dual roles is that the 10 Claimant is constantly engaged with and involved in 11 Mineralogy's operations. It is also well accepted that 12 active management of a subsidiary includes appointing 13 and removing directors. Under Mineralogy's 14 constitution, the Claimant has the power to appoint and 15 remove Mineralogy's directors, and it does so as part of 16 its active management of Mineralogy. In fact, all 17 current directors of Mineralogy have been appointed by 18 the Claimant. 19 (Slide 49) C-522 shows the current directors of 20 Mineralogy. All those directors were appointed by the 21 Claimant. It is clear that Claimant actively manages 22 investments in Australia and is not a passive investor. 23 We can further consider the denial of benefits 24 [objection]. The factual evidence in the record clearly 25 establishes the existence of the Claimant's substantive</p> <p style="text-align: center;">Page 201</p>	<p>16:10 1 wages. The Respondent cannot overcome these facts; they 2 are supported by clear evidence. 3 (Slide 52) Exhibit C-95, page 3: the Claimant also 4 has in place relevant insurance policies for public 5 liability, workplace accident and general business 6 insurance. These policies are on record and are 7 exhibited at Exhibit C-95. Again, it is the Claimant 8 who holds these insurance policies. The Claimant's 9 business is in Singapore. It is clearly a substantive 10 business, and not a sham as alleged by the Respondent. 11 At Exhibit C-96, there is a bundle of engagement 12 letters of various professional service providers, from 13 PwC to Allen & Gledhill. To suggest that such reputable 14 firms would be engaged with a sham or a façade is highly 15 insulting at best, and defamatory at worst. When such 16 allegations are made and not particularised, and are 17 without evidence, it represents sharp practice and is 18 embarrassing. 19 (Slide 53) The Claimant also produces annual 20 independent audited accounts on a stand-alone basis, 21 which have all been provided to the Tribunal in 22 Exhibits C-79 and [C-81], together with the consolidated 23 accounts. 24 (Slide 55) In 2019 to 2022, the most recent audited 25 accounts are at Exhibit [C-]579.</p> <p style="text-align: center;">Page 203</p>
<p>16:09 1 business in Singapore. 2 (Slide 50) Exhibit C-77 is a copy of the Claimant's 3 business profile in Singapore, held by the Singapore 4 Accounting and Corporate Regulatory Authority, known as 5 ACRA. It shows the Claimant's registered office is at 6 80 Genting Lane, Singapore. This office is open during 7 normal business hours. 8 The same exhibit shows the Claimant has seven 9 directors, two of whom are resident in Singapore: 10 Mr Quek Ser Wah Victor -- it's "Victor Quek" actually, 11 from a European point of view, and it should be 12 "Ms Loh Chan". 13 The same exhibit also shows that the Claimant's 14 auditors are Singapore Assurance PAC, and that the 15 Claimant's company secretaries are Yee Koon Daphne Ang 16 and Zhe Lei Tan, both of Allen & Gledhill in Singapore. 17 (Slide 51) The relevant government agencies have 18 issued the Claimant with all licences required to 19 conduct its business. Copies of these licences are 20 recorded in Exhibit C-94. These licences are issued to 21 the Claimant itself, not to the joint venture or 22 Kleenmatic. It's the Claimant that holds the required 23 licences. The Claimant employs the staff. It directly 24 receives government [subsidies]. And the Claimant 25 itself pays all employee-related contributions and</p> <p style="text-align: center;">Page 202</p>	<p>16:12 1 (Slide 53) Exhibit [C-]79: in June 2019, the 2 Claimant had total assets worth around SGD 8.2 million. 3 The cost of investment in Mineralogy is recorded at 4 SGD 5,803,894; Exhibit [C-]79, page 16. This figure was 5 independently audited by Hall Chadwick as at June 2020, 6 shortly before the Amendment Act was passed. 7 (Slide 54) The Claimant's assets, excluding 8 Mineralogy shares, had a value of SGD 19.1 million; 9 Exhibit [C-]81, page 7. Not only does this show 10 a substantive business: it shows the Claimant's business 11 was growing at the time the Amendment Act was passed. 12 (Slide 55) Exhibit C-579: the business continues to 13 grow, with assets valued at over SGD 173 million, and 14 income now at over SGD 12 million. This demonstrates 15 the Claimant's real -- very real -- and genuine 16 connection with Singapore since it was first 17 incorporated. 18 These accounts also provide detail of subsidies 19 received by the Claimant from the Singapore Government 20 during the Covid-19 pandemic. This in itself is 21 sufficient to combat any assertion that the Claimant is 22 a sham or lacks any genuine connection to Singapore. If 23 the Claimant were a shell or a sham, as alleged by the 24 Respondent, with no genuine connection to the business 25 in Singapore, it would have not received such</p> <p style="text-align: center;">Page 204</p>

<p>16:13 1 significant subsidies from the Singapore Government 2 during the period. 3 As demonstrated by the discussion of the law on 4 denial of benefits in the Rejoinder at paragraphs 276 to 5 285, this information alone -- indeed, much less than 6 this -- has been deemed sufficient to establish 7 a substantive business. 8 (Slide 56) But there is far more evidence in the 9 record of the Claimant's business in Singapore. 10 Note 12(b) of Exhibit C-80: the record establishes that 11 the Claimant first purchased three engineering companies 12 for the sum of \$3.6 million, which is in note 12(b) of 13 the consolidated accounts of the Claimant for the year 14 ended 30 June 2019. These engineering companies were 15 connected to Singapore's lucrative shipping industry, 16 [which] the Claimant was interested in exploring and in 17 which it saw wider synergies within the Mineralogy 18 Group. The business, employing around 60 people in 19 total, had a significant potential. 20 When the Claimant purchased these businesses, they 21 had a combined revenue of around \$4.5 million per year; 22 see the Response at paragraph 430, and Exhibits C-542, 23 C-543 and C-544. However, shipping was an industry that 24 was struck particularly hard by the Covid-19 pandemic, 25 and the business ceased after the Amendment Act was</p> <p style="text-align: center;">Page 205</p>	<p>16:16 1 authorised to enter into contracts on behalf of the 2 joint venture; see clause 9 of the joint venture 3 agreement. 4 (Slide 58) As stated previously, the Claimant 5 established a 90% interest in the joint venture. Most 6 of the employees of a previously existing business were 7 transferred to the Claimant in accordance with clause 24 8 of the joint venture agreement. Those previous 9 businesses ceased to exist. 10 (Slide 59) Exhibit C-88 contains a staff report 11 which shows the Claimant employed around 150 people at 12 the time the Amend[ment] Act was passed. The record 13 also contained the employment contracts of 146 employees 14 that were transferred from the minority joint venture 15 partners to the Claimant shortly after the joint venture 16 agreement was entered into. 17 Exhibits R-618 to R-763: currently the Claimant 18 employs around 300 people in Singapore. As a result of 19 employing so many people, the Claimant has made 20 significant contributions on behalf of those employees 21 to the Singapore Government's superannuation scheme, the 22 Central Provident Fund, or CPF, as it is known. The 23 documents at Exhibits C-89 to C-93 provide evidence in 24 detail of these payments. In the financial year ending 25 30 June 2021 -- it was the financial year in which the</p> <p style="text-align: center;">Page 207</p>
<p>16:15 1 passed in October 2020. 2 While the engineering companies were adversely 3 affected by the Covid pandemic, and were liquidated in 4 2021, they were still operating in August 2022. They 5 are no less a business activity because they failed. 6 Doing business entails a risk, and a financial failure 7 is evidence of that risk. 8 (Slide 57) On 24 January 2020, the Claimant 9 established a joint venture, having a 90% interest in 10 the joint venture. The joint venture is a mechanism 11 where each party has a direct interest in the business 12 themselves and is responsible for parts of the business. 13 The joint venture agreement, Exhibit C-469, sets out the 14 terms on which the joint venture operated, as required 15 under the agreement. 16 The Claimant, as the manager and senior joint 17 venture partner, took over all aspects of managing the 18 business, as defined in the joint venture agreement, 19 inter alia, in clauses 12, 14, and the joint venture 20 agreement itself. 21 The Claimant had a 90% interest in all joint venture 22 property and is liable for 90% of all the joint 23 venture's costs; see clause 5 of the joint venture 24 agreement. 25 The Claimant was the only joint venture partner</p> <p style="text-align: center;">Page 206</p>	<p>16:18 1 Amendment Act was passed -- the Claimant paid employee 2 contributions to the CPF of more than \$500,000. 3 The Claimant operates a successful cleaning business 4 in Singapore. The fact that it, inter alia, employs 5 cleaners simply shows it's a genuine business. There is 6 nothing in Article 11 of the AANZFTA that requires the 7 Claimant to operate any type of business or employees in 8 Singapore. And the case authorities are clear that 9 a substantive business for denial of benefits purposes 10 does not have to be in the same sector as the 11 investment. 12 The fact is the Claimant operates a genuine, 13 profitable and substantive business in Singapore, and 14 has done so for the last five and a half years. The 15 Claimant's business has a real, genuine link to 16 Singapore, and it has expanded since January 2019, when 17 the Claimant commenced operations in Singapore. Each 18 year it has expanded and increased its genuine links in 19 Singapore. 20 I will now illustrate to the Tribunal the Claimant's 21 links to Singapore and its employees by quickly showing 22 a short video of the Claimant's Chinese New Year party 23 which was held in Singapore earlier this year. The link 24 was provided in paragraph 275 of the Rejoinder. 25 (Video played)</p> <p style="text-align: center;">Page 208</p>

16:22 1 This video shows that the connection to Singapore is
 2 real, genuine and growing. It shows the Claimant's
 3 annual Chinese New Year party earlier this year. You
 4 can see here that those who are employed by the Claimant
 5 in Singapore work day-in and day-out, for the Claimant
 6 in Singapore.
 7 Present at the party are Victor Quek and
 8 Ms Loh Chan, the Claimant's Singapore-based directors,
 9 as well as Mr Declan Sheridan and Bernard Wong, two of
 10 the Claimant's Australian-based directors. Mr Sheridan
 11 is also Mineralogy's head of finance and financial
 12 relationships.
 13 In considering the issues before the Tribunal, it is
 14 important for the Tribunal to always remember that the
 15 well-established view in Western Australia prior to the
 16 Amendment Act was that the State Agreement would never
 17 be changed unilaterally by Parliament. This is because
 18 no such agreement had been changed in the 70-year
 19 history, because governments over generations had given
 20 representations to international investors that the
 21 Government would never unilaterally change a state
 22 agreement. State agreements had provisions in them that
 23 could only be amended by consent.
 24 (Slide 61) The Tribunal should read the review paper
 25 of the former Premier of Western Australia,

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16:24 1 position is that when the law and [facts] are applied,
 2 the Respondent's objections are all defeated.
 3 (Slide 62) It's curious that the Respondent makes
 4 a series of unfounded and unparticularised allegations
 5 against me and others in respect of a sham. I have
 6 a long-standing commitment to public service and
 7 a proven track record in business of 40 years.
 8 (Slide 63) Exhibit [C-]65. Indeed, it was,
 9 inter alia, these very qualities that led to me being
 10 recognised in 2012, by the Australian Government
 11 magazine, as the "Entrepreneur of the Decade", as set
 12 out in Exhibit [C-]65.
 13 (Slide 64) And becoming the fifth wealthiest
 14 Australian, as confirmed in the Australian Financial
 15 Review "Rich List", Exhibit C-481. These same qualities
 16 culminated in the Sino Iron Project, which involves the
 17 largest investment in the world made by China outside of
 18 China.
 19 I have now been involved in business for more than
 20 40 years. Projects which I have initiated or controlled
 21 during that time have contributed to the direct or
 22 indirect creation of more than 40,000 jobs in Australia,
 23 and more than \$10 billion of investment in the
 24 Australian economy. These matters are set out in
 25 paragraph 17 of my fifth witness statement.

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16:23 1 Mr Colin Barnett, to properly be informed on this
 2 matter. Mr Barnett's paper was published in the
 3 Australian Mining and Petroleum Law Association Yearbook
 4 in 1996, where he states, in Exhibit C-104, under the
 5 heading "Project security":
 6 "Whereas other statutes are able to be changed at
 7 will, the provisions of State Agreements are only able
 8 to be changed by mutual agreement in writing between the
 9 parties to each State Agreement ... State Agreements
 10 therefore provide certainty that ground rules for the
 11 life of each agreement project cannot be changed
 12 unilaterally."
 13 The former Premier goes on to say, under the heading
 14 "Inviolability", at page 321 of Exhibit C-104:
 15 "Unlike other statutes of Western Australia that can
 16 be changed by Parliament, State Agreement provisions can
 17 only be amended by mutual agreement by the parties
 18 thereto."
 19 The Respondent placed 865 exhibits on record,
 20 consisting of 7,173 pages of exhibits. 119 of those
 21 exhibits have no relevance in respect of the Claimant in
 22 this arbitration, and it's curious why the Respondent
 23 has filed them.
 24 Notwithstanding having regard to the Respondent's
 25 admissions and the Claimant's uncontested evidence, the

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16:25 1 (Slide 65) I was Adjunct Professor at the [Faculty]
 2 of Law and Business at Deakin University in Victoria,
 3 Australia from 1 August 2002 till 1 August 2006, and
 4 again from 12 February 2009 to 1 February 2011 (C-64).
 5 I was appointed Adjunct Professor at Bond University in
 6 Queensland in June 2008 (C-577).
 7 (Slide 66) I was also elected a "Living National
 8 Treasure" of Australia, and declared as such by a poll
 9 conducted by the National Trust of Australia (C-66).
 10 The award is given following selection by a popular vote
 11 of the people of Australia.
 12 (Slide 67) Following the largest swing of 50.3% in
 13 Australian political history, I was elected as a Member
 14 of the House of Representatives of the 44th Parliament
 15 of Australia. I was leader of the party, and we held
 16 a balance of power in the 44th Parliament.
 17 During my time as a Member of the House of
 18 Representatives, I served on the Parliamentary
 19 Committees: the Committee on Economics from
 20 4 December 2013 till 9 May 2016, the Standing Committee
 21 on Infrastructure and Communications from
 22 4 December 2013 to 13 October 2015, and the Joint Select
 23 Committee on Trade and Investment from 2 October 2014 to
 24 9 May 2016. I retired from Parliament in 2016.
 25 The Parliament of Australia acknowledged my service

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<p>16:27 1 to the country and contribution to Parliament. That 2 recognition was issued in writing under the authority of 3 the Speaker of the House of Representatives and the 4 President of the Senate. You can see Exhibit C-67 for 5 a copy of that. 6 (Slide 68) The Australian Financial Review, which is 7 Australia's leading financial newspaper, publishes each 8 year a "Power Index". And in 2014, I was second in the 9 Power Index, after then Prime Minister Tony Abbott 10 (C-576). 11 (Slide 69) Until May 2017, I was the world 12 secretary general of the World Leadership Alliance, 13 which is part of the Club of Madrid, an institute of the 14 largest number of former heads of government of any 15 organisation currently operating in the world. The 16 World Leadership Alliance's objective is to support and 17 foster democratic values and the rule of law throughout 18 the world (C-68). 19 During my term as secretary general of the World 20 Leadership Alliance I worked closely with our president, 21 Wim Kok, former prime minister of the Netherlands from 22 1994 to 2002; vice president Jennifer Mary Shipley, 23 former prime minister of New Zealand from 1997 to 1999; 24 and Vaira Vike-Freiberga, former president of Latvia 25 from 1999 to 2007.</p> <p style="text-align: center;">Page 213</p>	<p>16:30 1 through the Western Australia legislature, between 2 5.00 pm on 11 August 2020 and 13 August 2020, devoid of 3 the usual committee processes. 4 The Claimant and Mineralogy were unaware of 5 Quigley's idea of legislative intervention: texts to the 6 Premier on 23 May 2020. The Claimant and Mineralogy did 7 not know that the idea had been developed through June, 8 July and August 2020 by a select group of Western 9 Australian officials who were secretly promulgating the 10 Amendment Act. 11 Having had the idea of the Amendment Act in 12 May 2020, Western Australia was pretending to engage 13 with the State Agreement Arbitration arbitral process, 14 while at the same time going to extreme lengths to 15 maintain secrecy of its real agenda: the promulgation 16 and passage of the Amendment Act to terminate that very 17 process. The Respondent's Statement on Preliminary 18 Objections has not mentioned this subterfuge at all. 19 Respondent has not put forward any evidence from 20 Mr Quigley or Mr McGowan, or any other Western 21 Australian government official, to otherwise explain 22 Western Australia's actions in May [to] August 2020, or 23 at any other time. 24 In those circumstances, the Claimant submits that, 25 leaving aside the Respondent's admissions regarding lack</p> <p style="text-align: center;">Page 215</p>
<p>16:28 1 The chairman of the World Leadership Alliance in the 2 Club of Madrid was the former president William Clinton, 3 president of the United States from 1993 to 2001. 4 During my involvement with the World Leadership 5 Alliance, over 90 distinguished, democratically elected 6 former presidents and prime ministers from 60 countries 7 assisted in spreading democracy and the rule of law 8 throughout the western and eastern world. 9 (Slide 69) I'm also a former director of the 10 John F Kennedy Library Foundation of Boston, in the 11 United States of America (C-69). 12 In any event, especially following the Respondent's 13 admissions, the Claimant takes issue with all of 14 Respondent's expert evidence as not being relevant or 15 factually supported, and for that reason the Claimant 16 has not sought to cross-examine any of the Respondent's 17 witnesses. 18 When discussing what would become the Amendment Act 19 on 23 May 2020, a text exchanged between John Quigley, 20 the Attorney-General of Western Australia, and 21 Mark McGowan, the then Premier (C-432), concluded with 22 the agreement that absolute secrecy was of the essence 23 for a "very small legislative amendment" that would be 24 "a poison pill for the fat man", Mr Palmer. 25 The Amendment Act was passed in extreme urgency</p> <p style="text-align: center;">Page 214</p>	<p>16:31 1 of foreseeability, it must inevitably be inferred that 2 Western Australia knew that the measure giving rise to 3 this treaty claim was not foreseeable, and took 4 deliberate steps to ensure that it remain so. They must 5 have known it was not acting honestly in misleading the 6 Claimant, in breach of the arbitration agreement, in bad 7 faith. The Respondent's objections have always been 8 unarguable in light of the admissions, as it has always 9 known. 10 Having successfully pulled off, as they say, 11 a "Trojan horse" manoeuvre, as per Quigley's text, to 12 pass what Quigley and McGowan acknowledged at the 13 12 August 2020 media conference to be an extraordinary 14 measure, the Respondent cannot then be heard to say that 15 the Claimant should have seen the Amendment Act, or 16 something like it, was coming along. 17 The Respondent's plea of bad faith and abuse of 18 process by the Claimant is the height of hypocrisy if 19 the Respondent's own duplicity to connect the situation 20 and deceive the Claimant is considered. In other words, 21 Western Australia has gone to considerable lengths to 22 keep the prospect of any amendment to the State 23 Agreement adverse to Mineralogy a secret, while now 24 maintaining that Claimant should have expected that it 25 was likely that such extraordinary, unprecedented</p> <p style="text-align: center;">Page 216</p>

16:32 1 legislation be passed.
 2 The Respondent's position is incongruous and
 3 unsupportable. The Respondent has always known that the
 4 Claimant had a substantive business in Singapore and was
 5 an investor with substantial investment in Australia.
 6 Determining these preliminary objections is therefore
 7 very straightforward. The Respondent's case simply
 8 cannot succeed when the correct law is applied to the
 9 established facts.
 10 In conclusion, I respectfully submit that in its
 11 written and oral submissions, the Claimant has shown
 12 that it is uncontested that the Claimant has
 13 legitimately acquired the shares in Mineralogy, [and]
 14 has also reinvested significant amounts into Mineralogy
 15 in the form of retained profits, which are themselves
 16 investments. There is and can be nothing more required
 17 to make an investment or be an investor under AANZFTA,
 18 on the plain language of the treaty, properly
 19 interpreted.
 20 The Claimant is an investor with an investment and
 21 is entitled to bring this claim. This objection must be
 22 dismissed. The Claimant has already shown beyond any
 23 shadow of doubt that it has, and had at all relevant
 24 times, a real, genuine business and link with Singapore.
 25 It is not a shell company but a substantial entity that

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16:33 1 employees hundreds of people, operates a large and
 2 profitable business on a day-to-day basis, and has
 3 Singaporean-based directors and company secretaries that
 4 ensure its Singapore operations continue to grow and
 5 prosper.
 6 The Respondent's "sham" allegations are deeply
 7 flawed and must be rejected. The Claimant's business
 8 operations are substantive by any measure, and far
 9 exceed the standards set in the settled jurisprudence on
 10 this issue. There is simply no basis for the Respondent
 11 to deny the benefits under the treaty. This objection
 12 must be rejected.
 13 Finally, the Amendment Act was not foreseeable, nor
 14 was the dispute which emanates from it. This should be
 15 agreed. This dispute arises solely out of the Amendment
 16 Act. The Claimant's claims are based on it and nothing
 17 else. It is impossible to define the dispute in any
 18 other way, and impermissible to suggest that the dispute
 19 is some broad, nebulous disagreement or discord between
 20 the parties.
 21 The law, particularly the Swiss law, is clear: the
 22 specific dispute must be reasonably foreseeable. It was
 23 not. The objection must fail.
 24 The law is clear; the facts are established. The
 25 Tribunal should not hesitate to dismiss the preliminary

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16:35 1 objections and see them for what they are: a last-ditch
 2 attempt to avoid liability for an unprecedented,
 3 draconian and, quite frankly, shocking Amendment Act
 4 which sought to shatter the rule of law and abuse
 5 political power to strip the Claimant of its lawful
 6 rights.
 7 In conclusion, by reason of the matters to which
 8 I have referred, it is clear that the Tribunal has
 9 jurisdiction to hear the Claimant's claims. The
 10 Respondent's preliminary objections should be dismissed,
 11 the Tribunal should grant the Claimant the relief it
 12 seeks, and the matter should proceed to a hearing on the
 13 merits. It is what it is. The Claimant reserves its
 14 rights and its remaining time today to prepare for
 15 cross-examination and other ways in the hearing.
 16 Thank you, Madam President.
 17 THE PRESIDENT: Thank you.
 18 Do my colleagues have questions for Mr Palmer at
 19 this stage, in clarification or ...? No?
 20 MR KIRTLEY: They can wait, I think.
 21 THE PRESIDENT: Yes. If they can wait, yes, that's for you
 22 to say. Yes, good.
 23 Fine.
 24 Then I think that completes our day for today.
 25 Tomorrow morning we will start with the examination of

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16:36 1 Mr Palmer, and then hopefully we will have time to also
 2 examine Mr Birkett tomorrow. We have provided for
 3 a continuation in case it is needed. But we'll see
 4 tomorrow how we proceed; unless the Respondent wants to
 5 give an indication of the examination time?
 6 DR DONAGHUE: We're content with what you said there. We'll
 7 have to see how we proceed. But we have planned on the
 8 basis that we hope it will be possible to complete the
 9 cross-examination tomorrow.
 10 THE PRESIDENT: It would be neater in terms of our
 11 organisation, absolutely.
 12 DR DONAGHUE: Yes.
 13 THE PRESIDENT: Fine. Is there anything else that you wish
 14 to raise before we adjourn for the day?
 15 DR DONAGHUE: Not for our part, thank you.
 16 MR PALMER: Not from our side, Madam President.
 17 THE PRESIDENT: Not from your side.
 18 Then I wish everyone a good evening, and we see each
 19 other tomorrow and we start at 9.30 again. Goodbye,
 20 everyone.
 21 (4.38 pm)
 22 (The hearing adjourned until 9.30 am the following day)
 23
 24
 25

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