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,
Georgina Vaughn and Lisa Gulland.
Trevor McGowan CR

APPEARANCES

FOR CLAIMANT

CLIVE F PALMER, Claimant's representative and director
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
DECLAN SHERIDAN, director
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
DR NAOMI HART, Essex Court Chambers
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CHARLES LIGHT, senior legal officer, Office of International Law

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ANNIE TAN, senior assistant state solicitor, Western Australia

ELECTRONIC PRESENTATION OF EVIDENCE

JOHN LOPEZ, Opus 2 International

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08:42 Monday, 16 September 2024
(9.25 am)
THE PRESIDENT: Good morning to everyone. I see that we are all eager to start and we are all ready before the actual time for the start. Since this is being streamed, I think we should not start before the time for those who are watching remotely; it would not really be fair. So we'll just wait five more minutes.
(Pause)
(9.30 am)
THE PRESIDENT: The Peace Palace bell just rang 9.30. I am pleased to open this hearing and welcome you all here.
Let's just, for the record, establish who is in the room. I also welcome all those who we are not seeing and who are not in the room, but who are participating remotely.
You of course have the Tribunal: Mr Kirtley on my left, Professor McRae on my right; the Secretary of the Tribunal, Mr Montoya, on my far right; and Mr Williams, who is the representative of the PCA, on my far left.
We have the court reporter, the Opus technicians and the technicians who handle the transmission.
For the Respondent -- and I'm starting with the Respondent here because on preliminary objections, the Respondent is in a position of claimant, so to say -- we

09:31 have the Solicitor-General of Australia, Dr Donaghue KC.
Would you like to introduce those of your delegation or do you wish that each person introduces him- or herself?
DR DONAGHUE: Mr Clarke will introduce the delegation, if that's suitable to the Tribunal.
THE PRESIDENT: Fine, thank you.
MR CLARKE: Thank you. Good morning, Madam President and members of the Tribunal.
I am Jesse Clarke, the general counsel of the Office of International Law at the Attorney-General's Department. As you already noted, I am joined by the Solicitor-General of Australia, Dr Stephen Donaghue KC, and our counsel team: Mr Samuel Wordsworth KC, Professor Chester Brown, Dr Naomi Hart and Dr Esme Shirlow.
Joining from Western Australia is the Solicitor-General of Western Australia, Mr Craig Bydder SC, and Ms Annie Tan, senior assistant state solicitor of the Western Australian State Solicitor's Office.
THE PRESIDENT: If people who are in presence could just raise their hand, so we can put names on faces, it would be nice.
So Mr Solicitor-General of Western Australia. Good,

09:33 thank you.
MR CLARKE: I think we had Ms Annie Tan as well.
I am also joined by counsel assisting the Solicitor-General: Ms Penelope Bristow; Mr Jeremy Shirm of the Department of Foreign Affairs and Trade; and finally, my colleagues from the Office of International Law: first, Ms Lucy Martinez, Mr Kyle Dickson-Smith, Mr Charles Light, Ms Stephanie Brown and Ms Erin Manuel.
Madam President, if I may, we do have a PowerPoint slide presentation this morning which we have provided electronically, but we do have some hard copies available in the room in case any of the members of the Tribunal, the Secretary, the PCA or indeed the Claimant would prefer a hard copy. We're just handing those up now.
THE PRESIDENT: Thank you.
So let me turn to the Claimant now for the introduction. Should I give you the floor, Mr Palmer, to introduce those who are here with you, or do you want each of them to introduce him- or herself?
MR PALMER: I think it's best that they introduce themselves. I am Clive Palmer, I'm the representative and director of the Claimant in the arbitration.
DR KIRK: Dr Anna Kirk from Bankside Chambers, counsel assisting.

09:34 MR BYRNE: Kris Byrne, counsel assisting.
MR SOPHOCLES: Michael Sophocles, lawyer assisting the Claimant.
MR SHAW: Jonathan Shaw, lawyer assisting the Claimant.
MS A PALMER: Anna Palmer, counsel assisting the Claimant.
MR SHERIDAN: Declan Sheridan, director of the Claimant.
MS E PALMER: Emily Palmer, director of the Claimant.
MR BROWNING: Thomas Browning, Claimant party assisting.
MR JACOBSON: Daniel Jacobson counsel assisting.
MS SINGH: Baljeet Singh, administrator Claimant party assisting and director of the Claimant.
MS McCORMACK: Leanne McCormack, administrative assistant.
MR HARRIS: Nui Harris, director of Waratah Coal.
MRS SOPHOCLES: Yevheniya Sophocles, assisting the Claimant.
MR BIRKETT: Scott Birkett, expert witness from BDO.
MR MARTINO: Domenic Martino, corporate advisor to the Claimant.
MR PALMER: George Sokolov was to come; he's in Australia watching online. He's assisting us in the arbitration. So he's there. I thought I should just point that out.
(Pause)
THE PRESIDENT: As you know, the agenda of this hearing is to address the preliminary objections. We will proceed in accordance with Procedural Order No. 5. Some of the rules that we will follow are also in Procedural

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

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

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

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

around the world, both in the mainstream media and in the investor-state academic community.

That interest reflects the fact that global attitudes to the rules-based trading system are in flux. The outcome of this dispute will focus attention on whether the existing framework for investor-state arbitration truly reflects the intention of parties to treaties such as AANZFTA and the many treaties in similar terms. For that reason, in our submission, this Tribunal has been charged with a heavy task.

As this case has proceeded, it has acquired four exceptional features, which we wish to emphasise at the outset, which are particularly extraordinary in combination.

The first is: despite the extensive evidential case that Australia has assembled in support of its preliminary objections, the Claimant has left that case largely unaddressed in its pleadings and unanswered in its evidence. Yet the evidence that the Claimant has largely ignored is of a comprehensive and serious kind. It includes evidence from five experts and one fact witness.

By way, for the moment, just of very brief summary, the first expert is Professor Thomas Lys, who is the Eric L Kohler Professor Emeritus at Kellogg School of

Management at Northwestern University. He is a specialist in accounting, economics, corporate governance and negotiation. He has been a faculty member of the Kellogg School since 1981, and he became an Emeritus Professor in 2015.

Both Professor Lys's first report and his supplementary report are lengthy and detailed documents, and they cover a range of issues, including the scope of Zeph's business operations in Singapore, the business purpose of the restructuring, Zeph's arguments on retained earnings and the involvement of Zeph's directors in Mineralogy.

It is, we submit, of some note that the tribunal that decided Philip Morris v Australia, which is Exhibit RLA-95, was significantly assisted by Professor Lys. One passage from the award of that tribunal, at paragraph 583, which addressed Professor Lys's evidence on the purpose of a corporate restructuring, has particular resonance in this hearing today. Having set out the background of unpersuasive witness evidence by the claimant in that case, the tribunal said:

"Against this background, the expert report of Professor Lys does carry weight, especially as it remains unrebutted by other expert evidence, and

Professor Lys was not called for cross-examination."

That passage could equally be written in this case.

The second expert Australia relies upon is Mr George Rogers, whose experience, stretching back to 1989, includes having structured, lent and advised on several US billion dollars' worth of mining project finances in projects all over the world. Having set up the mining project finance business of Investec Bank in London in 2013, he set up his own mining project finance consultancy. And his first and supplementary expert reports address, again in detail, Zeph's claim that it was incorporated for the purpose of pursuing financing in Singapore for Australian coal projects. His evidence has been almost totally ignored by the Claimant.

The third expert is Mr Daniel Kalderimis KC, a New Zealand barrister of more than 20 years' standing, whose report addresses whether Zeph has presented a plausible rationale for the incorporation of Mineralogy International Limited in New Zealand in order to pursue lithium exploration or exploitation.

The fourth expert is Professor Graeme Cooper, who has practised in Australian tax law for more than 30 years, taught tax at a variety of prestigious universities, advised numerous states and international organisations. His evidence addresses the tax rationale

that Zeph has put forward for its incorporation in Singapore, including by identifying tax risks that the restructure created for the Mineralogy Group as a whole in Australia.

The fifth expert is Associate Professor Stephen Phua, who has for more than 30 years taught Singaporean and international tax law at the National University of Singapore, and who has advised local law firms and the Singaporean Government on tax matters. His opinion questions the asserted advantages put forward by Zeph under Singaporean tax law for the relevant restructure.

Finally, Australia presents as a fact witness Mr Bruno Vickers, the managing director of JS Held LLC in Singapore, who has over 15 years' experience in investigations and business intelligence. He provides a detailed account of his investigations into Zeph's alleged business operations in Singapore.

Madam President, members of the Tribunal, these witnesses, the five experts and the one fact witness, address issues which are relevant to each of Australia's preliminary objections, and the experts provide persuasive independent evidence in support of those objections.

It is in that context that the second of the four

09:48 exceptional features that I identified arises, which is that the Claimant has chosen not to cross-examine any of Australia's witnesses; not one.

The Claimant was, of course, entitled to make that choice, having regard to paragraph 6.7 of Procedural Order No. 1. But that paragraph does not mean that the [Claimant]'s choice not to challenge the evidence of any of Australia's witnesses is without any consequence. To the contrary, that choice has the significant consequence that Australia's evidential case is, in substance, unchallenged.

The decision to proceed in that way cannot reasonably be attributed to a lack of resources on the Claimant or Mr Palmer's part, such that the very clear inference is that the Claimant had no answer to that evidentiary case, and indeed feared that its position would indeed go backwards if it sought to cross-examine Australia's witnesses.

The third exceptional feature of the case is that less than two days after Australia communicated that it was exercising its right to call eight of the Claimant's witnesses for cross-examination, the Claimant entirely withdrew the evidence of four of those witnesses for the purposes of this jurisdictional hearing.

That eleventh-hour decision is, we say, remarkable.

09:49 It leaves large parts of the Claimant's written pleadings, which refer to the now-withdrawn witness statements, unsupported. Indeed, it leaves the Claimant in this proceeding almost entirely reliant on the uncorroborated evidence of Mr Palmer itself. That's really all you have from the Claimant. (Pause)

(Slide 4) The Claimant has failed to give the Tribunal any plausible exploration for the withdrawal of these four witnesses. The explanation, you will recall, proffered in the letter dated 21 August 2024, only a few weeks ago, which you can see extracted on the screen, was with respect to two witnesses:

"The witness statements of Mr ... Martino and Mr ... Harris were sworn prior to the Respondent's admissions made in the Reply on Preliminary Objections and, accordingly, their relevance for the purposes of the Hearing has been largely reduced ..."

Zeph has never informed the Tribunal what the alleged admissions it says rendered Mr Martino and Mr Harris's statements irrelevant actually are, and Australia certainly does not accept that it has made any admissions which have that effect. As for Mr Migliucci and Mr Sorensen, the Claimant stated in the same letter that their witness statements were "intended for the merits and damages stage of the Arbitration". But given

09:51 that there were references to the evidence of these witnesses in the pleadings concerning preliminary objections, that statement is inexplicable.

The position became no clearer at the pre-hearing video conference, where the Claimant stated only that it had:

"... deemed [the four witnesses] not to be any more relevant to the case as we are presenting it to the Tribunal."

The reality is that, far from becoming irrelevant, the evidence of the four witnesses that the Claimant has withdrawn went directly to matters of ongoing evidence to the Claimant's attempt to answer Australia's preliminary objections.

To give you for now just one example, Mr Martino had given an account of advice he claimed to have given to Mr Palmer concerning the reasons for the restructure that resulted in the interposition of Zeph into the corporate structure in January 2019, including as to the reasons to carry out that restructure urgently. We would have tested Mr Martino's evidence on that topic by cross-examination. Yet immediately upon us advising the Claimant of that fact, the Claimant advised us that Mr Martino's evidence had been withdrawn.

The result is that Mr Palmer gives an uncorroborated

09:52 account of the meeting in March 2018 when he says he received advice from Mr Martino about the restructure, while at the same time the Tribunal is deliberately deprived of the opportunity to hear about the same advice from the person who is said to have given it.

Throughout this opening, Australia will provide other examples where the evidence of the non-appearing witnesses would have been relevant, and obviously so. We respectfully submit that the Tribunal should take a very dim view of the Claimant's attempt to curate the facts so that Mr Palmer himself can completely control the factual narrative he contends that the Tribunal should accept.

The fourth and final exceptional feature of this case is the complete absence of contemporaneous documents of the kind one would expect to exist if the factual contentions that Zeph is advancing were true.

Where, for example, are the contemporaneous documents that support Zeph's case that it was incorporated as part of a restructured design to facilitate access to coal financing in Singapore, or, for that matter, to achieve tax benefits? Literally no such documents have been filed or produced, notwithstanding orders from the Tribunal that would have required such documents to be produced.

09:54 The result of the four matters I've just identified is that the ambit of the factual contest in this preliminary hearing is reasonably confined. You're not going to hear very much evidence. But critically, that's not because there is substantial agreement between the parties as to the facts; there's not. It's because the Claimant has largely vacated the field, leaving Australia's case completely unanswered.

Indeed, in our submission, the Claimant has left the Tribunal with a purposely incomplete and unverified narrative of key steps, including the reasons those steps were taken. In a claim said to be worth AUD 300 billion, that is demonstrably inadequate.

There can, we submit, be no explanation for the Claimant's decision to rest its case entirely upon the uncorroborated evidence of Mr Palmer, other than that it was unable to do better.

Madam President, members of the Tribunal, that's the first part of the opening remarks I am giving.

I propose now to turn to what we submit really happened in this case concerning the transposition of the extremely valuable Australian company Mineralogy to the supposed Singapore investor Zeph, and to identify some facts that are common to many of our preliminary objections.

09:55 In assessing the circumstances in which the Claimant came to be incorporated in Singapore in circumstances of apparent urgency in January 2019, and then to be interposed into the Mineralogy corporate group and to make immediate attempts to create the appearance of substantive business operations in Singapore by acquiring existing Singaporean companies, one needs to go back to late 2018.

At that time, various long-standing tensions between Mineralogy and the State of Western Australia concerning the State Agreement were coming to a head. The relevant State Agreement had been made between Mineralogy and the WA Government way back in 2002 and it had been amended in 2008. That's an agreement that is given force by legislation, by Western Australian legislation.

In 2012, the WA Government had declined to approve Mineralogy's Balmoral South Iron Ore Project proposal, a proposal that was made under that State Agreement, and that in turn precipitated a serious long-term decline in relations between Mineralogy and the Western Australian Government; a decline that was manifest in numerous ways, including a prolonged arbitral proceeding in Australia before a domestic arbitrator, Mr McHugh.

Another manifestation of those declining relations arose in the context of what was initially a commercial

09:57 dispute between Mineralogy and a Chinese state-owned company called CITIC, which had submitted mine continuation proposals continued to extend the life of an ongoing project, the Sino Iron Project, in a manner that could only occur if Mineralogy was prepared to submit a proposal to the WA Government under the State Agreement.

Over a period of several years, Mineralogy declined to submit that proposal, and that led CITIC to seek to involve and gain the support of the Western Australian Government.

The proposed response of the Western Australian Government introduced a new and highly relevant additional dimension to the already long-running tensions between Mineralogy and the WA Government concerning Mineralogy's rights under the State Agreement, because it was at that point that Western Australia raised the prospect that it might unilaterally legislate to amend the State Agreement to Mineralogy's detriment.

I'm going to take you now to a series documents that show this occurring, from November onwards.

(Slide 5) So you can see on the screen (R-130): on 3 November 2018, The West Australian newspaper reported statements by the then Premier of Western Australia,

09:58 Mr McGowan, and by the opposition leader of Western Australia, in which the Premier was reported as being open to:

"... changing the State Agreement governing the Sino Iron Project to break the impasse between [the] operator CITIC Pacific and tenement owner Clive Palmer."

The article quoted Premier McGowan as saying that, "The State is considering its options".

(Slide 6) Almost immediately, a couple of days later, on 6 November 2018, Mineralogy wrote to Premier McGowan asserting that it was inappropriate for Parliament to intervene in a commercial dispute (R-132).

(Slide 7) But then, a few weeks later, in the Parliament of Western Australia, the Premier stood up and made the following statement (R-133):

"State agreements are an important instrument ... but there is a responsibility on the beneficiary, Mineralogy, to do the right thing. I noted the recent comments of the opposition leader and his offer to help the government do all he can to sustain the project including altering the state agreement. I thank the opposition leader for this commitment. It appears we are as one on this issue ... Clive Palmer and Mineralogy are now on notice."

That's 29 November 2018.

09:59 (Slide 8) The next day, 30 November 2018, Mineralogy engages Allen & Gledhill, a Singaporean law firm, to begin the process of incorporating a private company in Singapore. In those instructions (C-502), as you can see highlighted on the screen, it emphasised that "time is of the essence", and that Mineralogy was "looking to move very quickly".

As we will develop over the course of the morning, none of the explanations that the Claimant now asks the Tribunal to accept provide any explanation for that obvious urgency. Mr Palmer claims in his evidence that in a meeting in March 2018, Mr Martino advised him that "we should move as fast as we could". But if Mr Martino did say that, and if he provided any explanation for that advice, Mr Palmer has not shared it. We would have asked Mr Martino about that, but of course his evidence was withdrawn.

But in any event, even if that advice was given in March 2018, it was clear that it wasn't followed, because nothing happened until late November 2018, immediately after Premier McGowan's statements in Parliament. As subsequent events show, this was not simply a coincidence.

(Slide 9) In particular, again only days later, 2 December 2018, Mineralogy again expressed disagreement

10:01 with the approach of the WA Government towards the State Agreement, in correspondence to Premier McGowan, and it took the step of publishing that letter, Exhibit R-136, in a full-page advertisement in The West Australian newspaper. We haven't put it on the slide, but that's Exhibit R-137.

Less than two weeks later, on 14 November, Mineralogy International Limited, or "MIL", was incorporated in New Zealand, pursuant to the directions of Mr Palmer. And two days after that, on 16 November, it engaged in a share swap by which the new shell company, MIL, obtained a very valuable 6 million or so shares in the Australian company Mineralogy by issuing the same number of shares in itself to the previous owners in Mineralogy in proportion to their previous shareholdings.

Those shares issued of MIL were of no value. Mr Wordsworth will be returning to that point very shortly.

(Slide 10) Then on 18 January 2019, which is in the quite brief period of time when MIL was the direct owner of the Australian company Mineralogy, MIL wrote to the Premier of Western Australia. And you can see again an extract on the slide (R-44).

Even though MIL had been incorporated only a month

10:02 earlier, it asserted in the first paragraph of the letter -- we've extracted the first paragraph, but you can see it under the heading on the slide -- it asserted that it "engage[d] in substantive business operations in New Zealand" and that it "has an active and continuous link with that country's economy", such that it was "entitled to ... protections ... under ... (AANZFTA)".

That specific phrase, "substantive business operations", rather than "substantial business activities", of course has a familiar ring to it.

The letter stated that if the WA Government proceeded to amend the State Agreement, that would cause significant loss and damage to Mineralogy, and as such to MIL, and it warned that this would breach Australia's obligations under AANZFTA.

(Slide 11) MIL further wrote in the letter -- and we'll be taking the Tribunal back to this letter in more detail at subsequent points:

"If your Government alters by legislation the terms of the State Agreement as you have foreshadowed to Parliament, Mineralogy inter alia will have lost its royalty income under existing agreements and court judgments and the benefit of the exclusive tenure it currently enjoys ... It cannot be a proper purpose to take from an Australian an Australian asset ..."

10:03 This is MIL writing this:

"... and in effect give it to a Chinese Government owned entity for a commercial purpose for that party to commercially exploit."

(Slide 12) "We put you and your government on notice of MIL's claim inter alia under AANZFTA for prompt, adequate and effective compensation should you, your Government or the Parliament of Western Australia take any steps to expropriate, either directly or indirectly, Mineralogy's interests or rights in Western Australia ... If your Government proceeds with amending legislation, MIL will immediately make a claim for $45Bn against the Commonwealth ..."

So that threat of proceedings is made in January 2019.

(Slide 13) A copy of that letter was sent to the Commonwealth Minister for Energy, Mr Angus Taylor (R-45). So the letter is sent to the Western Australian Government, but it's copied to the Federal Government.

The covering letter to Mr Taylor repeated that MIL was a New Zealand company:

"... which engages in substantive business operations in New Zealand and which ... [was] entitled to the protections offered to investors under ... (AANZFTA)."

It asserted that Premier McGowan had "threatened to unilaterally repudiate certain rights of Mineralogy" under the State Agreement, which would result in a major loss of MIL's investments, and would amount to:

"... many billions of dollars which under the terms of the AANZFTA would immediately become due and payable by the Commonwealth of Australia."

We submit that, particularly given the references in the first paragraphs of both this letter and the previous letter to the denial of benefits test, it is evident that the possibility that Australia might deny benefits under AANZFTA was front of mind for Mr Palmer and MIL at the time these letters were written.

(Slide 14) Then, again just days later, 22 January 2019, The Australian newspaper, which is a national broadsheet newspaper in Australia, reported that the following statement was made by Mr Palmer (R-46):

"Mr Palmer said the move offshore meant Mineralogy would be able to claim compensation from the Australian government under the investor protection provisions of the Australia-[New Zealand] free-trade agreement. He vowed to launch a damages claim if West Australia Premier Mark McGowan carrie[d] through with his threat to legislate in favour of Chinese giant CITIC's

interests in the $US10bn Sino Iron project in the Pilbara."

(Slide 15) There were a range of other articles published in due course, as you can see on the slide, reflecting the same statements. And Mr Palmer has never denied making the statement that the move offshore meant Mineralogy could claim compensation under AANZFTA.

In any case, the letters speak for themselves. They directly link the incorporation of MIL and its insertion into the ownership chain above Mineralogy to the attempt to obtain treaty protection. And not only that: they also display a contemporaneous awareness of the denial of benefits test that they would need to overcome in order to obtain that protection.

(Slide 16) Now, I've been talking about MIL. But around the same time as that press report was published, the incorporation of Zeph was being pursued with urgency. Here you can see an email (R-817) sent at 8.05 pm on the night of 19 January, which is a Saturday. Instructions were sent to Singaporean law firm Allen & Gledhill to incorporate a new company.

(Slide 17) At 6.03 am the following morning, Sunday morning, Allen & Gledhill were advised that Mr Mashayanyika, who was the chairman of MIL:

"... [would] be travelling to Singapore and would

like to meet ... at 10am on Monday in relation to [the] incorporation of this new company."

(Slide 18) Later on the Sunday, at 4.52 pm, a partner from Allen & Gledhill enquired about the business plan for the new entity, and said, "When do you need the entity by?"

(Slide 19) Later on Sunday night, 9.43 pm, Mr Mashayanyika advised that:

"The new entity will be acquiring established businesses in Singapore and we require [it] to be incorporated tomorrow Monday 21st ..."

(Slide 20) Allen & Gledhill responded at 11.10 pm on the Sunday night, "not[ing] the urgency of the incorporation ... by tomorrow" (R-549).

(Slide 21) And Zeph was actually incorporated on the Monday, the following day, as you can see from the certificate of incorporation (C-70).

(Slide 22) Now, again around the same time, Mr Sorensen, a long-term advisor to the Claimant, then a partner at PwC, also referred to the urgency of the incorporation of Zeph in contemporaneous emails. He also referred in those emails, as you can see extracted on the slide (R-775), to whether any delay would be consistent with what were identified as "broader asset protection aims". That is plainly a reference to the

investment treaty protection purpose, given the escalating dispute with Western Australia, and the absence of any other apparent basis on which interposition of a shell company above Mineralogy would provide any asset protection benefit.

In light of those emails, the Respondent called Mr Sorensen for cross-examination, but of course, again, the Tribunal is now deprived of the opportunity to hear from him on this issue.

In all the circumstances, the Tribunal should infer that the reason for the urgency associated with the incorporation of Zeph was that Mr Palmer had realised that he had made a mistake, and that the incorporation of MIL in New Zealand would not provide the investment treaty protection that had been sought.

(Slide 23) That mistake was identified publicly in the Australian press on 23 January, when press reports highlighted -- and you can see the headline, "Palmer's NZ move looks like a flop" -- that Australia and New Zealand had, by an exchange of letters, agreed that Chapter 11 of AANZFTA did not create rights or obligations between Australia and New Zealand. So a New Zealand company was not an appropriate vehicle for an investor-state claim, or not a possible vehicle.

On 29 January 2019, only about a week after it was

incorporated in Singapore, Zeph acquired all of the shares in Mineralogy in a share swap with MIL. The approximately 6 million shares in the valuable company Mineralogy were swapped for approximately 6 million newly issued shares in the Claimant; and again, the shares of the Claimant were of no value. Again, Mr Wordsworth will return to this issue shortly.

(Slide 24) Lest there be any doubt that the interposition of Zeph was related to the attempt to obtain investment treaty protection, on 4 February -- so again, only days after it becomes incorporated into the group -- correspondence from MIL, the New Zealand company, noted that its interest in Mineralogy was now held via Zeph, which at that point in time was called Mineralogy International Proprietary Limited, which was said to be:

"... a Singapore registered company, which engages in substantive business operations in Singapore and which has an active and continuous link with that country's economy."

A claim made just days after the company was created. And it was said to make it entitled to bring an investment claim, this time under the Singapore-Australia Free Trade Agreement.

In addition to the unambiguous terms of that

4 February letter, the timing of this letter strongly supports the inference that the purpose of the restructure and the insertion of Zeph into the corporate chain was to attract treaty protection in relation to the possible unilateral amendment of the State Agreement that Western Australia had threatened.

(Slide 25) The Claimant's internal documents confirm that although that letter was not sent until 4 February, it was actually drafted in the lead-up to the share swap which saw Zeph interposed between MIL and Mineralogy. You can see that from the draft which you now have on the slide, which is dated 24 January, so before the interposition.

It's apparent that the draft was incomplete. So the author can't, as you can see in the top text box, remember the name of the company. But nevertheless, the letter threatens proceeding under the Singapore-Australia Free Trade Agreement even before Zeph had acquired any interest in Mineralogy.

What's more, the Claimant itself recognises that this letter is connected to the share swap because this letter was produced to Australia in response to document request 3, which sought correspondence "in relation to the Mineralogy Group restructure".

(Slide 26) Contemporaneous press reports at the

time, around the time of the share swap, in our submission, accurately recognised what had occurred, with The Australian reporting that Mr Palmer had "shifted his corporate headquarters" from the "unoccupied" office in New Zealand to Singapore in an attempt to revive his threat to sue Australian taxpayers for AUD 45 billion (R-142), after he found that a New Zealand company could not make an investment treaty claim against Australia under AANZFTA.

Subsequently, and well before the passage of the Amendment Act, upon which Zeph bases its claim, on 14 March 2019, 20 March 2019, 15 October 2019 and 25 November 2019, MIL, Mineralogy and the Claimant repeatedly wrote to Australia invoking relevant free trade agreements to protest against unilateral action on the part of the Western Australian Government that would impact on Mineralogy's rights under the State Agreement.

Now, the Claimant has rejected the suggestion that any of these letters that I've just shown the Tribunal threatened investment treaty proceedings in response to the Western Australian Government's suggestion that it might legislate to amend the State Agreement. And we'll show you that submission.

(Slide 27) In the SODPO at paragraph 523, the Claimant argues:

"... the CITIC letters merely evince Mr Palmer's knowledge of the existence of investor-State agreements and nothing more."

With great respect, that claim is absurd. For example, the statement, "If your Government proceeds with amending legislation, MIL will immediately make a claim for $45Bn against the Commonwealth" -- that's a quote from Exhibit R-44, the letter of 18 January -- is in its terms a threat to commence investment treaty proceedings.

Madam President, members of the Tribunal, the facts I have just outlined are relevant to many of Australia's preliminary objections because they demonstrate very clearly what was really going on when Zeph was urgently incorporated into the Mineralogy Group in January 2019.

We now propose to develop each of our preliminary objections, and with the Tribunal's permission, I will hand over to Mr Wordsworth KC to deal with the first two. Thank you.

THE PRESIDENT: Thank you.

MR WORDSWORTH: Madam President, members of the Tribunal, thank you very much.

(Slide 28) I will be developing the first two of Australia's preliminary objections.

(Slide 29) First, that Zeph is not an "Investor of

a Party" as defined by Article 2(d) of Chapter 11 of AANZFTA. Zeph has not made an investment in the territory of Australia because it has not made any form of active contribution.

Second, that Zeph has not established the existence of a protected investment under Chapter 11. It's unable to demonstrate any of the inherent characteristics of an investment, most obviously in the form of the absence of contribution or of risk.

These objections fall to be considered against the exceptional factual background that you've just heard outlined by the Solicitor-General. And although the parties have referred to many of the past cases in their pleadings, in none of these was a tribunal looking at closely analogous facts.

As Mr Palmer said to The Australian newspaper, as you've just seen at slide 14, MIL was incorporated so that:

"... Mineralogy would be able to claim compensation from the Australian government under the investor protection provisions of the [AANZFTA]."

That's R-[46]. So no contribution is suggested there.

(Slide 30) As to what happened next, MIL obtained from Mr Palmer and his wholly owned companies the very

valuable 6 million or so shares in Mineralogy by swapping newly issued shares in MIL. MIL had a value of just $1. And you can see that from the relevant resolution of 16 December 2018 (C-63):

"The Company has no assets and liabilities other than the share capital of 1 fully paid redeemable share of NZD $1 ..."

So MIL had nothing of intrinsic value to contribute to Mineralogy, and did not contribute anything of value.

(Slide 31) Then Zeph -- newly incorporated, as you've just seen, a few weeks later -- acquired the shares in Mineralogy from MIL through an exchange of shares with MIL. And again, as you can see from the slide, Zeph had a value of $1 only. You can see that from the resolution of what was then called Mineralogy International Pte Limited of 19 January 2019 (C-63).

Thus, Zeph acquired the very valuable shares without contributing anything of intrinsic value. Any value in the Zeph shares came solely from the value of the Mineralogy shares, the Australian company Mineralogy. If anything, that is the reverse of a contribution.

Although Zeph says that it contributed in other ways, namely through management of Mineralogy and investing returns, all that happened is that existing Mineralogy directors and personnel were also appointed

as directors of Zeph, and Zeph cannot point to a single document showing any actual step taken by it -- taken by Zeph -- to invest returns in Mineralogy.

(Slide 32) Against that backdrop, I turn to the first question, focusing on the correct interpretation of Article 2(d). And focusing on that definition, the key phrase on which the parties are focusing is "make, is making, or has made an investment".

(Slide 33) To make an investment, in its ordinary meaning, is to make some form of contribution, most obviously of capital, in order to acquire an asset. And consistent with that interpretation, one can see from Article 8(1), which is the provision concerning free transfers, that the treaty-drafters saw the importance of ensuring the free transfer of, specifically, "contributions to capital, including the initial contribution".

So they undoubtedly envisaged that there would be an initial contribution. That's a point on context that Zeph has completely blanked in its written pleadings.

(Slide 34) Zeph has taken the position -- and this is paragraph 262 of its SODPO -- that "the verb 'make' has little or no substantive meaning in its own right", and that it just takes its meaning from the word "investment".

(Slide 35) You can see at paragraph 279 it is also saying that mere "passive ownership ... is sufficient".

But that is to deny the word "make" any effet utile and it's plainly wrong. To make an investment is not the same as to have, to own or control, to acquire or to hold an investment; all terms that the treaty parties could have used, but did not use. Just as, for example, to have or acquire a meal is not the same as to make a meal. The word "meal" is not somehow all-defining. And the same is true when it comes to the word "investment". The actual verb used is critical to meaning, and it is not a mere connective, as Zeph is suggesting.

(Slide 36) One can test the point another way. If the formula "to make an investment" just takes its meaning from the word "investment" -- that's Zeph's case -- then it would be easy just to slot in the treaty definition of "investment" in Article 2(c), which you will recall refers to "every kind of asset owned or controlled by an investor". But then if you try and slot that in, it just doesn't work, because "to make every kind of asset owned or controlled by an investor", it just doesn't make sense.

This identifies that the treaty-drafters had something else in mind in Article 2(d): that is, to

10:22 "make" an investment in the ordinary sense of the word, to make some form of contribution, to acquire an asset.

All this is confirmed by context and object and purpose. Article 2(c), as you can see, defines the term "investment" using different concepts: "owned or controlled by an investor". And it would make no sense if to "make" an investment was just to mean to own or control an investment, as that's already within the term "investment".

(Slide 37) The same basic point applies to Article 2(a) as to which Zeph seeks to rely on the words "established, acquired or expanded". But these words address a temporal issue. An investment is thus covered irrespective of whether it came into being, was acquired by the investor or was enlarged after AANZFTA came into force. The requirement in Article 2(d) to "make" an investment addresses a different issue, and that's why a different word is used.

(Slide 38) Zeph also seeks to make a point in the footnote, footnote 4, by reference to "seeks to make". Again, that's just addressing a different issue. An investor which has not yet made a concrete investment must have more than an abstract desire to do so in order to benefit from protection under Chapter 11. No great surprise there.

10:24 (Slide 39) As to object and purpose, Zeph has said that the primary purpose of AANZFTA is investor protection. But that is plainly wrong. Chapter 1 of AANZFTA sets out this free trade agreement's objectives. Article 1(c) states the objective to:

"... facilitate, promote and enhance investment opportunities among the Parties through further development of favourable investment environments ..."

There's no need for specifically favourable environments for investment opportunities if investments do not engender risk; that is, some form of contribution that could be lost in an unfavourable environment.

Article 1(d) then speaks of:

"... strengthening, diversifying and enhancing trade, investment and economic links among the Parties ..."

Investment and economic links between the AANZFTA state parties are not strengthened and enhanced if there is just a formal change in corporate structure, where a party of one state comes to own or control assets in another state without making any contribution.

Now, Zeph, in its recent Rejoinder, the RejPO, appears belatedly to have recognised the force of Australia's case on interpretation. In certain parts of its Rejoinder, Zeph is maintaining its position that

10:25 Article 2(d) requires no active steps and that the mere passive holding of an investment is enough. One can see that, for example, at paragraphs 132 to 135.

But Zeph also now includes a section where it seeks to give at least some limited meaning to the word "make", saying that this does require an activity, but merely in terms of participating in the relevant transaction. You can see that at paragraphs 158 through to 166. That would be a very major shift in position.

(Slide 40) We've put up on the slide for you to see and compare paragraphs 265 to 266 and 279 of the SODPO of March 2024 -- and you can see those are all saying in one way or another that mere holding or passive ownership is enough. Please compare that with the Zeph Rejoinder of August 2024 at paragraph 165, by way of example, where there is a reference to "the requirement to have 'made an investment'", with mere holding being distinguished.

So it is now accepting that the verb "to make" does have some meaning, which is a critical change in its case. Of course, it wishes to confine that meaning by saying, "It's enough if we just entered into this share swap, we signed some documents, we issued some shares", and it says, "There's no need for us to make an actual contribution".

10:27 We do hope we're going to get some clarity on what Zeph's case in fact is this afternoon. I just want to emphasise: it does really matter, because the two cases that Zeph now appears to be running are inconsistent. And if Zeph is shifting ground, then much of its argument on interpretation in the SODPO simply falls away.

Take as an example the case on which Zeph has placed the most emphasis, and that's the Swiss Federal Tribunal's first decision in the Clorox case, RLA-144.

The Tribunal already has our basic point that the court was looking at materially different wording, "invested by investors", in the definition of the term "investment", and there was no case there as to whether the requirements to be an investor had been met.

Venezuela had conceded that, and it had to, because you may recall that relevant treaty wording, the definition of "investor", does not contain the "make an investment" wording so far as concerns corporate entities. Interestingly, it does contain that wording so far as concerns natural persons, which brings in a very nice contrast. But Clorox of course was not a natural person and did not have the benefit of the "make an investment" type wording.

(Slide 41) But leaving this to one side, Zeph was

saying -- and you can see this from paragraph 270 of its SODPO -- that Clorox supported its position that "The [mere] holding of assets was sufficient", which is a correct analysis of what the Swiss court's decision says. And this was being used to say, by Zeph, that the words "make an investment" do not require any positive act, just like the words "invested by". So it's saying: look at Clorox, look at its interpretation of the words "invested by"; no positive act is required, mere holding is sufficient.

And you can see the court's analysis: we've just highlighted the most relevant part at the bottom of paragraph 3.4.2.7 (RLA-144).

But Zeph now appears to accept, quite correctly, that the "makes an investment" wording does require more than mere holding, although it seeks to limit that by reference to the form of action that is required. Thus, it appears now to be accepting our case that Clorox is distinguishable. Clorox, it says, "invested by": mere passive holding enough. Our wording, "make an investment", some action is required: mere passive holding is not enough. Which is it saying? We wait to see.

But if Zeph now accepts that the "made by an investor" language does indeed require more than

a passive holding, the only question is: what positive action is required? Is it the mere participation in a share swap with relation to Zeph shares of no value? That's Zeph's case. Or is some form of actual contribution required? That's Australia's case.

Now, there are many cases on this point that the parties have deployed, and we've tried to put those down in a more convenient form for you at slides 42-43. And of course we are identifying whether this has the "make an invest[ment]" type language, or does it have the different "invested by" language; and we are also identifying whether some form of active contribution was in fact made by the investor, and what the outcome was.

I can just say a few words on the entries concerning cases on which Zeph places particular weight in its pleadings. You'll see on the next page (43) we have Clorox, which I've already looked at; that's entry 12. And the point there is: different wording. It's all about the meaning of "invested by investors" in the "investment" definition.

Then Sea Search-Armada v Colombia (CLA-242), that's entry 16, a new authority cited by Zeph in RejPO paragraph 155, and the treaty language is again materially different, turning on the definition of "investment" and the meaning of the words "commitment of

capital". And the tribunal specifically found that treaties with different wording were "inapposite" and "of limited use"; that's paragraphs 170 and 172.

Then PAO Tatneft, RLA-51 at entry 10, a judgment on which Zeph relies heavily in both its pleadings. But not only is the "invested by" wording materially different, as the table shows, the judge expressly distinguished this from the "make an investment" formulation. And we refer you in particular to paragraphs 78 through to 80.

(Slide 44) It's useful to turn back to the other English court judgment that the parties are referring to: that's Gold Reserve (RLA-44). Zeph is now embracing this case in support of its changed position in the RejPO, for example at paragraph 162. And you can see the relevant treaty definition (RLA-44, paragraph 15) is analogous:

"(g) 'investor' means ...

[a person] who makes the investment in the territory of [the host state] ..."

In due course, we invite you to focus on the persuasive reasoning from paragraph 32 to paragraph 35, all of which is passed over by Zeph.

On the slide, you can see the interim conclusion in the judge's reasoning (paragraph 37):

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

Same here.

The conclusion by reference to the facts is then at paragraph 44. Picking that up halfway down the extract:

"There is no evidence that [Gold Reserve] ..."

That is the claimant:

"... made any payment or transferred anything of value to Gold Reserve Corp in return for becoming the indirect owner or controller of the shares in [the] CAB or of the Brisas Project."

That's obviously the investment.

There is then a reference to the absence of any evidence of action at all. And the court concludes:

"Whilst [Gold Reserve] undoubtedly become the indirect owner or controller of the shares in CAB and of the Brisas Project I must conclude that it did not at that time make an investment in the assets in respect of which the protection of BIT was sought."

10:36 Zeph is now seeking to portray this case as showing that to make an investment is satisfied by any form of activity -- that is, mere participation in the transaction -- and does not require any contribution of value. But the case doesn't say that. The court is just looking at the facts before it.

Zeph also seeks to distinguish the case because the Claimant itself had not transferred any shares; it was the Claimant's parent company that had transferred the shares. But although in this case it is Zeph which issued the shares, in substance that is very similar to the transaction in Gold Reserve. As in Gold Reserve, the Claimant has not contributed anything of value. Here, Zeph was a company worth $1 before the transaction. All of the value in the transaction came from the Mineralogy shares, which MIL held.

Zeph also seeks in its RejPO to support its position that any form of activity by the investor is sufficient by reference to two other cases. These are AMF (RLA-49) and also Gramercy (CLA-86), and if I can look at those briefly.

(Slide 45) You can see AMF, which is RLA-49. At paragraph 450, the tribunal finds that:

"The ordinary meaning of ['make an investment'] ... indicates that the investor has to act and effectively

10:37 engage in the action of making the investment."

We submit that must be right.

At paragraph 453, reference is made to previous cases in which there had not been an active investment. These included:

"... where a company did not make any payment or transfer anything of value in return for becoming the indirect owner or controller of the shares in the company that owns the investment ..."

Then on the next slide (46), paragraph 456, you can see there's a reference to Standard Chartered Bank and the Alapli v Turkey case, where:

"The ... tribunal ... [stated] that in order to establish the activity of investing, [a tribunal] 'must find an action transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to another'."

Then the key facts are at paragraph 457:

"Claimant, a German company, itself purchased the Aircraft from Fischer Air by transferring the purchase price to the Czech company's account ..."

So the facts are completely different: there was a real contribution of value, and the case does not establish that mere participation in a transaction -- let's say the mere issue of shares in a company that has

10:39 no value -- is sufficient.

(Slide 47) Zeph also refers to Gramercy v Peru, CLA-86. And again, this helps Australia. The conclusion is at paragraph 606 of the award, following on from a summary of the Alapli case and also KT Asia. You can see it says:

"These cases are inapposite; they refer to corporate restructurings where shell corporations acquire the investment for a nominal price, from a national of the host State or a third-party investor who does not benefit from the treaty."

Those are, in essence, what has happened here. So of course this doesn't cut across our position that mere participation in a transaction, without a contribution of value, does not amount to making an investment.

Against that backdrop on the law, can I turn to the current facts. Zeph actually says, "Well, in any event, we have made a contribution", and it puts that in three different ways. It says, "We've made the initial acquisition in shares in Mineralogy, we've invested in terms of management and we've reinvested returns".

If I can look at those in turn, starting, of course, with the initial acquisition. As you've seen, Zeph acquired its shares in Mineralogy, as a result of two share swaps, without contributing anything of value.

10:40 Zeph now has three primary lines of argument. First, it relies heavily on a statement in Australia's ROPO, paragraph 64, that:

"... Australia does not dispute that the share swap was both lawful and effective ..."

That so-called "admission" adds nothing. Article 2(d) requires that a putative investor make an investment. So the fact that we don't dispute that Zeph is the legal owner is neither here nor there.

Second, Zeph insists that the new shares it issued to MIL were in fact of value, but it provides no evidence of this. For example, it asserts at RejPO paragraph 149 that, "It is incorrect to say that the shares had no value", but notably, there is no reference to any evidence in support.

At RejPO paragraph 168, Zeph appears to be relying on the face value of the consideration shares that it had issued, which is approximately AUD 6 million. But of course, face value tells one nothing. Zeph's paid-up capital, its actual value before the transaction, was $1, as you've already seen from R-536, the board minute of 29 January 2019. The Zeph shares acquired value only as a result of the transaction with MIL.

(Slide 48) This is further confirmed in the evidence of Professor Lys. And you can see in particular at

paragraph 37 -- I don't have time to take you through it all:

"Because the Consideration Shares represent ownership of an enterprise with no assets and no intrinsic value immediately prior to the restructuring transaction, they have zero value outside of this share exchange."

All this is intuitive: this is what you'd be expecting, you'd be understanding. Professor Lys is confirming this from his expert point of view, and of course he is not being challenged through cross-examination.

Instead, and tellingly, Zeph is seeking to take out of context something that Australia has said on adequacy of consideration. But all Australia said -- and this is ROPO paragraph 61(a) -- was:

"Contrary to Zeph's suggestion, Australia does not rely on any argument concerning the adequacy of the consideration provided by Zeph. Its argument is that Zeph was required to make an active contribution, which cannot be achieved if Zeph provided nothing of value."

So of course there is no admission there.

Third, and defensively, Zeph argues that it is immaterial whether the shares it issued to MIL were of any value, because what matters instead is that it

actively participated in the transaction, such that the investment wasn't purely passive. But that's the argument on the law I've already addressed. The key point is that no foreign investor ever contributed anything of value.

Factually, there is actually a helpful analogy to be drawn to the facts of Clorox (RLA-148), because of course the Swiss courts overturned the award, but it's still useful to focus on what the facts showed, and hence what the outcome would have been had there been a requirement to make a contribution under the treaty language, as we say there is here; completely different treaty language.

(Slide 49) The basic facts are at paragraphs 827 and 828, if I can just summarise these for you now. One sees a Spanish SPV being incorporated so as to acquire the shares in the Venezuelan investment vehicle in exchange for issuing shares in itself to a US parent company, and all the value in the SPV then comes from the US parent company in the transfer of the valuable investment.

You can see the conclusion, the tribunal's response to that set of facts, which plainly is analogous to what we have here. So Clorox España was found not to have made an investment, despite having -- sorry:

"In light of these facts, the Tribunal finds unconvincing the Claimant's assertions that there occurred a 'real exchange of value', that '... there was a transfer between Clorox International and Clorex España and that 'This is a transfer for valuable and real consideration'."

So the point there: the SPV was found not to have made an investment, despite having taken what Zeph would call an "active step", in terms of issuing shares to the US company, and that's because those shares had no intrinsic value.

I turn to the second contribution engage alleged, which is through what Zeph calls "active management", which is based on the fact that five of the Claimant's directors also have roles in Mineralogy.

Notably, Zeph has not put forward a single case in support of the argument that when personnel of the locally incorporated investment company -- here Mineralogy -- are subsequently also appointed to some position in the alleged investor -- here Zeph -- this somehow amounts to a contribution by the investor. Plainly this is completely different to the situation where you have a foreign investor who is coming in and is contributing by way of some specific individual know-how or expertise.

What we have is just individuals who were already involved in Mineralogy, usually over a period of years or even decades, and then in 2019 or later their being appointed to the board of Zeph, but thereafter still continuing at Mineralogy.

The most obvious example is Mr Palmer himself, who has been involved in Mineralogy since the 1980s and has served almost continually as a Mineralogy director. He was just appointed as a director of Zeph on 23 January 2019, but of course that doesn't mean he hasn't remained heavily involved in Mineralogy.

As we've already highlighted in our ROPO at paragraph 67, the same basic point applies to all the other five individuals, who we do note have not been tendered as witnesses, ready to explain firsthand how specifically, as Zeph officers, they have contributed anything material to Mineralogy.

(Slide 50) Now, that leaves Zeph's third alleged form of contribution, and this is the alleged making of an investment through returns and dividends invested by the Claimant into Mineralogy. You can see that is exactly how Zeph is putting its case at SODPO paragraphs 303 and 358(g): an "invest[ment] by the Claimant into Mineralogy".

(Slide 51) Now, the two provisions that Zeph is

relying on are Article 2(c), and you see that:

"For the purposes of the definition of investment in this Article, returns that are invested shall be treated as investments ..."

Then Article 2(j):

"... return means an amount yielded by or derived from an investment, including profits, dividends, interest, capital gains ..."

This gives rise to two separate questions. First, are there returns in this case that meet the definition or requirements of Article 2(j); and second, even if yes, is the further requirement of Article 2(c) met, i.e. are those returns that are invested?

So as to Article 2(j), as you see, there must already be a qualifying investment in existence, as follows from any plain reading of the words: "an amount yielded by or derived from an investment". And in this case, there is no prior covered investment by Zeph, either through the share swap or the supposed management of Mineralogy, thus there can be no returns within the meaning of Article 2(j). And notably, Zeph does not engage with this point.

But it is an important point because, stepping back, Zeph wishes to deploy this as a sort of get-out-of-jail card. It would have no need to rely on alleged returns

if it had already succeeded in showing that it has made an investment through its acquisition of shares or through management. But it fails in that. And if it fails in that, as we say it does, this reliance on the treatment of returns under Articles 2(j) and 2(c) doesn't help it at all.

So Zeph's case on returns falls at the very first hurdle. There's just no investment on which Article 2(j) can bite.

Moving to the second hurdle, Article 2(c) is concerned with returns that "are invested". And as it accepts -- I showed you the relevant passages at slide [51] -- it must be Zeph itself as the investor which is investing. It cannot be enough for a claimant to point to an asset within the host state that is generating and retaining profits, without any action at all from the investor. After all, Article 2(c) is concerned with assets owned or controlled specifically by an investor, which of course is a person who must make an investment.

Turning briefly to the facts, Zeph relies on the profits that were made by Mineralogy in 2019 and 2020 that were not paid to it by way of dividends. But it can point to no evidence that it ever had any entitlement to these funds, nor that it ever made any

decision or took any act in relation to those profits, such that it could say that it had invested these sums in Mineralogy.

(Slide 52) Now, looking at the Mineralogy constitution, you can see at clause 31.1 -- this is C-563:

"The Company in general meeting may declare a dividend if, and only if the directors have recommended a dividend and such dividend shall not exceed the amount recommended by the directors."

So of course a dividend must be declared before there is any entitlement to it; it must be recommended before it can be declared. The general meeting -- that is, the shareholders -- cannot decide of their own initiative that there will be a dividend. The power is only to approve a dividend that the directors have already recommended; which, by the way, is also the default position as a matter of Australian law under Section 254U of the Corporations Act at CLA-161.

Now, the difficulty for Zeph is that no positive steps were ever taken so far as concerns the profit that Zeph now relies on. This is highlighted in Professor Lys's second report at paragraphs 54 to 56, but the basic facts are as follows.

In 2019, Mineralogy's directors did not recommend

any dividends, so Zeph, as a shareholder, was not entitled to any dividends. There is therefore no sum that it obtained, or was entitled to obtain, by way of a return that was available to it to reinvest. This means that in its RejPO at paragraph 181, it's just wrong to state that it had "forgone" a dividend, because there was nothing for it to forgo.

Then in 2020, the Mineralogy directors did recommend a dividend -- that's of approximately AUD 8.1 million -- but it's not suggested that those sums were reinvested by Zeph. And of course the same point applies: Zeph wasn't entitled to any dividend beyond those sums because nothing more was recommended and declared. So again, there was no return which it could have reinvested.

Zeph's answer appears to be that it was somehow engaged in the decision-making processes of Mineralogy because when Mr Palmer was acting as a director of Mineralogy, he was acting as Zeph, or was in any event entitled to act in the best interests of Zeph as a matter of clause 22.3 of the Mineralogy constitution (C-563), which you can see on the screen.

We can obviously explore that a bit with Mr Palmer. But we note that the position that Mr Palmer was acting as Zeph, when he was in fact acting as a director of

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

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

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

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

(Slide 57) Then at paragraph 77, the tribunal begins its helpful explanation as to why the tribunal must do more than simply look to the list of examples offered. Then at paragraph 78, it gives three reasons:

"First, the list of examples in Article I(f) is clearly non-exhaustive on its own terms. The open-ended nature of this part of the purported definition of investment calls for recourse to inherent features."

The same point here.

(Slide 58) Then paragraph 79:

"Second, the interplay between Article I(f) and Article I(g) of the BIT, and the terms 'investment' and 'investor' generally, support the necessity of recourse to inherent features. 'Investor' operates as a gateway for 'investment.' The 'investor' 'make[s] the investment.'"

Of course, again, the same point here.

"The Tribunal does not see the terms 'investor' and 'investment' as separate and pertaining only to ratione personae and ratione materiae respectively. By its plain meaning, the language in the BIT makes it necessary to address the question of what it is to 'make' an investment. This question in turn requires recourse to the inherent features of an investment."

Of course, the same reasoning applies so far as

concerns Articles 2(c) and (d) of Chapter 11. And we refer you in time to look at Komaksavia v Moldova, a 2022 case, at RLA-63, at paragraphs 148 and 153 and following, for analogous reasoning.

The third reasoning of the Tribunal is at paragraph 80, rejecting the argument that the existence of an inherent meaning is dependent on the choice of arbitral forum, i.e. whether it's an ICSID case or not.

(Slide 59) And paragraph 84 sets out the Tribunal's view as to what is required, and you see there the reference to "contribution ... and risk".

(Slide 60) If I can take you very briefly to the 2023 decision in Rasia v Armenia (RLA-129), another case with a non-exclusive list of assets; but here, interestingly, the definition is referring to "every kind of investment", not "every kind of asset". But the tribunal didn't see this as determinative. It saw as most important, again, the fact of the non-exclusive nature of the list of assets, just as we see here.

If I can ask you in due course to look with great care at paragraph 373, explaining the tribunal's persuasive reasoning, looking at Romak and saying that:

"... unless the term 'investment' is given some inherent meaning, the non-exclusive nature of the asset list in most BITs provides no benchmark by which

a tribunal could evaluate the qualifications of other forms of assets outside the illustrative list."

And importantly, it notes:

"The same is true for the common formulation in other BITs, which defines 'investment' sweepingly as 'every kind of asset.' Unless some intrinsic meaning is assigned to the term, such general formulations risk permitting even transactions that bear none of the traditional hallmarks of investment to qualify as such."

We know the treaty parties in this case were concerned to eliminate coverage in relation to such transactions.

(Slide 61) If I can ask you in due course to look at the remaining paragraphs of that, including, of course, the reference to what is required.

(Slide 62) It is also useful to point you -- it's not just referring to the need for contribution at paragraph 237 (RLA-67), but also:

"What matters is the economic reality of the contribution in consideration of all the relevant circumstances, not the formal arrangements used. An investor could ... borrow money from third parties to make an investment. What matters is that the investor is the one ultimately bearing the financial burden of the contribution."

Which sheds light on why risk is also relevant. A party doesn't assume risk unless it bears some financial burden. The mere possibility of receiving a return does not mean that an investor has assumed risk.

(Slide 63) One can get that from KT Asia v Kazakhstan, RLA-68 (paragraphs 218-219), and you can see there the same basic reasoning in relation to risk:

"As a general matter, an investment through the acquisition of equity in a corporation entails the risk that the value of the equity decreases or is even completely lost. Such a risk certainly qualifies as an investment ...

The difficulty here is that KT Asia has made no contribution and, having made no contribution, incurred no risk of losing such (inexistent) contribution."

And that is what's identified as the relevant risk.

(Slide 64) One can see the same point in Komaksavia v Moldova. Paragraph 175 actually is also relevant to the issue of contribution; while paragraph 177, on the next slide (65), deals with the issue of risk.

I skipped over by mistake Rand v Serbia; that's slide 62. I think perhaps -- this is obviously a case that the President knows very well.

THE PRESIDENT: You quoted it.

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

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

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

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

11:35 the words "owned or controlled" in Article 11(1)(b) are satisfied. And those words, we contend, must be interpreted as including indirect ownership or control, for the reasons developed in the SOPO at paragraphs 213 to 217.

The Claimant did not deny in its SODPO that it is ultimately owned or controlled by Mr Palmer, who is a national of Australia and therefore a national of the denying party. Instead, at paragraph 373, it stated that this was "irrelevant" and that it did not have to contest that issue.

(Slide 72) But then, as you can see on the slide, in paragraph 128 of its Rejoinder, at 128(e), the Claimant accepts that it is ultimately owned by Mr Clive Palmer. In our submission, that is clearly sufficient to satisfy the first substantive condition.

The second substantive condition is that which I identified a few moments ago as the determinative one, which is whether the Claimant has "substantive business operations" in Singapore.

In assessing whether the Claimant satisfies this requirement, we submit it is important to recall the key facts that I have taken the Tribunal to already this morning, including the numerous letters sent shortly after the incorporation of Zeph, which not only

11:36 expressly invoked treaty protection but also, you will recall, contained express assertions, drafted in the language of Article 11(1)(b), asserting that both MIL and Zeph had, days after they were created, substantive business operations in the relevant jurisdictions.

Those letters, we contend, make plain that Mr Palmer was aware of the need for a company to have substantive business operations in its state of incorporation if it was to obtain investment treaty protection under AANZFTA. It's that awareness that provides the only plausible explanation for the fact that only a few days after acquiring shares in Mineralogy, Zeph sought to create the appearance that it did have substantive business operations by cloaking itself in the pre-existing activities of existing Singaporean companies. Specifically, on 31 January 2019, two days after its interposition into the Mineralogy Group, Zeph acquired three Singaporean engineering companies.

Now, I'll address the acquisition of those companies in a little more detail later in this part of the opening. But for now, it is sufficient to note that all three of companies had been in the business of providing contract maintenance in Singaporean shipyards. They had nothing to do with mining, they had nothing to do with coal finance, they had nothing to do with any of the

11:38 other asserted rationales for the restructure creating Zeph, but they were purchased two days after it was included in the group.

Now, in its SODPO at paragraph 89(d)(iv), Zeph acknowledges that it paid SGD 3.6 million for these companies. As you will see from Professor Lys's statement, that was 15 times the book value of their combined equity before the purchase.

(Slide 74) And Zeph acquired those companies without conducting any due diligence, at a time when Australia's investigator, Mr Vickers, concludes that it is probable that they had already ceased to have any significant business operations. Mr Vickers says that in paragraph 83(b) of his witness statement, and the Claimant has chosen not to cross-examine Mr Vickers on that conclusion, which we contend the Tribunal should accept.

The acquisition of the engineering companies is analysed in detail by Professor Lys, who explains why their purchase was not a commercially viable decision, and who, like Mr Vickers, concludes that the companies were already failing when Zeph bought them, well prior to any effect of the Covid pandemic.

(Slide 75) As Professor Lys put it, and you can see the quote on the screen (expert report, paragraph 527),

11:39 in the last sentence:

"... from an operational perspective ... [the acquisition of these companies] makes no ... sense at all."

Again, the complainant has chosen not to test these conclusions, which strongly support the inference that the only plausible explanation for Zeph's acquisition of those companies is that it was a poorly executed attempt to defeat the denial of benefits clause in Article 11.

The attempt to provide the appearance of substantive business operations in Singapore is also the only plausible explanation for why, about a year later, in January 2020, Zeph entered into a joint venture with Kleenmatic, a Singaporean office-cleaning business. Again, I'll address this in more detail later in this part of the opening.

But like the acquisition of the engineering companies, the joint venture is explicable only as an attempt to subvert the plain intent of the parties to AANZFTA in agreeing to Article 11. It's just an attempt to re-badge the activities of an existing Singaporean business as substantive business operations of Zeph itself. We submit there's no other explanation for the holding company of a substantial Australian mining company -- which was established in Singapore, we are

told to assist in coal financing or to gain personal tax benefits for Mr Palmer -- to get into the business of office cleaning.

The belated suggestion of Mr Palmer that this was an effort to diversify operations and seek further business opportunities cannot be taken seriously. It is addressed in detail by Professor Lys in his first report at paragraphs 579 to 592. And again, his evidence has not been tested and indeed not been addressed on this point by the Claimant at all.

Can I turn then to the law concerning Article 1(1)(b), where, as I've noted, Australia contends the decisive consideration is that, for the reasons I'm going to develop, the Claimant itself, Zeph itself, had no operations in Singapore that are capable of being properly characterised as genuine or authentic business operations.

Before developing that point, the Tribunal will note that "substantive business operations", the phrase in 11(1)(b), differs from the much more common reference to "substantial business activities" in denial of benefits clauses in other treaties. The Tribunal will have noted the debate between the parties in the written pleadings about whether the term "substantive" sets a more onerous threshold than "substantial", or whether the words may

be used interchangeably, or whether "substantial" is more exacting than "substantive".

(Slide 76) Happily, we consider you can be spared any further debate on that point, because the Claimant in the SODPO, in the extract you can see on the screen (paragraph 458(a)), recognises that the term "'substantive' may connote 'authenticity and genuineness'", and that its "plain meaning" is "having substance; being real as supposed to apparent". And the Claimant in its Rejoinder reiterates or confirms that interpretation.

The Respondent agrees that the question the Tribunal should ask itself in applying Article 11(1)(b) is whether the Claimant's business operations in Singapore are genuine, authentic and of substance. So there appears to be no meaningful difference between the parties on this point.

The test that I have just identified is consistent with the award of the ICSID tribunal in Alverley v Romania, RLA-71, that being a tribunal which was chaired by Sir Christopher Greenwood. The Alverley tribunal said that it is appropriate to exercise particular care in assessing the genuineness of a putative investor company's connection to its state of incorporation if that company is in fact ultimately

owned or controlled by a national of the respondent state.

While the tribunal said that in the context of determining where the claimant's real seat was located for the purpose of determining whether there had been an investment within the meaning of the Romania-Cyprus BIT, its reasoning is more generally applicable.

(Slide 77) In particular, the tribunal said at paragraph 250, which you can see on the screen:

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

These comments are pertinent to the present case given that prior to the restructure, Mr Palmer owned Mineralogy through his two Australian holding companies, and the share swap transaction that Mr Wordsworth has already addressed seems to be the very kind of transaction that the Alverley tribunal had in mind.

The Claimant, you will have noted, says that Alverley was not a case which concerned the application of a denial of benefits provision; which, as I've said, Australia had already expressly noted in its SOPO at paragraph 223. We say that does nothing to diminish the force of the tribunal's analysis.

(Slide 78) The Claimant has also referred in its SODPO at paragraph 455 to the ICSID tribunal's decision in Gran Colombia v Colombia, RLA-80. This is a case that Australia likewise already discussed in its SOPO at paragraph 226, albeit under the different name of Aris Mining v Colombia. There (paragraph 137) -- and again it's on the screen -- the tribunal said:

"A business activity may not be mere cursory, fleeting or incidental, but must be of sufficient extent and meaning as to constitute a genuine connection by the company to its home State ... The connection between the company and the home State cannot be merely a sham, with no business reality whatsoever, other than an objective of maintaining its own corporate existence."

(Slide 79) Next, and importantly, the ICSID tribunal in Pac Rim v El Salvador (RLA-33), in upholding a denial of benefits objection, held that a substantial business activities requirement is concerned only with activities that are attributable to -- and you can see the language

there three lines down -- "the 'enterprise' itself". Thus, as the Pac Rim tribunal explained by reference to the equivalent of Article 11(2)(b):

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

(Slide 80) Importantly, the Claimant has accepted -- and you can see that from the extract that you've got on the screen from the SODPO at paragraphs 465 to 466 -- that:

"It is correct that the tribunal in Pac Rim ... held that although the group of companies of which the claimant (as a subsidiary) formed part did have substantial business activities in the territory in question, the 'substantial business activities' ... had to be attributable to the 'enterprise' itself ..."

So given that quite correct acceptance in the SODPO, the debate between the parties is not as to the

applicable legal test, but simply as to whether or not the Claimant itself, Zeph itself, had substantial business activities at the relevant date, as opposed to whether some other company had such activities.

We say that's significant because even if the engineering companies were not already defunct by the time they were purchased by Zeph -- and we say the evidence shows they were -- but even if they weren't, any business activities in which those companies engaged would not have been relevant because they would not have been activities of Zeph itself. The same is true for the business activities of the Kleenmatic companies, for the same reason.

(Slide 81) Next, in Bridgestone Licensing Services v Panama, RLA-30, the ICSID tribunal agreed at paragraph 291 with the United States' non-disputing party submission, and you can see it extracted on the screen. The US had argued, from paragraph 290, about halfway through the quote, that:

"'While it has long been U.S. practice to omit a precise definition of the term 'substantial business activities' in order that the existence of such activities may be evaluated on a case-by-case basis, the United States has indicated in, for example, its Statement of Administrative Action on the NAFTA that

"shell companies could be denied benefits but not, for example, firms that maintain their central administration or principal place of business in the territory of, or have a real and continuous link with, the country where they are established.'"'

Finally on the law, as to the requirement that the Claimant have "business operations" in Singapore, as opposed to "business activities", Australia submits that the term "operations" refers to a more significant form of continuous physical presence than merely having activities. We say that in SOPO, paragraph 222. The Claimant disputes this, for reasons we contend are unconvincing, in SODPO at paragraph 458. But ultimately, whichever test is applied, the Tribunal should conclude that that test is not satisfied by artificial arrangements of the kind in issue here.

Madam President, members of the Tribunal, before coming in a little more detail to the evidence concerning the Claimant's alleged operations in Singapore, can I say something brief about the point in time at which the existence of such operations falls to be assessed.

(Slide 82) The Claimant has said that 13 August 2020 is relevant date, because that's the date of the enactment of the Amendment Act, which the Claimant

alleges is the breach of the treaty. The Respondent submitted that the date for making this assessment must be, at the latest, the date on which the Claimant sought to avail itself of the protection of Chapter 11 of AANZFTA, which was 14 October 2020, which was the date it submitted its [written request for] consultation. So there's not much difference between them. We say, at the latest, 14 October; the Claimant says 13 August 2020.

We submit that ultimately it doesn't matter which of those dates is chosen, because the Claimant had no substantive operations at either of those dates. But on any view of it, events that occurred after October 2020 are irrelevant and must be disregarded. That's on the view of both parties. Anything after October 2020 is irrelevant.

Can I commence my examination of the evidence with Mr Palmer's claim, which was made in his first witness statement at paragraphs 36 and 37, that:

"During the 2020 calendar year, the Claimant conducted its business operations from two offices in Singapore located at:

A. 80 Genting Lane ... and

B. 1 Joo Koon Way ...

These addresses were, respectively, you can see from

11:51 the evidence, the premises of the engineering companies, first, and the Kleenmatic companies, second.

(Slide 83) The unchallenged evidence of Mr Vickers at paragraphs 23 through to 51 of his statement is that the Claimant did not, at the relevant time, have a visible presence at either of those locations. Indeed, Mr Vickers found no evidence of a visible physical presence in Singapore at all. For example -- and you can see on the screen -- he found no evidence of a website, a shopfront, public contact details, social media accounts for the company, visible employees or press reporting about the company, all of which are things he says he would have expected to find.

The Claimant chose not to cross-examine Mr Vickers on these conclusions, and it hasn't otherwise denied them or led any evidence that would establish the contrary; being, of course, evidence that the Claimant should have been peculiarly well placed to provide if there really was evidence of a physical presence at the relevant time.

As to the location of Zeph's directors, at all times the majority of the Claimant's board of directors had been based in Australia. The Claimant seeks to make much of the fact that it has two Singaporean directors, these people being the two people who have for many

11:52 years been running the Kleenmatic business. It's a family business and they've been running it for many years. They are now directors of Zeph.

While it's no doubt true that those two resident Singaporean directors make operational decisions in relation to the Kleenmatic business, there is no evidence at all that they make decisions in relation to the Claimant itself, in relation to Zeph. Indeed, it's not even clear the contrary is asserted.

(Slide 84) In fact, the contemporaneous documents from the time of Zeph's incorporation make it clear that it was the intention of Mr Palmer and those established in the establishment of Zeph that Zeph would be managed from Australia, not from Singapore. For example, you can see the email on the screen from Mr Sorensen sent in January, so around the time of the incorporation; just a day after the incorporation of Zeph. Mr Sorensen wrote:

"... we will also need to ensure that all meetings for the interposition of Mineralogy International Pte Ltd ..."

That's Zeph.

"... are held in Australia, with the chairperson also located in Australia for each meeting ...

We need to be able to clearly demonstrate that the

11:53 interposition resolutions were made in Australia and that the majority of the directors are Australian resident to ensure Australian tax residency is established for [Zeph]."

Now, Mr Sorensen was obviously concerned to ensure that Zeph should have Australian tax residency, and to that end he sought to ensure that all the critical decisions were made in Australia.

(Slide 85) This is a topic addressed in some detail by Professor Cooper. Mr Sorensen's concern was no doubt because, as Professor Cooper explains, the insertion of the Claimant into the chain of ownership of Mineralogy may have had highly adverse tax consequences for the Mineralogy Group if the Claimant was not an Australian tax resident.

To avoid those consequences, it was necessary to ensure that "the 'management and control' of Zeph" -- and I'm quoting there from the highlighted passage at 29 -- "never be allowed to happen [from] Singapore". Zeph was never to be allowed to be managed or controlled from Singapore. That, as Professor Cooper explains, meant -- and you see this at the top of paragraph 31 in the quote -- "Mr Palmer might walk a tight-rope" in trying to establish investor protection based on presence in Singapore, whilst not triggering adverse tax

11:55 consequences in Australia.

Again, the Claimant has not sought to challenge Professor Cooper's evidence in this regard. And that, we say, is not surprising because it seems that Mr Sorensen was himself conscious of the importance of avoiding the very adverse tax consequences that Professor Cooper explains.

We referred to Mr Sorensen's email in our ROPO at paragraphs 206 and 234, and we wanted to ask him about this email exchange with Mr Palmer and to explore the advice that Mineralogy was receiving about the pros and cons of inserting a Singaporean company into the chain of ownership above Mineralogy. But notwithstanding the fact we'd expressly referred to that issue in the ROPO, which should have alerted the Claimant to the issue, Mr Sorensen was one of the witnesses who was withdrawn, apparently because his evidence was not relevant.

(Slide 86) What Mr Sorensen's interventions show was that, far from the Claimant managing Mineralogy from Singapore, the reverse is true, and must remain true. The explanation for that is provided by Professor Cooper. I won't take you into the detail of the Australian law, but you can see the relevant definition in paragraph 3 on the screen:

"A foreign-incorporated company will be

11:56 an Australian tax resident if it --

"... has either its central management and control in Australia, or its voting power [is] controlled by shareholders who are residents of Australia.'"

Zeph can't satisfy that second test because it's owned by a New Zealand company.

Professor Cooper opines that:

"... the affairs of both Zeph and MIL have been managed ... to attract Australian residence under the 'central management and control in Australia' limb ..."

Which is consistent with Mr Sorensen's concern about ensuring that Zeph is an Australian tax resident, but is entirely inconsistent with its assertion that the management of Zeph is a substantive business operation that occurs in Singapore for Article 11 purposes. They can't both be true.

(Slide 87) In any event, the evidence before the Tribunal plainly establishes that the person who manages and controls both the Claimant and Mineralogy was and is Mr Palmer himself. This is emphatically asserted by Mr Palmer in, for example, his sixth witness statement at paragraph 61. And it's plain that that occurs from Australia, not from Singapore.

Can I come then to explain in a little more detail the Singaporean engineering companies, and return to the

11:57 Claimant's assertion that it had substantive business operations in Singapore as a result of its acquisition of those companies.

We submit it's plain on the evidence that those companies did not have substantive business operations in August 2020, not least because all three went into voluntary liquidation in October 2020. But as I've already said, the unchallenged evidence is that they probably did not have substantive business operations by the end of 2018 -- that is, before they were acquired -- meaning that even when they were acquired, they could not have helped the Claimant to show that it had substantive business operations in Singapore, even if it was entitled to count the business operations of those companies, which it wasn't because of Pac Rim.

(Slide 88) The Claimant acquired the engineering companies only about a week after its incorporation. And Professor Lys analyses the acquisition in detail in his statement, in terms that are unchallenged. He concludes, as you can see on the screen (expert report, paragraph 339), that:

"... these three firms appeared to be failing when Zeph bought them on January 31, 2019."

(Slide 89) Nevertheless, the Claimant purchased the companies, each from the same individual, for a total of

11:58 SGD 3.5 million. As Professor Lys notes:

"... the record contains no evidence of any due diligence or valuation ... that preceded the acquisition of those three firms which, based on my experience, is contrary to what I would expect."

(Slide 90) At paragraph 338, he states:

"... my analysis of the financial statements does not provide any support for paying SGD $3.5 million for those three engineering firms."

And indeed, at paragraph 343, he goes on to state:

"... my review of their financial statements indicates that their value was substantially less than SGD $3.5 million, which incidentally is almost 15 times the book value of their combined equity shortly before the purchase."

(Slide 91) Professor Lys concludes at paragraph 348:

"In summary, my review of the documents in the record, including the financial statements of the three engineering firms and Zeph, indicate no business or economic purpose to the transactions: the three engineering firms were losing money and offered no synergies to Mineralogy. Moreover, the financial outlook for at least two of the three engineering firms at the acquisition date seems bleak, further raising the question of what the real reason was for acquiring these

11:59 three engineering firms. Ultimately, all three investments resulted in significant losses."

The Claimant has attributed the failure of the engineering companies to the Covid pandemic in its RejPO at paragraph 216(c). But that is demonstrably incorrect, given that Professor Lys's analysis of the accounts and Mr Vickers's unchallenged evidence concluded that they had likely failed to have substantive business operations by the end of 2018, well before the emergence of the pandemic.

Given all of that, we contend that the Tribunal should accept that the evidence demonstrates that the engineering companies are of no assistance to Zeph in establishing that it had substantive business operations in October 2020, because by that date they did not have any business operations at all; and that even if they had, it would not assist Zeph because Pac Rim demonstrates that the analysis must focus on the business operations of the Claimant itself, not those of other corporate entities within its group, such as companies it had purchased.

Can I turn then to the Kleenmatic joint venture, which commenced in January 2020.

The Claimant did not actually acquire the Kleenmatic businesses until August 2022, two years after what it

12:01 itself says is the relevant date. So the position that is relevant is the joint venture, the contractual agreement between the companies, that commenced in January 2020.

(Slide 92) As Mr Vickers explains in paragraph 92, which you can see on the slide:

"... Kleenmatic is a long-standing family-owned cleaning business in Singapore that operated for approximately 20 years prior to Zeph's involvement."

And the managers of Kleenmatic continue to be the same people who have managed it for many years.

Analysis of the joint venture agreement demonstrates that by entering into that agreement, Zeph sought simply to adopt the existing business of the Kleenmatic companies, and we'll show the Tribunal this in due course. It's plain from the joint venture agreement that those companies were always intended to carry on exactly the same business they had carried on before, using the same employees, paid out of the same bank accounts, keeping the same business records. The business's operations remained exactly as they were before the joint venture, business operations of the Kleenmatic companies.

Not only were those companies separate legal entities from the Claimant, they weren't even owned by

12:02 the Claimant: there was just a contractual joint venture agreement. There is no principal basis upon which their activities can properly be treated as if they were business operations of the Claimant itself.

(Slide 93) The Claimant seeks to escape that conclusion by relying on the fact that it is the formal employer of some of the Kleenmatic workers. But this, we say, is complete artifice.

Those employees -- and you can see this in the ROPO, and in particular at footnote 437, which we've blown up on the screen -- those employees were just informed that their employment would be transferred to Zeph -- apparently after the fact they were informed -- while at the same time they were told that their "duties, responsibilities, remuneration, leave details" and other details "remain[ed] unchanged". The evidence shows that their salary continued to be paid by the Kleenmatic companies out of the Kleenmatic bank accounts.

The Claimant does pay their compulsory Central Provident Fund contributions, which is the Singaporean Government's basic pension requirement, presumably because that's a statutory obligation that arises from the formal employment relationship. But in every other respect, at the relevant time, the employees remained in substance employees of Kleenmatic and apparently

12:03 regarded themselves as such, according to Mr Vickers's evidence.

The artificiality of the Claimant asserting the list of names of its employees who were transferred from Kleenmatic to Zeph was highlighted in the document production process because when ordered to produce the employment contracts of its employees in Singapore, the Claimant produced 146 contracts, which we've listed in annexure A to our ROPO. Of those 146 contracts, 140 relate to cleaners. So of Zeph's employees, 140 of the 146 are cleaners; the other 6 were management roles within the Kleenmatic business. So none had anything to do with the purported rationale for the incorporation of Zeph, such as accessing finance or matters of that kind.

The Claimant also argues that it has licences from the Singaporean Government and that it carries insurance policies in Singapore. But again, we contend that doesn't assist the Claimant, as these are licences and forms of insurance necessary to carry on a cleaning business in Singapore; they don't evidence substantive business operations of the Claimant itself.

Nor does it assist the Claimant that it may have been entitled to subsidies from the Singaporean Government during Covid, most of which in any event postdate the relevant date of August 2020.

12:05 Finally, I come to the Claimant's assertion that it actively manages its investments in Australia, which constitutes business operations in Singapore. That, we contend, is simply nonsense. The Claimant does not even seek to refer to any evidence in support of that claim in its Rejoinder. In our submission, the simple and obvious fact is that the management of Mineralogy and Mr Palmer's various other Australian companies is carried out in Australia by Mr Palmer himself.

Indeed, as I've already mentioned, and as Professor Cooper's evidence makes clear, this is a necessary and deliberate state of affairs because if the management of Zeph ever did occur in Singapore, that would have major adverse tax implications for the Mineralogy Group.

For all of those reasons, the reality is that Zeph had no substantive business operations in Singapore as at the relevant date, notwithstanding the evidence that immediately upon its incorporation -- within two days of incorporation into the group -- it immediately attempted to create the semblance of such operations, presumably to back up the claim in the letters you've seen, the claim made immediately after incorporation, that these were firms with substantive business operations in Singapore or New Zealand.

12:06 The link between those events -- the acquisition of the local business and the attempt to obtain investment treaty protection -- is made manifest in the letters themselves that had been drafted asserting that Zeph had substantive business operations in Singapore. And I showed you the draft of the 4 February letter, dated 24 January. Written even before Zeph had been inserted into the chain, and before it had acquired the engineering businesses, Zeph was asserting that it had substantive business operations in Singapore. It is artifice.

Thank you for your attention. Can I now pass the floor to Professor Brown to address the next objection, which is abuse of process.

THE PRESIDENT: Please. Thank you.

PROFESSOR BROWN: Thank you, Madam President, members of the Tribunal.

(Slide 94) I will be presenting Australia's submissions on abuse of process.

The crux of this objection is that the Claimant, Zeph, was created for the determinative purpose of bringing a treaty claim concerning a foreseeable and foreseen unilateral amendment of the State Agreement by the WA Parliament to the disadvantage of Mineralogy.

As the Tribunal has already heard this morning,

12:07 there is compelling contemporaneous evidence that the Mineralogy Group sought to incorporate -- and did incorporate -- foreign companies to take advantage of Australia's investment treaties in view of its deteriorating relationship with the WA Government in 2018 and into early 2019.

There is extensive independent evidence filed by Australia, with which the Claimant has not meaningfully engaged, that seriously undermines the credibility of Zeph's claim that there was any, let alone a determinative bona fide purpose for the Mineralogy Group restructure, and the insertion of MIL and Zeph into the chain of ownership of Mineralogy.

It is telling that there is barely a shred of contemporaneous documentary evidence to support the purported rationale for the restructure that the Claimant has put forward. It is also telling that the Claimant has withdrawn the witnesses who it had previously claimed provided some corroboration for Mr Palmer's evidence.

As this Tribunal will be well aware, it is an abuse of process for an investor to file a claim under an investment treaty following a corporate restructure that takes place when a dispute is already in existence or could be reasonably foreseen. Indeed, two of the

12:09 members of this tribunal were members of the Philip Morris Asia tribunal, RLA-95, which assisted in the crystallisation of the relevant principles. These principles are now well established in investment treaty cases, and so the disagreement between the parties in respect of this objection concerns how these principles apply on the facts.

None of the Claimant's submissions are sufficient to overcome clear evidence to the effect that Zeph was incorporated and acquired the Mineralogy shares at a time -- to use the words of the Philip Morris tribunal at paragraph 554 -- when there was:

"... a reasonable prospect ... that a measure which may give rise to a treaty claim will materialise."

To the contrary, the extensive evidence of the purpose behind the restructure reveals the abusive nature of the present claim. And as the Tidewater tribunal recognised -- that's RLA-93, at paragraph 150 of its decision on jurisdiction of 8 February 2013 -- it is an abuse of process for a claimant to file a claim following a restructuring when:

"... 'the objective purpose of the restructuring was to facilitate access to an investment treaty tribunal with respect to a claim that was within the reasonable contemplation of the investor'."

12:10 That includes a quote from Professor Douglas's well-known work on international law investment claims, which is RLA-86.

So the Respondent accordingly submits that the Tribunal should dismiss the Claimant's claim as an abuse of process.

I begin with the facts. And the Solicitor-General has already set out the salient factual background, and the detail of that is also contained in the chronology to Australia's SOPO.

Not only was a treaty claim related to the State Agreement foreseen by the Mineralogy Group in late 2018 and early 2019, but it specifically acted on that foresight by incorporating Zeph as the corporate vehicle to pursue that claim in the event that the WA Government adopted measures interfering with Mineralogy's rights under the State Agreement. And the Mineralogy Group foreshadowed to the Australian Government that such a claim would be filed if any such measures were adopted. And so, in circumstances where the parties had been disputing over Balmoral South since 2012, the Claimant filed the present claim once the Amendment Act was passed.

Now, in these circumstances, it's neither here nor there that the Amendment Act of the WA Parliament was

not adopted until August 2020. Zeph's claims in these proceedings closely mirror the terms of the letters that were sent well prior to the passage of the Act and immediately following its incorporation in Singapore.

(Slide 95) You can see on the slide a letter which you've already seen earlier today, a letter that was sent by MIL in respect of Mineralogy's investment in Zeph on 4 February 2019 -- that's Exhibit R-141 -- which was sent less than one week after the Claimant acquired the shares in Mineralogy. And you can see the highlighted passage referring to "interference in the rights of Mineralogy under the State Agreement".

I come then to the purpose of the restructure. Tribunals applying the principles articulated in the Philip Morris Asia award have repeatedly confirmed the importance for abuse of process objections of the purpose behind the relevant corporate restructure.

(Slide 96) For instance in Alverley v Romania, RLA-71, the tribunal stated at paragraph 376 of its award of 16 March 2022 that:

"... the correct test is whether a determinative or principal purpose was to gain the protection of the treaty."

You can see that in the highlighted passage at the end of that paragraph.

And the Cascade v Turkey Tribunal, RLA-98, said at paragraph 340 and also 341 of its award of 29 September 2021 that:

"... a key objective ... is to derive from the evidence a conclusion as to whether an investment transaction was made for the genuine 'purpose of engaging in economic activity' in the host State, or only apparently to obtain treaty protection in the face of a looming dispute, for an investment which (prior to the transaction) would not have been entitled to such protection."

The Cascade tribunal is there quoting the passage immediately before footnote marker 458 of the award in Phoenix Action, which is RLA-91.

Tribunals have also confirmed that the purposes of the restructure must be assessed subjectively, by reference to what the evidence discloses to be the Claimant's actual purpose at the relevant time, and also objectively, by reference to what a reasonable investor in the Claimant's position could have had as its purpose.

As to the timing for assessing purpose, Zeph appears now to have abandoned its earlier position that a 2008 meeting concerning an IPO in Hong Kong is somehow relevant to assessing the reasons behind the

restructure; it made that concession in its Rejoinder at paragraphs 462 and 463. So the parties agree that the Tribunal should assess the evidence of the purpose of the restructure as at 2018 and early 2019.

(Slide 97) Now, although the Claimants asserts that commercial reasons were the primary reasons for the restructuring, it now admits that investment treaty coverage was an "ancillary purpose". That is set out in the Rejoinder at paragraphs 380 and 383, which are on the slide.

By reason of that concession, the parties now agree that Zeph was incorporated, at least in part, for the purpose of securing treaty protection for what were otherwise purely Australian entities. As the Solicitor-General has explained, the contemporaneous documents and the Mineralogy Group's conduct at the relevant time reveal that securing treaty protection in relation to the escalating dispute with WA was a determinative purpose of the restructure; and further, the urgency with which the restructure was undertaken is inconsistent with the alternative rationales put forward by Zeph to explain the actions of the Mineralogy Group.

The reasons that Zeph invokes to explain its incorporation in 2019 and its acquisition of Mineralogy shortly afterwards are ex post rationales developed for

the purpose of these proceedings. This explains why their contours have shifted even over the course of the written pleadings, and why there are no contemporaneous documents to support them.

Now, this of course matters. The rationale for a given restructuring should be, insofar as concerns the investor, a well-known fact. The investor should not be casting around years after the event took place looking for reasons, and then abandoning reasons that it has suggested when they are shown to be implausible.

The first of these rationales, which is the so-called "alleged coal funding rationale", arises from the proposition that Zeph was inserted into the chain of ownership of Mineralogy in order to assist in securing funding from Singapore banks to develop the coal holdings of its subsidiary Waratah Coal in Queensland. Australia's independent experts have considered this purported rationale and it does not withstand scrutiny.

(Slide 98) Mr George Rogers is an independent expert with over 30 years' experience in the financing of mines. He states in his expert report (paragraph E.1.1.1) that there was:

"... no basis for believing that Singapore banks would have been more likely to fund the coal projects of Singapore companies than Australian ones [in the

relevant period] between December 2017 and January 2019."

He also says, in the second extract on the slide (paragraph G.6.1.7), that Singapore banks had:

"... no track record in arranging [or] structuring a project financing for a coal mine of any size ..."

He also says (paragraph E.1.1.2) that there is:

"... [no] serious basis for Mineralogy to have believed that the insertion of Zeph into the corporate structure would increase the likelihood of attracting financing from Singaporean banks, or indeed those of any nation."

He also says (paragraph G.8.1.1) that:

"Even the most basic research, due diligence or conversations would have told Mr Palmer and Mr Martino ..."

Who also gave evidence on this issue:

"... that there would be no improved access to finance by their insertion of Zeph into the corporate structure."

He also said that the stated urgency would not have been for project finance-related reasons.

(Slide 99) Professor Lys, an Emeritus Professor at the Kellogg School of Management at Northwestern University in Illinois, who is an expert in economics

and finance, likewise considers the alleged coal funding rationale to be fundamentally flawed.

In his first report, he notes at paragraphs 540 to 542 that there is no evidence that the transfer of Mineralogy shares to Zeph would yield any advantage for procuring financing for Mineralogy's mining operations in Australia.

At paragraphs 593 to 595, he notes that there is no evidence that any staff with the expertise necessary to realise the alleged coal funding rationale were at any time engaged by or for Zeph in Singapore.

Also, in the third extract on the slide, at paragraph 529, he notes that there is a lack of contemporaneous documentary evidence supporting this claimed rationale for the restructure. And you can see, if you continue to read in the not-highlighted section of paragraph 529, the types of documents that Professor Lys would have expected to have been available and to have been produced in the course of the alleged rationale.

Now, the Claimant has no substantive response to any of this expert evidence. It chose not to put on rebuttal evidence, it chose not to take the opportunity to cross-examine these experts on their evidence, and nor did it take the opportunity to file with its

Rejoinder any of the types of documents that Professor Lys noted would have existed had this been a genuine, let alone a determinative, rationale for the restructure.

In fact, the Claimant has specifically withdrawn most of the limited evidence it had filed in support of this rationale through its eleventh-hour decision to no longer rely on the witness statements of Messrs Martino, Harris and Migliucci. The withdrawn witness statements included purported evidence of conversations about the coal funding rationale, and they also concerned the availability of funding in Singapore.

But they are no longer before the Tribunal and we are unable to test that evidence in cross-examination. This leaves the alleged coal funding rationale supported only by Mr Palmer's assertions. And the only reasonable inference for the withdrawal of those witnesses is that they would not have supported Mr Palmer's version of events.

I turn then to the alleged tax rationale. Australia would first note that the contours of this rationale have shifted over the course of the proceedings.

(Slide 100) We understand Zeph's current position to be that the restructure was in some way connected with an asserted plan on the part of Mr Palmer to relocate to

Singapore to take up permanent residency there in order to save AUD 90 million in personal tax. This plan required him to give up his Australian tax residency, as is acknowledged in the Rejoinder at paragraph 713.

Again, there is a lack of contemporaneous documentary evidence supporting this rationale. Neither Mr Palmer nor Zeph have provided evidence of having received any substantive contemporaneous advice from a tax expert as to alleged tax benefits.

Mr Palmer asserts that he did his own research as to tax benefits on the internet. That is simply implausible. Indeed, it is clear that Mineralogy was receiving some advice from Mr Sorensen as to the adverse tax implications that the restructure might cause, although that advice has not actually been produced.

What few documents have been produced, such as Exhibit R-600, which the Solicitor-General referred to earlier, confirm that to the extent any tax consequences were considered during the course of the restructure, the Mineralogy Group sought to preserve its existing tax status.

(Slide 101) That was in R-600, which is on the screen again now: the email from Mr Sorensen dated 22 January 2019, the date immediately after the incorporation of Zeph. In this email, Mr Sorensen tells

Mr Palmer that the new Singapore company, Zeph, and the New Zealand company, MIL, both need to maintain Australian tax residency.

As the Solicitor-General said earlier, we wanted to cross-examine Mr Sorensen about this matter. But again, his evidence has been withdrawn.

From the documents provided by the Claimant with its Statement of Defence, its SODPO, Mr Palmer only sought advice as to the implementation of this plan in March 2024, during these proceedings.

This can be seen in Exhibit C-495 -- and these are not, I believe, extracted on the slide. But Exhibit C-495 is a short letter from Ms Sharnie Mitchell of BDO, who more recently appeared as an expert witness on behalf of the Claimant, on a potential AUD 90 million tax saving if Mr Palmer became a tax resident of Singapore. And Exhibit C-496, being a short letter from Mr Louis Lim on the methods of obtaining permanent residency of Singapore.

I don't need to take you to these letters, but both of them are dated March 2024, rather than late 2018 or early 2019, at the time the alleged tax rationale was under consideration and was supposedly motivating the Mineralogy Group restructure.

Australia has provided expert reports by Emeritus

Professor Graeme Cooper of the University of Sydney and Associate Professor Stephen Phua of the National University of Singapore, and the Solicitor General has already referred to their expert reports. They are experts in Australian and Singaporean tax law, respectively, and they offer compelling evidence that no tax advantages arose as a result of the restructure.

(Slide 102) As Professor Graeme Cooper explains in his report, which you can see on the slide at paragraphs 24 and 25, the insertion of Zeph into the corporate chain did not give rise to any Australian tax advantage for Mr Palmer. He goes on to say that the restructure in fact created tax disadvantages for the Mineralogy Group and an ongoing imperative to ensure that the management of Mineralogy and the two new international companies, MIL and Zeph, only occurred in Australia. And that explains the email from Mr Sorensen to Mr Palmer which we just looked at, Exhibit R-600.

(Slide 103) Professor Phua likewise explains that the incorporation of Zeph and its insertion into the chain of ownership of Mineralogy was superfluous and wholly unnecessary for any alleged personal tax advantage for Mr Palmer in Singapore. He also says that it created potential tax disadvantages for the Mineralogy Group.

Now, Zeph itself has not offered any evidence, any witness evidence, capable of substantiating its position that the restructure was motivated by tax reasons. As the Respondent pointed out in its SOPO at paragraphs 340 and 341, there were significant deficiencies in Mr Martino's evidence on this purported rationale, including inconsistencies with Mr Palmer's evidence on this matter.

And the short expert report of Ms Mitchell takes matters no further. That report simply cites fragments of the evidence from Professors Cooper and Phua out of context and asserts, without offering any supporting analysis, that tax advantages would have accrued to Mr Palmer as a result of the restructure.

(Slide 104) Finally on this point, Zeph has confirmed in its Rejoinder that Mr Palmer in fact remains an Australian tax resident and that there has been no activation of the restructure for the purpose of obtaining tax advantages. That can be seen on the slide at paragraph 513 of the Rejoinder. And the Claimant says that it will get professional advice as to the activation of that plan if and when that happens.

But Zeph's failure to activate this plan, and its explanation for its failure to activate this plan, is wholly inconsistent with the contemporaneous documents

at the time of the restructure indicating that the restructure was undertaken with some urgency.

For completeness, with respect to the incorporation of MIL in New Zealand, the Claimant elected not to engage with Australia's submissions or expert evidence on its alleged lithium rationale, despite now claiming in its Rejoinder that it has not abandoned this purported rationale as an explanation for the incorporation of MIL. The Claimant simply states that it's addressed in the witness evidence of Mr Martino and Mr Palmer.

As to this, of course Mr Martino's evidence has been withdrawn; and yet again, there is a lack of documentary evidence as we would expect to find if it was a genuinely motivated incorporation of MIL in New Zealand. So the Tribunal has only the uncorroborated evidence of Mr Palmer as to this alleged rationale.

(Slide 105) Mr Palmer in his evidence and the Claimant in its submissions also entirely fail to engage with the expert report of Mr Daniel Kalderimis KC that it was unnecessary to have a New Zealand company to engage in lithium exploration. And you can see a summary of Mr Kalderimis's conclusions on that issue extracted on the slide.

So the stated reasons for the incorporation of MIL as the first step in the restructure does not withstand any scrutiny.

Madam President, members of the Tribunal, I turn next to foreseeability.

(Slide 106) As the tribunal accepted in Pac Rim, RLA-33, at paragraph 2.100, the Tribunal needs to determine whether a restructure has taken place:

"'... at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration.'"

It's extracted on the slide on the screen.

And the tribunal in Cascade Investments v Turkey, RLA-98, held that a dispute will be foreseeable where it was subjectively actually foreseen by an investor or in circumstances where:

"... a reasonable investor, conducting an appropriate inquiry, should have understood that the investment it was acquiring already faced a significant risk of government action that would adversely affect its rights ..."

The Cascade tribunal noted that in many cases, specific government action is preceded by some period of deteriorating relationships, and the longer the relationship deteriorates, the more foreseeable adverse

state action may become. That's from paragraphs 345 and 347 of the award in Cascade.

Now, in the present case, the restructure clearly took place following such a period of deteriorating relationships between Mineralogy and companies in the Mineralogy Group on the one hand, and the WA Government on the other.

By at least late 2018, to use the words of the Transglobal v Panama tribunal, which is RLA-97 -- this is paragraph 116 of that award, which is not on a slide -- "it was clear that there was a problem" between Mineralogy, which was at that time, of course, wholly Australian owned, and the WA Government, in light of the strongly contested positions of both parties with respect to the WA Government's threat to amend unilaterally the State Agreement to the detriment of Mineralogy.

Both the timeline and the conduct of the Mineralogy Group, including its engagement with Australia and its invocation of investment treaty protection in correspondence, unequivocally confirm that it had foreseen that the Government of Western Australia may take adverse state action in relation to unilateral amendment of the State Agreement, and that a claim was in fact "in prospect at the time[] of the

restructuring". That's language taken from the ConocoPhillips award at paragraphs [279] and 280, RLA-94.

Now, Zeph nonetheless seeks to avoid its clear statements in previous correspondence by characterising the dispute at issue in these proceedings by reference to the Amendment Act, which was passed by the Western Australian Parliament on 13 August 2020, and which Zeph contends was not foreseeable at the time it was incorporated.

Key to the Claimant's submissions in this respect is its position that the specific measure at issue in the treaty claim must have been foreseen for that claim to constitute an abuse of process. Yet the foreseeability test for the purpose of an abuse of process objection focus on the foreseeability of the dispute, and not the precise measure at issue in the resulting claim. In this respect, the Claimant's submissions in its Rejoinder in relation to several decisions take it no further forward.

(Slide 107) For instance the Claimant has referred to the Philip Morris Asia case, which is extracted on the slide, quoting at paragraph 341 of its Rejoinder -- I'm sorry, this is paragraph 554 of the award (RLA-95) -- that:

"... a dispute is foreseeable when there is a reasonable prospect ... that a measure which may give rise to a treaty claim will materialise."

And we entirely agree with that statement. As the Tribunal will recall, the precise facts of the Philip Morris case were that the plain packaging measure had in fact been announced by the Australian Government.

Now, what the Claimant is seeking to do is to conflate the need for the dispute to be foreseeable with the need for the specific measure to be foreseeable, but tribunals have been clear that it is only the dispute that must be foreseeable. I refer to our Reply, paragraphs 245 to 258.

(Slide 108) The Claimant also seeks to rely on the choice of words of the Pac Rim tribunal, which is RLA-33, which refer to the foreseeability of a specific future dispute. It's worth looking at exactly what the Pac Rim tribunal said in the proper context of its reasons in that case.

At paragraph 2.96, which is not on the slide, the tribunal noted that the parties had suggested three possible points in time when a change of nationality can become an abuse of process. And at paragraph 2.99, it came up with the formula which the Claimant invokes, that:

12:32 "... the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy."

But that is not where the tribunal ends its analysis. At paragraph 2.100, the tribunal expressly accepts:

"... the Respondent's general submission that: '... it is clearly an abuse for an investor to manipulate the nationality of a shell company subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration.'"

The tribunal went on to explain the policy rationale behind this approach, namely that the doctrine of abuse of process must preclude unacceptable manipulations by a claimant acting in bad faith and fully aware of an existing or future dispute.

This is the test that informed the tribunal's decision in Pac Rim: was the investor aware of events that had occurred which negatively affected its investment and which may lead to arbitration?

The Claimant refers to other cases which are similarly unavailing. The Respondent has addressed

12:33 these in its SOPO at paragraphs 305 to 316 and in its ROPO at paragraphs 241 to 264.

Now, the approach adopted in the Philip Morris award that a dispute must be foreseeable, not the particular measure, is widely regarded as correct, and this approach has been applied in subsequent cases.

(Slide 109) One such case is Cascade v Turkey, to which I have referred a few times already. In its award of 20 September 2021 -- this is RLA-98 -- the tribunal provided a persuasive analysis, which it described as being consistent with the approach in Philip Morris Asia, of what must be foreseeable for the purposes of an abuse of process objection. And there are two paragraphs to which I draw your attention on the slide: 350 and 351.

If I can just look to the highlighted section in paragraph 350:

"Logically, a domestic investor who artificially imposes a foreign entity in an ownership chain in the context of a developing disagreement with its own government, solely to allow itself to invoke an investment treaty in the event the State takes adverse action against its rights, is no less guilty of abuse of process because the State ultimately adopts measure X against the investment, rather than measure Y

12:34 which the investor may have predicted."

Turning to paragraph 351, and again looking at the highlighted text:

"... what must be reasonably foreseeable is that the State will take some adverse action against the investment, on account of a disagreement or conflict of interests with the investor, which -- when it transpires -- will impact the investor's rights and therefore be 'susceptible of being stated in terms of a concrete claim' ... That formulation does not require foreseeability of the precise measure that the State eventually adopts, just 'a measure' ... that is capable of harming the investment to the degree that a treaty claim could be asserted."

In Australia's submission, this approach of the Cascade tribunal is the correct articulation of the principles regarding foreseeability as they apply in cases such as the present. And contrary to the submissions of the Claimant, it is also the way that the awards in Alverley, which is RLA-71, and Ipek, RLA-99, should be understood.

The relevant passages from Alverley -- I won't take you to them now in the interests of time, but I'd ask to you look at paragraph 385 of the Alverley tribunal's award at RLA-71, and paragraphs 320 and following of the

12:36 Ipek award at RLA-99.

As to the Claimant's reliance on the decisions of the Swiss Federal Tribunal in Clorox II, the Claimant here again conflates the foreseeability of the dispute with the foreseeability of the measure.

(Slide 110) If we look at the judgment of the Swiss Federal Tribunal in Clorox II, which is RLA-142, we can see at paragraph 5.6, which is on the slide -- this is taken from the English translation; when you are looking in the authorities bundle, the English translation follows the original French -- the Swiss Federal Tribunal held that it was not possible to infer from the President's speech that, firstly, a concrete measure would be adopted, you can see the first step there highlighted in the sixth line of the extract; and secondly, that any such measure would actually affect the investment, the investment here being products marketed by the investor in that case; and thirdly, that the effect of the measure would be of such an extent as to lead to a dispute.

So in other words, there was no need for an investor to foresee the specific measure that would be implemented, simply that something would happen.

This does not mean, as the Claimant suggests in its Rejoinder at paragraph 354, that an abuse occurs

whenever it is reasonably foreseeable that a state will take any measure which will result in any type of investment dispute. What it means that it is no answer to our objection that the Mineralogy Group did not predict the passage of the Amendment Act prior to the transfer of the Mineralogy shares to Zeph on 29 January 2019.

It is instead decisive that a dispute concerning the unilateral amendment of the State Agreement by the Western Australian Parliament, to the detriment of Mineralogy, was foreseeable. Indeed, it was actually foreseen prior to January 2019. This is amply demonstrated by the contemporaneous letters and public statements that the Solicitor-General took you to this morning.

Madam President, members of the Tribunal, in these circumstances, Zeph's invocation of Article 20 of Chapter 11 of AANZFTA is an abuse of process and must be dismissed by this Tribunal.

I now ask you to give the floor to Dr Esme Shirlow. Thank you.

THE PRESIDENT: Thank you.

DR SHIRLOW: (Slide 111) Madam President, members of the Tribunal, I will address Zeph's reliance on the principles allegedly relevant to estoppel, admissions,

approbation and reprobation, unilateral acts, acquiescence and good faith.

The factual foundation for Zeph's reliance on these principles is a grab-bag of administrative decisions, often of a non-discretionary kind, by which Australian authorities have applied domestic statutory definitions. Those definitions are all expressed in terms that differ markedly to the matters under AANZFTA that are relevant to Australia's preliminary objections.

(Slide 112) Specifically, the Claimant first refers to the fact that Zeph was registered by the Australian Securities and Investments Commission, or ASIC, as a "foreign company" under the Australian Corporations Act, which is CLA-161.

Under Section 9 of that Act, ASIC's registration of Zeph followed automatically from Zeph's application, Zeph being a company that is "incorporated ... outside Australia".

The Claimant also refers to determinations by the Foreign Investment Review Board, or FIRB, and the Australian Taxation Office, the ATO. Those determinations were to the effect that Mineralogy is a "foreign person" within the meaning of the Australian Foreign Acquisitions and Takeovers Act, which is abbreviated as "FATA" and is CLA-166.

That definition again applied because Zeph is "a corporation formed outside the limits of the Commonwealth of Australia". And you can see that definition being applied in RLA-122 and R-603.

The bare fact of Zeph's incorporation in Singapore is, of course, not in dispute in these proceedings. Australia instead says that the circumstances in which the Claimant was incorporated mean that it cannot invoke treaty protection.

It also takes issue with whether the Claimant has substantive business operations in Singapore, and ASIC, FIRB and the ATO each expressed no opinion on those matters. Nor did they address whether Zeph could be regarded as an investor with an investment within the meaning of Chapter 11 of the AANZFTA.

(Slide 113) In another example, the Claimant refers to the decisions of the Queensland Revenue Office, QRO (CLA-167), and Revenue WA (CLA-168). Those decisions were to the effect, first, that the Mineralogy Group was exempt from having to pay landholder duty as a result of the Mineralogy Group restructuring.

Second, it was determined that foreign transfer duty was payable on a subsequent purchase of residential real estate in Western Australia by Mineralogy. That was on the basis that Mineralogy was an entity in which

a company incorporated in Singapore, being Zeph, had a controlling interest.

Both decisions were made applying the relevant domestic statutory provisions, the detail of which is set out in paragraph 29 of the ROPO. But those statutory tests again had nothing to do with the matters relevant to Australia's preliminary objections.

(Slide 114) The Claimant also refers to the Respondent having reported the present claim as a "contingent liability" in its federal budget papers. A contingent liability is of course expressly equivocal and conditional. But in any case, it was reported under domestic standards, which again have nothing to do with the questions before this Tribunal. For more detail on the relevant domestic tests that were applied, I refer you to paragraphs 19 to 30 of the ROPO.

So turning first to the principle of estoppel, and as Australia has explained in the ROPO at paragraphs 10 to 18, estoppel has been repeatedly and consistently defined to require: first, clear, consistent unequivocal and unambiguous statements or conduct on the part of one party; second, that those statements or conduct be made voluntarily, unconditionally and under authority; and third, that they have induced reliance by another party, causing some detriment to that party or some benefit to

12:43 the party making the statements or undertaking the conduct.

None of the acts or representations that Zeph invokes come anywhere close to the requirement that conduct be clear, consistent, unequivocal or unambiguous. That is because, as I have explained, none of the conduct [or] statements was made with reference to any of the requirements in AANZFTA put in issue by Australia's preliminary objections.

The situation may of course be different if Australia were seeking to challenge, for example, the fact of Zeph's incorporation in Singapore or its ownership of shares in Mineralogy, assuming the other requirements of estoppel were met. But it does not challenge those facts, and so the domestic decisions on those matters have no relevant overlap with any of the matters this Tribunal needs to determine.

The Claimant argues that the alleged representations need not be specific to AANZFTA in order to give rise to estoppel under international law. But the reality is that AANZFTA has specific requirements, and if a representation under domestic law has no overlap with those requirements, it plainly cannot be unequivocal or unambiguous with reference to them.

The cases cited by the Claimant in support of its

12:44 position on this matter or inapposite.

(Slide 116) The Claimant first cites Middle East Cement v Egypt, which is CLA-174, which you can see on the slide. And while the tribunal in that case did not employ the language of estoppel, the determinations made by the domestic authorities overlapped in any case entirely with the matter that the Tribunal was required to determine in applying the investment treaty. And that matter was: who, as a matter of domestic law, owned a ship.

(Slide 117) In Bankswitch v Ghana, which is RLA-119, the matter at issue before the tribunal was whether an agreement was valid and enforceable under domestic law. The tribunal held that this matter had been directly addressed in clear terms by domestic authorities, including by the Attorney-General and Minister for Justice in prior statements. And you can see the clarity of the statement extracted on that slide (paragraphs 11.82 and 11.83).

The Claimant's reliance on paragraphs 117 to 118 and 250 of the partial award from Eureko v Poland, which is CLA-257, is similarly misplaced. That tribunal did not even engage the principle of estoppel. It instead was analysing the application of an umbrella clause in considering whether a state was bound by a contract due

12:45 to its involvement in contractual negotiations.

(Slide 118) The Claimant has also sought to contend that a broader view of estoppel, which does not require detrimental reliance, should be preferred to the restrictive view, which does. However, as the Respondent has established at paragraph 17 of the ROPO, the decisions cited by the Claimant do not support its position. That is because those tribunals did not analyse the relevant submissions under the principle of estoppel, or they referred to an element of at least reliance.

The International Court of Justice and investment tribunals have repeatedly emphasised that detrimental reliance is required to give rise to estoppel under international law. There is no broad principle of estoppel, and the Claimant's attempt to argue otherwise must be rejected.

The requirement of detrimental reliance has fatal consequences for the Claimant's case on estoppel. This is because the Claimant has not demonstrated that it changed its position in reliance on the statements and conduct it invokes to its detriment or to Australia's benefit. And very obviously, it could not reasonably have done any such thing.

The Claimant instead cites vague detriments and

12:47 benefits which are unconnected to any of Australia's alleged representations. Zeph alleges, first, that due to Australia's conduct, and I quote from paragraph 685 of the Rejoinder:

"... the Claimant's local ... subsidiary elected to retain over $240 million ... of dividends in Australia."

But where is the evidence of this supposed election to retain dividends in reliance on Australia's conduct? There is none.

As to the decisions of QRO and Revenue WA, there can be no suggestion by Zeph that it suffered any detriment as a result of being granted an exemption from the payment of landholder duty under the applicable legislation. And you can see that exemption being granted at C-63, annexes 26 and 27.

Foreign transfer duty was paid by Mineralogy in respect of Mineralogy's -- not Zeph's -- purchase of a residential property in Western Australia in 2019, and the ATO separately advised Mineralogy that it may have breached the FATA because it did not seek approval from the FIRB before purchasing that same property. On 31 March 2022, as Zeph acknowledges at paragraph 686 of the Rejoinder, Mineralogy transferred the property to Mr Palmer to remedy that breach and avoid the applicable duty.

12:48 The proposition appears to be that Mineralogy, an Australian company, has somehow suffered detriments relevant to these proceedings by being required to comply with Australian law while operating in Australia. This should be given short shrift by the Tribunal. Zeph's submissions as to other nebulous detriments at paragraphs 609, 612 and 692 of the Rejoinder should be rejected for similar reasons.

Turning then to admissions. At paragraph 560 of its Rejoinder, Zeph defines the concept of "admissions" by reference to Professor Bowett's well-known article on estoppel and acquiescence, and that's RLA-104. In that article at page 195, Professor Bowett notes that:

"Where one or other of the foregoing essentials of a binding estoppel is absent the representation ... may still be adduced in evidence as an admission to show a lack of consistency or weakness in a party's position."

Of course, to show any lack of consistency or weakness in Australia's position, the alleged position must be referable to a position the Respondent is taking in these proceedings. An element of specificity is therefore also implicit in the concept of admissions.

(Slide 120) This requirement is emphasise indeed the Channel Tunnel partial award at paragraph 277, and

12:50 that's RLA-171 on the slide. There the tribunal rejected the parties' respective reliance on alleged admissions on the basis that to constitute admissions:

"... [they] would need to be unequivocal, and unequivocally addressed to the issues before the Tribunal, before they could be seriously taken into account as admissions."

(Slide 121) Zeph itself accepts as much at paragraph 563 of the Rejoinder, when it contends that the statements and conduct that it invokes as the relevant admissions must be "clear and unequivocal" and must "be objectively construed by the Respondent for the purposes of AANZFTA".

Obviously that test is not met so far as concerns the supposed admissions made by entities like ASIC or Revenue WA. Zeph also relies on purported admissions in these proceedings, and these have already been addressed by my colleagues.

Zeph's reliance on Australia's denial of benefits, which it says constitutes a recognition by Australia that Zeph is an investor with an investment under AANZFTA, is a nonsense. In short, as the tribunal in Fraport recognised at paragraph 395 -- and that's CLA-176 -- an admission cannot arise out of a party making "legitimate arguments in the alternative which

12:51 scrupulous counsel are entitled to make".

Australia is, moreover, not seeking to resile from any of the statements which Zeph describes as admissions. So no issue of approbation and reprobation can possibly arise.

(Slide 123) In support of its position on unilateral acts, the Claimant cites the Nuclear Tests case, which is CLA-246, and the International Law Commission's Guiding Principles on Unilateral Declarations, CLA-247. Yet both sources expressly recognise that to constitute unilateral acts, statements or conduct need to be -- to quote from the ILCA Guiding Principles (paragraph 7):

"... stated in clear and specific terms [and] ... In [the] case of doubt ... interpreted in a restrictive manner."

(Slide 124) And as Nuclear Tests emphasises (paragraph 43), the relevant declaration must be articulated "publicly, and with an intent to be bound".

Self-evidently, Australia has made no representations that have satisfied that test.

The Claimant's reliance on the principle of acquiescence is similarly misplaced. Australia has not been silent in respect of any of the matters that Zeph contends to have been established through acquiescence. Australia has repeatedly and consistently disputed

12:52 Zeph's claims to be an investor with an investment that is entitled to invoke the benefits of AANZFTA.

For good measure, I note that the Claimant also makes various scattergun allegations as to a lack of good faith on the part of Australia. Plainly, in our view, these are also misconceived.

Given the forgoing, the Respondent respectfully submits that the Tribunal should reject the Claimant's submissions on estoppel, admissions, approbation and reprobation, unilateral acts, acquiescence and good faith.

Thank you. That concludes Australia's opening submissions.

THE PRESIDENT: Thank you very much for this opening argument, to all of you.

I don't know whether my colleagues have questions at this stage for counsel?

MR KIRTLEY: We can wait for the questions.

THE PRESIDENT: No questions at this stage. We might have questions, as we mentioned, tomorrow night or whenever is appropriate, for the closing remarks.

Fine. So this would be a good time for the lunch break. Is it fine if we resume at 2.00? And then we'll listen to the Claimant.

Is that fine with the Claimant?

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

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

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

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

answer.

It's a nonsense to suggest that a defendant can answer a claim brought by a plaintiff by changing a claim and answering some other matter that the Claimant has not sought judicial review on, judicial dealings with. The Claimant will not be baited by the Respondent to enter into a debate for that purpose, nor will the Claimant assist the Respondent in wasting the Tribunal's time. The Claimants will, however, deal with a couple of issues that the Respondent has raised and will set out the Claimant's case, which is based on clear facts, the Respondent's submissions, evidence and law.

Before I get into the substantive part of the Claimant's opening, I want to first make a preliminary comment about my involvement and respond to two matters that have been raised in the Respondent's presentation this morning.

Why I have addressed the Tribunal personally, and the Claimant's approach to the conduct of this hearing, and the Respondent's decision to question when the Claimant decided to restructure and the CITIC-related correspondence evidence.

As the Tribunal will have gathered from the documents and submissions in this case, I tend to want

to approach these matters directly so that I'm available for the Tribunal to answer any questions it may have. I take control of these matters and make decisions based on my own judgment. And it's been that way, I've conducted my affairs for over 40 years as a successful businessman, and I felt it was important that the Tribunal understands this from the outset.

Moreover, I believe this affords the Tribunal with a chance to raise matters with me directly, importantly, both because I am the only person with the full and direct knowledge of the relevant facts in this case, and also because I am dismayed by the ongoing attacks on my credibility.

Now, I'm eager to help the Tribunal put to bed -- and in doing so, dismiss outright -- the Respondent's challenges, including those which are based on groundless attacks on my evidence, such as my rationale for incorporation of Zeph. Indeed, throughout my career, I have never faced accusations of the nature the Respondent has thrown at me in recent months, and which they continued to do so in submissions this morning.

I take decisions in good faith, which I accept are often unconventional, but they are always taken with a view of resolving issues swiftly and fairly. A good example of this, which I will return to later, is the

decision not to call certain witnesses for this hearing. I took the view that in light of my evidence, Australia's admissions and revised case in their Reply, there is no need to waste anyone's time with unnecessary evidence.

That is also, importantly, the approach I adopt for corporate and commercial decisions, perhaps unlike a lot of corporates which are managed by committees. I hope this is useful in the context.

I would like to start, though, with two discrete points to ensure that there's no room for doubt at the onset about this. It concerns the Respondent's decision to question when the Claimant decided to restructure, and the CITIC-related correspondence in the evidence.

The Claimant's primary position is, of course, that both matters are not relevant to this hearing, following the Respondent's admission that the Amendment Act dispute was not foreseeable at the time of restructuring.

The time of restructuring is evidenced by the Claimant's certificate of incorporation, which is Exhibit C-70; and the share purchase agreement with Mineralogy International Limited, which is Exhibit C-562, and which Respondent has admitted at paragraph 64 of the Reply was legal and effective.

Notwithstanding the Respondent's position, it appears to be that two matters are important in the Respondent's case it wishes to present before the Tribunal. So for that reason, the Claimant will make a short submission on each of those matters, which are facts the Respondent cannot avoid.

Firstly, I will address the decision I made to offshore in early June 2018. The Respondent says there are no documents, but that is not true. This matter is addressed in my evidence: in my first witness statement in paragraphs 113 to 139.

(Slide 2) I refer the Tribunal to Exhibit C-166, which is a letter dated 12 December 2017 from the Premier of Queensland to the Prime Minister of Australia vetoing a funding of $1 billion to the Adani coal project. In paragraph 123 of my first witness statement, I explain that the Adani coal project is being developed alongside the Claimant's proposed coal project in Queensland. I note that the Adani project was eventually funded through Singapore.

(Slide 3) Secondly, I refer to Exhibit R-484, which is a draft bill entitled "Coal-Fired Power Funding Prohibition Bill 2017", which was legislation then currently before the Australian Parliament, inter alia banning the funding of coal projects.

(Slide 4) Thirdly, I refer to Exhibit C-165, which is an article evincing that Mineralogy's own bank, the National Bank --

THE PRESIDENT: Just for the transcript, it's R-165.

MR PALMER: Sorry, Exhibit R-165, which is an article evincing that Mineralogy's own bank, the National Australia Bank, had made a decision not to fund any new coal projects.

So in early 2018, as the evidence shows at paragraphs 119, 122 and 123 of my first witness statement, these three documents were in my possession. And it was clear, after considering the documents in June 2018, that the coal project's chances of obtaining funding of billions of dollars needed for its development in Australia were non-existent.

The Claimant would submit that the decision I faced then as a director of Mineralogy and Waratah Coal, personally, was whether or not the project should be closed and the millions of dollars of investment written off, or was there some other possibility of obtaining coal funding. In short, was there a positive decision I could take, for long-term commercial reasons, to avoid this type of major significant downside by writing off the whole investment?

(Slide 5) The answer can be found in Exhibit C-167,

which is a news article in The Straits Times of Singapore, which confirms that coal funding was available in Singapore.

Paragraphs 126 to 130 of my first witness statement further expand on why Singapore was attractive from a fundraising perspective. The Claimant submits it was a simple commercial decision, being: should the coal project be closed down, and if so, should the investment of many millions of dollars be written off; or would it be better to have a go and restructure, and see if we could raise money in Singapore? A simple, straightforward commercial decision.

The Claimant submits that most commercial companies would choose life over death while there were prospects of obtaining funding offshore. And that is what I decided to do in June 2018, as the evidence I've just mentioned demonstrates, and sets out the rationale for doing so.

Historically, my commercial judgment has prevailed in similar situations over the years. And the Claimant submits it was comfortable with my own judgment, especially when the only alternative was to write off the whole investment. Indeed, despite the evidence of purported experts served by the Respondent in this case criticising my approach, I note that there had been no

commercial downside to that commercial decision.

Pausing there leaves the Tribunal with my evidence about the rationale and the facts.

(Slide 6) Second, in respect of the CITIC letters and the associated matters, I refer the Tribunal to Exhibit C-104, which is a paper written by the former Western Australian Premier Colin Barnett. I refer in particular to page 317, which I think is on the slide, which states:

"An important feature of a State Agreement is that they, unlike ... other statutes of the Parliament of Western Australia, are facilitating documents. Other statutes perform regulatory functions of one sort or another ... Whereas other statutes are able to be changed at will, the provisions of State Agreements are only able to be changed by mutual agreement in writing by the parties to each State Agreement. State Agreements therefore provide certainty that ground rules for the life of each agreement project cannot be changed unilaterally."

At page 321, it goes on to say:

"Unlike other statutes of Western Australia that can be changed by Parliament, State Agreement provisions can only be amended by mutual agreement [of] the parties ..."

I would point out that no government for over 70 years had sought to change the terms of a state agreement unilaterally. The convention was they couldn't do so, by the terms of the contract and the fact that Parliament had ratified all state agreements, which had a clause saying they could only be changed by consent.

The Claimant submits that I was never of the view -- and no one could have imagined -- that a government could or would seek to change a state agreement other than by consent. I confirm that it was never my view, and I never expressed that view. It was also a truly remarkable and unmeritorious submission when one stands back from it.

No Western Australian Government, to the best of my knowledge -- and certainly not Australia -- has ever acted in that way. If Australia is standing before the Tribunal submitting that there is some form of ongoing foreseeable risk that any of its state agreements or its international treaties could be revoked in [that] manner, [that] is remarkable. If the Respondent is truly making that submission on instructions directly from the Government, it would have the most extraordinary and immediate consequences for the Australian economy, given those watching [the] live

stream, and the risk to a whole host of investment and other arrangements.

In that context, the correspondence between Mineralogy and the then Premier of Western Australia was nothing more than a bluff and bluster, from Mineralogy's perspective. It was a call to call the Premier's bluff, which it did, as the Government never sought to change the State Agreement -- by consent or otherwise -- in respect of the CITIC dispute.

(Slide 7) The Premier backed down, and the CITIC dispute -- which was between CITIC and Mineralogy, and not the Government -- was ultimately determined by the Supreme Court of Western Australia in Mineralogy's favour. The judgment is Exhibit CLA-70.

Regardless, the foregoing matters are of no relevance in law or fact following the Respondent's admissions, which I will later refer to. The Amendment Act, and the dispute flowing therefore from it, was not foreseeable at the time of restructure, or indeed at any time.

(Slide 8) Today I propose to address the following matters in the Claimant's opening oral submissions.

Firstly, I will talk about the burden of proof and the Respondent's failure to adduce any evidence which could possibly satisfy the Tribunal in respect of the

Respondent's objections to jurisdiction.

Secondly, I will deal with the way in which the Claimant is now conducting its case, as a result of the various admissions by the Respondent, and in particular the key concession that the dispute before the Tribunal was not foreseeable. That admission means that the rationale for the restructure is no longer relevant and neither the Claimant's evidence nor the Respondent's evidence with respect to restructure is of any relevance.

Thirdly, I will address a range of admissions made by the Respondent which show that the Claimant is an investor in Singapore, has made investments in Australia and has substantive business in Singapore.

Fourthly, I will take the Tribunal to the actual evidence which proves that the Claimant is an investor in Singapore, has made investments in Australia and has a substantial business in Singapore.

Finally, the Respondent will, for unknown reasons, perpetuate before this Tribunal its ongoing attacks upon me personally. Those attacks are improper, misconceived and a distraction from the real issues in dispute. They should simply be ignored.

In any event, when the law is applied to the Respondent's admissions, the Respondent's objections

fall away. And this dictates that the Respondent's jurisdictional challenge should be dismissed and the relief the Claimant seeks should be granted.

(Slide 9) Before I begin the Claimant's opening submission, the Claimant would like to show the Tribunal part of the Claimant's investment in Australia, through its shareholding in Mineralogy. In this regard, I would like to share with the Tribunal a brief video of the Sino Iron Project. This is Exhibit C-121.

The Sino Iron Project was, of course, approved by the Western Australian Government under the State Agreement and is the Chinese Government's largest single investment outside China. I think it's helpful for the Tribunal to understand the nature of the Claimant's investment in Australia and the type of industry we are considering. It's an existing project, operating on Mineralogy's tenements, which was developed prior to the enactment of the Amendment Act. It is the same as other additional projects that would have been developed but for the Amendment Act.

So if we could just play the video.

(Video Exhibit C-121 played)

This is a video of the mining pit. It's the largest magnetite mining pit in the world. And you'll see the trucks at the front there, which are about 15 storeys

high, each truck, to give you an idea of the scale of the magnitude. And we're travelling at approximately 200 knots by helicopter.

The magnetite ore is mined; it's then crushed. If you see at the right top of the screen, this is at the top of three crushers, which are all about 15 storeys up themselves.

This is looking from the other side of the pit.

On the right side at the top, you'll see a conveyor belt coming up to some buildings up the top, which we'll soon fly over, which is where the magnetite ore is concentrated, before it's shipped by slurry pipe on to the coast, some 25 kilometres away, and through our port.

There's a waste dump we're over now, flying back over the mine. On the right-hand side, you'll see the processing facilities, which we'll soon turn right and fly over.

There are four lines of magnetic concentration where the ore is concentrated. And it's split in two streams, one which goes to tailings, which has waste in it, and the other one which goes to the coast to be exported to China.

There's currently in the vicinity of AUD 18 billion of investment in the project to date. And the process

14:24 is: the ore is first crushed in a crusher and there are three stages -- you can probably see down there -- of magnetic concentration: we pass three concentrators.

Looking further ahead, there's the power station, which is a similar-size station [to that] which powers The Hague.

There's recycling water there that comes back from the tailings dam. This is the tailings dam, where the waste goes to. You'll see the size by the size of the car now that you can see on the left-hand side. This takes up about 20 square kilometres of tailing storage.

The Sino Iron Project and indeed Claimant's investments in Australia are much larger and more extensive than what's being briefly shown in this video, and I think it can only be appreciated and understood by a full site visit to Mineralogy's tenements in Western Australia.

(Pause as video continues to play)

That's it.

The Respondent's jurisdictional objections cannot be allowed to deny the Claimant a hearing in this important investor-state dispute. When the correct law is applied to the relevant facts, it is clear that the Tribunal has jurisdiction to hear the Claimant's claims, and those claims should be heard on their merits.

14:28 I will turn in a moment to address a number of key points which I'd like to make orally. But before doing so, I'd like to emphasise on the record at the very outset that nothing in my oral submission should be treated as varying or departing from the Claimant's case in the Rejoinder, the Response and other written submissions. The Claimant's case is maintained in full.

Further, to the extent that the Respondent suggests -- as it disingenuously sought to do at the pre-hearing conference in August and today -- that the Claimant has somehow changed its case or abandoned any part of its case, that is wrong. As I explained previously at the pre-hearing conference, the Claimant has simply sought to ensure that the Tribunal is not troubled with unnecessary factual testimony in circumstances where the Respondent has now made, a bit belatedly, some crucial admissions.

I'm in a position to address all relevant factual matters, including any reference to the matters set out in the other statements which I incorporate into my evidence in full. All parties to arbitrations such as this have a duty to make sure they are constantly taking steps to assist the Tribunal to streamline the procedure. It is this type of obligation some lawyers often ignore, taking bad points. But I am keen to keep

14:29 matters as clear and as focused as possible.

In this context, in this hearing dealing with jurisdiction, the Claimant relies upon the Notice of Arbitration, the Claimant's Response and Rejoinder, as well as the witness statements and expert reports filed by the Claimant in this arbitration, including all my evidence which has been incorporated by cross-reference to other statements; other than, of course, for this jurisdictional hearing only, the witness statements of Domenic Martino [and] Nui Harris, and the expert reports of Graham Sorensen and Alberto Migliucci.

(Slide 10) I will now turn to the burden of proof.

(Slide 11) The Respondent bears the burden of proving its claims on the balance of probabilities, a burden it has not discharged. This burden is acknowledged by the Respondent at paragraph 23 of the Respondent's Statement of Preliminary Objections, which states as follows:

"As to the applicable standard of proof, arbitral tribunals have frequently applied the 'balance of probabilities' standard, although there may be different ways in which this standard is expressed (such as the 'preponderance of the evidence'). As recently explained by the Carlos Sastre tribunal: ..."

Which is Exhibit RLA-29 at paragraph 147:

14:31 "... 'This standard requires an evaluation by the Tribunal of all the evidence produced by Claimants and Respondent on the issues at hand to determine which party's claims are more likely to be true. Thus, Claimants must present persuasive evidence of the facts to establish jurisdiction for the Tribunal to be satisfied that the burden of proof has been discharged. ... Respondent, in turn, must provide persuasive evidence of the facts that make out its objections to jurisdiction."

(Slide 12) The application of this principle is illustrated in the following decisions, and they are up there for you to have a look at: Antonio del Valle Ruiz v Kingdom of Spain, which is Exhibit RLA-28, at paragraph 495; Churchill Mining decision on annulment, which is Exhibit RLA-31, at paragraph 215; Churchill Mining award, which is Exhibit RLA-32, at paragraphs 240 and 244; Pac Rim decision on jurisdiction, which is Exhibit RLA-33, at paragraph 2.10; Sergei v Russia, which is Exhibit RLA-34, at paragraph 256.

Whereas the Claimant has provided substantial clear, concrete evidence via facts by way of the witness statement served with each Notice of Arbitration and Statement of Claim, Response and Rejoinder, in contrast, the Respondent has provided little or no evidence of

14:32 facts, and failed to contest the Claimant's factual evidence with any equivalent factual evidence of its own. It is the Claimant's respectful submission that the role of the Tribunal in considering the Respondent's objections is to properly evaluate the factual evidence; and/or where there are admissions, to apply the provisions of AANZFTA and international law to such factual admissions in reaching its conclusions.

The position in respect of the Respondent's evidence is even less satisfactory when compared to the Claimant's case and the Respondent's admissions. The Respondent's evidence consists of ill-informed and inadmissible opinion and speculation, often transgressing wholly inappropriate, improper challenges to the credibility of my evidence.

Consistent with the narrative in this case, the Respondent spends its time attacking me personally, and delaying matters with this jurisdictional challenge, rather than focusing on the law and the actual facts.

(Slide 13) The law and the facts are against it. As stated in Philip Morris v Australia, which is Exhibit RLA-95, at paragraph 539:

"... the threshold for finding an abusive initiation of an investment claim is high."

(Slide 14) And Clorox, which is Exhibit RLA-142, at

14:34 paragraph 5.2.4, stated:

"It is up to the party claiming the existence of after abuse of rights to allege and prove the facts ... establish[ing] the foreseeability of the dispute [when the investment was restructured] ..."

Evidence of fact in witness statements filed by the Claimant from persons who were directly involved in the relevant events cannot be displaced by speculative opinion evidence from persons who were not contemporaneously involved in the matters about which they opine, who have no firsthand knowledge of any of the facts.

In the current circumstances, the Respondent's opinion evidence is nothing more than a hypothetical analysis of what certain experts subjectively consider might have been done differently in each case, based on an expert's limited area of expertise, which, by its very nature, isolates them from the context of all the actual factual matters before the Tribunal, when none of them have my commercial or practical business experience.

The Respondent also misses the point that the Respondent's own admissions, made during the course of this arbitration, mean that once the appropriate law is applied to those admitted facts, the Tribunal has

14:35 jurisdiction to hear the Claimant's claims.

Having addressed the burden of proof and the evidence, I will now address the issues.

Firstly, it is appropriate to review why we are here. We are here because of the Amendment Act. It is the Amendment Act which created the present dispute. If there was no Amendment Act, we would not be here. If there was no Amendment Act, there would be no claims for the Tribunal to consider, and this arbitration just would not exist.

The claims in this arbitration are claims emanating from the enactment of the Amendment Act, a piece of legislation which it is common ground was not foreseeable and, inter alia, terminated the arbitration agreement which had only been entered into some three weeks earlier. How could this possibly have been foreseeable over 20 months earlier?

The Amendment Act is Exhibit C-1. The Claimant's primary position is, therefore, that the commercial rationale for the restructuring is irrelevant to the abuse of process objection, because the specific dispute or measure at issue in this arbitration is the Amendment Act and the damage it causes, which could not be foreseeable. Indeed, it is now common ground that the specific measure of the Amendment Act and the resulting

14:36 claims were not foreseeable at the time of restructuring.

Before dealing with the Respondent's investor/investment and substantive business and abuse of process objections, it is worthwhile recalling how the Amendment Act was created, and how it created this present dispute.

On 13 August 2020, the Amendment Act was enacted by the Western Australian Parliament. The object of the Amend[ment] Act was to eviscerate, inter alia, Mineralogy's rights by terminating the arbitration agreement and the mediation agreement, which had only been entered into a few weeks earlier, and the Claimant's right to pursue a claim for Western Australia's established breach of the State Agreement in 2012.

The Amend[ment] Act also terminated the BSIOP dispute as a whole, and it absolved by legislation all liability of the State of Western Australia in relation to the BSIOP proposal and consequent upon the passage of the Amend[ment] Act itself.

To recall, the Amendment Act provided inter alia for the following: that the BSIOP proposal has no contractual or other legal effect, Section 9; that the arbitration agreement and mediation agreement are

terminated; that existing awards, including the first and second awards, are of no effect, and taken never to have had any effect, Section 10; that the State, including the Crown, of Western Australia and the Western Australian State Authority has no liability and cannot have any liability to any person connected in any way with the BSIOP proposal or the passage of the Amendment Act, Sections 11 and 19; [that] there can be no appeal, no review or any other challenge to the State's conduct concerning the BSIOP proposal or the passage of the Amendment Act; that the rules of natural justice, including any duty of procedural fairness, do not apply in respect of the BSIOP dispute or the passage of the Amendment Act; [that] no conduct of the State related to the BSIOP proposal or the passage of the Amendment Act can give rise to commission of a civil wrong or a criminal offence, Sections 18 and 20.

Really, is it acceptable that our politicians and bureaucrats are given immunity from the criminal law and place themselves above the rule of law? Is it acceptable that the Amendment Act take from the courts their jurisdiction in respect of this particular dispute?

Mineralogy, International Minerals and Clive Palmer must indemnify the State against any loss, cost [or]

liability connected with the Amendment Act and the BSIOP proposal, including those arising under international treaties or international law, [and] any loss or cost relating to the BSIOP proposal or the passage of the Amendment Act.

By denying the right to freedom of information, the Government also took away a free press to hold politicians and bureaucrats accountable. The Amendment Act, of course, also created a massive sovereign risk. It was and is an unprecedented piece of legislation, certainly for a western democracy, in terms of the manner in which it was drafted, in secret; in terms of the scope and effect; in terms of the disgusting communications about me and the Claimant by key protagonists, which have since been discovered; and in terms of its consequences.

This arbitration is intended to bring the Respondent to account for its multiple breaches of AANZFTA and flagrant disregard for the rule of law.

Background to this hearing which should be borne in mind when the Respondent remarkably and improperly seeks to suggest that the conduct of the Claimant's side amounts to a sham, an abuse, and fails to particularise or provide any evidence of such: it lies in the Respondent's mouth to make such submissions, given its

own conduct.

As has been said, the Western Australia legislation contemplates significant departures from traditional characteristics of judicial process. It abrogates a court's decisional independence, conscripts it into an implementation of a government plan. It prejudices an issue. It compromises the court's role in quelling a dispute. It renders judicial decisions not final and conclusive, which is inherent by their very nature.

These are fundamental and serious departures from the characteristics of the judicial process, significantly impairing a court's institutional integrity. At risk is the judicial reputation of an independent umpire in the resolution of disputes and [as] upholders of the rule of law. If we effectively permit this kind of treaty breach to go unsanctioned, more and worse are likely to follow.

Key points that the Tribunal should take into account when considering the Claimant's submission are: [firstly,] that the Claimant was incorporated for perfectly proper commercial reasons. This is addressed in my evidence: in the first Palmer witness statement at paragraphs 113 to 139 and in the fifth Palmer witness statement at paragraphs 48 to 72. Secondly, the incorporation of the Claimant was carried out at a time

when the Amendment Act dispute was not foreseeable, as the Respondent has admitted. And thirdly, the Claimant carries on a perfectly proper and substantial business in Singapore and Australia, and has done so at all material times.

Before embarking on further analysis, the Tribunal should consider the following facts: firstly, the evidence meets the investor/investment test without scope for any real debate; secondly, the Respondent has recognised the nature and ownership of a number of occasions with important and concrete consequences for the Claimant and the group; thirdly, the Respondent's submissions in these proceedings evince the mischief which the Respondent has sought to achieve by bringing these objections before the Tribunal; and fourthly, the Respondent's preliminary objections are unarguable and should be summarily dismissed.

The Respondent's objections are contrary to several important formal admissions made by the Respondent during the course of these proceedings and are not supported by factual evidence. Those admissions, [with] which the Respondent's preliminary objections are in conflict, are, on their face, clear and unequivocal, such that they no longer need to be proved by the Claimant, and the Respondent cannot now resile from

them. The Respondent is accordingly bound by such admissions for the purpose of this arbitration.

Before proceeding further, it's important to recall that a party to an arbitration is bound by omissions of fact which are made in proceedings before an arbitral tribunal. Once the party concedes a fact in issue, it cannot contest that fact later in proceedings or take any positions which conflict with the prior admission.

(Slide 16) Authority for that proposition is set out in the Claimant's Rejoinder at paragraph 30, namely: Petersen and Eton Park v Argentina, which is CLA-267, at paragraph 83; Davis v City of New York, which is CLA-268; and NAFED v Swarup Group of Industries, which is Exhibit CLA-269, at paragraphs 8 and 14.

(Slide 17) As mentioned in paragraph 30 of the Rejoinder, respected jurist Geoffrey Waincymer has observed that "tribunals will commonly see particular value in admissions against interest", given there is no vested interest in making them. These observations are recorded in Waincymer, Procedure and Evidence in International Arbitration, which is Exhibit CLA-270, at 10.4.14.

It is also important to recall that a tribunal's decision should also be consistent with any agreed facts. This observation is also recorded in Waincymer,

Procedure and Evidence in International Arbitration, which is CLA-270, at 10.4.13.

To the extent, therefore, that those admissions are inconsistent, or the Respondent's preliminary objections are unsupportable by any factual evidence, such objections are in themselves an abuse of process and should be rejected on this basis.

It's important to emphasise in relation to the various admissions made or confirmed by the Respondent that once the nature and effect of those admissions is properly understood, it is clear that Respondent's preliminary objections are without any substance and must be dismissed.

Accordingly, it is not necessary for the Tribunal to be burdened with the task of fact-finding on a great many issues. Instead, with the benefit of the Respondent's admissions, the Tribunal can readily be satisfied that the Respondent's preliminary objections are unfounded and should be dismissed.

Reference will now be made to the Respondent's various submissions and what the Tribunal should make of them. I will now consider the Respondent's admissions in respect of the Respondent's "investment" and "investor" objections.

Respondent has made a series of admissions which

enable the Tribunal to conclude that the Claimant is an investor which has made a qualifying investment. Some admissions by the Respondent are of fact and others are of law.

First, at paragraph 64 of the Reply, the Respondent has admitted that the share swap was both lawful and effective in transferring the ownership of its shares in Mineralogy to the Claimant.

Secondly, at paragraph 68 of its Reply, the Respondent acknowledged that an investment can validly be made through a cashless transaction.

[Thirdly], I note that in paragraph 71 of its Reply, the Respondent does not deny that a share swap can constitute an active contribution. I also note that it is curious that at paragraph 72 of its Reply, the Respondent does not question that the acquisition by way of a share swap is not legitimate.

I note further, at paragraph 110 of its Reply, that the Respondent did not dispute that Article 2(c) of Chapter 11 of AANZFTA covers both direct and indirect investment.

Against this background, the Claimant now turns to consider in more detail the admissions which the Respondent has made on the related issues of investor and investment.

It is submitted that the Respondent's admissions confirm the Claimant is an investor and has a qualifying investment in Australia in accordance with the terms of AANZFTA.

(Slide 18) The Respondent's first admission, at paragraph 64 of the Reply, is that:

"... Australia does not dispute that the share swap was ... lawful and effective in transferring ownership ..."

That's important:

"... in transferring ownership of the shares in Mineralogy to Zeph [the Claimant]."

(Slide 19) AANZFTA, in Chapter 11, Article 2(c), states:

"investment means every kind of asset owned or controlled by an investor, including but not limited to ...

(ii) shares ..."

In the circumstances, it's curious, to say the least, for the Respondent to dispute that Claimant has made an investment. The Respondent has conceded that Claimant became the owner of the shares following a lawful and effective share swap. The admission that the share swap was lawful and effective in transferring ownership of the shares [in] Mineralogy to the Claimant

is necessarily an admission of ownership by the Claimant of the asset, namely the Mineralogy shares. This is therefore an admission of the Respondent of the existence of the Claimant's investment within the meaning of Chapter 11, Article 2(c) of AANZFTA.

(Slide 20) In the circumstances, it is also curious and unsustainable for the Respondent to contend that the Claimant is not an investor. This is because AANZFTA, in Chapter 11, Article 2(d), as follows, states:

"... investor of a Party means a natural person of a Party or a juridical person of a Party that seeks to make, is making, or has made an investment ..."

(Slide 21) The Respondent's admission that the share swap was lawful and effective is an admission that the Claimant owns the Mineralogy shares, has made an investment by the acquisition of shares in a company incorporated in Australia; and accordingly, this is an admission that the Claimant has made an investment in the territory of Australia. By having an investment, we must have an investor.

That being so, the Respondent has effectively admitted that the Claimant is an "investor of a Party" within the meaning of AANZFTA Chapter 11, Article 2(d) of AANZFTA.

THE PRESIDENT: Mr Palmer, do forgive me for interrupting

you, but I would like to make sure that we understand your position correctly.

The way I understand the Respondent is they are not saying you could not have a share swap; they are saying that's, in principle, a lawful transfer. They are not saying that that did not become the owner. What the Respondent is saying is that that made no contribution because the shares it contributed as part of the share swap had no value.

Do you want to answer that? You can do it now or later. But it would be good that we have your clear position on that.

MR PALMER: I was going to answer that. I can answer --

THE PRESIDENT: Okay. Then you can do it later.

MR PALMER: I might get to it, but I can just say quickly.

In essence, with the share purchase agreement, it was contemplated that the share swap would take place on settlement, and at settlement there would be a contemporaneous exchange of shares, right? For that to happen -- it was a common commercial technique -- the value is normally assessed as the -- the shares are of equal value, because that's where the person ending up has still that same investment.

In this case in particular, they had a face value of AUD 6 million, which was covered by the articles of

association and the Corporations Act: it's a real value. So we say that it did have a real value.

But my point here is a little bit different. I'm saying here that if we go back to the treaty, the treaty says the test of an investment is actually ownership, right? So in that sense, the treaty says ownership is the test. The Respondent has admitted that the share swap was valid and effective, but what it did do was it transferred ownership.

Therefore, the ownership of the investment complies with section 2 -- I'm not sure what it was -- of the treaty [as] being a valid investment in Australia. And to have a valid investment in Australia, you must have an investor. So it's a little bit circular argument, right?

I hope that --

THE PRESIDENT: So you are saying the test is ownership?

MR PALMER: Yes.

THE PRESIDENT: And you don't consider value as part of the test?

MR PALMER: Well, we have to go back to the treaty.

THE PRESIDENT: Yes.

MS PALMER: The treaty should take precedence, I think, prior to other matters. The treaty is quite clear on its face: it says ownership is a test.

Maybe I can just have a minute.

THE PRESIDENT: I don't want you to have to come back. We can certainly read the treaty.

MR PALMER: If we look at Chapter --

THE PRESIDENT: I just wanted your answer on this value issue.

MR PALMER: Chapter 11, Article 2(c), "investment" is "every kind of asset owned or controlled by an investor, including but not limited to ... shares".

THE PRESIDENT: Yes, but of course, then (2)(d) says "make ... an investment". That's one part of the argument.

The other argument is that an investment in and of itself implies certain characteristics, out of which contribution is one; and "contribution" is contribution of something of value --

MR PALMER: That's correct.

THE PRESIDENT: -- it's an allocation of resources.

MR PALMER: So we're saying it is something of value, right?

THE PRESIDENT: Yes.

MR PALMER: If I can just continue --

THE PRESIDENT: Of course. Apologies. But I thought it might be better to ask for the clarification.

MR PALMER: There's a little bit more on it, so maybe there are some more questions.

THE PRESIDENT: Sure.

14:53 MR PALMER: In the circumstance, it's curious, to say the least, for the Respondent to dispute the claim [that the Claimant] has made an investment.

The Respondent has conceded that the Claimant became the owner of the shares following a lawful and effective share swap. The admission that the share swap was legal and effective in transferring ownership of the shares in Mineralogy to the Claimant is necessarily admission of ownership of the Claimant of an asset, namely the Mineralogy shares. This is therefore an admission [by] Respondent of the existence of the Claimant's investment within the meaning of Chapter 11, Article 2(c) of AANZFTA.

In the circumstances, it's also curious -- and unsustainable -- for the Respondent to contend that the Claimant is not an investor. This is because AANZFTA Chapter 11, Article 2(d) states as follows:

"... [an] investor of a Party means a natural person of a Party or a juridical person of a Party that seeks to make, is making, or has made an investment ..."

"... or has made an investment". So it's "or has made an investment". It's not both of them; it's one or the other, right? So I'm saying: if you have an investment, it has made an investment.

The Respondent's admission that the share swap was

14:54 lawful and effective is an admission that the Claimant owns the Mineralogy shares, and as such has made an investment by the acquisition of shares in a company incorporated in Australia. And accordingly, this is an admission that the Claimant has made an investment in the territory of Australia. So by having an investment, we must have an investor. That being so, the Respondent has effectively admitted the Claimant was an "investor of a Party" within the meaning of Chapter 11, Article 2(d) of AANZFTA.

By reason of these matters, the Respondent has admitted that the Claimant was an investor, has made an investment. That being so, the Respondent's first preliminary objection, in respect of "investor" and "investment", is made contrary to its own admissions. As such, the first preliminary objection cannot be maintained; it should now be dismissed by the Tribunal.

I will now deal with the Respondent's admissions relevant to denial of benefits.

(Slide 21) The Respondent makes a further admission at paragraph 146 of its Reply, which was as follows:

"As at 13 August 2020, the Claimant's 'business operations' consisted of: (a) holding three engineering companies, being GCS Engineering Services Pte Ltd, Visco Engineering Pte Ltd, and Visco Offshore

14:56 Engineering Pte Ltd (the 'Engineering Companies'), which it acquired on 31 January 2019; and (b) participation in a Joint Venture Agreement (the 'JVA') with the Kleenmatic Companies, which it entered into on 24 January 2020. It is only those activities that are relevant to whether the Claimant had 'substantive business operations' in Singapore with the meaning of Article 11(1)(b) of Chapter 11 of AANZFTA."

The Respondent has thus admitted and acknowledged the existence of the Claimant's investment and businesses, the only relevant date being 13 August 2020, the date the Amendment Act became law; see paragraph 131 of the Reply.

Not only that, but the Respondent has formally admitted the Claimant and the Claimant's investment in Australia. On 29 March 2019, the Respondent approved the Claimant as a foreign company carrying on business in Australia, as evinced by Claimant's application for registration as a foreign company in Australia, which is Exhibit C-97, and the current and historical ASIC extract for the Claimant, which is Exhibit C-483.

That issue is addressed fully in Section II of the Claimant's Response and Section Two of the Claimant's Rejoinder, which need not be repeated here, but will assist the Tribunal in understanding the matter.

14:58 The Respondent cannot take the benefit, as it has in this case, to the tune of more than $400,000, and then seek to deny a benefit to the Claimant.

(Slide 22) The Respondent's taking of that benefit is evinced by the foreign transfer duty statement grounds WA, which is C-63, annexure A, exhibit 28 at page 322.

The point is that the Respondent cannot, on the one hand, formally admit the Claimant and its investments and have notice of the Claimant's substantive business in Singapore, and yet subsequently seek to deny the Claimant the benefits of Chapter 11 of AANZFTA.

Cogent factual evidence, as set out, inter alia, in the first Palmer witness statement at paragraphs 27 to 82, illustrates that Claimant's business in Singapore is indeed substantive. The Respondent nevertheless asserts without any proper foundation that Claimant does not have a substantive business in Singapore. These assertions do not stand scrutiny when one has regard to the following series of admissions which the Respondent has made in its Reply.

(Slide 23) First, the Respondent admitted the following at paragraph 129 of its Reply:

"The key issue between the Parties is whether Zeph had 'substantive business operations' in Singapore at

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

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

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

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

15:04 the Tribunal has any doubts, it should consider all the detailed, uncontested factual evidence which comprehensively demonstrates that the Claimant has a substantive business in Singapore. That evidence is referred to in the Claimant's Response and Rejoinder and previously filed material, and I'll return to it later in my remarks.

The applicable legal principles are also set out in the Response and the Rejoinder, and the Claimant's previously filed documents, need not be repeated here.

By reason of these matters, the Respondent has made admissions of fact [which], together with the Claimant's uncontested factual evidence, are sufficient to establish the Claimant has a substantive business in Singapore. That being so, the Respondent's second preliminary objection, in relation to denial of benefits, is made contrary to its own admissions and concessions and uncontested factual evidence. As such, the second preliminary objection cannot be maintained and should be dismissed by the Tribunal.

I will now address the Respondent's admissions in relation to the Respondent's abuse of process objection.

Before addressing the nature and effect of the Respondent's admissions concerning the abuse of process objection, it is important to emphasise again what this

15:05 dispute actually relates to.

The UNCITRAL Arbitration Rules of 2020 (sic) set out the content of a notice of arbitration. And Article 3(3) of the Rules states that the claimant must include details of the dispute which is the subject of the arbitration. The nature and the scope of the dispute is therefore determined and defined by what is included and described in the notice of arbitration, and defined by the claimant as the party commencing the arbitration.

The Notice of Arbitration was served on the Respondent on 29 March 2023. It incorporated the Notice of Intent dated 20 October 2022, by way of paragraph 4 of the Notice of Arbitration.

(Slide 33) The Notice of Arbitration thereby incorporates by reference, in its entirety, the Notice of Intent (C-63). And the Notice of Intent defines the dispute, in section 6, line 447, as follows:

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

15:07 Accordingly, the Claimant claims this arbitration all arise out of the enactment of the Amendment Act on 13 August 2020, and the effect of that extraordinary and unprecedented legislation on the Claimant's investments in Australia, and upon the rights and the obligations of the Claimant and its subsidiaries.

In a breathtaking display of irony, having acknowledged that the Amendment Act was not foreseeable because of successful duplicitous actions of the West Australian government officers, including its Attorney-General and Premier, the Respondent accuses the Claimant of an abuse of right. [This objection] cannot withstand scrutiny.

The test of abuse of process is a difficult test to satisfy. Abuse of right is not found lightly; it is an extraordinary remedy which requires proof of the Respondent to a high threshold.

(Slide 29) In particular, the Swiss Federal Tribunal explained in Clorox, which is Exhibit RLA-142, at paragraph 5.2.4:

"It is up to the party claiming existence of an abuse of rights to allege and prove the facts enabling it to establish the foreseeability of the dispute at the moment of the restructuring of the investment ..."

15:08 (Slide 30) In Clorox v Venezuela, being the award dated 17 June 2021, which is Exhibit CLA-239, at paragraph 447, that tribunal considered that:

"The object of foreseeability must be a specific dispute."

And in paragraph 441, held that the test for foreseeability:

"... must relate to the specific dispute as it is shaped in the arbitration proceedings."

At paragraph 448, the tribunal held that:

"... foreseeability must refer to a specific type of dispute, namely, not to any dispute in general, but to a specific type of dispute that, eventually, proves to be the one challenged by the restructured investor."

The restructured investor has only challenged claims emanating from the Amend[ment] Act.

(Slide 31) Importantly, at paragraph 428, the Clorox tribunal held that:

"... in the event that [a] dispute submitted to the Tribunal was not foreseeable at the date of completion of the corporate restructuring that allows benefiting from the protection of [the] treaty, any abuse of process can be excluded."

At paragraph 450, the Clorox tribunal held, in considering a claim of an abuse of process:

15:09 "... it is important to identify the first measure or practice constituting the alleged breach of the Treaty and to determine whether its adoption or implementation was foreseeable at the critical date."

In that regard, the first measure would have been the Amend[ment] Act itself.

Accordingly, the tribunal in Clorox determined that the test of foreseeability of the dispute must be to a specific dispute, not a general dispute, and that is identified by reference to a specific measure challenged by an investor, or a claim that gives rise to an alleged breach of the treaty. This decision was upheld and endorsed by the Swiss Federal Tribunal in Clorox, which is Exhibit RLA-142.

As emphasised earlier, the foreseeable dispute must be specific, not general: one that is identified by reference to the claim that gives rise to the alleged breach of the treaty. Once the measure which constitutes the alleged breach is identified, then the factual context will determine when the adoption of that claim was objectively foreseeable as more than a simple possibility but a real prospect.

(Slide 32) Authorities such as Tidewater, Exhibit RLA-93, and Mobil, Exhibit RLA-92, Aguas del Tunari, Exhibit CLA-185, and Clorox,

15:11 Exhibit RLA-142, illustrate that a measure giving rise to the relevant treaty claim must be well defined and apparent, even in circumstances when there are existing disputes, or circumstances of general enmity between the investor and the host state. Usually, to be foreseeable, it's [if] a requisite sense of a specific claim or measure is announced or in some other way communicated by the government to the claimant or the wider commercial world.

It's not enough to establish abuse to say that a claimant should have anticipated or imagined an adverse measure. Governments are free to act as they see fit, and it is always possible for an investor to imagine any number of adverse measures which a government could conceivably adopt in respect of a claimant's investment. This is why they seek investment treaty protection, but it does not make it an abuse to do so.

Accordingly, the critical question is whether the specific measure which gives rise to the treaty claim was objectively foreseeable as a reasonable prospect, not a mere possibility at the time of the relevant corporate restructuring.

The seminal case is Philip Morris v Australia, Exhibit RLA-95; and the more recent cases of Clorox

15:12 v Venezuela, Exhibit RLA-142, Natland v Czech Republic, Exhibit CLA-235, Alverley v Romania, Exhibit RLA-71, and Ipek v Turkey, Exhibit RLA-99, all evidence this approach.

It is now common ground that the enactment of the Amendment Act and this dispute before this Tribunal, which emanates from the Amend[ment] Act, was not foreseeable at the time when the Claimant made its investment in Singapore. The references to this are in paragraphs 132 and 241 of the Respondent's Reply, and paragraph 37 of the Procedural Order No. 4 dated 24 May 2024, which is set out in Exhibit CLA-261, and which need not be repeated here.

(Slide 33) As mentioned previously, the dispute before the Tribunal was defined in section 6.1 of the Claimant's Notice of Intent. This was further amplified in paragraph 219 of the Claimant's Response. The Notice of Arbitration was served on the Respondent, as said before, on 29 March 2023, and incorporated the Notice of Intent dated 20 October 2022 by way of paragraph 4 of the Notice of Arbitration.

The Notice of Arbitration incorporates by reference in its entirety the Notice of Intent, as I've already said; and the Notice of Intent defined the dispute in section 6, from line 447, when referring to the

15:14 Notice of Arbitration:

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

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

(Slide 34) Further, at paragraph 221, the Claimant's Response stated, referring to the Notice of Arbitration, as follows:

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

15:15 Amendment Act."
The Respondent's admissions on the abuse of process issue will now be discussed.
(Slide 35) First, in lines 3 and 4 at paragraph 131 of the Reply, the Respondent said:
"... the Claimant's position is that 'the date is 13 August 2020, the date of the Amendment Act' ..."
And then at lines 7, 8 and 9, the Respondent submitted:
"... the common ground between the Parties is that the relevant date to be used by the Tribunal to assess 'substantive business operations' in this proceeding is the date nominated by the Claimant -- 13 August 2020."
Secondly, the Respondent made a further admission in line 6 at paragraph 132 of the Reply, which was to say that:
"All that matters is the position as at 13 August 2020."
(Slide 36) Thirdly, the Respondent admitted at paragraph 144(a) (sic) of the Reply that "Zeph's activities must be assessed as at 13 August 2020".
The effect of the Respondent admitting in paragraph 131, and again at paragraphs 132 and 144 of the Response on Preliminary Objections, that the date of the "substantive business operations" test is

15:17 13 August 2020, the date that the Amendment Act was enacted, it's an admission by the Respondent that 13 August 2020 is the date on which this dispute crystallised, the date of the breach. Because 13 August 2020 is the date of the breach, this is plainly also an admission that the dispute arises out of the Amendment Act on 13 August 2020, as contended for by the Claimant. This is the dispute before the Tribunal in this arbitration.
(Slide 37) Fourthly, as earlier noted, the Respondent had, at paragraphs 132 and 241 of its Reply on Preliminary Objections, previously admitted that the Amendment Act was not foreseeable at the time of the share swap and restructuring. Respondent's admission to that effect is recorded in Procedural Order No. 4, dated 24 May 2024, at paragraph 37, which is Exhibit CLA-261, which states as follows:
"However, the Tribunal understands that the Respondent acknowledges that the fact of the passing of the Amendment Act per se was not foreseeable to the Claimant at the time of the January 2019 Restructure. Indeed, referring to evidence already in the record and in part furnished by the Claimant, the Respondent concedes that the Amendment Act was not conceptualized before March-May 2020; that the draft bill that would

15:18 become the Amendment Act was not approved before July 2020; and that the draft bills were not only kept secret, but were accessible only to a handful of high-level public officials."
It bears emphasising again that it's now common ground that the enactment of the Amendment Act was not foreseeable at that time when the Claimant made its investment. All in all, it is a further example of the Respondent taking points on jurisdiction which it should never have taken, especially when it purported to enter into arbitrations in good faith prior to the Amendment Act, which I note in passing is a further reason why this dispute was completely unforeseeable at the date of the Amendment Act, with the consequence that very significant amounts of Australian taxpayer money have been wasted fighting points which were bad as a matter of fact and law.
The definition of "dispute" in the Notice of Arbitration clearly states that the dispute involves the termination of the 2020 Arbitration Agreement and the State Agreement Arbitration by the Amendment Act. The dispute defined by the Claimant is the only dispute which is before this Tribunal. All of the Claimant's claims arise from the passing of the Amendment Act, and nothing else.

15:19 A plaintiff in a court proceeding sets out its complaint, which the defendant must answer. It's not open to a defendant to answer some different complaint. Likewise in arbitration, it's not open to the respondent to choose to answer a different complaint, other than the complaint set out [by] the claimant in its notice of arbitration.
The Respondent is purposely answering a different complaint, as it is well aware. It has no answer to the real complaint made by the Claimant.
(Slide 38) The law relevant to the issue of foreseeability is discussed in detail in the Claimant's Rejoinder, and previously in the Claimant's Response. The references to such discussion may be found in the Claimant's Rejoinder are, inter alia, as follows: paragraph 71; paragraph 304; paragraphs 312 to 362; paragraph 375; paragraphs 377 to 378; paragraphs 401 and 402; paragraphs 528 to 531; and paragraphs 535 to 547.
The Respondent's acceptance at paragraph 131 of its Reply that all that matters is the position at 13 August 2020 is an admission that this is the date of breach, or the date on which dispute subject to the arbitration crystallised or commenced.
There was not and could not be any dispute over measures in the Amendment Act until the Amendment Act

was passed, on 13 August 2020. All claims the Claimant makes in this arbitration are claims first brought into existence by the Amendment Act. It follows, therefore, that it is the measures in the Amendment Act that are subject to this dispute. The Respondent, at paragraph 241 of its Reply, has not admitted that the Amendment Act was not foreseeable.

To recap, having accepted that the dispute arose out of the Amendment Act passed on 13 August 2020, the Respondent is not permitted to say now that the Amendment Act is not a relevant dispute [for] foreseeability purposes. The Claimant submits that the first measure which breaches the treaty which is before the Tribunal defines the dispute.

(Slide 39) The reference I make to "the first measure" is from the Clorox v Venezuela arbitration award dated 17 June 2021, which is Exhibit CLA-239, at paragraph 450, which says that, while it is not necessary for the dispute to have materialised:

"... it is important to identify the first measure or practice constituting the alleged breach of the Treaty and to determine whether its adoption or implementation was foreseeable at the [crucial] date."

The first measure constituting a breach of the treaty in this arbitration is the Amendment Act. All

the claims made by the Claimant are a consequence of and from the Amendment Act.

As the Respondent has effectively admitted both that the Amendment Act dispute is the specific dispute before the Tribunal in this arbitration [and] that the Amendment Act as passed into law on 13 August 2020 was not subjectively or objectively foreseeable to the Claimant at the time of the share swap and the restructuring in 2019, the critical date for the present purposes, there can be no abuse of process.

In this arbitration, the Claimant's claims under AANZFTA arise from a specific measure, being the Amendment Act that gives rise to alleged breaches of the treaty, which is the dispute before this Tribunal.

(Slide 40) In the Clorox arbitration, Venezuela unsuccessfully appealed [to] the Swiss Federal Court against the award of 17 June 2021. In dismissing Venezuela's appeal, the Swiss Federal Court, in its decision of 20 May 2022, which is Exhibit RLA-142, agreed at paragraph 5.2.4 with the arbitral tribunal's conclusions that for an abuse of process to be established:

"... a restructuring must have been carried out with a view to a specific dispute at a time when its occurrence was foreseeable."

And that:

"... is necessary to assess the criterion foreseeability of a dispute in a restrictive manner ..."

Having accepted that the dispute arose out of the Amendment Act passed on 13 August 2020, the Respondent is not permitted to say now that the Amendment Act is not a dispute for foreseeability purposes. That being so, the Respondent's third preliminary objection in relation to the alleged abuse of process is made contrary to its own admissions and concessions. As such, the third preliminary objection cannot be maintained; it should therefore be dismissed. This Tribunal must now dismiss the Respondent's abuse of process objections.

I have prepared a table, Madam President, in respect of the Respondent's [ad]missions on the main points, to assist the Tribunal. If I can distribute a copy of that table to the Tribunal and the Respondent, it may help them consider the submissions that I've made.

I would also submit it may well be -- we've been going for an hour and a half: it may be a good time to have a 20-minute break.

THE PRESIDENT: Yes. We are not yet exactly at 1 hour 30, but we can very well take the break now.

Is this part of your PowerPoint that you've just

printed or is it something else, what you are now handing out?

MR PALMER: No, it's not part of the PowerPoint. We weren't able to put it in that format.

DR KIRK: We did upload it yesterday, though, as a demonstrative.

THE PRESIDENT: Oh, that's the demonstrative that you uploaded yesterday?

MR PALMER: Yes.

THE PRESIDENT: Fine. Good.

MR PALMER: Is it okay?

THE PRESIDENT: Yes. The demonstrative has nothing in -- your opponents have seen it yesterday and have not raised any issue, and I don't see any, because it just restates matters that are in the record, if I understand it correctly.

MR PALMER: That's right.

THE PRESIDENT: Just not found in this form in the record. That's fine.

Should we take the break now?

MR PALMER: Yes.

THE PRESIDENT: Yes? Fine. Let's take 20 minutes, which means we would resume at -- let's say 3.50, a little bit more than 20.

MR PALMER: Okay.

15:26 (3.27 pm)
(A short break)
(3.51 pm)
THE PRESIDENT: So we are ready.
MR PALMER: Madam President, perhaps I can continue.
THE PRESIDENT: Yes, please.
MR PALMER: Firstly, I must apologise: when you asked me about investor/investment earlier, I went back to my work and I left out two paragraphs of my submission.
On reviewing it, there are two items that I should bring to your attention, which I intended to bring to your attention. And that was: in our Rejoinder in paragraphs 147 to 157 and in our Response, paragraphs 271 to 247, we set out all the information about contribution, investor et cetera. At that time I was about to refer the Tribunal to those paragraphs.
THE PRESIDENT: Thank you.
MR PALMER: Thanks very much.
So in essence, the Claimant's position is that the facts are agreed, and the law should be applied to those agreed facts.
Moving on, the Claimant is here today to establish its right to have its claims heard. It's not without some risk that the Claimant and even I, as the Claimant's representative, are here.

15:52 I refer to the Amendment Act, which requires Clive Palmer and the Claimant's subsidiaries to indemnify the State against any losses, costs or liabilities, inter alia, including those arising from international treaties or international law, and for any loss or cost or liability relating to the passage of the Amendment Act. These are in Sections 14, 15, 22 and 23 of Exhibit C-1, being the Amendment Act itself.
I say these things because the Tribunal needs to recognise the extraordinary and unprecedented circumstances of this case and the Respondent's objections, which are all an ill-founded attempt to avoid liability for damage caused to the Claimant by the Amendment Act. The Respondent's objection are themselves, in our view, an abuse of process, especially in light of their own admissions, which they must have known before they lodged their application for a preliminary objection.
The Respondent's objections are consistent with the respondent's conduct as can be seen in other cases, such as Timor-Leste, and including Exhibit CLA-151 and Exhibits C-55 to C-61, and all of the rest of the matters that Claimant has raised before the Tribunal in the Claimant's interim measures application. The Claimant is nevertheless here to responsibly answer the

15:54 objections that the Respondent has brought to the Tribunal's jurisdiction.
The Tribunal has jurisdiction to hear the Claimant's claim. Claimant's claims all start in time, as we've said, from the passing of the Amendment Act on 13 August 2020 by the Western Australian Government.
The Claimant brings its claims because the Amendment Act destroys the rule of law, and we need to protect the rule of law and our system of international dispute resolution by arbitration, which protects over $28 trillion of world trade and, importantly, promotes peace and cooperation among nations.
The Claimant's Response and Rejoinder clearly set out the Claimant's case. The Tribunal must apply the law to the facts in reaching its conclusion, dismiss the objections and grant the Claimant the relief it seeks.
The Respondent, in contrast to the Claimant, has not provided any facts, but has made admissions upon which the Claimant relies. The Respondent has always known the matters the subject of the admissions, and could have made them earlier; indeed, it was obliged in good faith to make them earlier to the Tribunal. If the Respondent was undertaking this arbitration in good faith, it would have done so.
It's helpful to consider the impact of the

15:55 Respondent's admissions on this arbitration in terms of costs, wasted resources, increased damages in the form of interest. If the Respondent had not taken its objections to jurisdiction, which it should not have done, the Claimant's claim for interest alone would have not increased by $12 billion, Respondent would not have incurred millions of dollars of cost at taxpayers' expense, and the Tribunal would not have had to deal with all the matters it has since the making of the Respondent's objections in 2023.
The Claimant respectfully submits that it's important for future arbitrations that this Tribunal give a clear message that this type of delay, especially when we consider Respondent's admissions and conduct, is not acceptable in investor-state arbitrations.
The Tribunal should not allow itself to be sidetracked or misled by the Respondent. It is not necessary for the Tribunal to go beyond the admissions that the Respondent has made.
The law that is applicable to those admissions and the objections demonstrates that the appropriate course is for the Tribunal to dismiss the Respondent's objections and grant the Claimant the relief it seeks, as set out in paragraph 724 of the Rejoinder, with the proviso that costs should be awarded to the Claimant on

15:56 an indemnity basis.

The Claimant's submission is that it is properly documented the Claimant's case in the Claimant's Response, Rejoinder, and the Claimant's expert reports, witness statements and the references to the law relied upon. The Claimant respectfully submits that the Tribunal should forthwith dismiss the Respondent's objections and grant the Claimant its relief.

If the Tribunal nevertheless forms the view that it cannot dismiss the Respondent's objections solely after considering the Respondent's admissions and the law, the Tribunal must read and consider all the material filed and relied upon by the Claimant in this arbitration, especially the Response and Rejoinder.

To assist the Tribunal in that process, and to the extent that it is necessary, I shall now take the Tribunal to some of the key factual exhibits on the record to prove the Claimant's case.

This is another point at which the point raised above can be made again: that the treaty breaches giving rise to the Claimant's claims to be arbitrated are only those which commenced with and are caused by the Amendment Act.

As previously mentioned in support of the position on the preliminary objections, the Claimant has produced

15:58 a large amount of factual evidence. This contrasts with the Respondent's reliance on so-called "expert" evidence, which amounts to little more than irrelevant speculation and hypothesis. It is for this reason that the Claimant maintains that Respondent's expert statements are simply not relevant to the Tribunal's task in this jurisdictional phase. Hypothesis and generalisations simply cannot override or controvert clear factual evidence of what actually happened, as provide by the Claimant.

Investor/investment.

To start, the evidence establishes that the Claimant is a Singapore entity with an investment in Australia. The claim is therefore, prima facie, an investor with a covered investment under the treaty. To establish jurisdiction, the Claimant is required to prove it is a company incorporated in Singapore.

(Slide 42) Exhibit C-70 is the Claimant's certificate of incorporation as a Singaporean company. This is not disputed, and satisfies the requirement of Articles 2(d) and 2(f) of AANZFTA: that the Claimant is a juridical person of a party.

The Claimant is also required to establish that it has made an investment. The Rejoinder addressed the meaning of the word "investment" in the context and the

15:59 case authorities on this issue. In that regard, I refer the Tribunal to the Rejoinder at paragraph 37. For the present purposes, it's sufficient to note that the Claimant's evidence establishes that it acquired and owns shares in Mineralogy.

(Slide 43) The share purchase agreement, Exhibit C-562, shows the Claimant's properly and legitimately purchased shares in Mineralogy from Mineralogy International, and the Respondent does not dispute this. As the share purchase agreement sets out, in consideration for the share transfer, the Claimant issued to Mineralogy International 6,002,896 shares, fully paid, in the Claimant.

(Slide 44) Exhibit C-63 at page 158 sets out a meeting on 29 January 2019 at 10.00 am. The Claimant's then directors, Mr Mashayanyika as chair of the meeting, myself and Mr Tan, resolved to issue to Mineralogy International Limited new ordinary shares in the Claimant as consideration for the purchase of the fully paid ordinary shares in Mineralogy.

The number of ordinary shares to be issued was the same, and had the same value of the shares that were being purchased. All necessary actions to issue the new shares and to change them took place contemporaneously on settlement. All other resolutions to properly

16:00 document and approve the transaction can be found in a document known as annexure A which was attached to the Notice of Intent; see Exhibit C-63 at pages 153 to 168.

There can be no dispute -- and the Respondent accepts, as was admitted in paragraph 64 of the Reply -- that the transaction was both lawful and effective. The Claimant acquired the Mineralogy shares and provided consideration to Mineralogy International Limited for that purchase.

It is recalled that the meaning of "investment" in AANZFTA under Article 2(c) of Chapter 11 is very broad and encompasses "every kind of asset", including shares. The evidence is clear that the Claimant, a Singaporean company, owns the shares in Mineralogy, an Australian company. The Claimant paid a consideration of $6,002,896 for these shares, the same amount as the face value of the Mineralogy shares; see Exhibit C-63, annexure A, exhibits 11, 14 and 16.

There was nothing nefarious, dishonest or even unusual about this transaction. This was a properly documented, legitimate share swap, a common mechanism used when structuring a corporate group. The share swap most certainly was not a sham, as alleged by the Respondent.

In short, the evidence establishes that the Claimant

meets all the definitions of an "investor" under the treaty, and has an investment in Australia. The Respondent is unable to rebut the evidence and so, as mentioned earlier, has resorted to strained interpretations of the phrase "make ... an investment" in Article 2(d) of AANZFTA. This point is addressed separately, and discussion of the law, in the Rejoinder. But suffice to say the law is clear: the Claimant's acquisition of Mineralogy's shares is sufficient to meet any requirement of the Claimant to make an investment.

I will further visit this matter in our closing and invite the Tribunal to make any questions they may have in this regard.

Ongoing contribution.

If we consider ongoing contributions in addition to the acquisition of the Mineralogy shares, the Claimant has not been a passive investor in Mineralogy. It has continued to invest both in terms of returns and active management.

Under AANZFTA, returns that are invested are classified as a separate investment in accordance with Article 2(c). Returns are defined in Article 2(j) as amounts yielded by an investment, including profits and capital gains.

(Slide 45) At paragraph 4.5 of the first Birkett

statement is a table which highlights the earnings and reserve balances of Mineralogy's consolidated financial accounts for the years 2019 and 2020, which shows the retained earnings in the company.

Mr Birkett confirms in his supplementary report, dated 2 August 2024, that retained profits may be left in a subsidiary company by the parent and used by the subsidiary company to further its activities. It's a normal business parlance. This is particularly an investment by the parent in the subsidiary.

It is also clear that by making more funds available to Mineralogy, it was also in the best interests of Mineralogy, and of the Claimant and its investment.

Moreover, in accordance with the plain words of Article 2(j) of AANZFTA, these retained profits are indeed profits that are yielded by the investment, profits shared by Mineralogy as a result of its activities. These profits are available to be distributed to Mineralogy's sole shareholder, the Claimant, through cash or other equivalents, as confirmed by Mr Birkett in his second report.

(Slide 46) The Claimant must approve the annual accounts of Mineralogy in which a decision to retain profits is formalised. And the Claimant actively approved retention of these profits of Mineralogy

instead of paying a dividend to the Claimant. The Claimant did so in 2019 and 2020. The resolutions signed by the Claimant are exhibited in Exhibit C-546 for 2019 and Exhibit C-547 for 2020.

(Slide 47) Exhibit [C-]563, clause 22.3 -- as I explained in detail in my sixth witness statement, clauses 22.3 and 29 of the Mineralogy constitution permit me, as a director of Mineralogy, to act in the best interests of the Claimant, which in any event always aligned with Mineralogy's best interests. It is in Mineralogy's best interest to have more funds available to pursue its activities, and not to have to borrow money.

(Slide 48) As I confirmed in paragraph 39 of my sixth witness statement:

"In deciding to recommend a dividend and/or approving the 2019 [or] 2020 Accounts, I was acting as a director of Mineralogy and the Claimant for the benefit of the Claimant in accordance with Rule 22.3 of the Mineralogy Constitution. At all times I acted in the best interests of the Claimant to ensure [that] profits of Mineralogy would be reinvested in Australia to enhance the value of the Claimant's investment in Mineralogy's business and Mineralogy shares owned by the Claimant."

It is clear that the retention of profits and/or payment of dividends was undertaken in the Claimant's and Mineralogy's best interest. The dividend of just $8 million declared in 2020 was to pay off intra-group loans between the Claimant and Mineralogy. This was clearly done in the interests of both the Claimant and Mineralogy.

The act of approving the Mineralogy accounts with retained profits, and thus forgoing a dividend, is an act of investing the yields under the treaty. On the plain words of the treaty, the retained profits constitute separate investments in Mineralogy.

I emphasise the use of the word "retained" profits, which means the profits were made by the company and retained within the company. And that refers directly to the treaty provision. I think that's an important point: they were retained profits. This meets both the intent and the plain meaning of the treaty provision, and it is the only plausible reading of AANZFTA.

Thus, the Claimant not only made an initial investment in Mineralogy, through its purchase of the shares from Mineralogy International Limited: it also made further investments through approving the retention of profits, retained earnings to be used by Mineralogy to further its investments in Australia.

I'll now deal with the question of active management.

In the Claimant's Response and Rejoinder on Preliminary Objections, the Claimant provides details of a number of senior executives that have roles in both the Claimant and Mineralogy. In that regard, I refer to the Response at paragraphs 74 to 81 and paragraphs 248 to 249, [and] the Rejoinder at paragraphs 120 to 127.

The economic reality of these dual roles is that the Claimant is constantly engaged with and involved in Mineralogy's operations. It is also well accepted that active management of a subsidiary includes appointing and removing directors. Under Mineralogy's constitution, the Claimant has the power to appoint and remove Mineralogy's directors, and it does so as part of its active management of Mineralogy. In fact, all current directors of Mineralogy have been appointed by the Claimant.

(Slide 49) C-522 shows the current directors of Mineralogy. All those directors were appointed by the Claimant. It is clear that Claimant actively manages investments in Australia and is not a passive investor.

We can further consider the denial of benefits [objection]. The factual evidence in the record clearly establishes the existence of the Claimant's substantive

business in Singapore.

(Slide 50) Exhibit C-77 is a copy of the Claimant's business profile in Singapore, held by the Singapore Accounting and Corporate Regulatory Authority, known as ACRA. It shows the Claimant's registered office is at 80 Genting Lane, Singapore. This office is open during normal business hours.

The same exhibit shows the Claimant has seven directors, two of whom are resident in Singapore: Mr Quek Ser Wah Victor -- it's "Victor Quek" actually, from a European point of view, and it should be "Ms Loh Chan".

The same exhibit also shows that the Claimant's auditors are Singapore Assurance PAC, and that the Claimant's company secretaries are Yee Koon Daphne Ang and Zhe Lei Tan, both of Allen & Gledhill in Singapore.

(Slide 51) The relevant government agencies have issued the Claimant with all licences required to conduct its business. Copies of these licences are recorded in Exhibit C-94. These licences are issued to the Claimant itself, not to the joint venture or Kleenmatic. It's the Claimant that holds the required licences. The Claimant employs the staff. It directly receives government [subsidies]. And the Claimant itself pays all employee-related contributions and

wages. The Respondent cannot overcome these facts; they are supported by clear evidence.

(Slide 52) Exhibit C-95, page 3: the Claimant also has in place relevant insurance policies for public liability, workplace accident and general business insurance. These policies are on record and are exhibited at Exhibit C-95. Again, it is the Claimant who holds these insurance policies. The Claimant's business is in Singapore. It is clearly a substantive business, and not a sham as alleged by the Respondent.

At Exhibit C-96, there is a bundle of engagement letters of various professional service providers, from PwC to Allen & Gledhill. To suggest that such reputable firms would be engaged with a sham or a façade is highly insulting at best, and defamatory at worst. When such allegations are made and not particularised, and are without evidence, it represents sharp practice and is embarrassing.

(Slide 53) The Claimant also produces annual independent audited accounts on a stand-alone basis, which have all been provided to the Tribunal in Exhibits C-79 and [C-81], together with the consolidated accounts.

(Slide 55) In 2019 to 2022, the most recent audited accounts are at Exhibit [C-]579.

(Slide 53) Exhibit [C-]79: in June 2019, the Claimant had total assets worth around SGD 8.2 million. The cost of investment in Mineralogy is recorded at SGD 5,803,894; Exhibit [C-]79, page 16. This figure was independently audited by Hall Chadwick as at June 2020, shortly before the Amendment Act was passed.

(Slide 54) The Claimant's assets, excluding Mineralogy shares, had a value of SGD 19.1 million; Exhibit [C-]81, page 7. Not only does this show a substantive business: it shows the Claimant's business was growing at the time the Amendment Act was passed.

(Slide 55) Exhibit C-579: the business continues to grow, with assets valued at over SGD 173 million, and income now at over SGD 12 million. This demonstrates the Claimant's real -- very real -- and genuine connection with Singapore since it was first incorporated.

These accounts also provide detail of subsidies received by the Claimant from the Singapore Government during the Covid-19 pandemic. This in itself is sufficient to combat any assertion that the Claimant is a sham or lacks any genuine connection to Singapore. If the Claimant were a shell or a sham, as alleged by the Respondent, with no genuine connection to the business in Singapore, it would have not received such

significant subsidies from the Singapore Government during the period.

As demonstrated by the discussion of the law on denial of benefits in the Rejoinder at paragraphs 276 to 285, this information alone -- indeed, much less than this -- has been deemed sufficient to establish a substantive business.

(Slide 56) But there is far more evidence in the record of the Claimant's business in Singapore. Note 12(b) of Exhibit C-80: the record establishes that the Claimant first purchased three engineering companies for the sum of $3.6 million, which is in note 12(b) of the consolidated accounts of the Claimant for the year ended 30 June 2019. These engineering companies were connected to Singapore's lucrative shipping industry, [which] the Claimant was interested in exploring and in which it saw wider synergies within the Mineralogy Group. The business, employing around 60 people in total, had a significant potential.

When the Claimant purchased these businesses, they had a combined revenue of around $4.5 million per year; see the Response at paragraph 430, and Exhibits C-542, C-543 and C-544. However, shipping was an industry that was struck particularly hard by the Covid-19 pandemic, and the business ceased after the Amendment Act was

passed in October 2020.

While the engineering companies were adversely affected by the Covid pandemic, and were liquidated in 2021, they were still operating in August 2022. They are no less a business activity because they failed. Doing business entails a risk, and a financial failure is evidence of that risk.

(Slide 57) On 24 January 2020, the Claimant established a joint venture, having a 90% interest in the joint venture. The joint venture is a mechanism where each party has a direct interest in the business themselves and is responsible for parts of the business. The joint venture agreement, Exhibit C-469, sets out the terms on which the joint venture operated, as required under the agreement.

The Claimant, as the manager and senior joint venture partner, took over all aspects of managing the business, as defined in the joint venture agreement, inter alia, in clauses 12, 14, and the joint venture agreement itself.

The Claimant had a 90% interest in all joint venture property and is liable for 90% of all the joint venture's costs; see clause 5 of the joint venture agreement.

The Claimant was the only joint venture partner

authorised to enter into contracts on behalf of the joint venture; see clause 9 of the joint venture agreement.

(Slide 58) As stated previously, the Claimant established a 90% interest in the joint venture. Most of the employees of a previously existing business were transferred to the Claimant in accordance with clause 24 of the joint venture agreement. Those previous businesses ceased to exist.

(Slide 59) Exhibit C-88 contains a staff report which shows the Claimant employed around 150 people at the time the Amend[ment] Act was passed. The record also contained the employment contracts of 146 employees that were transferred from the minority joint venture partners to the Claimant shortly after the joint venture agreement was entered into.

Exhibits R-618 to R-763: currently the Claimant employs around 300 people in Singapore. As a result of employing so many people, the Claimant has made significant contributions on behalf of those employees to the Singapore Government's superannuation scheme, the Central Provident Fund, or CPF, as it is known. The documents at Exhibits C-89 to C-93 provide evidence in detail of these payments. In the financial year ending 30 June 2021 -- it was the financial year in which the

Amendment Act was passed -- the Claimant paid employee contributions to the CPF of more than $500,000.

The Claimant operates a successful cleaning business in Singapore. The fact that it, inter alia, employs cleaners simply shows it's a genuine business. There is nothing in Article 11 of the AANZFTA that requires the Claimant to operate any type of business or employees in Singapore. And the case authorities are clear that a substantive business for denial of benefits purposes does not have to be in the same sector as the investment.

The fact is the Claimant operates a genuine, profitable and substantive business in Singapore, and has done so for the last five and a half years. The Claimant's business has a real, genuine link to Singapore, and it has expanded since January 2019, when the Claimant commenced operations in Singapore. Each year it has expanded and increased its genuine links in Singapore.

I will now illustrate to the Tribunal the Claimant's links to Singapore and its employees by quickly showing a short video of the Claimant's Chinese New Year party which was held in Singapore earlier this year. The link was provided in paragraph 275 of the Rejoinder.

(Video played)

16:22 This video shows that the connection to Singapore is real, genuine and growing. It shows the Claimant's annual Chinese New Year party earlier this year. You can see here that those who are employed by the Claimant in Singapore work day-in and day-out, for the Claimant in Singapore.

Present at the party are Victor Quek and Ms Loh Chan, the Claimant's Singapore-based directors, as well as Mr Declan Sheridan and Bernard Wong, two of the Claimant's Australian-based directors. Mr Sheridan is also Mineralogy's head of finance and financial relationships.

In considering the issues before the Tribunal, it is important for the Tribunal to always remember that the well-established view in Western Australia prior to the Amendment Act was that the State Agreement would never be changed unilaterally by Parliament. This is because no such agreement had been changed in the 70-year history, because governments over generations had given representations to international investors that the Government would never unilaterally change a state agreement. State agreements had provisions in them that could only be amended by consent.

(Slide 61) The Tribunal should read the review paper of the former Premier of Western Australia,

16:23 Mr Colin Barnett, to properly be informed on this matter. Mr Barnett's paper was published in the Australian Mining and Petroleum Law Association Yearbook in 1996, where he states, in Exhibit C-104, under the heading "Project security":

"Whereas other statutes are able to be changed at will, the provisions of State Agreements are only able to be changed by mutual agreement in writing between the parties to each State Agreement ... State Agreements therefore provide certainty that ground rules for the life of each agreement project cannot be changed unilaterally."

The former Premier goes on to say, under the heading "Inviolability", at page 321 of Exhibit C-104:

"Unlike other statutes of Western Australia that can be changed by Parliament, State Agreement provisions can only be amended by mutual agreement by the parties thereto."

The Respondent placed 865 exhibits on record, consisting of 7,173 pages of exhibits. 119 of those exhibits have no relevance in respect of the Claimant in this arbitration, and it's curious why the Respondent has filed them.

Notwithstanding having regard to the Respondent's admissions and the Claimant's uncontested evidence, the

16:24 position is that when the law and [facts] are applied, the Respondent's objections are all defeated.

(Slide 62) It's curious that the Respondent makes a series of unfounded and unparticularised allegations against me and others in respect of a sham. I have a long-standing commitment to public service and a proven track record in business of 40 years.

(Slide 63) Exhibit [C-]65. Indeed, it was, inter alia, these very qualities that led to me being recognised in 2012, by the Australian Government magazine, as the "Entrepreneur of the Decade", as set out in Exhibit [C-]65.

(Slide 64) And becoming the fifth wealthiest Australian, as confirmed in the Australian Financial Review "Rich List", Exhibit C-481. These same qualities culminated in the Sino Iron Project, which involves the largest investment in the world made by China outside of China.

I have now been involved in business for more than 40 years. Projects which I have initiated or controlled during that time have contributed to the direct or indirect creation of more than 40,000 jobs in Australia, and more than $10 billion of investment in the Australian economy. These matters are set out in paragraph 17 of my fifth witness statement.

16:25 (Slide 65) I was Adjunct Professor at the [Faculty] of Law and Business at Deakin University in Victoria, Australia from 1 August 2002 till 1 August 2006, and again from 12 February 2009 to 1 February 2011 (C-64). I was appointed Adjunct Professor at Bond University in Queensland in June 2008 (C-577).

(Slide 66) I was also elected a "Living National Treasure" of Australia, and declared as such by a poll conducted by the National Trust of Australia (C-66). The award is given following selection by a popular vote of the people of Australia.

(Slide 67) Following the largest swing of 50.3% in Australian political history, I was elected as a Member of the House of Representatives of the 44th Parliament of Australia. I was leader of the party, and we held a balance of power in the 44th Parliament.

During my time as a Member of the House of Representatives, I served on the Parliamentary Committees: the Committee on Economics from 4 December 2013 till 9 May 2016, the Standing Committee on Infrastructure and Communications from 4 December 2013 to 13 October 2015, and the Joint Select Committee on Trade and Investment from 2 October 2014 to 9 May 2016. I retired from Parliament in 2016.

The Parliament of Australia acknowledged my service

16:27 to the country and contribution to Parliament. That recognition was issued in writing under the authority of the Speaker of the House of Representatives and the President of the Senate. You can see Exhibit C-67 for a copy of that.

(Slide 68) The Australian Financial Review, which is Australia's leading financial newspaper, publishes each year a "Power Index". And in 2014, I was second in the Power Index, after then Prime Minister Tony Abbott (C-576).

(Slide 69) Until May 2017, I was the world secretary general of the World Leadership Alliance, which is part of the Club of Madrid, an institute of the largest number of former heads of government of any organisation currently operating in the world. The World Leadership Alliance's objective is to support and foster democratic values and the rule of law throughout the world (C-68).

During my term as secretary general of the World Leadership Alliance I worked closely with our president, Wim Kok, former prime minister of the Netherlands from 1994 to 2002; vice president Jennifer Mary Shipley, former prime minister of New Zealand from 1997 to 1999; and Vaira Vike-Freiberga, former president of Latvia from 1999 to 2007.

16:28 The chairman of the World Leadership Alliance in the Club of Madrid was the former president William Clinton, president of the United States from 1993 to 2001. During my involvement with the World Leadership Alliance, over 90 distinguished, democratically elected former presidents and prime ministers from 60 countries assisted in spreading democracy and the rule of law throughout the western and eastern world.

(Slide 69) I'm also a former director of the John F Kennedy Library Foundation of Boston, in the United States of America (C-69).

In any event, especially following the Respondent's admissions, the Claimant takes issue with all of Respondent's expert evidence as not being relevant or factually supported, and for that reason the Claimant has not sought to cross-examine any of the Respondent's witnesses.

When discussing what would become the Amendment Act on 23 May 2020, a text exchanged between John Quigley, the Attorney-General of Western Australia, and Mark McGowan, the then Premier (C-432), concluded with the agreement that absolute secrecy was of the essence for a "very small legislative amendment" that would be "a poison pill for the fat man", Mr Palmer.

The Amendment Act was passed in extreme urgency

16:30 through the Western Australia legislature, between 5.00 pm on 11 August 2020 and 13 August 2020, devoid of the usual committee processes.

The Claimant and Mineralogy were unaware of Quigley's idea of legislative intervention: texts to the Premier on 23 May 2020. The Claimant and Mineralogy did not know that the idea had been developed through June, July and August 2020 by a select group of Western Australian officials who were secretly promulgating the Amendment Act.

Having had the idea of the Amendment Act in May 2020, Western Australia was pretending to engage with the State Agreement Arbitration arbitral process, while at the same time going to extreme lengths to maintain secrecy of its real agenda: the promulgation and passage of the Amendment Act to terminate that very process. The Respondent's Statement on Preliminary Objections has not mentioned this subterfuge at all. Respondent has not put forward any evidence from Mr Quigley or Mr McGowan, or any other Western Australian government official, to otherwise explain Western Australia's actions in May [to] August 2020, or at any other time.

In those circumstances, the Claimant submits that, leaving aside the Respondent's admissions regarding lack

16:31 of foreseeability, it must inevitably be inferred that Western Australia knew that the measure giving rise to this treaty claim was not foreseeable, and took deliberate steps to ensure that it remain so. They must have known it was not acting honestly in misleading the Claimant, in breach of the arbitration agreement, in bad faith. The Respondent's objections have always been unarguable in light of the admissions, as it has always known.

Having successfully pulled off, as they say, a "Trojan horse" manoeuvre, as per Quigley's text, to pass what Quigley and McGowan acknowledged at the 12 August 2020 media conference to be an extraordinary measure, the Respondent cannot then be heard to say that the Claimant should have seen the Amendment Act, or something like it, was coming along.

The Respondent's plea of bad faith and abuse of process by the Claimant is the height of hypocrisy if the Respondent's own duplicity to connect the situation and deceive the Claimant is considered. In other words, Western Australia has gone to considerable lengths to keep the prospect of any amendment to the State Agreement adverse to Mineralogy a secret, while now maintaining that Claimant should have expected that it was likely that such extraordinary, unprecedented

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

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

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

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