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 3 Wednesday, 18 September 2024

Hearing on Preliminary Objections

Before:
PROFESSOR GABRIELLE KAUFMANN-KOHLER
MR WILLIAM KIRTLEY
PROFESSOR DONALD MCRAE

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ZEPH INVESTMENTS PTE LTD

Claimant

-v-

THE COMMONWEALTH OF AUSTRALIA

Respondent

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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

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1 Wednesday, 18 September 2024
2 (10.32 am)
3 THE PRESIDENT: Good morning to everyone. We are starting
4 Day 3 of this hearing. We are ready to listen to the
5 Respondent's answers to the Tribunal questions and
6 closing remarks.
7 Is there anything that needs to be raised before
8 we start?
9 DR DONAGHUE: No, there is not.
10 THE PRESIDENT: Not on your side.
11 Dr Kirk?
12 DR KIRK: Not from our side.
13 THE PRESIDENT: No, fine.
14 Then we can start. As you know, you have two hours,
15 and then we will have the lunch break, and thereafter we
16 will listen to the Claimants.
17 Dr Donaghue.
18 Closing statement on behalf of Respondent
19 DR DONAGHUE: Thank you, Madam President, members of
20 the Tribunal.
21 We propose to focus in our closing remarks on
22 answering the questions that the Tribunal has asked. So
23 to that end, we will structure our address this morning
24 as follows: Mr Wordsworth KC will address the answers to
25 the Tribunal's questions 1 and 4; Professor Brown will



10:32 1 then address the answer to question 3; Mr Clarke will
2 address the answer to question 5. Then Dr Hart will
3 then make some submissions about burden of proof before
4 handing back to me. I'll address question 2 and then,
5 depending how we're going for time, I might make some
6 brief overview submissions by way of closing about the
7 facts as they relate to the key issues as we see them.
8 There are some slides that various members of our
9 closing team will be using, which we'll provide to the
10 Tribunal in hard copy and which will be coming up on the
11 screen. Some of us will be using slides, and some,
12 Opus 2.
13 So if that is convenient to the Tribunal, I would
14 hand the floor to Mr Wordsworth.
15 MR WORDSWORTH: Thank you very much, Madam President.
16 I kick off with question 1, which of course is which
17 of four dates may be relevant to assessing "substantive
18 business operations". And the question has highlighted
19 the date of the alleged breach, the date of the
20 investor's request for consultations, the date of the
21 State's notification of denial of benefits and then the
22 date of the actual denial.
23 It is, of course, essential to focus on the wording
24 of this specific free trade agreement; indeed, of
25 course, the way the question is put asks us to focus on



10:34 1 that issue.
2 So could we have F1/1/158 on the screen, please.
3 This is Article 11(1) of the FTA (CLA-1), which you will
4 be very familiar with.
5 Opus, can we please have F1/1/158.
6 THE PRESIDENT: We have it with us, so I think you can
7 proceed.
8 MR WORDSWORTH: Thank you very much.
9 "Following notification ..."
10 And that, of course, is one potential date:
11 "... a Party may deny the benefits of this
12 Chapter ..."
13 Which is another potential date:
14 "(b) to an investor of another Party that is
15 a juridical person of such other Party and to
16 investments of that investor if an investor of the
17 denying Party [1] owns or controls the juridical person
18 and [2] the juridical person has no substantive business
19 operations in the territory of any Party other than the
20 denying Party."
21 This obviously contains no express date for
22 assessing the alleged substantive business operations.
23 One possible date would be the date of actual
24 denial, and this would always be a backstop date.
25 However, the aim of the application of Article 11(1)



10:36 1 must be a fair assessment of the business operations of
2 the investor in the natural course of that business; for
3 example, before any potential adverse impact by
4 potentially unlawful acts of the respondent state.
5 It also follows from this that the date of actual
6 denial would make little sense in many cases because the
7 investor would already have been put on notice under
8 Article 11(1) by receipt of the notification of the
9 intent to deny.
10 So if the date of actual denial was regarded as the
11 relevant date, it would be open to the investor to seek
12 to improve its position post-notification, and that
13 cannot be the intention.
14 Another possibility is the date of notification.
15 However, this needs to be considered along [with] the
16 consultation provision, which is Article 19(1); so that
17 is F1/1/169, so 169 in the same document. You see
18 there:
19 "In the event of an investment dispute referred to
20 in Article 18.1 ..."
21 So obviously it's defined, that's the definition
22 provision:
23 "... the disputing parties shall as far as possible
24 resolve the dispute through consultation, with a view
25 towards reaching an amicable settlement. Such

10:37 consultations, which may include the use of non-binding, third party procedures, shall be initiated by a written request for consultations delivered by the disputing investor to the disputing Party."

This obligation to consult must, of course, be performed in good faith, and it is also predicated on the existence of a dispute. And the aim is that the parties may be able to resolve and, through consultation, seek to resolve the dispute without arbitration.

It would follow that although the dispute has been notified through the request, and there may be subsequent events that, for example, fall within the dispute and amount to a breach of the treaty, a tribunal will always be wary of a party seeking to put subsequent facts on the ground simply with a view to improving its position on the dispute.

This is not a strict rule, but we say it just is a rule that's really going to the weight of the evidence. It's of less value to you as a Tribunal if, subsequent to the request for consultation, either the state or the investor has been seeking to change the position in relation to the substantive business operations.

That approach, which reflects a more general



10:39 approach in terms of assessing evidence, protects both parties' interests. Investors should not, in the usual course, be able to improve its position on substantive business operations by putting new facts on the ground, such as suddenly employing 50 new people after the consultation period has begun. And likewise, the state should not, in the usual course, be able to improve its position by seeking to impact the status of the investor's operations. And those operations of the investor and their viability may -- for example, in the case of a holding company -- be very susceptible to how the underlying investment is treated within the respondent state's jurisdiction.

So the position, as we see it, is broadly analogous to what one sees in a state-to-state case, where a court is looking at the issue of effectivité in a case where they are seeking to establish who does or does not have a good title to territory. And the long-standing approach of the ICJ, and of course other tribunals, is to place limited or no weight on supposed effectivité after the date of crystallisation of the dispute.

The rationale for that applies equally here. The basic point is that a tribunal will not be greatly assisted in a legal assessment of title where a state, knowing that there is a dispute, decides to build



10:41 a lighthouse, decides to station its troops, or otherwise seeks to assert its jurisdiction to try and build up its position in relation to a dispute that everybody already has identified as existing, and thereby seek to improve its claim. There is no point in giving effect to a position where a party is seeking literally sometimes just to try to put facts on the ground.

So that is the basic thinking behind why Australia is saying that 14 October 2020, the date of the request of the consultations, at the latest, is the relevant date in this case. And that's also why we've been a little hesitant of just accepting the Claimant's suggested date of 13 August 2020 -- that is the date of the alleged breach -- as at that date Australia had not been formally notified of the alleged breach and the claim being brought with respect to that breach.

But we do say that this is an issue on timing where there is no one answer. For example, the investor would not be appropriately protected if, prior even to the alleged breach, the state had engaged in some potentially unlawful acts that reduced the operations of the investor in the home state. To similar effect, if an investor had purported to create substantive business operations a few weeks before it alleges breach, or



10:43 before the alleged breach, this is a matter a tribunal would likely also consider when assessing relevant dates.

All of this comes with the caution that of course the Tribunal is going to have in mind that it's going to be very important to approach past cases by reference to the specific treaty wording they're looking at, but also very much by reference to the specific facts that they are looking at. Of course, there's the treaty point that many treaties don't have the same steps of consultation, followed by notification, followed by denial. But the facts also, as we sought to indicate, are also very important in the given case.

We do see as persuasive the reasoning in the Guaracachi case. That's F2/69/142 (RLA-69), if we could go to that, please. Paragraph 376, picking up from the end of the first line:

"The Tribunal cannot agree with the Claimants when they argue that the Respondent is precluded from applying the denial of benefits clause retroactively. The very purpose of the denial of benefits is to give the Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits. As such, it is proper that the denial is 'activated' when the benefits are being claimed.

10:45 1 377. The Contracting Parties to the BIT could have
2 agreed otherwise, but they decided not to do so.
3 Instead they agreed that a Contracting Party could deny
4 benefits (including the benefit of having a dispute
5 decided by an arbitral tribunal) subject to meeting
6 certain conditions, none of which entails that such
7 denial is only effective in relation to disputes arising
8 after the notification of such denial or ... any other
9 limitation period ..."
10 Et cetera.
11 "378. On the contrary, the Tribunal agrees that the
12 denial can and usually will be used whenever an investor
13 decides to on invoke one of the benefits of the BIT. It
14 will be on that occasion that the respondent State will
15 analyse whether the objective conditions for the denial
16 are met and, if so, decide on whether to exercise its
17 right to deny the benefits contained in the BIT, up to
18 the submission of its statement of defence.
19 379. As a matter of fact, it would be odd for
20 a State to examine whether the requirements of
21 Article XII had been fulfilled in relation to
22 an investor with whom it had no dispute whatsoever. In
23 that case, the notification of the denial of benefits
24 would -- per se -- be seen as an unfriendly and
25 groundless act, contrary to the promotion of foreign



10:47 1 investments. On the other side, the fulfilment of the
2 aforementioned requirements is not static and can change
3 from one day to the next, which means that it is only
4 when a dispute arises that the respondent State will be
5 able to assess whether such requirements are met and
6 decide whether it will deny the benefits of the treaty
7 in respect of that particular dispute."
8 So we would submit that is persuasive reasoning.
9 But within that persuasive reasoning, there is a degree
10 of flexibility that is being accorded to the tribunal.
11 I would note that Guaracachi is cited with approval
12 in Big Sky v Kazakhstan -- that's Exhibit RLA-85 --
13 which you'll recall the Claimant relied on in opening,
14 and I refer you to paragraph 276. There, you may
15 recall, the tribunal saw the need for some flexibility
16 because it was concerned about pre-notice steps being
17 taken by the state to undermine the substantive business
18 operations in the home state.
19 Before departing this topic, there is the point on
20 the facts, which is to make the point that in this case
21 not too much turns on whether the Tribunal in fact were
22 to settle on dates 1, 2, 3 or 4, because no one is, as
23 we understand it, pointing to a marked increase of
24 activity between dates 1 and 2, the alleged breach [and]
25 the request for consultations; and as we understand it,



10:49 1 the same applies so far as concerns the 22 [December]
2 2020 and 14 June 2021 dates.
3 So with your leave, I would move on to question 4.
4 And again, if we can go back to Article 11(1) of the
5 treaty on the screen, at F1/1/158. Thank you.
6 If we could go, in fact, on to the next page,
7 because here, as a starting point, of course we are
8 focusing on the phrase "substantive business
9 operations". And the Tribunal already has on board our
10 point that the term "substantive" already itself imports
11 the requirement that the business operations be real and
12 genuine, and as such would not include operations set up
13 for a sham purpose.
14 The need for the business operations to be real,
15 authentic and genuine is, as we understand it from the
16 Claimant's pleadings, common ground, and I didn't
17 understand the Claimant to withdraw from that position
18 in its opening submissions on Monday. But of course our
19 position as to the need for the substantive business
20 operations to be real, authentic and genuine is
21 supported by the various cases that the
22 Solicitor-General took you to on Monday morning.
23 THE PRESIDENT: Maybe I should say: the Tribunal's question
24 goes to whether you can have real, genuine operations,
25 authentic operations. Because in real life, the



10:51 1 operations are there, yet they are there for a purpose
2 that is not really the business purpose of these
3 operations, but for a different purpose that in this
4 case would allegedly be treaty protection. And that is
5 why we thought that the very words of "genuine",
6 "authentic", "real" do not necessarily answer our
7 question.
8 MR WORDSWORTH: Absolutely, Madam President, and I want to
9 approach that through two angles: first, the issue of
10 interpretation, of course good faith interpretation; but
11 then the second prism, which is of performance, and good
12 faith performance.
13 What I'm doing in making this introductory
14 submission is that when you're looking at the term
15 "substantive" and you're interpreting that as a matter
16 of good faith -- and of course the Tribunal does that
17 under Article 31(1) of the Vienna Convention -- the word
18 "substantive", as understood correctly as genuine, real,
19 authentic, takes on the meaning of "genuine" as in not
20 being of a sham nature, i.e. put in place for
21 an improper purpose.
22 One gets to that, as a matter of good faith
23 interpretation, simply by asking the question: could it
24 have been the intention of the treaty parties to
25 establish a test for "substantive business operations"

10:52 that could be subverted by the creation of business operations in essence in bad faith, in order simply to deprive the host state of the important right of being able to deny benefits?

So as a matter of good faith interpretation, purpose does feature; but it also features as a matter of good faith performance of the arbitration agreement.

If I can take this in a number of steps.

First, as is common ground between the parties, and as is, of course, supported by the ordinary wording of Article 11(1), as well as multiple cases, the denial of benefits provision applies just as much to the existence of the offer to arbitrate as it does to the substantive provisions of Chapter 11.

Of course, you can see that if we go back to the preceding page, because the ordinary meaning of the words ... (Pause)

"Following notification, a Party may deny the benefits of this Chapter: ..."

And of course "this Chapter" includes the offer to arbitrate and all the related provisions in Section B of Chapter 11.

As is also uncontroversial, the Claimant has purported to accept the offer to arbitrate contained in Article 20; and of course a claimant is not able to



10:55 change any of the terms pursuant to which an offer to arbitrate was made or that condition its existence or application. These are all established, of course, by the relevant treaty parties, and all the Claimant can do is either accept the offer or not accept the offer. It cannot change any of the relevant conditions or preconditions.

Of course, when the offer is accepted, that is generally regarded as establishing an agreement to arbitrate, which is likewise generally regarded as being governed by international law. And of course it's very difficult to see what other law it could be governed by in a situation where the offer is contained within a treaty governed by international law and all the Claimant does is to accept the offer; it can't change any of the terms, it can't change the nature of the offer. So the resultant agreement must be governed by international law.

Now, two things follow from those preliminary points. First, the offer has been accepted subject to the right of the host State to deny benefits. As part of its acceptance, the Claimant has accepted that the State may deny the right to arbitrate in certain specified situations.

Second, the agreement to arbitrate is subject to the



10:56 obligation to arbitrate in good faith. One can get that by various routes: of course, one gets there by Article 26 of the Vienna Convention, obligation to perform in good faith. It applies to all international agreements. Of course, one also gets there as a matter of general principle. And of course, in this case, the Claimant has on multiple occasions asserted the existence of an obligation to arbitrate in good faith in the various preliminary issues that the parties have been fighting over. And indeed, the Tribunal has taken the step in its procedural order of 12 September 2023 to refer to this essential principle.

And where a claimant state seeks to prevent a state from being able to exercise a right that the treaty confers with respect to the offer to arbitrate, through establishing business operations in a claimed home state for the purpose of defeating that right, and then seeks to rely before the arbitral tribunal on the facts on the ground that it has brought into being, it is engaged in a performance of the arbitration agreement that is otherwise than in good faith. And it follows that the motivation or the reason for setting up the operations very much do matter.

One can see that again in one of Professor Bin Cheng's classic formulations. If we could have



10:58 F2/101/6 on the screen, please. This is Exhibit RLA-101. If I can pick it up roughly halfway down:

"A reasonable and bona fide exercise of a right in such a case is one which is appropriate and necessary for the purpose of the right (i.e. in furtherance of the interests which the right is intended to protect). It should at the same time be fair and equitable as between the parties and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed."

And the premise of the Tribunal's question 4 is that there is precisely such a calculation.

THE PRESIDENT: So would you say this is an abuse of the arbitration agreement?

MR WORDSWORTH: I am going to come to that, Madam President, in a moment. But yes, of course you can see it through the prism of abuse of the arbitration agreement. The submission that I'm making before I get to that point is actually: it's a failure to perform the arbitration in good faith.

You can go that extra step, as of course many of the cases on abuse of right or abuse of process do, and they characterise there being a specific abuse of the right to arbitrate. We're putting this slightly differently,

11:00 1 in the sense there is an obligation to perform the
2 arbitration agreement in good faith; here, as I've
3 identified, there is a failure to perform that
4 arbitration agreement in good faith.
5 THE PRESIDENT: And the difference is a difference in level
6 because the threshold for abuse of right is higher? Or
7 what difference does it make to say "performance not in
8 good faith" as opposed to "abuse"?
9 MR WORDSWORTH: Potentially, there is a difference possibly
10 in threshold. It's rather unclear, isn't it? Because
11 when one looks at the case on abuse, there is that
12 conflation between a failure to exercise the right to
13 arbitrate in good faith, and then leaping on a little
14 bit to say: well, that is positively an abuse of right
15 or abuse of process.
16 THE PRESIDENT: But that's the cases. I'm interested in the
17 concepts, in the reasoning.
18 MR WORDSWORTH: I think the concepts are very, very closely
19 related indeed, because the existence of the abuse is
20 predicated on the failure to exercise the right in good
21 faith. So maybe it's just a difference in terms of
22 formulation, as opposed to a real difference in the
23 principle.
24 THE PRESIDENT: I see abuse as a manifestation of the
25 principle of good faith, but I'm not sure about the



11:02 1 level.
2 MR WORDSWORTH: Yes. Well, certainly the submission we are
3 putting to you is about that same manifestation of
4 a failure to act in good faith.
5 If one continues with what Professor Bin Cheng is
6 saying:
7 "A reasonable exercise of the right is regarded as
8 compatible with the obligation."
9 And that, of course, is here the obligation to
10 arbitrate in good faith.
11 "But the exercise of the right in such a manner as
12 to prejudice the interests of the other contracting
13 party arising out of the treaty ..."
14 And this is precisely what is happening as per the
15 assumed facts: the Respondent State having an interest
16 in being able to see that the terms of its agreement to
17 arbitrate are not undermined by subterfuge.
18 And he continues:
19 "... is unreasonable and is considered as
20 inconsistent with the bona fide execution of the treaty
21 obligation, and a breach of the treaty."
22 One can see then, in a case like Phoenix Action, how
23 that analysis then turns into the analysis of abuse.
24 And there is probably the correspondence between the two
25 principles: the failure of good faith and the abuse.



11:03 1 If we look at Phoenix Action at F2/91/44 (RLA-91),
2 paragraph 107:
3 "The principle of good faith has long been
4 recognized in public international law, as it is also in
5 all national legal systems. This principle requires
6 parties 'to deal honestly and fairly with each other, to
7 represent their motives and purposes truthfully, and to
8 refrain from taking unfair advantage ...' This principle
9 governs the relations between States, but also the legal
10 rights and duties of those seeking to assert
11 an international claim under a treaty. Nobody shall
12 abuse the rights granted by treaties, and more
13 generally, every rule of law includes an implied clause
14 that it should not be abused. This is stated for
15 example by Hersch Lauterpacht:
16 'There is no right, however well established, which
17 could not, in some circumstances, be refused recognition
18 on the ground that it has been abused.'"
19 Then as to the issue of the effect of the
20 motivation, which question 4 asks, because there is
21 a lack of good faith and/or an abuse, there are
22 inevitably procedural consequences so far as concerns
23 denial of benefits. The right to arbitrate under the
24 arbitration agreement, which must be performed in good
25 faith, must be "refused recognition", to borrow the



11:06 1 words of Hersch Lauterpacht.
2 So on the assumed facts of question 4, the claim is
3 inadmissible and the Tribunal would be precluded from
4 exercising its jurisdiction.
5 Can I then turn briefly to the issue of "no
6 investor" and "no investment".
7 THE PRESIDENT: Can I just ask one clarification.
8 I understood you before to say that your submission
9 is that there is a performance that is not in good
10 faith, and therefore a breach of the treaty. And your
11 final sentence rather made me think that your submission
12 was a reference to the Hersch Lauterpacht quote, that
13 your submission is rather one of abuse.
14 So you will tell me it makes no difference in the
15 end, and you will probably be right, legally. But just
16 to make sure that I well understand what the
17 submission is.
18 MR WORDSWORTH: Sorry, the submission is both. I hope I was
19 clear.
20 THE PRESIDENT: Okay, good.
21 MR WORDSWORTH: As I said, as to the issue of the effect of
22 the motivation, because there is a lack of good faith
23 and/or an abuse.
24 THE PRESIDENT: Okay, good. That's clear.
25 MR WORDSWORTH: So absolutely we put it on both bases,

11:07 1 insofar as there is a difference.
2 (Slide 2) So, Madam President, if I can turn briefly
3 to the issues of "no investor" and "no investment".
4 The Tribunal will recall that the Claimant on Monday
5 handed up a list of cases, and on that list I think
6 there were 40 or so that were said to go to "no
7 investor"/"no investment". It wasn't being said what
8 particular issue they went to or why they are relevant.
9 You will also recall that on Monday we put up
10 a two-page slide identifying the relevant treaty
11 language in the cases on "making ... an investment", the
12 specific Article 2(d) issue, and we identified the
13 language; we identified whether there was a contribution
14 in those cases.
15 (Slides 3-5) So that table is now on the screen
16 before you. What we've done is simply to add, so far as
17 we can see, the cases from the Claimant's list handed up
18 to you on Monday that go to that issue of the making of
19 an investment. So we hope that is of assistance.
20 I don't propose to take you through that now, but
21 I suspect all these cases are reasonably familiar to the
22 Tribunal. You will see the key point is that they all
23 have different wording, and indeed they all involve some
24 form of active contribution by a foreign investor.
25 THE PRESIDENT: I have been asking myself whether the



11:09 1 distinction active/passive is not unnecessary, because
2 if you have a requirement for a contribution, then
3 a contribution is making an allocation, and so it would
4 imply an active behaviour, would it not?
5 MR WORDSWORTH: Well, that --
6 THE PRESIDENT: That could be an argument, let's put it that
7 way.
8 MR WORDSWORTH: Well, we say --
9 THE PRESIDENT: If we didn't have the word "making" here,
10 would we discuss or not the requirement of an "active"
11 contribution? And is a contribution not by definition
12 "active"? That is my point.
13 MR WORDSWORTH: Madam President, we would, because we'd get
14 there through the definition, correctly understood, of
15 the term "investment". Because "investment" of itself,
16 under AANZFTA, as I submitted on Monday, requires that
17 there be the inherent characteristics of an investor,
18 i.e. some form of contribution, i.e. risk. So you're
19 already there.
20 But we're making a separate, freestanding submission
21 specifically with respect to the ordinary meaning of
22 "make ... an investment", which itself, we do say, does
23 require you to do something. What does it require you
24 to do? It requires you to make a contribution.
25 And when you're assessing what is required, you have



11:11 1 to look at all the relevant facts. In the facts of this
2 case, when we say all that's happened is that MIL has
3 acquired the astonishingly valuable shares in Mineralogy
4 for nothing, and then MIL has transferred those valuable
5 shares to Zeph for nothing, and we also know what is the
6 purpose behind that transaction, that's just a feature
7 which helps you identify that there has been no
8 contribution. Looking at those relevant facts, there
9 has been no contribution, no making of an investment.
10 THE PRESIDENT: Do I understand your submission correctly
11 that if the Tribunal thinks that an investment has the
12 inherent characteristic of contribution, that actually,
13 in and of itself, would suffice to require an allocation
14 of resources by the investor?
15 MR WORDSWORTH: That's correct, Madam President.
16 THE PRESIDENT: And that the word "making" does reinforce
17 that understanding? Or do I over-interpret what you're
18 saying?
19 MR WORDSWORTH: Well, I wouldn't put it as "reinforcing",
20 because we're putting these as separate points on
21 interpretation. But if you look at some of the cases,
22 what you do see is that they treat them as being
23 reinforcing.
24 I think it's AMF or Rasia where they're looking
25 specifically at the treaty language, including the fact



11:13 1 of making an investment. And in looking at the question
2 of whether an investment has inherent characteristics,
3 even though it's the "every kind of asset" type of
4 language, it is saying: yes, because we look at all the
5 relevant language.
6 So you can get there really looking at either
7 separately or together.
8 THE PRESIDENT: Thank you.
9 MR WORDSWORTH: If I can just pick up very quickly a few
10 points on the evidence that came out yesterday that go
11 to our case on there being no investor, no investment.
12 Firstly, that Mr Palmer appeared to accept that in
13 financial terms that there had been no contribution. Do
14 you recall yesterday his suggestion, as a fallback
15 position in the absence of any meaningful financial
16 contribution, he was saying: well, look at the mere fact
17 of them being a Singapore company and having the shares;
18 the shares in the Singapore company and the rights that
19 attach to those shares and the specific features of
20 those shares, that somehow in itself was making some
21 form of a contribution to Mineralogy. That's transcript
22 Day 2, pages 211 to 212. And we just say, of course,
23 that is not any meaningful form of contribution.
24 So no initial contribution; and likewise, no
25 contribution by way of the so-called "active

11:15 1 management".
2 Of course, none of the people relied on as witnesses
3 are here, save for Mr Palmer. And there are no
4 documents to support the alleged contribution through
5 some active management, save for the alleged
6 contribution of Emily Palmer, which you'll recall was
7 covered yesterday in the evidence, and there was
8 reference to the function she fulfilled at Mineralogy.
9 But of course, she would anyway be fulfilling that
10 function, regardless of whether she is said to have
11 a Zeph hat on or not. And I refer you to Day 2,
12 page 237, lines 13 to 22.
13 You'll recall the third way the contribution was put
14 was by way of the supposed reinvestment of profits. And
15 of course that fails at the first hurdle. Article 2(j):
16 there was never an investment in the first place. You
17 don't even get within this provision by reference to the
18 definition of returns in the treaty.
19 (Slide 6) Then as to the second point, which is that
20 the supposed return has to be invested by the Claimant,
21 there was never a recommendation even of a dividend by
22 the Mineralogy directors. That's Day 2, [page] 228
23 lines 6 to 10. And Mr Palmer accepted that it was
24 a requirement for a dividend to be declared, and we can
25 see that on the slide, we've got the relevant evidence,

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11:17 1 and that's Day 2, page 222. You see there he is
2 accepting what is plain from the relevant clause of the
3 Mineralogy constitution.
4 (Slide 7) He also accepted that the annual accounts
5 could not somehow be changing retrospectively what had
6 happened in the relevant financial year; that's on our
7 second slide here. That's Day 2, page 232:
8 "Question: ... the decision to approve the accounts
9 can't be changing what happened retrospectively in the
10 financial year to which the accounts relate? You would
11 agree with that?
12 "Answer: Yes."
13 (Slide 8) It also became all the more evident that
14 what is happening in terms of any relevant decisions is
15 that these are taken by Mr Palmer, and the Claimant
16 simply does not enter into the picture in any meaningful
17 way. You can see that at page 230 of yesterday's
18 transcript:
19 "Question: So we can just ignore the corporate
20 forms?
21 "Answer: All I'm saying is that I don't live my
22 life on corporate forms; I make decision. And the
23 decision that I made, in whatever capacity, was to keep
24 the money in Mineralogy and not pay it to Zeph.
25 And I acknowledge that it could have been paid to

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11:19 1 Zeph ..."
2 Tellingly:
3 "... if I had decided to pay it -- or, sorry, if the
4 Claimant wanted it, they could have got it."
5 So there indeed the corporate forms are truly
6 ignored and one sees that what's really happening here,
7 which is that it is Mr Palmer who controls what happens,
8 Zeph has done nothing, and the actual corporate forms
9 are neither here nor there.
10 It's useful here to point to the unchallenged
11 evidence of Professor Lys that the profits of Mineralogy
12 somehow count four times as retained earnings. If we
13 could go to D2/7/16, and this is Professor Lys's second
14 report. (Pause) You see paragraph 57 at the bottom:
15 "To the extent that the decision to retain profits
16 instead of paying them out can be considered a form of
17 investment from an economics point of view, such
18 a decision represents an investment made by Mineralogy
19 to reinvest them into itself, and Zeph has no role
20 whatsoever in that decision -- Zeph cannot control or
21 force that issue. (As an aside, Mr Palmer, in his
22 capacity as owner of MIL, also has no direct say in the
23 matter. I explain this matter in more detail in my
24 discussion on the board of directors ...)"
25 Could we then go to footnote 32 at the bottom of the

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11:21 1 page:
2 "I note that the logic underlying the Claimant's
3 assertion leads to a paradoxical conclusion of quadruple
4 counting any retention of earnings by Mineralogy: first
5 as an investment by Mineralogy, second as an investment
6 by Zeph, third as an investment by MIL, and finally as
7 an investment by Mr Palmer."
8 So of course it just doesn't make sense, the way
9 this is being put to you. And all these same points on
10 the absence of contribution also go to the absence of
11 risk. Mr Palmer was unable to point to any legally
12 relevant risk.
13 (Slide 9) If we go to the fourth slide here, that's
14 at page 269 of the transcript of Day 2. I think we have
15 a slide of this. You see there, there was in essence
16 the acceptance that the inherent risk was of losing the
17 dollar; and Mr Palmer said:
18 "Of losing the dollar, but also losing -- part of it
19 is rights and obligations that you have in shares;
20 they're dealt with in the constitution of the
21 companies."
22 So again, there is no serious case of any real risk
23 in making the investment.
24 Madam President, may I hand over to Professor Brown
25 to continue.

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11:23 1 THE PRESIDENT: Thank you.
2 PROFESSOR BROWN: (Slide 10) Madam President, members of
3 the Tribunal, I will be addressing the third question
4 that you posed, on the foreseeability issue, which of
5 course arises in the context of the abuse of process
6 objection.
7 To recall, that question is an assumption, and it is
8 an assumption in three parts, followed by a number of
9 questions.
10 First, we were asked to assume that a corporation
11 restructures to gain treaty protection with a specific
12 disagreement in mind; and that in that case, if the
13 corporation has that specific disagreement in mind,
14 it means that it's foreseeable. We are then asked to
15 assume, further, that the disagreement in question does
16 not lead to the invocation of treaty protection. And
17 then we are asked to assume, finally, that another
18 disagreement arises, as such not foreseeable. And the
19 Tribunal's question in relation to these three steps was
20 whether the invocation of treaty protection for the
21 other disagreement is abusive or not.
22 And then, Madam President, members of the Tribunal,
23 there were a few add-on questions: whether the answer
24 would change if, instead of saying "disagreement", which
25 you chose as a neutral term, we would use the word

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11:24 1 "dispute" [or] we would use the term "measure".
2 I'll begin with the first part of the assumption:
3 that is, if a corporation restructures to gain treaty
4 protection with a specific disagreement in mind, and if
5 it has it in mind, it means that it's foreseeable.
6 The way that assumption 1 is stated is of course
7 correct, but it's not the case that foreseeability is
8 the only relevant test. There is also the situation
9 where there is a pre-existing dispute, which is well
10 known from the Philip Morris Asia case, which is RLA-95,
11 and other decisions and awards such as Pac Rim
12 v El Salvador, RLA-43, [and] Tidewater v Venezuela,
13 which is RLA-93. And these are all collected together
14 in the Philip Morris Asia award at paragraphs 545
15 to 554.
16 (Slide 11) One of those other decisions and awards
17 is of course Mobil v Venezuela, which is RLA-92. And
18 the tribunal there said, at paragraph 205, which is
19 extracted on the screen, that:
20 "With respect to pre-existing disputes, the
21 situation is different and the Tribunal considers that
22 to restructure investments only ... to gain jurisdiction
23 under a BIT for such disputes would constitute, to take
24 the words of the Phoenix Tribunal, 'an abusive
25 manipulation of the system of international investment

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11:25 1 protection ..."
2 So if there is a pre-existing dispute, then
3 foreseeability is not relevant.
4 Foreseeability is relevant where there is not yet
5 a dispute, but there is a need for a test as to whether
6 the dispute that is then notified in the future is
7 a motivating factor for the restructuring. And in the
8 first part of assumption 1, it matters that the
9 restructure has taken place with an abusive purpose in
10 mind, and there is no question that it has in fact taken
11 place with an abusive purpose in mind. The abuse is all
12 the more clear because there is a foreseeable dispute,
13 and the intent is to gain investment treaty protection
14 with respect to that dispute.
15 Then in part B of the assumption, the disagreement
16 doesn't lead to the invocation of the treaty protection.
17 This is different from the usual situation, where
18 an investor may make an investment, and this may be
19 structured in order to secure the benefit of treaty
20 protection, including ISDS protection, with respect to
21 any unknown future dispute.
22 Of course, there's nothing wrong with that. There
23 are multiple decisions and awards that confirm that it
24 is permissible to structure investment to take advantage
25 of an investment treaty in respect of unknown future

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11:27 1 disputes. And there are multiple authorities on that
2 point: Mobil v Venezuela, RLA-92, is one such authority,
3 and there are several others which I don't need to
4 trouble with you.
5 But in the assumption which has been provided to us
6 by the Tribunal, there is an abusive purpose to the
7 restructure in the first part of the assumption. And in
8 Australia's submission, that abusive purpose cannot
9 simply be put to one side when assessing what happens
10 next, even though that disagreement that the investor
11 had in mind doesn't lead to the invocation of investment
12 treaty protection.
13 So turning to the third part of the assumption,
14 where there is another "disagreement", to use the
15 Tribunal's neutral term, which as such is not
16 foreseeable. The question here is whether the
17 invocation of treaty protection is abusive in those
18 circumstances.
19 We say this has to be a fact-sensitive matter which
20 has to take account of all of the relevant
21 circumstances. And there are three specific areas of
22 facts that are likely to be important in that
23 assessment: firstly, what the substance is of the second
24 disagreement; secondly, the timing of the second
25 disagreement; and thirdly, the measure which is at issue

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11:28 1 in the second disagreement. I will address these in
2 turn.
3 The first of these factors is the substance of the
4 second disagreement. And this is relevant if there is
5 any connection between the two disagreements: if they,
6 for instance, involve the investor being exposed to the
7 same sort of state conduct, which the investor has
8 responded to already through seeking the treaty
9 protection in the first place.
10 It would also be relevant if the second disagreement
11 concerned the same state actors, the same investment
12 vehicle, and the same investment -- for instance, the
13 same investment contract, such as a state agreement --
14 as well as any other relevant factors. This has to be
15 a holistic assessment.
16 Another relevant factor may be the involvement of
17 the same specific state representative, where there are
18 cases of personal animosity. For example, where
19 something is happening like two bulls are butting heads,
20 first in relation to disagreement 1 and then the same
21 thing happens in relation to disagreement 2, then we say
22 this is a relevant factor in relation to considering
23 whether commencing an investment treaty claim in
24 relation to disagreement 2 would be abusive.
25 Turning to the timing of the second disagreement,



11:29 1 one can think of hypothetical examples which throw this
2 issue into sharp relief. For instance, suppose the
3 situation is that the corporate restructure is carried
4 out in week 1 to gain treaty protection with
5 disagreement 1 in mind; that might be a taxation
6 measure. But then in week 2, disagreement 2 arises; and
7 that might be the cancellation of a permit. And then in
8 week 3, the treaty is invoked in relation to
9 disagreement 2, being the cancellation of the permit.
10 Now, it would appear rather odd for that not to be
11 considered abusive. There has been no investment other
12 than for the purposes of treaty protection for
13 an abusive purpose during a period of just two weeks.
14 There has been no possibility for the state to get any
15 benefit in relation to a genuine investment before
16 a claim is submitted.
17 These first two factors, substance and timing,
18 explain why recent cases have emphasised the
19 significance of there being deteriorating relations
20 between the investor and the host state.
21 (Slide 12) In this respect, in the case BRIF
22 v Serbia, which is RLA-136, which is extracted on the
23 slide, the claim was brought by two Serbian companies
24 which had acquired Luxembourg nationality through
25 a restructure in 2019, in circumstances where the two



11:31 1 Serbian companies were already in dispute with the
2 respondent, the Republic of Serbia, and had in fact been
3 in dispute with the Serbian authorities for around
4 12 years at the time of the restructuring.
5 At paragraph 208, as you can see on the slide, the
6 tribunal observed that:
7 "... what needs to be foreseeable is a dispute
8 originating from deteriorated circumstances affecting
9 an investment in the host State. The abuse is in
10 manipulating the system, being aware that facts at the
11 root of a dispute ..."
12 And I interpose that that is the type of factors
13 that I've been outlining in the present case:
14 "... have already taken place negatively affecting
15 the investment and could lead to investment treaty
16 arbitration, irrespective of how a claimant labels the
17 same facts as leading to a 'domestic' or
18 an 'international' dispute."
19 (Slide 13) In Cascade v Turkey (RLA-98), a case
20 which I took you to a number of times on Monday morning,
21 here the Belgian claimant had acquired shares in CMD,
22 a media company in Turkey, which was being shut down on
23 national security grounds as part of the Government of
24 Turkey's actions against the movement inspired by the
25 exiled cleric Fethullah Gülen.



11:32 1 I took you, as I said, to a number of passages of
2 Cascade on Monday, but not to this particular paragraph.
3 At paragraph 347, the tribunal held that:
4 "... the Tribunal agrees with prior awards that
5 describe foreseeability as a continuum between
6 unforeseeable disputes and highly probable disputes,
7 with most cases falling somewhere between the two
8 extremes (and thus, by definition, not precisely at
9 either). That is because in many cases, specific
10 government action is preceded by some period of
11 deteriorating relationships, and the longer the
12 relationship deteriorates, the more foreseeable adverse
13 State action may become. That is presumably why the
14 Pac Rim tribunal described the exercise of drawing
15 a line on the continuum as not necessarily clear cut,
16 and 'recognize[d] that, as a matter of practical
17 reality, the dividing-line will rarely be a thin red
18 line, but will include a significant grey area.' And
19 that is precisely why it is necessary to conduct
20 a holistic analysis that focuses on all relevant factors
21 and not to focus too rigidly on just one, such as the
22 precise degree of foreseeability on the date of
23 investment. In considering all relevant factors, the
24 Tribunal does agree that there will be a high threshold
25 to meet the test for showing abuse of process, but that

11:33 1 is because it will be only in unusual circumstances that
2 the evidence points to a likely sham transaction, rather
3 than one made for genuine commercial purposes. But
4 a high threshold for proving abuse does not equate to
5 a requirement to prove that adverse State action is
6 already highly probable on the date of the investment."
7 (Slide 14) And in this case, in Cascade v Turkey,
8 the tribunal ultimately held, at paragraph 444, that the
9 claimant's acquisition of the shares in the media
10 company was:
11 "... designed to repackage under a foreign flag
12 an investment actually made by domestic investors in
13 their home State, at a time and in an atmosphere when
14 adverse actions by the ..."
15 The redacted text is no doubt the Turkish
16 authorities:
17 "... were reasonably foreseeable."
18 I come then to the third factor to be considered,
19 and that is the relevant measure at issue in the second
20 disagreement, and whether that specific type of measure
21 is foreseen. This is also linked to the second part of
22 the Tribunal's question, which I'll come to.
23 Here what is relevant is the character of the
24 government measure; in our case, being a legislative
25 measure adopted by the Western Australian Parliament



11:34 1 that effected a unilateral modification of the
2 State Agreement. This is, firstly, what was threatened
3 in relation to the mine continuation proposals issue
4 involving the CITIC parties; secondly, what was
5 anticipated might be used in relation to the Balmoral
6 South proposal and the arbitration proceedings; and
7 thirdly, what in fact happened, with the Amendment Act
8 as enacted in August 2020.
9 Now, turning to the Tribunal's hypothesis of this
10 second disagreement, Australia's submission is that this
11 has to be assessed on a fact-sensitive basis.
12 We note at the outset that it is not Australia's
13 position that the submission of a claim to arbitration
14 in respect of such a second disagreement would always be
15 abusive; nor is Australia's position that it would never
16 be abusive. Clearly there are cases where the
17 substance, the timing and the character of the measure
18 at issue in the second disagreement will be such that it
19 would be abusive for an investment treaty claim to be
20 submitted in relation to that second disagreement.
21 Thus, in Australia's submission, it will be abusive
22 to submit a claim concerning the second disagreement to
23 investor-state arbitration in the following
24 circumstances.
25 Firstly, where the second disagreement concerns the



11:36 1 same sort of state conduct by the same state actors,
2 particularly in a context of deteriorating relations or
3 personal animosity, and where that conduct is directed
4 at the same investment vehicle.
5 Secondly, where the second disagreement is
6 sufficiently proximate in time; again, this being
7 a fact-specific enquiry. In the usual course, if this
8 happens many years later, it may be insufficiently
9 proximate, leaving aside other considerations.
10 And thirdly, where the second disagreement is
11 effected by the same sort of measure, having regard to
12 its character, effect and the relevant author of that
13 state measure.
14 I come then to the Tribunal's further follow-up
15 questions. The first of these is what the impact would
16 be if the word "disagreement", which the Tribunal
17 deliberately chose as being a neutral term, were
18 replaced by the term "dispute".
19 We see the terms "disagreement" and "dispute" as
20 being interchangeable. This, accordingly, does not
21 affect our analysis.
22 (Slide 15) This is consistent with the well-known
23 dictum of the International Court of Justice which was
24 exemplified in the ICJ's judgment in Georgia v Russia,
25 which is RLA-133, at paragraph 30, where the



11:37 1 International Court of Justice collected its consistent
2 jurisprudence on this matter:
3 "The Court recalls its established case law ...
4 beginning with the frequently quoted statement by the
5 Permanent Court of International Justice in the
6 Mavrommatis Palestine Concessions case in 1924:
7 'A dispute is a disagreement on a point of law or fact,
8 a conflict of legal views or of interests between
9 two persons.'"
10 If the term "measure" were inserted instead of the
11 neutral term "disagreement", that would make the test
12 more exacting. But that is not the approach of
13 investment tribunals. In this respect, I refer to the
14 cases I cited in opening on Monday morning; and I also
15 refer to Australia's submissions in the SOPO at
16 paragraphs 312 to 316 and in the ROPO at paragraph 248
17 to 250.
18 (Slide 16) On this issue, let me come to the
19 Claimant's slide on foreseeability, which was slide 32
20 of its slide deck.
21 In that slide, the Claimant suggests that there were
22 certain decisions and awards which supported two
23 propositions. Firstly, that the measure giving rise to
24 the dispute must be well defined, and there are a series
25 of cases cited in support of that proposition:

11:38 1 Tidewater, Mobil, Aguas del Tunari and Clorox. And then
2 other cases that supported the proposition, apparently,
3 that the specific measure must be foreseeable, and there
4 were cited: Philip Morris Asia, again Clorox, Natland,
5 Alverley and Ipek.
6 But the Claimant's citation of cases under these two
7 headings is incorrect, and I'll briefly go through those
8 decisions and awards. If I can begin then with the
9 cases cited for the proposition that the measure giving
10 rise to the dispute must be well defined.
11 (Slide 17) The first of those, chronologically at
12 least, is Aguas del Tunari v Bolivia, which is CLA-185.
13 Now, this is, with respect, a rather dated case, from
14 2005, and it predates many of the decisions and awards
15 that have considered this question.
16 The tribunal's award and decision on this point is
17 really not to the point. It doesn't subject this issue
18 to close analysis. There is really no discussion of
19 relevant findings by the ICSID tribunal in this case of
20 the foreseeability of the dispute or of the measure
21 giving rise to the dispute, nor is there anything about
22 anything being well defined.
23 The only discussion of foreseeability in that case
24 concerns the foreseeability of rights and civil unrest
25 in Bolivia in relation to the claimant's concession,



11:40 1 which you can see extracted at paragraph 329 on the
2 slide. So no assistance can be found from that award.
3 (Slide 18) As for Mobil v Venezuela (RLA-92), this
4 case is, in fact, not about foreseeability. Rather, if
5 we can look at the extract of paragraphs 204 and 205 on
6 the slide:
7 "As stated by the Claimants ..."
8 Quoting from paragraph 204:
9 "... the aim of the restructuring of their
10 investments in Venezuela through a Dutch holding was to
11 protect those investments against breaches of their
12 rights by the Venezuelan authorities by gaining access
13 to ICSID arbitration through the BIT."
14 And the tribunal says this was "perfectly legitimate
15 ... as ... concerned future disputes".
16 And in paragraph 205, the tribunal notes that it was
17 different with respect to pre-existing disputes, and
18 that that would be abusive, quoting Phoenix Action. And
19 the claimants were indeed conscious of this, looking at
20 the highlighted section in the last few lines, that the
21 Claimants had stated that:
22 "... they 'invoke ICSID jurisdiction on the basis of
23 the consent expressed in the Treaty only for disputes
24 arising under the Treaty for action that the Respondent
25 took or continued to take after the restructuring was



11:41 1 completed'."
2 So this was about certain existing disputes and then
3 a future dispute, with no discussion as to the
4 foreseeability of that future dispute.
5 (Slide 19) As for Tidewater v Venezuela, RLA-93,
6 this also doesn't support the proposition that the
7 Claimant asserts. Here the ICSID tribunal noted at
8 paragraph 193 that there was:
9 "... [a] possibility that a dispute between the
10 Claimants and the Republic in relation to the
11 expropriation of the Claimants' assets in Venezuela was
12 reasonably foreseeable ...", et cetera.
13 Now, the Tribunal there is not talking in terms of
14 identifying with any specificity the expropriation
15 measure. It's talking about the substance of a dispute,
16 such as, for instance: what is the conflict of legal
17 views or interests? And here it was the parties' rights
18 and obligations in relation to a possible expropriation
19 under the treaty.
20 (Slide 20) I turn then to Clorox v Venezuela
21 (RLA-142), and I addressed this case in opening. And
22 the Swiss Federal Tribunal here is concerned again about
23 the foreseeability of the dispute, not the particular
24 measure.
25 If we can look at paragraph 5.4.2 on the slide.



11:42 1 I didn't show you this in opening on Monday, but
2 I'll bring it up today. We can see in the extract
3 that's not highlighted that:
4 "To assess the foreseeability of the dispute during
5 the restructuring of the investment, one must not focus
6 on the point of view of the investor concerned. To the
7 extent that recourse to abuse of rights aims to limit
8 maneuvers that objectively do not deserve any
9 protection, it is rather appropriate to ask whether
10 a specific dispute would have been foreseeable for
11 a reasonable investor placed in the same situation as
12 the investor concerned."
13 So again, looking at the dispute, not the particular
14 specific measure.
15 (Slide 21) At paragraph 5.6, the tribunal applied
16 this test. And in that case, there had been a speech
17 made by the former President of Venezuela, where there
18 had been in fact a particular measure that had been
19 referred to. But that wasn't specifically identified;
20 it wasn't necessary for that to be specifically
21 identified, in the view of the tribunal.
22 Put simply, it was just something that the
23 tribunal -- the court, rather, the Swiss Federal
24 Tribunal, said that something has to be threatened or in
25 some way likely, but not specifically identified; and

11:43 1 what was going to happen would actually have to infect
2 the investment; and that the effect of that would be of
3 such an extent as to lead to a conflict of legal views
4 or interests between the parties.
5 So again, in the view of the Swiss Federal Tribunal,
6 no need for an investor to foresee the specific measure
7 that would be implemented. Rather, what had to be
8 foreseen was a real possibility that something would
9 happen.
10 (Slide 22) I turn then to the Claimant's cases that
11 apparently stand for the proposition that the specific
12 measure must be foreseeable. And the Claimant here
13 cites Philip Morris Asia v Australia, RLA-95.
14 That is plainly not right on the face of
15 paragraph 554 of the award. I took you to this passage
16 on Monday, as I recall. I don't need to read it all
17 into the transcript. It is simply there as a reference
18 to there being:
19 "... gain[ing] the protection of an investment
20 treaty at a point in time when a specific dispute [is]
21 foreseeable."
22 And then the tribunal said:
23 "... [it] is foreseeable when there is a reasonable
24 prospect, as stated by the Tidewater tribunal, that
25 a measure which may give rise to a treaty claim will



11:44 1 materialise."
2 So the tribunal didn't consider it necessary that
3 Philip Morris Asia could foresee the plain packaging
4 measure. It could have been some other measure that
5 interfered with their investment, such as another
6 tobacco control measure having an equivalent effect.
7 In any [event], we have to recall that the facts of
8 this case were peculiar, as I explained in opening, in
9 that a very specific measure had in fact be announced by
10 Australia, and draft legislation had been published --
11 in the form of the exposure draft of the plain packaging
12 bill -- well in advance. But even so, the test, as
13 formulated and adopted by the tribunal, did not require
14 foresight of that specific measure.
15 The Claimant also refers to Natland
16 v Czech Republic, which is CLA-235, which is another
17 judgment of the Swiss Federal Tribunal. This concerned
18 a renewable energy case against the Czech Republic. The
19 Claimant made no particular oral submissions on this
20 case in opening.
21 But the Swiss Federal Tribunal held that because
22 the host state had announced its intention to adapt the
23 feed-in tariff before expressly abandoning the measure,
24 following lobbying from foreign investors and banks, the
25 investors could have reasonably expected that their



11:46 1 investment would not be subject to a similar measure; in
2 that case, something like the solar levy.
3 Now, the Swiss Federal Tribunal thereby implicitly
4 confirmed that the dispute between the investors and the
5 host state encompassed not only the adaptation of the
6 feed-in tariff, the measure in that case that was
7 originally envisaged, but also similar measures that the
8 host state could implement to achieve the same outcome.
9 (Slides 23-34) Now, the Claimant then cited Alverley
10 and Ipek, and these are in fact cases that assist the
11 Respondent. I'll come to those in a moment. But before
12 doing so, I also note that the Claimant failed to
13 mention other decisions cited by the Respondent in its
14 written submissions, like the award in Cascade v Turkey
15 (RLA-98). I've raised this case already. But the
16 tribunal there provided a persuasive analysis, which it
17 described as being consistent with the approach in
18 Philip Morris Asia, of what must be foreseeable for the
19 purposes of an abuse of process objection.
20 I took you to paragraphs 350 and 351 in opening on
21 Monday morning; I don't need to read them to you again.
22 But we submit that this is the correct approach in
23 cases such as the present, particularly the express
24 recognition by the Cascade tribunal that the state might
25 adopt measure X, rather than measure Y, against



11:47 1 a background of a deteriorating relationship between the
2 investor and the host state; and the investor who seeks
3 to bring a claim in respect of measure X, rather than
4 measure Y, is no less guilty of an abuse.
5 (Slide 25) This is also the way that the awards in
6 Alverley, RLA-71, and Ipek, RLA-99, should be correctly
7 understood.
8 The Alverley tribunal expressly recognised that
9 disputes may evolve over time, such that:
10 "... it is not necessary that every contour of the
11 dispute as it is eventually laid before an arbitral
12 tribunal has to be foreseeable."
13 This is paragraph 385. The tribunal said:
14 "[Instead] [i]t is the dispute, not the detailed
15 claim, which has to be foreseeable."
16 (Slide 26) And to turn to Ipek briefly, which is
17 RLA-99, the tribunal referred to the foreseeability of
18 a measure which may give rise to a treaty claim. That
19 tribunal recognised that:
20 "... a test based on foreseeability must of its
21 nature include instances in which the specific State
22 measure has not yet been taken, such that the precise
23 State powers or mechanisms to be used, and their effects
24 on the investment, are not necessarily known to the
25 investor."

11:48 1 So it cannot be right that this award in any way
2 supports the proposition that it is necessary for the
3 specific measure to be foreseen.
4 Madam President, members of the Tribunal, those are
5 my submissions on foreseeability. With your permission,
6 I will now pass to Mr Jesse Clarke.
7 THE PRESIDENT: Thank you.
8 MR CLARKE: Madam President, members of the Tribunal, good
9 morning.
10 I wasn't sure whether the Tribunal intended to take
11 a break this morning. We are happy to proceed; we are
12 in your hands, as you wish. My role is to simply
13 provide you with a brief answer to the fifth question on
14 joint interpretation, which will take about
15 three minutes. I can return and do that, or break, as
16 you wish.
17 THE PRESIDENT: Should we listen to you and then have
18 a break? Does that make sense?
19 MR CLARKE: We're very happy to proceed that way,
20 Madam President.
21 (Slide 27) So as I mentioned, my task this morning
22 is to provide a brief answer to the fifth question posed
23 yesterday concerning a possible request for a joint
24 interpretation pursuant to Article 27(2) of Chapter 11
25 of AANZFTA.



11:50 1 As the Tribunal observed in its question, when it
2 previously raised this matter in October 2023, neither
3 the Respondent nor the Claimant proposed to request
4 a joint interpretation at that time. And,
5 Madam President, members of the Tribunal, the position
6 of the Respondent on this issue has not changed. At
7 this advanced procedural stage of the arbitration,
8 Australia does not propose to request a joint
9 interpretation.
10 In the preliminary objections phase of this case,
11 there are, of course, questions of interpretation of
12 specific provisions of AANZFTA that the Tribunal will
13 need to resolve. The Respondent has full confidence in
14 the Tribunal completing this important task without
15 needing to request a joint interpretation.
16 The Tribunal now has the benefit of Australia's
17 written and oral submissions on the proper
18 interpretation of the provisions of AANZFTA relevant to
19 our preliminary objections on "no investor"/"no
20 investment" and denial of benefits.
21 It is the Respondent's position that the textual
22 basis in AANZFTA for our preliminary objections is clear
23 and conclusive, and that the Tribunal should itself
24 properly determine any questions of interpretation of
25 the provisions of AANZFTA by having recourse to the



11:51 1 well-established rules and principles of treaty
2 interpretation.
3 Should the Tribunal nevertheless itself propose to
4 request a joint interpretation from the AANZFTA treaty
5 parties, the Respondent would respectfully ask the
6 Tribunal to consult the parties prior to issuing any
7 such request, particularly identifying the specific
8 provision or provisions of AANZFTA on which a joint
9 interpretation might be requested, and the proposed
10 terms of any request.
11 Thank you, Madam President, members of the Tribunal.
12 That concludes my answer to that question.
13 THE PRESIDENT: We thank you for this answer. And we trust,
14 of course, that you have paid careful attention to the
15 wording of Article 27(2), which is the reason why we
16 asked the question. Once more:
17 "The tribunal shall ... request a joint
18 interpretation of any provision of this Agreement that
19 is in issue in a dispute."
20 It's quite a broad scope. And it's mandatory
21 language: it says, "The tribunal shall".
22 I am just emphasising this because we will have to
23 assess what exactly our task is under the treaty and of
24 course take this into account, and we will necessarily
25 also take into account the disputing parties' views.



11:53 1 MR CLARKE: Thank you, Madam President.
2 THE PRESIDENT: Thank you.
3 Should we take a break now? How much more time do
4 you think you will spend, now being started?
5 DR DONAGHUE: Madam President, contrary to my initial
6 assessment, I think we will take our two hours. But
7 that is now only, by my reckoning, about 35 minutes from
8 now. So if you would prefer us just to continue and
9 complete, then we're content to do that. But we're --
10 THE PRESIDENT: We can certainly continue. Let me look at
11 the court reporter. (Pause)
12 DR DONAGHUE: I wasn't seeking to press the Tribunal to take
13 that course. We're happy either way.
14 THE PRESIDENT: No, that's fine. Let's move on then.
15 DR DONAGHUE: Thank you.
16 Next then, Dr Hart.
17 DR HART: (Slide 28) Good morning, Madam President. I will
18 be responding briefly to the Claimant's opening
19 submissions on the burden of proof in this case.
20 There is no question that the Claimant bears the
21 burden of proving that the basic jurisdictional
22 requirements of Chapter 11 of AANZFTA are satisfied,
23 including that Zeph is an investor and that it owns or
24 controls an investment. If any authority were required,
25 it may be found in the Carlos Sastre v Mexico award of

11:54 1 2022, RLA-29, paragraph 147.
2 (Slide 29) In any event, the Claimant has readily
3 accepted that it bears this burden, as shown on the
4 current slide.
5 But the Claimant has fallen well short of
6 discharging the burden of showing it made a contribution
7 or that it assumed a risk. Take two examples from
8 yesterday alone.
9 First, in relation to Zeph's argument that it has
10 contributed to Mineralogy through so-called "active
11 management", Dr Donaghue asked Mr Palmer why Zeph had
12 not asked Ms Emily Palmer, Mr Sheridan, Mr Wong and
13 Ms Singh to present evidence of their roles. Mr Palmer
14 responded:
15 "None of your people have approached them and asked
16 them would they be a witness, which you could have."
17 That's at the transcript of yesterday, page 241,
18 line 25. But the onus was not on Australia to adduce
19 this evidence.
20 Secondly, on the reinvesting dividends argument,
21 Mr Birkett conceded yesterday that he had no evidence
22 that Zeph had turned its mind to this issue at all; see
23 pages 284 to 286 of the draft transcript. Zeph has not
24 otherwise offered any evidence of decision-making
25 specifically by Zeph -- as opposed to Mr Palmer, as the



11:56 1 controller of the Mineralogy Group -- on the question of
2 retained earnings. Given its burden of proving it has
3 made an investment, this lack of evidence is fatal to
4 its argument.
5 Australia accepts that it formally bears the burden
6 in relation to its denial of benefits and abuse of
7 process objections. But, given the Claimant's unique
8 access to facts and evidence relevant to these
9 objections, the appropriate approach to the burden of
10 proof is more nuanced than that.
11 (Slide 30) In relation to denial of benefits, this
12 was confirmed in AMTO v Ukraine, RLA-72, paragraph 65,
13 which undoubtedly the Tribunal is well familiar with.
14 That tribunal referred to the "negative inferences"
15 which a tribunal could draw against a claimant which
16 does not provide evidence of those matters; "those
17 matters" including its activities within its home
18 jurisdiction.
19 (Slide 31) In Bridgestone v Panama, being RLA-30,
20 the tribunal stated at paragraph 289 that the burden
21 would be readily shifted to a claimant on "matters that
22 fall essentially within [its] knowledge".
23 (Slide 32) That same approach applies in relation to
24 Australia's abuse of process objection. In the Alverley
25 v Romania case, RLA-71, the tribunal explained at



11:57 1 paragraph 364 that where a respondent alleges an abuse
2 of process:
3 "... a claimant may not simply shield itself behind
4 the fact that the burden is on the respondent."
5 Evidence on matters such as "the motive for
6 a transfer of assets and the nature of the corporate
7 structure are possessed by the claimant", which
8 therefore "bear[s] the burden of adducing evidence to
9 explain its actions -- evidence to which it alone has
10 access".
11 (Slide 33) How have these principles played out in
12 this case? Madam President, allow me to show you
13 Procedural Order No. 4, and specifically the grounds on
14 which the Claimant resisted many of the Respondent's
15 requests for document production.
16 As part of its so-called "Over[arching] Objection",
17 the Claimant expressly recognised that on the rationales
18 for the restructure, it bore the burden of proof. In
19 this response, which is now on the screen, the Claimant
20 was telling the Tribunal that there was no need to order
21 it to produce documents: it, the Claimant, already had
22 every incentive to provide any documents it had because,
23 unsurprisingly, it was required to prove its own
24 commercial rationale.
25 (Slides 34-35) It made similar statements



11:59 1 specifically in relation to Australia's request 3,
2 concerning the purpose of the corporate restructuring,
3 as well as requests 4 and 8, each concerning aspects of
4 the availability of financing for coal projects from
5 Singaporean banks.
6 Given those statements, it really is remarkable that
7 Zeph has been unable to provide a cogent explanation,
8 let alone one supported by evidence, for the
9 restructuring.
10 (Slide 36) It gave the same response to Australia's
11 request 14, which concerned due diligence reports and
12 business valuations by Zeph relating to the Kleenmatic
13 and the engineering companies. And yet, to this day,
14 Zeph has not been able to explain its involvement in
15 these companies, and has instead resorted to
16 increasingly outlandish explanations.
17 For example, yesterday Mr Palmer suggested for the
18 first time that the urgency of incorporating Zeph was
19 driven by the need to acquire the three failing
20 engineering companies, which he saw as "a good
21 opportunity", despite having no documented due
22 diligence. That's at page 35 of yesterday's transcript.
23 When Dr Donaghue asked him why he had never given
24 this evidence in his seven witness statements in these
25 proceedings, Mr Palmer answered:

12:00 1 "Well, you've never asked me before."
2 That's page 36, line 12.
3 But on issues where Zeph is required to explain and
4 evidence its behaviour, there is no question of it
5 needing to be asked.
6 Zeph has attacked Australia's evidence on the ground
7 that its multiple expert witnesses, as well as
8 Mr Vickers, weren't there on the ground with Zeph, and
9 thus can't speak to the facts.
10 As the AMTO, Bridgestone and Alverley tribunals
11 recognised, of course a respondent state isn't witness
12 to the internal workings of a claimant company, so it
13 can't be expected to give the same evidence as the
14 company itself.
15 But what Australia has done in these proceedings is
16 ask reputable independent experts, with decades of
17 relevant experience, to take an objective look at the
18 behaviour of Mineralogy, Mr Palmer and Zeph, as well as
19 the contemporaneous documentary record -- such as it
20 is -- and see if they can make any sense of it at all,
21 in light of the rationales presented by the Claimant.
22 Uniformly, they could not.
23 If Zeph felt that Australia's witnesses weren't
24 qualified, it could have put on countervailing expert
25 evidence by individuals who it felt possessed the



12:02 1 necessary credentials. It also could have
2 cross-examined Australia's experts. When it came to
3 Mr Vickers, it could have provided documents showing,
4 for example, that Zeph did have a real physical presence
5 in Singapore at its registered addresses. But it did
6 none of those things.
7 Instead, what we heard from Mr Palmer yesterday is
8 that he hadn't even read Australia's evidence. See the
9 draft transcript at page 37, line 5; page 38, line 21;
10 page 87, line 23; and page 161, line 5.
11 Madam President, I will now hand over to the
12 Solicitor-General, Dr Donaghue.
13 THE PRESIDENT: Thank you.
14 DR DONAGHUE: Thank you, Madam President, members of
15 the Tribunal.
16 (Slide 37) Can I start with question 2. The
17 Tribunal will recall that that question asks us again to
18 make some assumptions -- to assume the Tribunal views
19 the facts on the record as showing two streams of
20 events: one stream linked to the disagreement with the
21 CITIC parties and one stream relating to the
22 disagreement about the BSIOP proposal -- and, under this
23 assumption, asks about the connecting factors that may
24 exist between those two streams.
25 Can I start my answer to that question by referring



12:03 1 back to the legal submissions that Professor Brown has
2 already made in the context of question 3, because the
3 legal framework obviously affects the factual connecting
4 factors that need to exist.
5 As Professor Brown explains, we contend that where
6 one has the same state actors, the same investment
7 company, the same investment contract -- as in the State
8 Agreement -- underlying the matter, the same personnel
9 at the heart of the dispute -- Premier McGowan on the
10 one hand, Mr Palmer on the other -- that they are all
11 relevant. So if the Tribunal accepts that legal
12 framework that Professor Brown has just developed, then
13 that broadens out the range of connective factors that
14 are relevant to the answer to question 2. We submit
15 that here you have overlap on all of those matters.
16 Of course, as Professor Brown also developed, in
17 point of time, you have -- the "BSIOP dispute", if I can
18 call it that, that goes right back to 2012, and that
19 continues until the Amendment Act. So it's
20 a long-running dispute; broader in point of time than
21 the CITIC proposal, relating in part to an issue under
22 the same State Agreement, in relation to an area of land
23 closely proximate to the BSIOP area of land, and
24 involving -- as I'll come to develop in just a moment --
25 at least some level of shared facilities with the



12:05 1 Balmoral proposal. So there is some evidence that the
2 Tribunal hasn't yet seen that I'll take you to that
3 shows those levels of proximity.
4 But the overlap with people, the overlap with time
5 and the overlap in the general subject matter are all
6 important, in our submission, because where those
7 matters aren't present, it's not difficult to untangle
8 facts; but where they are, where the same people are
9 doing thing at the same time in relation to multiple
10 different matters, you have the problem that events in
11 the real world don't come with subheadings or with
12 labels. So when people are speaking, and in what
13 Mr Palmer called a "war" yesterday, between himself and
14 Western Australia, there aren't clear demarcation lines,
15 necessarily, as to who might get damaged in particular
16 salvos, if I can continue that analogy.
17 So here we submit -- and I know the Tribunal has
18 this point, so I won't waste too much of our time
19 repeating it. But you will recall I took Mr Palmer
20 yesterday -- and I won't take the Tribunal back to it
21 now -- to Exhibit R-90, which was a document from
22 Mineralogy on 6 August 2018 submitting the notice of
23 arbitration that instituted what led to the second
24 McHugh award. So that was Mineralogy stating in terms
25 with Western Australia, "We are in dispute with you as

12:06 1 to our entitlement to damages under the BSIOP proposal".
2 Obviously, because that's the second award, it takes
3 its place in what was already a very long-term decline
4 of relationships between Mineralogy and Western
5 Australia. But it does mean that only a few months
6 before the restructure took place, Mineralogy had
7 instituted a formal arbitral proceeding about damages
8 under Balmoral with respect to Balmoral South, and that
9 dispute was there at the same time as the CITIC dispute,
10 which was the immediate subject matter for Premier
11 McGowan to announce in the Western Australian Parliament
12 that, with the support of the opposition, they were
13 looking at unilaterally amending the State Agreement.
14 And notwithstanding Mr Palmer's repeated references
15 yesterday to an academic paper provided by a former
16 Premier of Western Australia in the mid-1990s, we had
17 proximate statements by the current Premier, with the
18 support of the current opposition leader, that expressly
19 threatened unilateral amendment of the State Agreement.
20 Now, Mr Palmer says it was inconceivable that that
21 would ever happen. But in our submission, it was very
22 conceivable that it would happen, because it was being
23 announced as a prospect with bipartisan support in the
24 Western Australian Parliament.
25 Once that's on the table as something that the



12:08 1 Western Australian Parliament might be prepared to do,
2 in my submission it's necessarily on the table in
3 relation to any problems under the State Agreement,
4 including the very long-running problems relating to the
5 BSIOP. That may not have been the trigger for the
6 immediate announcement, but once that tool is on the
7 table, in our submission, it's not hard to see that the
8 tool might be deployed in relation to any of the
9 dimensions of the ongoing disagreements between
10 Western Australia and Mineralogy.
11 In strong support of that submission is the fact
12 that this is exactly how Mr Palmer himself understood
13 it. You will recall that I took Mr Palmer to a letter
14 that he signed on 15 October 2019 (R-145), four days
15 after the second McHugh award was granted. It was
16 a letter evidently copied from the 4 February letter,
17 Exhibit R-141, which was the first threatened
18 investor-state proceeding on behalf of Mineralogy.
19 The text is almost identical, except for the first
20 paragraph. And it expressly says, "Zeph is concerned
21 that the State not act in a way that will undermine our
22 right to damages pursuant to the second McHugh award".
23 Now, the critical thing about that letter -- that's
24 a very important letter, in our submission, because it
25 shows, a long time before the Amendment Act, Mr Palmer



12:09 1 foreseeing unilateral action against Mineralogy with
2 respect to Balmoral South. But he didn't foresee that
3 because Premier McGowan made another threat, made
4 a threat in relation to Balmoral. Nothing happened in
5 October to precipitate that letter except the making of
6 the award. The threat that Mr Palmer was responding to
7 in drafting that letter about Balmoral and the McHugh
8 award was the November threat that had been made
9 originally by Premier McGowan. There was no further
10 or ...
11 So it wasn't so much that Mr Palmer was seeing CITIC
12 as in a silo from Balmoral. Premier McGowan makes
13 a threat about unilateral amendments, and Mr Palmer sees
14 that threat as extending to his victory in the second
15 McHugh award in a way that warrants the shot across the
16 bow represented by the letter one sees at R-145.
17 Can I just ask the operator to bring up Mr Palmer's
18 answers about this. I think it is G/2/41 (Day 2),
19 page 147 of the transcript, or actually starting on
20 page 146 at line 8. So I put to Mr Palmer:
21 "... that's ... the same language as appears in the
22 4 February letter[?]"
23 We're discussing Exhibit R-145. And he says:
24 "And it was written for the same reasons."
25 So he's saying he was writing about Balmoral for the



12:11 1 same reasons as he'd written on 4 February in making the
2 first threat that Zeph would bring investor-state
3 proceedings.
4 Then over the page at 147:
5 "Question: What it shows is that in October 2019,
6 you were contemplating the possibility that there might
7 be a legislative interference with the awards made by
8 Michael McHugh?
9 "Answer: I was contemplating that the Premier had
10 said in Parliament that he planned to do this --
11 interfere with the agreement -- back in 2018 ..."
12 And I said:
13 "... just [to] clarify: 'to do this' [you mean] to
14 unilaterally amend the State Agreement?"
15 Mr Palmer said:
16 "To repeal unilaterally the State Agreement [that's
17 what I meant]."
18 So he viewed the threat as extending across the
19 board to issues between Mineralogy and WA, and the
20 letter at [R-]145 supports that.
21 So in terms of connective tissue between the
22 two disputes, we submit that because Mr Palmer and
23 Premier McGowan were, to use Mr Palmer's words, "butting
24 heads", they were at war over all of these issues, a new
25 dimension having been introduced into their

12:12 1 relationship, which was, "If you don't play ball, we
2 will legislate unilaterally to take away your rights",
3 that can't just be put in the box of CITIC; it was
4 broader.
5 That's all by way of material the Tribunal had
6 already seen; can I just alert you to a few other
7 documents you may not have.
8 Can we first bring up R-113, which is E2/113/10.
9 This is the mine continuation proposal that CITIC had
10 submitted in December 2017. So this is the revised
11 version. It was initially submitted in 2016; a revised
12 version in 2017.
13 If the operator could then bring up -- so it's
14 E2/113/10, I hope. You can see near the bottom of that
15 page, the last paragraph:
16 "Mineralogy ..."
17 So this is CITIC writing this:
18 "Mineralogy raised a concern with respect to the
19 interaction between this Proposal ..."
20 The mine continuation proposal:
21 "... and the proposed Balmoral South Iron Ore
22 Project ... particularly in relation to the proposed
23 location of the Port stockyard layout at Cape Preston."
24 That's the shipping facility that Mr Palmer referred
25 to a number of times, where you ship the ore out of the



12:14 1 area.
2 "To address Mineralogy's concerns, Sino Iron and
3 Korean Steel have modified the proposed configuration of
4 [the] stockyard ..."
5 So CITIC is saying, "Well, we've addressed the
6 problem". But Mineralogy continued not to agree to
7 approve this proposal, so evidently it was not satisfied
8 that CITIC had successfully addressed its difficulty.
9 In this same document, if we bring up E2/113/[32],
10 you can see a map. I'm not sure that the Tribunal has
11 seen one of these maps before, and it's entirely our
12 fault. Late in the piece, we thought the Tribunal might
13 be assisted by the maps, which was what the controversy
14 was about in the few days before the hearing about the
15 provision of further materials.
16 But if the Tribunal looks at the map, you'll see the
17 land area at the top that looks perhaps a bit like
18 a nose or a bill: that's Cape Preston. And the facility
19 at the top, you can see an overlap there involving
20 green, which are approved proposals, and blue, which is
21 the mine continuation proposals.
22 So there was an overlap. Part of the mine
23 continuation proposal are the big blue areas you see
24 below, which are mainly in relation to tailings
25 facilities and matters of that kind, but there was work



12:15 1 being done with respect to the port; or there were
2 proposals extended to things that CITIC wanted to do,
3 rather, with respect to the port.
4 Now, I emphasise that because if one then goes to
5 the next document, which is C-196 --
6 THE PRESIDENT: Just to make sure that we get the reference
7 right, this is R-113, page 33; is that what it is?
8 DR DONAGHUE: I think 32, but ...
9 THE PRESIDENT: But it's R-113?
10 DR DONAGHUE: R-113, that is correct.
11 THE PRESIDENT: Thank you.
12 DR DONAGHUE: If we could next bring up C-196. I think it
13 is E1/196/1085.
14 Now, this document -- I think I've actually probably
15 taken you well into the text. But the front page of
16 this document shows that it is the Balmoral South Iron
17 Ore Project proposal for the Western Australian
18 Government, dated August 2012. So this is the original
19 Balmoral South proposal.
20 And if we go back to the page I specified, which was
21 1085, you can see 1.[10], "Common land use":
22 "This section has been prepared in accordance with
23 Clause 6(2) ... of the [State Agreement]. It describes
24 areas of common use land and facilities required for the
25 BSIOP.



12:17 1 The SIP ..."
2 Which is defined at the top of the page, Sino Iron
3 Project:
4 "... will be entering into production within the
5 next 6 to 12 months."
6 This is back in 2012.
7 "Under commercial agreements with Mineralogy that
8 govern the development, operation and use of shared
9 infrastructure facilities for the transport and export
10 of iron ore products, the SIP and BSIOP will share
11 existing common infrastructure, with BSIOP extending
12 those facilities as required."
13 And there's a description.
14 So BSIOP was going to share with Sino Iron. The
15 mine continuation proposal was making developments in
16 relation to the port, including with respect to shared
17 facilities or infrastructure, and Mineralogy and CITIC
18 were in dispute about that.
19 You can see, to make good that last point, the last
20 document I'm going to take you to, which is CLA-70,
21 which is F1/70/1. This is one of many domestic court
22 judgments given in respect of litigation involving some
23 combination of Mineralogy, CITIC, the State of Western
24 Australia. You can see it's a monstrous judgment: it's
25 900 pages long.

12:18 1 On the first page, you can see a list, in the second
2 half of the page, of the parties. Sino Iron,
3 Korean Steel and CITIC are suing: (1) Mineralogy;
4 (2) Mr Palmer; and (3) the State of Western Australia.
5 So while it is true that this was litigation between
6 CITIC and Mineralogy, it is not true that Western
7 Australia were out of the picture. They were a party to
8 this litigation and they were represented by senior
9 counsel, KC, or SC in Western Australia. So they were
10 there as a participant in the litigation.
11 I obviously can't -- and the Tribunal doesn't need
12 to -- go to all of the detail of this. But the judge,
13 Justice Kenneth Martin, had to deal with a lot of the
14 alleged problems between Mineralogy and CITIC in respect
15 of the mine continuation proposal.
16 If the operator could take us forward to page 85, so
17 F1/70/85. Sorry, if we go to the previous page first,
18 you can see that the judge is describing "Key functional
19 components of the 2017 [mine continuation proposal]";
20 that's the first document I showed you.
21 Then if we could go back over to paragraph (d), you
22 will see:
23 "... an increase in the capacity for existing stock
24 piles and associated infrastructure at the Sino Iron
25 Terminal Facility situated within Mineralogy's ..."



12:20 1 That's one of Mineralogy's tenements.
2 "This aspect of the MCPs also carries acquisition of
3 extra tenure ramifications, manifested in the context of
4 Mineralogy's long-standing and openly communicated plan
5 to [expand the] multi-user export facility at
6 Cape Preston. The extra areas at the Cape Preston Port
7 proposed to be used for greater volumes of stockpiling
8 of concentrate prior to ... movement and loading for sea
9 export, presents as one of the most controversial tenure
10 areas in dispute in the Primary Trial ..."
11 So all I'm seeking to illustrate from this is that
12 one can't easily slice the world up into neat pie slices
13 with CITIC and Balmoral. Parts of the dispute between
14 CITIC and Mineralogy related to facilities that were
15 intended to be common to both, and that was part of the
16 issue that underlay those disputes.
17 And CITIC, having been unable to secure the support
18 of Mineralogy -- or Mineralogy needed to make the
19 proposal for the mine continuation under the State
20 Agreement; that was how it worked. And it was
21 Mineralogy's refusal to put forward that proposal, as
22 sought by CITIC, that led CITIC to seek to involve
23 Western Australia, and that led Premier McGowan to make
24 the announcement in November that said, "If you don't
25 support this, we're going to look at unilateral action".



12:21 1 So that, we submit, is another illustration of
2 connective tissue, which supports the primary argument
3 I made and the propositions that I put based on R-145.
4 That's all I propose to say in answer to question 2.
5 Can I use our last ten minutes to make some pretty brief
6 overarching observations about some of the key
7 evidentiary issues as they relate to point in contest
8 between the parties.
9 The first is -- and these points all really go to
10 a combination of the denial of benefits objection and
11 the abuse objection. I will rely on what Mr Wordsworth
12 already said about "no investor"/"no investment" and the
13 evidence that fell from Mr Palmer about that.
14 The first point is that while the evidence has
15 journeyed broadly across various explanations for the
16 restructure and various explanations for the urgency of
17 the restructure, it happily landed on a clear statement
18 from Mr Palmer that he agreed that Zeph was incorporated
19 in a situation of urgency in January 2019. He said that
20 at G/2/13 (Day 2), which is page 34 of the transcript,
21 and it was quite unequivocal.
22 So Zeph was incorporated urgently in January 2019.
23 Why? Well, as I say, we've had a lot of reasons in the
24 seven witness statements from Mr Palmer; or not in all
25 of them, but I think in four of them. The reasons for



12:23 1 the urgency that we were given yesterday were wholly
2 new.
3 The business opportunity provided by the engineering
4 companies, that's again page 34 of the transcript, and
5 the need urgently to purchase industrial property in
6 an industrial estate in Christchurch in New Zealand as
7 to MIL: in our submission, both of those, that shifted
8 position was inherently implausible.
9 As to the engineering companies, not only had he
10 never said it before -- and when asked about that,
11 the evidence was, "Well, I'm just not used to being
12 accountable to anyone", he said at [pages] 41 to 42 --
13 but as the Tribunal has seen, Professor Lys analysed the
14 financial state of those companies in detail: they were
15 going broke, if they weren't broke already. At the time
16 term that they were acquired, no due diligence appears
17 to have been conducted.
18 The idea that it was necessary to change the planned
19 timeline for a restructure of the group to acquire those
20 failing companies is not one that the Tribunal should
21 accept. While Mr Palmer says it was a good opportunity,
22 it evidently wasn't: he lost 91% of the investment. And
23 there was no reason to think that anything different was
24 going to happen, given Professor Lys's analysis, which
25 really hasn't been challenged.

12:24 1 As to the absence of due diligence, Mr Palmer said,
2 "Well, SGD 3.5 million is trivial to me". But then
3 almost in the next breath, he says, "But I acquired
4 an $11 million property in New Zealand because it gave
5 me great financial comfort to have some assets offshore
6 in a different jurisdiction". Not only is that a very
7 difficult answer to accept on its face, given the value
8 of Mineralogy in the hundreds of millions of dollars,
9 and not only was it not an explanation he's ever given
10 before, but there's an evident tension between saying,
11 on the one hand, "I wouldn't even blink if I lose
12 3.5 million", and then saying, "I get significant
13 comfort from 11 million", in the next breath.
14 Now, what Mr Palmer had said in his witness
15 statement, in his first witness statement at
16 paragraph 131, is that when the Chinese Government
17 lodged an appeal from the royalties judgment, he
18 concluded that the appropriate and prudent course was to
19 wait for the judgment, because that judgment was worth
20 at least hundreds of millions, and I think he said in
21 answer to me yesterday actually billions of dollars to
22 Mineralogy.
23 Having made a decision that you shouldn't
24 restructure until you know the outcome of such a very
25 substantial revenue stream, the proposition that you



12:26 1 change your plans to acquire failing engineering
2 companies or an industrial property in New Zealand is
3 ridiculous.
4 The Tribunal should, in our submission, accept that
5 the urgency that Mr Palmer now agrees attended the
6 incorporation of Zeph is only able to be explained by
7 the fact that there was an imminent threat, as he saw
8 it, of unilateral amendment of the State Agreement to
9 Mineralogy's disadvantage; that the attempt to acquire
10 treaty protection against that threat in New Zealand had
11 failed because of the side agreement between Australia
12 and New Zealand, and so he needed a Singaporean company.
13 That's why the urgent restructure happened, and none of
14 the other attempts to explain it have survived scrutiny.
15 Very briefly, as to the two main suggested
16 rationales for the restructure, there are, we submit,
17 multiple reasons why the coal financing rationale should
18 not be accepted by the Tribunal.
19 First, there was clearly no need to have a company
20 based in Singapore to raise finance in Singapore. So
21 even if Mr Palmer did want to raise finance for
22 Waratah Coal in Singapore, he could have done it without
23 incorporating Zeph, and there was no proper reason to
24 think otherwise. All you've really been given as
25 an explanation for the corporate vehicle is Mr Palmer's



12:27 1 unassisted recall of a 16-year-old conversation, said to
2 have occurred in Singapore in 2008, with lawyers who
3 were there to talk about an IPO. It's not a strong
4 foundation for saying he needed to incorporate
5 a Singaporean company.
6 So he didn't need a Singaporean company. There are
7 no contemporaneous documents to suggest that the
8 reasoning had anything to do with coal finance. The
9 coal finance rationale does not explain the urgency at
10 all, because Waratah Coal was years away from being
11 ready to be funded, as Mr Rogers explains in some detail
12 in his reports.
13 Fourth, as Mr Rogers also explains, publicly
14 available lending policies of the banks, on the one
15 hand, with respect to new thermal coal projects, and the
16 amount of debt that was sought to be raised -- which
17 Mr Palmer says was 8 billion, in circumstances where
18 less than 300 million had been loaned globally across,
19 I think, the last 20 years -- both of those
20 considerations cause Mr Rogers to explain that even
21 a cursory examination of the issue would have made it
22 plain that there was no prospect of raising debt finance
23 for Waratah Coal.
24 What have you got against that? Almost nothing.
25 You've got a press report in The Straits Times,



12:28 1 which refers to the same database that Mr Rogers looks
2 at. But when Mr Rogers interrogates the Straits Times
3 article, mostly it was about coal power stations;
4 it wasn't about coal mines at all.
5 You've got reliance on the Coal-Fired Power Bill,
6 which I put to Mr Palmer, which just had nothing to do
7 with the funding of new coal mines at all. So he gave
8 you, as one of the three main reasons for restructuring
9 his corporate group to Singapore, a bill which he said
10 he studied, and which evidently, on its face, is about
11 Commonwealth Government funding for power stations, not
12 about private funding for coal mines. So that
13 justification which Mr Palmer relied upon as the main
14 reason for restructuring just doesn't hold water.
15 The other main reason was personal tax finance,
16 which, as Mr Palmer accepted, was really just a plan
17 that caused him to need to cease being an Australian tax
18 resident and to break his ties with Australia. As to
19 that, we say again it clearly doesn't explain the
20 urgency of the restructure.
21 Actually, Mr Palmer was frank in his acceptance of
22 that. So on page 86 of yesterday's transcript -- I'm
23 afraid I haven't got the Opus reference -- I put to him:
24 "It follows from [his] description of [the tax plan
25 that he] had in mind that ... there was no urgency about

12:30 1 the restructure to achieve that, because you could
2 control when dividends were paid?"
3 And he said:
4 "Exactly ... on that point, there was no urgency to
5 do it."
6 So it's accepted it doesn't explain the urgency
7 because he could control the dividends. He accepts that
8 he didn't even raise the plan with his wife until two
9 and a half years later, at which point it was
10 immediately vetoed.
11 And there was evidence that Mr Palmer wasn't able to
12 contradict from both Professor Cooper and Associate
13 Professor Phua that to get the tax advantage, you didn't
14 need a Singaporean company.
15 Mr Palmer said as to that, "I needed to become
16 a resident of Singapore". But there is no basis to
17 think, and no evidence, that to satisfy the residency
18 requirements, even if you needed to put some money into
19 the economy, that the only way to do that was to
20 restructure the whole group through Singapore.
21 Obviously Mr Palmer had money available that he could
22 have used to meet an asset test or activities test of
23 some kind, if that were necessary. And he didn't even
24 seek advice about what he needed to do until 2004.
25 So, given that it doesn't explain the urgency and



12:31 1 you didn't need a corporate restructure, in our
2 submission, that rationale fails as well.
3 So you have ultimately, at the end of the day,
4 an accepted urgent restructure, unexplained by the
5 reasons that Mr Palmer has given you, but explained
6 completely by the only contemporaneous documents that we
7 have on this point: the letters that were sent on
8 18 January and 4 February. And even though he has no
9 contemporaneous documents, Mr Palmer says as to them,
10 "They are bluff and bluster and I didn't mean what
11 I said".
12 In our submission, the Tribunal should find that he
13 did mean what he said: that these companies were
14 incorporated for the purpose that they state. And what
15 that means is that insofar as the Tribunal's questions
16 to us said, "Assume the Tribunal finds, in effect, the
17 abuse of purpose", that assumption should be found to be
18 made good. So, factually, the premise is established;
19 and then we get to the legal issues that my colleagues
20 have addressed the Tribunal on.
21 I think I've hit the mark exactly, I hope. So thank
22 you for your attention. Those are our submissions.
23 THE PRESIDENT: Very exactly, according to my watch.
24 Absolutely. So we thank you for your presentations.
25 Do my colleagues have questions for counsel at this



12:32 1 stage?
2 (12.33 pm)
3 Questions from TRIBUNAL
4 MR KIRTLEY: My only question would be where you draw
5 the line in terms of when a restructuring can take
6 place. When do you draw the line? I think it is
7 accepted by Australia that a restructuring can take
8 place in order to take advantage of treaty protection.
9 But at what point does that become abusive?
10 PROFESSOR BROWN: Thank you for the question, Mr Kirtley.
11 I think it would be simply through application of
12 the tests that have been developed through tribunals,
13 such as the Philip Morris Asia tribunal. If there's
14 an existing dispute, obviously, at the time of the
15 restructure, that's something that would be abusive.
16 And where there's a foreseeable dispute, and the purpose
17 of the restructure is in order to gain treaty
18 protection, then through that test of foreseeability, as
19 I developed in my submissions earlier today, that would
20 also be abusive; including in that sort of situation
21 where there are potentially two disagreements, or
22 a second disagreement can be developed.
23 That would be the orthodox application of the
24 principles that have been developed by tribunals.
25 MR KIRTLEY: Okay, thank you.



12:34 1 THE PRESIDENT: Fine. If there's nothing further for now,
2 we can take the lunch break.
3 I said yesterday that we would take an hour and 15.
4 If that is still fine with the Claimant, then we could
5 resume at 2.00. Is this fine?
6 DR KIRK: Yes, thank you.
7 THE PRESIDENT: Good. Have a good lunch, everyone.
8 (12.35 pm)
9 (Adjourned until 2.00 pm)
10 (2.01 pm)
11 THE PRESIDENT: I think we are ready to resume.
12 Mr Palmer, you have joined us now. Good afternoon.
13 MR PALMER: Thank you.
14 THE PRESIDENT: So --
15 MR PALMER: We can begin?
16 THE PRESIDENT: Absolutely.
17 Closing statement on behalf of Claimant
18 MR PALMER: Thank you, Madam President, for the opportunity
19 to answer some very important questions that the
20 Tribunal has identified.
21 I propose to proceed today by first dealing with
22 each question by number and providing the Claimant's
23 answers. I will then summarise important points that
24 need to be considered in respect of the Respondent's
25 objections; in particular, a recap on the evidence with

14:01 1 respect to the denial of benefits questions, and the
2 context and purpose of the restructuring which took
3 place in January 2019.
4 Subsequently, I will be assisted by Dr Anna Kirk in
5 dealing with Respondent's objections: firstly, on
6 "investor"/"investment"; secondly, on the foreseeability
7 issues and the abuse of process.
8 The Claimant will then conclude with summary
9 comments, prior to closing for the day.
10 Question 1:
11 "So the first question is about the timing for the
12 Tribunal to assess the requirements for denial of
13 benefits. We understand the parties' positions: the
14 Claimant says 13 August 2020; the Respondent says not
15 later than 14 October 2020, but agrees [has agreed in
16 the past] to 13 August 2020.
17 The Tribunal is tasked with applying a treaty
18 provision, and therefore we think we have to make our
19 own assessment of what the correct date is; obviously
20 considering the parties' submissions, but still.
21 There are four dates, in our understanding, that
22 could come into play. One is, of course,
23 13 August 2020: that's the amendment of the Amendment
24 Act. The second one is 14 October 2020, which is the
25 request for consultation under the treaty. The third



14:02 1 one is 22 December, when the Respondent announces it is
2 considering denying benefits; that's Exhibit C-153. And
3 the fourth and last one is 14 June 2021, which is
4 Exhibit C-155, which is the actual date of the denial of
5 benefits letter.
6 So we would be assisted if you could comment on
7 these dates and say which one[] may be relevant ..."
8 That was the question that --
9 THE PRESIDENT: Can I just interrupt you for a logistical
10 point.
11 Is the public webcast on? Because it's not on the
12 screen on which I usually watch it. That's fine.
13 I just want to know whether it is running.
14 MR WILLIAMS: Yes, it is.
15 THE PRESIDENT: Fine. Good. Apologies.
16 MR PALMER: As the Tribunal has rightly noted, the Claimant
17 has identified 13 August 2020 as the date on which it is
18 appropriate to consider the tests under the denial of
19 benefits issue, and the Respondent then alighted on that
20 submission and focused on that date. The Claimant has,
21 however, sought to emphasise that whatever date one
22 adopts, the Respondent's objection should be dismissed.
23 Without prejudice to that position, and turning to
24 the Tribunal's question and recognising that what
25 matters here is that the Tribunal reaches the correct



14:04 1 decision by reference to the treaty, it is right to
2 approach matters as follows.
3 Article 11 is necessarily the starting point. It
4 provides, in (1)(a) and (b), that a party may deny the
5 benefits to an investor that "has no substantive
6 business operations in the territory of [the other]
7 Party".
8 The use of the present tense, "has", might, on one
9 view, be suggested to refer to the date on which a state
10 announces it is considering denying benefits, or even on
11 the date of the actual denial of benefits. However,
12 that would be emphatically wrong. Any denial of
13 benefits provision ought to operate at the earliest
14 possible date. This is essentially the position that
15 the parties had previously adopted and is the position
16 that the Claimant adopts.
17 It's right to proceed on that basis for three
18 reasons. The first matter is one of procedural
19 fairness: the evidence has been adduced on that basis
20 and I was cross-examined on that basis. The second,
21 which I will build on briefly below, is that the
22 earliest date is the most fair and reasonable approach
23 to construction of treaty provisions. The third, and
24 aligned with the second, is that the construction is the
25 most faithful to the text, object and purpose of the



14:05 1 provision and its operation in practice.
2 I make that submission for the following reason.
3 It makes sense to take the earliest date of the four
4 provided by the Tribunal because the extent to which
5 an investor falls within a denial of benefits clause
6 should be tested by reference [to] the events at the
7 date of the state's wrongful act. Any later date risks
8 the test which the investor might never be in a position
9 to meet, given the conduct of the state.
10 For example, if it faced a full expropriation which
11 denudes an investor of the ability to conduct any form
12 of business, a test which adopts a later date will risk
13 imposing on an investor a hurdle that would be
14 impossible to overcome, because it would never have
15 a business at the relevant date which is capable of
16 complying with a denial of benefits clause, regardless
17 of the propriety of its conduct.
18 That is the point made by the tribunal in Big Sky,
19 which is Exhibit RLA-85, albeit obiter, at 276, and
20 without any real discussion of the jurisprudence
21 concerning the various possible points in time at which
22 the test could be assessed. It says:
23 "For this purpose, it does not logically follow that
24 the only relevant date for examining such activities
25 would be the date of a request for arbitration. It is

14:07 1 quite a common characteristic of investment treaty
2 arbitrations that by the time a request for arbitration
3 is filed, a claimant-investor is fairly or completely
4 inactive aside from the arbitration itself, in large
5 part because of the negative business effects it
6 attributes to a host State. Because of this, if the
7 only relevant date was the start of an arbitration,
8 then, in theory, a respondent State could assure itself
9 of protection under the denial of benefits clause as
10 long as it took such significant action against
11 a claimant-investor as to completely rid it of any
12 current business activities (e.g. a complete and total
13 expropriation). This simply cannot be the proper
14 analysis under such a clause, which is why tribunals
15 have analyzed business activities more broadly with
16 respect to the relevant date."
17 That approach provides a predictable framework for
18 the test. And it's consistent with the analysis that
19 the relevant dispute, for the purposes of the abuse of
20 process test, i.e. if one looks at the specific dispute
21 which has arisen and considers whether it was
22 foreseeable at the date of incorporation of the relevant
23 entity, then one uses the date on which the dispute
24 crystallised for the purpose of the denial of benefits
25 test. It's a sensible, predictable and fair basis on

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14:08 1 which to approach the test.
2 It is also a fair approach bearing in mind that the
3 state bears the burden of proving that the requirements
4 of a denial of benefits clause have been met; a point
5 which ought to be emphasised in this instance, given
6 that the Respondent has failed to adduce direct factual
7 evidence in support of its position that there was no
8 substantive business being conducted at the material
9 time. Instead, it relies upon third parties, whether
10 experts or investigators, none of whom are in a position
11 to comment on the actual business being carried on as
12 direct witnesses.
13 For good order, a similar point well may be made
14 about the 14 October 2020 date; from the State's
15 perspective, being the date of the request for the
16 consultations and being a date under the control of the
17 Claimant. That again militates in favour of the
18 earliest date.
19 For the avoidance of doubt, and without prejudice to
20 the matters set out above, the Claimant's case remains
21 strong regardless of the date on which the substantive
22 business activities fall to be assessed.
23 It bought the engineering companies in early 2019.
24 It entered into the cleaning business joint venture in
25 January 2020. While the engineering businesses had

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14:10 1 declined, they still traded and existed on all the dates
2 mentioned by the Tribunal. The cleaning joint venture
3 was a sizeable, profitable business as at January 2020,
4 and remains so today. In fact, it has increased its
5 profitability. Accordingly, there is no material
6 difference in the Claimant's business operations on any
7 of the dates proposed by the Tribunal.
8 I will now refer to question 2.
9 Firstly, I understood Mr Wordsworth raised
10 a question of the connection between the CITIC project
11 and the litigation between Sino Iron and Mineralogy in
12 the Supreme Court of Western Australia. I'll just make
13 a few comments on that.
14 The first is that both the State and myself and
15 Mineralogy were defendants in that [case], and
16 Sino Iron, Korean [Steel] and CITIC were the plaintiffs.
17 So it wasn't a dispute between the State of Western
18 Australia and myself.
19 And secondly, I'd point out here that the State of
20 Western Australia sought no relief, and was not granted
21 any relief, even though we won the judgment; that the
22 plaintiff's action was dismissed; and that the State
23 really was just there as an observer.
24 It's appalling that this matter has not been
25 accurately stated by the Respondent.

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14:11 1 I will now proceed to answer, on behalf of the
2 Claimant, question 2.
3 In responding to this question, it is the Claimant's
4 respectful position that there are no connecting factors
5 between the CITIC disagreement and the BSIOP
6 disagreement. Instead, it's important that the Tribunal
7 approaches them as two discrete matters.
8 The Claimant refers the Tribunal in the first
9 instance to its written submissions, and in particular
10 the section of the Rejoinder starting at paragraph 289,
11 in which the disputes are analysed one by one.
12 The best way to deal with this is to start with the
13 CITIC dispute. There has perhaps been relatively little
14 discussion of this, and so hopefully this summary will
15 help the Tribunal, as it's crucial to be 100% about
16 this, given Australia's attempt to obfuscate and allege
17 that these issues are connected when they are simply
18 not.
19 Between 2006 and 2007, Mineralogy sold two of its
20 subsidiaries, Korean Steel Proprietary Limited and
21 Sino Iron Proprietary Limited, to subsidiaries of CITIC
22 Limited, a Hong Kong-based corporate entity listed on
23 the Hong Kong Stock Exchange, at that time
24 majority-owned by the People's Republic of China.
25 On 21 March 2006, Mineralogy entered into two

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14:13 1 written contracts with Sino Iron and one with
2 Korean Steel. These contracts were described as mining
3 right and site lease agreements. I'll call them
4 "MRSLAs" for convenience.
5 In 2008, CITIC guaranteed the obligations of
6 Korean Steel and Sino Iron under the MRSLAs. However,
7 from 2013 onwards, following the refusal of the Western
8 Australian Government to approve more projects, which
9 was the subject of the domestic arbitration, the
10 relationship between Mineralogy and the CITIC parties
11 deteriorated. The parties became embroiled in a series
12 of commercial disputes. Two of these protracted
13 litigation battles bear mention, in contrast to the
14 dispute before the Tribunal.
15 In 2013, Mineralogy initiated proceedings against
16 the CITIC parties in relation to substantial royalties
17 under the MRSLA which had not been paid. The dispute
18 turned upon the correct interpretation of the formula
19 for the calculation of the royalties under the MRSLA.
20 Mineralogy's position was vindicated in a judgment
21 delivered by the Western Australian Supreme Court on
22 24 November 2017, which awarded Mineralogy nearly
23 US$150 million in unpaid royalties for the period ended
24 31 December 2013 to 31 March 2017. And on
25 9 December 2016, the CITIC parties provided Mineralogy



14:14 1 with a draft mine continuation proposal for the
2 expansion of the Sino Iron and Korean Steel projects.
3 In December 2017, the CITIC parties submitted a new
4 draft proposal to Mineralogy and sought their approval
5 for additional tenements of land without the payment of
6 any money. Under the State Agreement, Mineralogy, as
7 a co-proponent of any projects being developed on our
8 property, must approve that proposal and the grant of
9 additional land. However, the CITIC companies refused
10 to negotiate or pay for any additional land that they
11 wanted, and did not offer Mineralogy any payment in
12 return for a substantial additional tenure sought by
13 them.
14 It was in October 2018 that the CITIC parties
15 commenced legal proceedings in the Supreme Court of
16 Western Australia seeking injunctive relief to compel
17 Mineralogy: (1) to grant them additional tenure under
18 the MRSLA for no consideration; and [2] to submit the
19 MCPs as co-proponent under the State Agreement. No
20 tenure was sought, or could be sought, under the
21 State Agreement.
22 This litigation was totally unsuccessful for the
23 CITIC parties in 2023, when the Supreme Court of Western
24 Australia held that there was no implied or expressed
25 contractual obligation which required Mineralogy to



14:16 1 grant tenure to the CITIC parties under the MRSLA, and
2 no obligation on Mineralogy to submit the MCPs under the
3 State Agreement.
4 Just pausing there, the CITIC claims were purely
5 commercial disputes between two commercial parties being
6 litigated in the courts. In both cases, the subject
7 matter of the litigation was the interpretation of
8 rights and obligations under contracts between those
9 parties.
10 Western Australia was not a party to the dispute,
11 had no involvement in the contractual aspect of the
12 dispute. No relief was sought against the State in the
13 CITIC disagreement. The CITIC parties did not seek
14 orders compelling the State to force Mineralogy to
15 submit proposals. It was joined in the proceedings for
16 form only, to be kept informed; and joined as
17 a defendant, not as a plaintiff. CITIC's claims
18 concerned proposals yet to be submitted, rather than
19 having already been considered under the
20 State Agreement.
21 Despite a measure of political rhetoric, which
22 turned out to be entirely empty rhetoric, consistent
23 with the Claimant's case on foreseeability and my
24 evidence in cross-examination yesterday,
25 Western Australia did not take any steps to legislate in



14:17 1 relation to this dispute.
2 In terms of the BSIOP matter, Mineralogy and
3 International Minerals initiated the BSIOP arbitration
4 by notice of dispute dated 7 November 2012. The
5 arbitration was commenced under clause 42 of the
6 State Agreement. The subject of the dispute was that
7 the Minister for State Development refused to consider
8 the BSIOP proposal for the development of a project
9 under the State Agreement.
10 On 19 March 2013, retired Australian High Court
11 judge Michael McHugh AC KC was appointed as the
12 arbitrator by order of the Chief Justice of Western
13 Australia, Wayne Martin.
14 By an award dated 20 May 2014, the first BSIOP
15 award, Mr McHugh held that the BSIOP proposal was
16 a proposal for the purposes of the State Agreement.
17 Mr McHugh further held that Western Australia had
18 breached the State Agreement when the Premier of Western
19 Australia, as the Minister of State Development, failed
20 to give a decision on the BSIOP proposal within the time
21 required by clause 7(2) of the State Agreement.
22 Mineralogy wished to claim damages from Western
23 Australia consequent upon Western Australia's breach of
24 the State Agreement, as found in the first award.
25 Turning to events in 2018 and 2019. It's crucial

14:19 1 that the Tribunal considers this chronology carefully
2 because when one looks objectively at what was going on
3 and the steps being taken by Western Australia in the
4 arbitration, it beggars belief that we are even
5 discussing foreseeability of a dispute concerning the
6 Amendment Act.
7 In August 2018, Mineralogy commenced a second
8 arbitration to arbitrate their claim for damages.
9 Western Australia considered that the right to recover
10 those damages was heard and determined under the first
11 award, and that the legal effect of the first award was
12 that Mineralogy was foreclosed from pursuing those
13 damages.
14 Ultimately, it was agreed that this dispute should
15 be referred to Mr McHugh for determination. On
16 20 December 2018, Mr McHugh accepted his appointment as
17 arbitrator.
18 The second BSIOP arbitration progressed throughout
19 2019. By an award dated 11 October 2019, the second
20 award, Mr McHugh determined that Mineralogy's right to
21 recover damages had not been heard in the first
22 arbitration and had not been determined in the first
23 award. Accordingly, Mineralogy was not foreclosed from
24 pursuing damages arising from any breach of the
25 State Agreement.



14:20 1 That was the date, 11 October 2019, that Mineralogy
2 even knew that it would be able to pursue a claim for
3 damages, and that was a date which is some nine to
4 ten months after the restructuring that we've been
5 talking about in this arbitration. So up to that time,
6 the Claimant didn't even know they had a claim.
7 On 31 October 2019 -- as I said, please make note of
8 that date -- Western Australia challenged the second
9 BSIOP award in the Supreme Court of Western Australia
10 under an appeal and review regime of the Commercial
11 Arbitration Act of 1985.
12 The appeal challenging the second award failed. In
13 a judgment delivered on 28 February 2020,
14 Kenneth J Martin dismissed the State's appeal.
15 Since Western Australia's challenge to the second
16 BSIOP award had failed, Mineralogy was entitled to
17 pursue its damages claim. It remained for the parties
18 to progress to a third phase of arbitration to determine
19 those damages.
20 On 26 June 2020, Western Australia and Mineralogy
21 participated in a directions conference before
22 Mr McHugh. Mr McHugh issued procedural directions for
23 a three-week damages hearing, which was to begin on
24 30 November 2020.
25 Following the directions hearing, the parties took



14:22 1 the following actions in furtherance of this third
2 arbitration, which we have referred to in this
3 arbitration as the "State Agreement arbitration", or the
4 "BSIOP arbitration", I think, from the Respondent.
5 The arbitrator raised the question with the parties
6 that before he would proceed with the arbitration,
7 he required that the parties enter into an arbitration
8 agreement. On 8 July 2020, Mineralogy and
9 Western Australia, and Mr McHugh as arbitrator, signed
10 an agreement for the arbitration of damages claims,
11 which has been referred to by the Claimant as
12 "the arbitration agreement" in this arbitration.
13 On 5 August 2020, Mineralogy and Western Australia
14 and the Honourable Wayne Martin AC KC, the former
15 Chief Justice of the Supreme Court of Western Australia,
16 executed an agreement for mediation to be held on a date
17 before 31 October 2020.
18 Western Australia received service of Mineralogy's
19 claims and statements of evidence for the arbitration.
20 However, Western Australia itself failed to comply with
21 the obligation to file and serve its own documents.
22 On 11 August 2020 at 5.00 pm, the Western Australian
23 Attorney-General, John Quigley, introduced the
24 Amendment Act into the Western Australian legislature.
25 On 13 August 2020, the Western Australian Parliament



14:23 1 enacted the Amend[ment] Act. The following day, Western
2 Australia State Solicitor's Office wrote to Mr McHugh to
3 inform him that the third arbitration had been
4 terminated by the Amendment Act.
5 Now, again pausing, I've already dealt with some
6 defining features of the CITIC contractual claims. But
7 it's also important to emphasise the features of the
8 BSIOP matter which make it wholly separate from the
9 CITIC claims.
10 None of the CITIC parties were involved, for
11 a start. It was being pursued in arbitration with
12 Western Australia, a state entity. The BSIOP matter
13 involved a breach by the State of Western Australia, not
14 Mineralogy. The timing was different. And the various
15 ad hoc arbitration agreements being entered into were
16 between Mineralogy and the State of Western Australia.
17 The relief sought was in no sense connected, whether as
18 a matter of fact, common sense or law.
19 The CITIC matter proceeded to be determined in
20 Mineralogy's favour in the Supreme Court of Western
21 Australia, which is Exhibit CLA-70.
22 Australia has sought to conflate the disputes by
23 adopting a crude analysis of certain underlying facts,
24 such as the land sought by CITIC and the land which was
25 subject to the BSIOP proposal. It's like saying in

14:25 1 Paris: any dispute in Paris is joined, because it's
2 happening in Paris. There might be 4,000, 5,000
3 disputes at a time in Paris, but they're not all linked
4 just because they're in Paris. They're all about
5 different matters, different issues, different parties,
6 different reliefs, different time periods. Certainly
7 the location is not a basis to link a dispute.
8 Australia has sought to conflate the disputes by
9 adopting a crude analysis, as I said, of the underlying
10 facts. But that is preposterous. The disputes were
11 legally and factually distinct. One matter was
12 a contractual dispute with a counterparty and one was
13 a dispute with the government; [which] Mr McHugh
14 recognis[ed], on the basis of evidence from the State,
15 in the second award, when he observed that the
16 litigation between Mineralogy and the CITIC parties had
17 no direct connection with the BSIOP arbitrations between
18 Western Australia and the Australian [companies].
19 This is at the second award by Mr McHugh, which is
20 Exhibit C-443, and you'll find that at paragraph 100,
21 which relevantly stated -- and I'll put it up for you
22 now -- oh, we haven't got it. So I'll just have to read
23 it. It's only short:
24 "None of the proceedings had any direct connection
25 with any of the Arbitrations between the present



14:27 1 parties."
2 That's a finding by a former High Court judge of
3 the Australian High Court, an eminent jurist with
4 an international reputation.
5 I'm going to turn to the Tribunal's third question
6 next, about foreseeability. But before I do, I want to
7 make an important point, while we all have the facts and
8 the chronology of the BSIOP matter in our minds.
9 If one starts with the events of August 2020, the
10 time of the Amendment Act -- let us not forget that
11 the Respondent accepts that those events were not
12 foreseeable -- and we work backwards, one can see that
13 there is nothing in the fact pattern which renders the
14 events more foreseeable at any point in time. Put
15 another way, if the events were not foreseeable the day,
16 the week, the month before the Act was promulgated, then
17 they cannot be foreseeable at a more distant point in
18 time.
19 Just highlighting a few points.
20 In 2018, [Western] Australia took part in the second
21 arbitration, agreeing to appoint a sole arbitrator.
22 There was no suggestion at that time that they were not
23 acting in good faith in doing so. That proceeded in
24 2019: again, absolutely no suggestion that Western
25 Australia was not acting in good faith in taking part in



14:28 1 the arbitration from my perspective, and I note it's not
2 said that they were acting in bad faith at that time.
3 If that is right, the Amendment Act dispute simply
4 cannot be objectively or subjectively foreseeable.
5 It seemed to be suggested in cross-examination
6 yesterday that there was a point of a foreseeable
7 dispute at some point in 2019 and 2020. But that is
8 a wholly improper question in light of the Respondent's
9 concession that the Amend[ment] Act was not foreseeable,
10 and it is one which I firmly reject.
11 Western Australia took steps in court in late 2019
12 and early 2020, and in mid-2020 took part in hearings
13 before the sole arbitrator. Again, no question of them
14 acting duplicitously or in bad faith in doing so.
15 I relied on them taking part in those proceedings, and
16 it was not put to me yesterday that I somehow thought at
17 the time that they were acting in bad faith or preparing
18 to unravel the agreement. Indeed, it would have been
19 an abuse of those proceedings for the State not to have
20 conducted themselves -- as they did -- in good faith.
21 They signed the documents as part of those
22 proceedings, the arbitration agreement and the mediation
23 agreement, just seven days before the Amendment Act;
24 namely, agreements to arbitrate and to mediate with
25 senior Australian judges. Again, no question of



14:30 1 a dispute being on the horizon; no hint that these
2 people were plotting secretly against us and misleading
3 us dishonestly.
4 So no question of any form of foreseeable dispute in
5 2018 or 2020 re the BSIOP matter; far from it. I've
6 already explained the position in relation to the CITIC
7 matter both as a matter which was unrelated to the BSIOP
8 proceedings and one that did not give rise to a dispute
9 or a foreseeable dispute.
10 Finally, it's up to Respondent to allege and prove
11 facts, and to establish the foreseeability of dispute,
12 but they have not called any witnesses on this issue.
13 They have instead admitted that the Amendment Act was
14 not foreseeable. They have not called politicians to
15 substantiate their stance or explain their position.
16 That alone dictates that the foreseeability arm to the
17 Respondent's abuse objection should be rejected very
18 firmly by this Tribunal.
19 I will now deal with question 3. Before turning to
20 a detailed response to this very important question,
21 there are two points to draw to the fore at the outset.
22 Firstly, it bears emphasis that when considering
23 foreseeability in this particular context, a mere
24 possibility that a dispute might occur will not be
25 sufficient, because it is a perfectly legitimate act of

14:31 1 corporate planning to restructure an investment to
2 obtain treaty protection against a general risk of
3 future disputes with a host state.
4 I refer the Tribunal to the following cases in
5 support of that proposition: Clorox v Venezuela, which
6 is Exhibit RLA-142, at [paragraph] 5.6; Tidewater
7 v Venezuela, which is Exhibit RLA-93, at
8 [paragraph] 184; Levy v Peru, which is Exhibit CLA-188,
9 at [paragraph] 184; and Philip Morris v Australia, which
10 is Exhibit RLA-95, at [paragraph] 540.
11 Secondly, the first limb of the question posed
12 suggests that if a party has a disagreement in mind,
13 it's foreseeable. But we need to be careful about that,
14 as of course the test is objective, leaving aside for
15 the purposes any debate arising out of the use of the
16 word "disagreement".
17 Turning to the specific question, the invocation of
18 treaty protection in the circumstances outlined above is
19 not abusive. The general principle is that it's
20 a perfectly legitimate act of corporate planning to
21 restructure an investment to obtain treaty protection
22 against the general risk of future disputes with a host
23 state. The authorities for that proposition were
24 referred to earlier, namely: Clorox, Tidewater, Levy
25 v Peru, Philip Morris.



14:33 1 Let me be absolutely clear: it is not an abuse of
2 right to invoke treaty protection in respect of
3 an unforeseeable dispute because the Claimant was
4 restructured to gain treaty protection in light of
5 a separate foreseeable dispute.
6 The dividing-line between a legitimate restructure
7 and abuse of process occurs when the relevant party can
8 see the actual dispute or can foresee a specific future
9 dispute as a very high probability, not merely as
10 a possibility. This is supported in Pac Rim, which is
11 RLA-33, at [paragraph] 2.99; and in Philip Morris,
12 Exhibit RLA-95, at [paragraph] 547.
13 [In] the example provided by the Tribunal, the
14 foreseeable dispute falls on the abusive side of the
15 dividing line. The second unforeseeable dispute falls
16 on the other side: the restructuring was not carried out
17 in light of that dispute, and it is therefore not
18 an abuse to invoke treaty protection for that
19 unforeseeable dispute.
20 Starting with Clorox v Venezuela, Exhibit CLA-182,
21 the Swiss Federal Tribunal observed that because "abuse
22 of rights is an exceptional remedy, the criterion of
23 foreseeability of the dispute must be assessed
24 restrictively", at paragraph 5.2.3.
25 The arbitral tribunal in that case addressed



14:35 1 concepts of object foreseeability at a level of
2 probability directly as follows. I would like to go to
3 this in its entirety (CLA-239). It's on the screen. At
4 [paragraph] 447:
5 "The object of foreseeability must be a specific
6 dispute. As the Tribunal in the case of Tidewater
7 v Venezuela stated, it is perfectly legitimate for
8 an investor to seek the protection of a treaty to
9 protect itself from the general risk of litigation with
10 a host State. In order to offer this protection to
11 their investors, States sign investment protection
12 treaties with arbitration clauses."
13 At 448, it is the foreseeability of a specific
14 dispute that must be assessed, and the parties agree
15 that:
16 "... 'a foreseeable dispute is more than a possible
17 dispute: the simple possibility that a dispute may arise
18 between an investor and a State of another nationality
19 is not enough to constitute an abuse of process.
20 Foreseeability must refer to a specific type of dispute,
21 namely, not to any dispute in general, but to a specific
22 type of dispute that, eventually, proves to be the one
23 challenged by the restructured investor."
24 I think that's important. It's a specific dispute,
25 and it's got to be the one that was eventually



14:36 1 challenged by the restructured investor.
2 So the question for this arbitration is: was the
3 Amendment Act dispute foreseeable? Because that's the
4 dispute that's being challenged in this arbitration, and
5 all the claims that have been made by the Claimant
6 emanate from breaches incurred by the Amendment Act of
7 the treaty.
8 In 450 ...
9 THE PRESIDENT: Before you go there, can I just ask --
10 can we just go to the slide before -- do you see
11 a difference, or is there none, between saying
12 "a specific dispute" and "a specific type of dispute"?
13 MR PALMER: I don't think there's a difference. I think
14 it's semantic --
15 THE PRESIDENT: It's just semantics?
16 MR PALMER: No, no, there's a difference with "a specific
17 type of dispute". It's general, it's not specific.
18 It's a play on words. A specific type: what type?
19 The word "specific" really means it's a dispute.
20 I think the safe way of looking at it is: it's the
21 dispute that's before the Tribunal that's being assessed
22 in the arbitration. That's a "specific dispute",
23 I think.
24 And I think in Clorox, later in my reading --
25 I can't give you the quote here -- but it basically

14:38 1 indicated that the claims emanating from the measure, if
2 we want to call it a "measure", or the "breach" or
3 whatever, is what we have to look at. And that is the
4 specific claims that are before the Tribunal, nothing
5 else.
6 THE PRESIDENT: Thank you.
7 MR PALMER: At 450:
8 "... it is important to identify the first
9 measure ..."
10 This is what we are talking about:
11 "... or practice constituting the alleged breach of
12 the Treaty ..."
13 So if we look at 450:
14 "... it is important to identify the first measure
15 or practice constituting the alleged breach of the
16 Treaty ..."
17 And in our case, the first measure or practice
18 constituting the alleged breach of the treaty are the
19 claims we make under this arbitration, that being the
20 Amendment Act.
21 "... and to determine whether its adoption or
22 implementation was foreseeable at the critical date."
23 That decision underscores the need to approach this
24 with real intellectual rigour and discipline. It is
25 a test which must be grounded squarely and exclusively



14:39 1 on the one and sole dispute which is said to have given
2 rise to the investment arbitration in question.
3 It cannot be relied on by a state as an amorphous,
4 catch-all argument. Leading different alleged disputes
5 to adopt that approach would be to ride roughshod over
6 rational for proper abuse of process objections and the
7 need to apply a high, restrictive threshold to such
8 objections. The specific dispute must be considered by
9 reference to the claim advanced. Therefore, [if] it was
10 the case that a party incorporates an entity for
11 a historic foreseeable dispute, but one that never
12 materialises, then a later dispute which was not
13 foreseeable should not fall outside the scope of
14 protection afforded to an investor.
15 Consistent with that submission, and by way of
16 example, I refer to Ipek v Turkey, Exhibit RLA-99. The
17 tribunal emphasised that the object of foreseeability
18 must be a specific dispute which is to be determined by
19 reference to the essence of the Claimant's claim; see
20 paragraph 320 and paragraph 325.
21 As a matter of law, a distinction is to be drawn
22 between the restructuring of an investment at a time
23 when the investor seeks to protect itself from the
24 general risk of future disputes with the host state,
25 which is a legitimate goal, and no abuse of investment



14:40 1 treaty protection, and where a specific dispute was
2 foreseeable, namely when there is a reasonable prospect
3 that a measure which may give rise to a treaty claim
4 will materialise.
5 In the context of this case, the Tribunal proceeds
6 on the basis of what must be reasonably foreseeable --
7 that is foreseeable to a reasonable person in the
8 position of the investor -- [which] is the risk that
9 the Republic will expropriate all or part of its
10 business, which is the essence of the Claimant's claim
11 in these proceedings.
12 The above analysis is borne out by the approach in
13 Mobil v Venezuela, Exhibit RLA-92, a case I am aware
14 Madam President is familiar with. It concerned
15 a corporate restructure, designed to gain treaty
16 protection, at a time where there were existing disputes
17 with the host state.
18 The Dutch claimant, Mobil BV, was inserted into the
19 ownership chain of the Venezuelan investments,
20 Mobil Venezuela, in 2006. At the time of the
21 restructuring, it was acknowledged that there were
22 disputes between the parties concerning enactment of
23 higher royalty and income taxes; see paragraphs 19 and
24 202. It was also accepted that the sole purpose of the
25 restructuring was to obtain treaty protection; see



14:42 1 paragraphs 190 and 204.
2 In January 2007, Venezuela announced measures to
3 nationalise certain oil projects, including those of
4 Mobil Venezuela. By June 2007, Mobil's investment had
5 been fully expropriated. Mobil BV brought a claim under
6 the Netherlands-Venezuela BIT in respect of the
7 expropriation of its investment. Venezuela argued that
8 the claim constituted an abuse of right because the
9 restructuring was effected at a time when this dispute
10 was foreseeable.
11 The Mobil tribunal was careful to distinguish
12 between different disputes in its assessment of
13 foreseeability. In respect of the pre-existing tax and
14 royalty disputes, for which the claimant did not invoke
15 the protection of the treaty, it was clear that the
16 tribunal did not have jurisdiction.
17 However, the existence of those pre-existing
18 disputes did not disqualify the tribunal's jurisdiction
19 in respect of the Nationalisation Law, which was enacted
20 after the restructuring. It is implicit that the
21 tribunal's reasoning that the adverse tax and royalty
22 measures which Venezuela had already impressed upon
23 Mobil were not sufficient to put it on notice that
24 Venezuela might foreseeably take further adverse
25 measures against its interest.

14:43 1 Similarly, the tribunal in Tidewater v Venezuela,
2 which is Exhibit RLA-93, found that one of the two
3 purposes for restructuring of the claimant was to
4 protect Tidewater from the risk of expropriation [by]
5 incorporation of an investment vehicle in a state having
6 investment treaty arrangements with Venezuela. See
7 paragraph 183, which says that a restructure was carried
8 out in light of pre-existing, and therefore foreseeable,
9 disputes with Venezuela's national oil company, which
10 predated the incorporation of Tidewater Barbados in 2009
11 and the transfer to it of Tidewater's Venezuelan
12 business, in paragraph 184.
13 However, as in Mobil, the fact that the
14 restructuring was carried out in light of an existing
15 foreseeable dispute did not deprive the claimant of the
16 right to invoke the treaty for future disputes which
17 were unforeseeable at the time of the restructuring.
18 Accordingly, the tribunal held that it was not an abuse
19 for Tidewater to bring a claim under the treaty in
20 respect of an unforeseeable expropriation law passed by
21 Venezuela after the date of restructuring; see
22 paragraphs 196 and 197.
23 In terms of the language in the question, it is the
24 Claimant's position that anything less than specific
25 dispute does not engage the abusive provisions, if that

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14:45 1 is what is meant by the final part of the question. The
2 Claimant considers it's right to adopt the language used
3 in the authorities.
4 I will now deal with the fourth question that
5 the Tribunal sought the Claimant's answers on.
6 The Claimant's position on this question is quite
7 simple and straightforward: respectfully, no, it does
8 not matter. There can be no question of motive for
9 establishment of operations in Singapore somehow
10 undercutting an otherwise good response to a denial of
11 benefits objection.
12 The point has not been taken by the Respondent and
13 it cannot now be taken. The purpose of denial of
14 benefits clauses is to limit the use of corporate
15 restructuring as a means of treaty-shopping. Denial
16 clauses operate to exclude investors which are simply
17 an intermediary for interests substantially foreign by
18 permitting a respondent state to deny benefits of
19 a treaty to an entity that does not have an economic
20 connection to a state or on whose nationality it relies.
21 By incorporating a denial of benefits clause in
22 a treaty, the parties have patently turned their minds
23 to the issue of treaty-shopping and to the criteria
24 necessary to establish the requisite economic
25 connection. Here, in the AANZFTA, the [state parties]

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14:46 1 chose substantive business operations as the criteria
2 which would permit companies owned by a national of the
3 host state of the investment to benefit from the
4 protections offered by AANZFTA to nationals of their
5 claimed home state.
6 The treaty sets out the prerequisites for such
7 coverage. It cannot be an abuse to fulfil the express
8 criteria on which states have agreed. Otherwise, for
9 example, for a treaty which only required simple
10 incorporation to be an investor, incorporation with
11 motivation of treaty coverage would be an abuse. That
12 cannot be correct.
13 Moreover, there are further sound reasons for the
14 Claimant's stance, and I will summarise these now.
15 The denial of benefits provision operates by
16 reference to the treaty wording. It's not another form
17 of abuse. Denial of benefits does not import the more
18 general concepts of good faith which one finds in the
19 abuse objection.
20 Denial of benefits provisions operate on
21 a case-by-case basis under the relevant treaty, whereas
22 abuse of process imports general principles as a form of
23 customary international law, which floats above the
24 express provisions of a treaty.
25 The threshold to establish substantive or, where

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14:48 1 applicable, substantial business operations is not
2 especially high, consistent with the fact that tribunals
3 aren't looking at motive; instead they are focused on
4 the facts. See, for example, GCG v Colombia (RLA-180)
5 at [paragraph] 141.
6 Put another way, if a tribunal accepts that the
7 claimant has overcome the abuse objection, it would be
8 perverse to dismiss the claim on the basis of a denial
9 of benefits in circumstances where the claimant has met
10 the test by the express wording of the treaty.
11 In fact, contrary to Mr Wordsworth's submissions
12 this morning, the Claimant would go further and say: not
13 only would any such finding be perverse, whether by
14 purported reference to broad good faith obligations or
15 the arbitration agreement, it is not open to this
16 Tribunal, as a matter of law on the issues before the
17 Tribunal, to widen the ambit of the denial of benefits
18 objection.
19 The Claimant would also note that if some form of
20 value judgment is being exercised by the Tribunal on
21 a broader-brush basis -- which is, of course, not the
22 correct approach on this issue -- the Tribunal should
23 respectfully reflect on Respondent's conduct in relation
24 to the Amendment Act and treat them as vindicating any
25 form of protective step which it is alleged the Claimant

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14:49 1 has taken.
2 THE PRESIDENT: Can I just ask you a question in this
3 respect.
4 MR PALMER: Certainly.
5 THE PRESIDENT: You say that denial of benefit does not
6 inform the general concept of good faith, if I have
7 understood you correctly, unlike abuse of process.
8 You recognise that when we interpret a treaty
9 provision under the Vienna Convention, we have to do
10 this in good faith. Does that not play into this
11 somehow? Or what would you say?
12 MR PALMER: I'd say two things, I guess.
13 The Tribunal has seen a lot of submissions about
14 estoppel and about acquiescence, about all of these
15 types of issues, and generally tribunals don't want to
16 go near it. They prefer to look at the treaty itself,
17 the black-and-white treaty, because they recognise that
18 the parties making the treaty are the preeminent people
19 from [whom] we've got to seek our guidance. And we all
20 recognise that all treaties are different. But we're
21 dealing with a particular treaty, where people have come
22 together and set up a particular test that's been
23 prescribed, and they've done that for a reason.
24 So a general provision in the Vienna Convention like
25 that I don't think can override the actual agreement



14:51 1 between the parties to the treaty, who have thought
2 about this question, who have decided what they want to
3 do. They could have put all sorts of tests -- which
4 you're very familiar with from other treaties -- there,
5 but they chose a specific test.
6 So I would say the job of the Tribunal is to
7 determine whether that test has been met or it hasn't
8 been met, and nothing any further than that.
9 And certainly in the case of the Respondent --
10 I mean, I don't want to bore the Tribunal with how
11 we would say their behaviour has not been one which
12 would justify any sort of consideration of things like
13 the rules of equity, even in an English court system.
14 The Amend[ment] Act is, by its very nature, something
15 which is just beyond description, beyond being
16 perceived, I think.
17 THE PRESIDENT: I see that this is your submission. But of
18 course here we are not dealing with the Amendment Act
19 itself; that's an issue for the merits.
20 MR PALMER: Sure.
21 THE PRESIDENT: Here we are dealing with jurisdiction and
22 preliminary objections.
23 MR PALMER: Certainly. Certainly. But I --
24 THE PRESIDENT: So we need to stick to those, I suppose.
25 MR PALMER: I think so. But I think we need to stick to the



14:52 1 treaty: the treaty that's before us, the treaty that's
2 there in black and white, the treaty that the parties to
3 the treaty have thought about and decided to put
4 a specific test on. And certainly I don't see how that
5 can be overridden.
6 That's my personal view on it, and the Claimant's,
7 I suppose.
8 THE PRESIDENT: Thank you.
9 MR PALMER: Is that alright? Does that answer --
10 THE PRESIDENT: That answers my question, yes.
11 MR PALMER: Where did I finish?
12 The Claimant would also like to note that if some
13 form of value judgment is being exercised by a tribunal
14 on a broad-brush basis, which of course is not
15 correct ... I think I've gone through that section.
16 I now deal with the question that you asked,
17 question 5. And the Claimant's position is that on this
18 issue, it remains as its previous stance, reserving its
19 right to change its position at any later point in time
20 during this arbitration.
21 THE PRESIDENT: When you say -- I'm not sure -- have you
22 concluded your answer on question 5, or ...?
23 MR PALMER: At question 5, we're dealing with Article 27(2),
24 and we're saying that our position remains unchanged at
25 this point in time.



14:53 1 THE PRESIDENT: But you make a reservation for later stages.
2 Are you meaning that refers to if this arbitration
3 proceeds to the merits?
4 MR PALMER: Exactly, yes.
5 THE PRESIDENT: Not during this preliminary stage?
6 MR PALMER: Not during this preliminary stage.
7 THE PRESIDENT: Fine.
8 MR PALMER: But if it does proceeds to the merits, there
9 will be different issues; it may be appropriate to
10 invoke 27(2). It's hypothetical at this stage, I think.
11 THE PRESIDENT: Yes, thank you.
12 MR PALMER: As promised in my opening, in response to the
13 President's enquiry and invitation about the Claimant's
14 position in respect of the matter of "investor" and
15 "investment", the Claimant now responds to the
16 Tribunal's invitation.
17 The Claimant must confirm to the Tribunal that the
18 Respondent has wrongly and untruthfully stated the
19 Claimant's position with respect to the Respondent's
20 "investor"/"investment" objection. The Claimant has
21 done nothing of the sort, but merely reiterated and
22 clarified alternative arguments in its Rejoinder, as set
23 out in paragraphs 130 [to] 172 of the Claimant's
24 Rejoinder, which are consistent with the primary
25 position of the Respondent, which is set out in

14:55 1 paragraphs 252 to 347 of the Claimant's Response.
2 After I explain two of the Claimant's alternative
3 arguments, Dr Anna Kirk will further assist the Tribunal
4 in understanding the Claimant's primary position.
5 I will first go to two alternative arguments that
6 the Claimant wishes to make, based on the AANZFTA treaty
7 itself. We have a slide there, I think. (Pause)
8 The Respondent's first admission that we've referred
9 to earlier is at paragraph 64 of its Reply, that:
10 "... Australia does not dispute that the share swap
11 was both lawful and effective in transferring ownership
12 of the shares in Mineralogy to Zeph."
13 AANZFTA, in Chapter 11, Article 2(c), states,
14 inter alia, that:
15 "... investment means every kind of asset owned or
16 controlled by an investor, including but not limited to
17 the following: ..."
18 And it lists "shares".
19 In the circumstances, it's curious, to say the
20 least, for the Respondent to dispute that the Claimant
21 has made an investment. The Respondent has conceded
22 that the Claimant became the owner of the shares
23 following the lawful and effective share swap. The
24 admission that the share swap was legal and effective in
25 transferring ownership of the shares in Mineralogy to



14:56 1 the Claimant is necessarily an admission of ownership by
2 the Claimant of the asset, namely the Mineralogy shares.
3 This is therefore an admission by the Respondent of the
4 existence of the Claimant's investment within the
5 meaning of Chapter 11, Article 2(c) of AANZFTA.
6 Current evidence already filed with the Response and
7 the Rejoinder makes it clear that the Claimant is
8 an investor of Australia, has made investments in
9 accordance with the requirements of AANZFTA, Chapter 11.
10 Article 2(d) states, when dealing with an "investor
11 of a Party", it means:
12 "... a natural person of a Party or a juridical
13 person of a Party that seeks to make, is making, or has
14 made an investment in the territory of another
15 Party ..."
16 Importantly, the relevant footnote 4 -- which is on
17 the third line of the slide, I think -- provides
18 certainty, and states as follows:
19 "For greater certainty, the Parties understand that
20 an investor that 'seeks to make' an investment refers to
21 an investor of another Party that has taken active steps
22 to make an investment. Where a notification or approval
23 process is required for making an investment,
24 an investor that 'seeks to make' an investment refers to
25 an investor of another Party that has initiated such



14:58 1 notification or approval process."
2 The Claimant participated in the share swap on
3 29 January 2019, as set out in Exhibit C-562, and
4 formally advised the Respondent's ASIC, by
5 Exhibit C-484, of the share swap on 8 February 2019.
6 The Claimant, immediately following the share swap,
7 started preparing its application pursuant to
8 Section 601CD of the Corporations Act 2001, which is
9 Exhibit [CLA-]161. Section 601CD states as follows:
10 "(1) A foreign company must not carry on business in
11 the jurisdiction unless:
12 (a) it is registered under this Division; or
13 (b) it has applied to be so registered and the
14 application has not been dealt with."
15 "Carrying on business in Australia" is defined in
16 Section 21 of the Corporations Act as follows:
17 "(1) A body corporate that has a place of business
18 in Australia, or in a State or Territory, carries on
19 business in Australia, or in that State or Territory, as
20 the case may be.
21 (2) A reference to a body corporate carrying on
22 business ... includes a reference the body: ...
23 (b) administering, managing, or otherwise dealing
24 with, property situated in Australia, or in the State or
25 Territory, as the case may be, as an agent, legal



14:59 1 personal representative or trustee ... or otherwise."
2 Importantly, also in Exhibit CLA-161 is
3 Section 601CE of the Corporations Act, which sets out
4 what matters must be addressed in an application for
5 registration, which states as follows -- I think they're
6 listed on the slide in front of you:
7 "Subject to this Part, where a foreign company
8 lodges an application for registration under this
9 Division that is in the prescribed form and is
10 accompanied by:
11 (a) a certified copy of a current certificate of its
12 incorporation or registration ...
13 (b) a certified copy of its constitution ...
14 (c) a list of its directors containing personal
15 details of those directors that are equivalent to the
16 personal details of directors referred to in [another
17 section of the Corporations Act] 205B(3) ...
18 (d) if that list includes directors who are:
19 (i) resident in Australia ...
20 (ii) members of a local board of directors;
21 A memorandum that is duly executed by or on behalf
22 of the foreign company and states the powers of those
23 directors ...
24 (f) notice of the address of:
25 (i) if it has in its place of origin a registered

15:00 1 office ...
2 (ii) otherwise -- its principal place of
3 business ...
4 (g) notice of the address of its registered office
5 under section 601CT ..."
6 It goes on to say, as you can see, that ASIC, if
7 that material is provided, must grant it permission.
8 THE PRESIDENT: Can I ask you: if I understand you
9 correctly, you refer to this Act in relation to
10 footnote 4, 2(d).
11 MR PALMER: That's correct.
12 THE PRESIDENT: That's right.
13 MR PALMER: I've got one --
14 THE PRESIDENT: I must say -- and I will be interested in
15 what you say about it -- to me, footnote 4 deals with
16 the status of an investor pre-investment, when the
17 investment is not yet made but the investor has only
18 taken steps, and what steps are sufficient or what steps
19 are not sufficient to qualify as an investor.
20 Now, Zeph had made the investment, had made the
21 share swap --
22 MR PALMER: Can I just respond to that, before we go too far
23 in the argument?
24 THE PRESIDENT: Yes, please.
25 MR PALMER: I mean, during the opening for the Respondent,



15:02 1 they said that the fact that the ownership transfer was
2 legally effective did not necessarily mean that it had
3 made an investment under the treaty. That's what they
4 said. That was their --
5 THE PRESIDENT: Why did they say that?
6 MR PALMER: I don't know. I don't know.
7 THE PRESIDENT: I put it to you that the Respondent said so
8 because they consider that the share swap was not
9 a contribution because it contributed no value to the
10 investment.
11 MR PALMER: Okay. So let's just assume for the argument
12 that they're correct, right? In that circumstance, it
13 hasn't made an investment but it's seeking to make one,
14 in this two-step process.
15 THE PRESIDENT: That's why you're addressing this?
16 MR PALMER: That's correct.
17 THE PRESIDENT: Okay, thank you. That's clear.
18 MR PALMER: The Claimant completed its application for
19 registration and notification with ASIC, as set out in
20 Exhibit C-97, on 8 March 2019. So because of the volume
21 of material since its acquisition, it lodged that on
22 8 March. And the Claimant was registered as a foreign
23 company in Australia, which is required by the ASIC Act,
24 as set out in Exhibit C-482, on 29 March 2019.
25 The Claimant submits that by the above matters,



15:03 1 it is a certainty that it is an "investor of a Party" as
2 provided by Article 2(d), in accordance with the
3 certainty given by footnote 4: that it initiated its
4 notification and approval process required by
5 Section 601CE of the Corporations Act to allow it to be
6 a foreign company operating in Australia.
7 So just summarising there, we are saying: on one
8 hand, it has ownership, it's required to have ownership,
9 it's a section of the treaty that says if it's got
10 ownership, it's an investment. On the other hand, we
11 say it is an investor because it has pursued seeking
12 an investment to the stage where it has made its
13 notification, and footnote 4 and the treaty itself deems
14 it to be an investor.
15 So it has complied with "investment", it has
16 complied with "investor". That's my submission.
17 THE PRESIDENT: I understand. And what is your answer to
18 the objections that are made in respect of the verb
19 "make" in 2(d)?
20 MR PALMER: So if we go back and look at the
21 construction ...
22 DR KIRK: Perhaps I can help, because that's exactly what
23 I'll address now.
24 MR PALMER: Yes, so what we're doing is I'll now ask
25 Dr Kirk.



15:04 1 THE PRESIDENT: If you have organised yourself differently,
2 I don't want to interfere.
3 MR PALMER: Okay.
4 THE PRESIDENT: I just thought that --
5 MR PALMER: Dr Kirk was going to address that point.
6 THE PRESIDENT: Fine. Then address it when you have planned
7 to do so.
8 MR PALMER: I will now ask Dr Kirk to address the Tribunal
9 on behalf of the Claimant to further deal with matters
10 set out as the Claimant's primary position, because
11 I was dealing first with two alternative positions.
12 Okay, thank you. Dr Kirk.
13 THE PRESIDENT: Thank you.
14 DR KIRK: Thank you very much.
15 So I will briefly address the Tribunal on the
16 Claimant's position on the investment and investor
17 objections: in particular, whether an active
18 contribution is required for an investor to have made
19 an investment. The Claimant's position on these issues
20 is set out in the response at paragraphs 271 to 364 and
21 the Rejoinder at paragraphs 147 to 157.
22 As the tribunal in RENERGY v Spain (CLA-179)
23 observed, the majority of the investment cases support
24 the conclusion that an active contribution from the new
25 owner is not required. It's there on the slide. The

15:06 1 tribunal says at [paragraph] 571:
2 "In a larger number of cases, tribunals have
3 rejected the suggestion that the current owner of assets
4 must have made an active contribution to qualify as
5 an investor. In several cases tribunals have held that
6 the acquisition of the assets was sufficient."
7 In other words, the majority of tribunals have
8 rejected the submission now made to you by the
9 Respondent.
10 To this end, the Tribunal should not accept at face
11 value the Respondent's table at slides 42 and 43 of
12 their opening slides. Please read the cases carefully.
13 Of course, we know you will.
14 In reality, the position on active contribution by
15 an investor is markedly different on a proper analysis
16 of the cases, and I will seek to draw out some of the
17 key points now.
18 In Addiko Bank v Montenegro (RLA-52), a case that
19 the Respondent says supports its position that an active
20 contribution by an investor is required to make
21 an investment, the tribunal interpreted the same treaty
22 wording that is at issue here. The case involved
23 a transfer of shares for no consideration. The tribunal
24 did not find that the requirement to make an investment
25 necessitated any active contribution. The tribunal said



15:07 1 at paragraph 352, and that's up there on the screen:
2 "The Tribunal is of the view that the ordinary
3 meaning of the verb 'making' includes an act of
4 acquiring an investment which can be defined as gaining
5 possession or control of, or getting or obtaining
6 something. The emphasis is not on the exchange of
7 monetary value for title or possession, but on the act
8 of obtaining title or possession. Thus, 'making'
9 an investment includes instances in which title or
10 possession is obtained over an asset that qualifies as
11 an investment."
12 It is submitted that this is the sensible and
13 natural meaning of the phrase "make an investment", and
14 is the meaning that should be adopted here. It is not
15 a case of "making a meal", to pick up on Mr Wordsworth's
16 language. To "invest" does not require in and of itself
17 further active steps, unlike perhaps making a meal, not
18 least because there are a number of forms that
19 an investment can take. And you picked up on this this
20 morning, Madam President. They include active or
21 passive or otherwise.
22 Now, in emphasising this point, this most certainly
23 is not a change by the Claimant in its position. The
24 Claimant has always said that ownership of the
25 investment is key. Provided that the Claimant has



15:09 1 obtained ownership of the shares, and in this case by
2 a share swap, it has made an investment in accordance
3 with the plain meaning of the treaty.
4 A similar finding was made by the tribunal in
5 AMF Aircraftleasing v Czech Republic (RLA-49), another
6 case that the Respondent suggests supports its position.
7 The tribunal in that case said that the treaty provides
8 that investors must be authorised to make an investment.
9 The ordinary meaning of these terms indeed indicates
10 that the investor has to act and effectively engage in
11 the action of making an investment. In other words, all
12 that is required is that the claimant acted to make
13 an investment; in the present case, by engaging in the
14 share swap.
15 The position in Addiko was adopted in the recent
16 case of Sea Search-Armada v Colombia (CLA-242). Again,
17 the treaty at issue contains substantially the same
18 definition of "investor" as the AANZFTA. In that case,
19 the rights at issue were assigned to the investor by
20 a related company. There is no indication in the award
21 that any consideration whatsoever was paid for the
22 assignment of the rights.
23 The tribunal upheld the investment. It said that
24 there was no requirement for an active or personal
25 contribution from the claimant, as the original



15:11 1 investment satisfied any requirement for a contribution.
2 The tribunal relied on the Addiko case and on
3 Kim v Uzbekistan in rejecting any requirement for
4 an active or personal investment by the investor.
5 As I have mentioned, in both Addiko and
6 Sea Search-Armada, no consideration at all was paid for
7 the assets acquired. These cases involved a straight
8 transfer of assets. This was also the case in Levy
9 v Peru (CLA-188, paragraph 148), where the tribunal
10 said:
11 "It is clear that the Claimant acquired her rights
12 and shares free of charge. However, this does not mean
13 that the persons from whom she acquired these shares and
14 rights did not previously make very considerable
15 investments of which ownership was transmitted to the
16 Claimant by perfectly legitimate legal instruments."
17 In all of these cases, if any requirement for
18 contribution exists, it is satisfied by the original
19 investment or contribution. There is no requirement for
20 any active additional contribution from the person
21 acquiring the investment.
22 Additional cases which confirm this position are set
23 out in the Response at [paragraphs] 322 through to 329.
24 These cases are all consistent with the position taken
25 by the Swiss Federal Tribunal in Clorox v Venezuela.

15:12 1 And this is the first Swiss Federal Tribunal decision on
2 this (RLA-144), rather than the one we have been looking
3 at on abuse of right.
4 In this decision, the Federal Tribunal overturned
5 the arbitral decision, finding that the verb -- in that
6 case "invested" or "to invest" -- required an active
7 contribution. In that case, the shares in the
8 investment had been transferred to the claimant without
9 any payment or consideration. The arbitral tribunal
10 found that there had been no transfer of value, and
11 therefore that no investment had been made.
12 The Swiss Federal Tribunal in Clorox rejected the
13 very arguments now being made by the Respondent, and
14 said at paragraph 3.4.2.7 that the term "invested" did
15 not require an active investment be made by the investor
16 in exchange for the assets. The holding of assets was
17 sufficient to show that the Claimant had invested in
18 those assets.
19 The Swiss court went on to say that the arbitral
20 tribunal was wrong to impose additional conditions on
21 the investor, being the condition of active contribution
22 that was not expressly stated in the words of the
23 treaty.
24 The Swiss Federal Tribunal also confirmed that
25 an arbitral tribunal was not permitted to deny



15:14 1 jurisdiction on the basis that the original investment
2 was carried out by another entity and then transferred
3 to the claimant through a corporate restructuring.
4 There are many other cases in the Claimant's
5 Response and Rejoinder that come to a similar
6 conclusion, and the Claimant continues to rely on all of
7 these.
8 In its Reply, the Respondent relies on Montauk
9 Metals v Colombia (RLA-147), which is a June 2024
10 decision, to support its position. The tribunal in
11 Montauk only briefly considered the meaning of "make
12 an investment", and while it did say that an active
13 contribution was required, the tribunal expressly relied
14 on the original arbitral decision in Clorox in coming to
15 that conclusion. That is the award that was annulled by
16 the Swiss Federal Tribunal for being incorrect. And it
17 appears that the tribunal in Montauk was not aware that
18 the Clorox decision had been annulled: it simply doesn't
19 refer to it.
20 THE PRESIDENT: Can I just ask you a question.
21 When you speak of "an active investment", as opposed
22 to just "an investment", do you mean an investment that
23 is made with a payment? What does the "active" mean?
24 Do I have to actively manage the corporation? What is
25 the "active" about?



15:16 1 DR KIRK: I am simply reflecting the Respondent's
2 submission. They are the ones who are saying that "made
3 an investment" means an active contribution.
4 THE PRESIDENT: But what the Respondent says is: to have
5 an investment, you must make contribution, meaning you
6 have to provide something of value. And I hope I am not
7 distorting the Respondent's submission.
8 But my question is: what has to be active? What
9 does this "active" stand for? The cases often say
10 "active", but have people really thought about what
11 needs to be active? For what does it stand? I'm not
12 sure all the cases use "active" with the same
13 connotation.
14 DR KIRK: They may not. In my submission, "active" -- or at
15 least, from the Claimant's side, all that is required as
16 far as an active contribution is concerned is engaging
17 in the act of obtaining the title to the investment.
18 And I will come to that --
19 THE PRESIDENT: That's why you spoke of the participation?
20 DR KIRK: Exactly.
21 THE PRESIDENT: Yes, good. Thank you.
22 DR KIRK: And I will speak a little more about
23 restructurings in a minute, which may fill that out.
24 THE PRESIDENT: You have answered my question.
25 DR KIRK: The Respondent also relies in its written



15:17 1 submissions on Standard Chartered v Tanzania, one of the
2 cases that most clearly imposes a requirement for
3 an active investment, whatever that might mean. That
4 case has generally not been followed by subsequent
5 tribunals.
6 Indeed, the tribunal in Koza v Turkmenistan
7 (CLA-180, paragraph 231) said that the finding in
8 Standard Chartered that investments must be made by
9 an investor in some active way, rather than simply
10 passive ownership, resulted from -- and these are the
11 words on the slide -- "a somewhat strained reading of
12 the words 'of', 'by' and 'made'" in the relevant BIT.
13 And it is precisely this "strained reading" that the
14 Respondent advocates for here. It should be rejected,
15 just as it was in the Koza case.
16 Similarly, in Nachingwea v Tanzania (RLA-47,
17 paragraph 153), the tribunal considered the case of
18 Standard Chartered, and concluded that:
19 "... this Tribunal is unable to agree [with the
20 Standard Chartered case] that such a requirement of
21 active contribution can be said to arise by virtue of
22 the use of the word 'made' in Article 1(a) of the BIT.
23 That an investment has to be 'made' does not necessarily
24 imply that an investment has to be 'actively made'.
25 There is a distinction between the two and this Tribunal

15:19 1 would be very reluctant to conclude, without more, that
2 'made' equates with 'actively made'."
3 I have only referred to a few of the cases in the
4 submissions. But you can see, even from this high-level
5 review, that the position accords with the conclusion of
6 the esteemed authors Dolzer, Kriebaum and Schreuer in
7 their 2022 text Principles of International Investment
8 Law (CLA-191, page 81), which is on the slide now.
9 It says:
10 "It follows from these authorities that the
11 preponderant view is that mere ownership or control of
12 the investment will suffice to bestow the status of
13 an investor. In other words, according to the majority
14 view, it seems that an active contribution by the
15 current owner of the assets is not required."
16 Before moving on, I also wish to recall some of the
17 additional matters that appear actually largely agreed
18 between the parties, or at least not contested. And
19 I say this by reference to paragraph 61 of the ROPO.
20 First, a share swap, including a cashless share
21 swap, in and of itself is a legitimate way of obtaining
22 an investment. This was clearly established in Mobil
23 v Venezuela and a number of other cases discussed at
24 paragraphs 284 to 286 of the Claimant's Response, and
25 the Respondent quite rightly does not contest this.



15:20 1 Second, an investment can be acquired through
2 a corporate restructuring. There is absolutely nothing
3 wrong with acquiring an investment in this manner,
4 whether by share swap, transfer or otherwise, as
5 confirmed in cases such as Levy v Peru, Tidewater
6 v Venezuela and Aguas del Tunari v Bolivia, amongst many
7 others.
8 There is nothing unusual about the restructure in
9 the present case or the share swap that went on. It
10 reflects standard corporate practice and is similar to
11 many of these other cases where investments have been
12 found.
13 These two points are important also in regard to the
14 President's questions to Mr Palmer yesterday on the
15 nominal value of the shares swapped versus the economic
16 reality that you were discussing, and also on the risk
17 point that was raised.
18 As I said, the share swap in the present cases is
19 an entirely standard commercial practice, commonly used
20 when restructuring a corporate group. We've actually
21 heard a lot in this hearing about Mr Palmer's
22 unconventional way of approaching business. He
23 certainly does not do business or manage his affairs in
24 a way that we all might be used to seeing in cases like
25 this, and for the most part he has been very successful



15:22 1 in his idiosyncratic approach.
2 Funnily enough, on the share swap, he was entirely
3 conventional. And share swaps or transfers have been
4 recognised by investment tribunals time and again as
5 being a legitimate way of making an investment in the
6 context of corporate restructurings. This is
7 an established principle and it should be the end of the
8 matter.
9 It follows from this that issues of nominal or face
10 value are also irrelevant in the context of corporate
11 restructuring. And this was confirmed in RENERGY
12 v Spain (CLA-179), which distinguished the case of
13 KT Asia on the basis that KT Asia where a nominal value
14 in the exchange was at issue did not involve a corporate
15 restructuring.
16 The nominal value issue simply does not arise in
17 context of a corporate restructuring. It is important
18 to note that after the share swap, just as an aside,
19 MIL, the parent, retained very, very valuable assets, in
20 the form of both Zeph and Mineralogy. And that was the
21 purpose of the share swap.
22 Given the case authorities on this issue, and the
23 continual recognition that corporate restructuring using
24 share swaps creates legitimate investments, it would be
25 incongruous of this Tribunal to then say that the shares



15:24 1 transferred in a restructuring are not an investment as
2 they do not satisfy any risk or contribution element
3 that may exist because they were part of a standard
4 corporate restructuring. In none of the cases I have
5 mentioned have elements of risk or contribution been
6 deemed unsatisfied simply because the transaction was
7 a face-value share swap or share transfer as part of
8 a regular corporate restructuring.
9 As I have also stated earlier, it is
10 a well-established principle that any requirement for
11 contribution inherent in the term "investment", as it
12 may be, is satisfied by the original investment and does
13 not require a brand new investment from every investor
14 that subsequently acquires the asset. Both the original
15 contribution and the inherent risks involved in the
16 investment are transferred with that asset to the new
17 investor.
18 I do emphasise here that obviously this is not
19 an ICSID Convention arbitration. It is far from clear
20 that the inherent characteristics that one implies into
21 the definition of "investment" in the ICSID Convention
22 can be implied into a treaty such as the AANZFTA, where
23 the state parties have provided a very clear definition
24 of "investment" that already includes carve-outs for
25 commercial contracts for sale of goods and services, and

15:25 1 similar types of transactions.
2 The state parties to the AANZFTA have been very
3 clear about what an "investment" means, and this should
4 be respected. You have our submissions on this point in
5 the Response and I just want to make sure it's clear
6 that we continue to rely on those.
7 So returning to the points that I was making before
8 I went off on that little tangent. The third point that
9 I wanted to make -- and it's related to what I've just
10 been discussing -- is that the adequacy of the
11 contribution paid is irrelevant. And this, again, is
12 an agreed point by the Respondent.
13 The tribunal in Gavrilovic v Croatia (CLA-195)
14 confirmed that the amount of the purchase price is
15 immaterial, and that an investigation into the adequacy
16 of the consideration is not required. The Respondent,
17 as I've said, has expressly agreed with us in the ROPO.
18 Similarly, in Invesmart v Czech Republic (CLA-196),
19 the tribunal refused to look at the adequacy of
20 consideration because it would imply an additional
21 requirement of a qualitatively adequate investment.
22 And indeed, this is even more of an issue in
23 a corporate restructuring context, as emphasised earlier
24 in that slide I showed you from RENERGY v Spain
25 (CLA-179), where it distinguished the KT Asia case that

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15:27 1 was about nominal value on the basis that KT Asia did
2 not pertain to a corporate restructuring.
3 One could only imagine the uncertainty that would be
4 introduced into the investment regime if adequate
5 consideration were a requirement of an investment.
6 Fifth, the origin of the funds from which the
7 original investment was made is irrelevant. This was
8 confirmed in RENERGY v Spain, Tokios Tokelés and
9 a number of other cases cited in the Claimant's
10 response. In particular, it does not matter if the
11 original contribution to the investment came from within
12 the host state; in this case, from within Australia.
13 And again, the Respondent agrees with this point.
14 Sixth, on a plain reading, nothing in the treaty
15 suggests that an active contribution is required or was
16 intended by the state parties when they used the term
17 "made an investment".
18 As the Claimant has pointed out, the definition of
19 "investor" is based on the US Model BIT. The only thing
20 added was the footnote you saw earlier, which required
21 "active steps" for an investor seeking to make
22 an investment. Clearly the state parties considered the
23 requirement for "active steps" needed to be clarified
24 for that particular portion of the definition, and no
25 such requirement was added where an investor has made

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15:29 1 an investment.
2 Consistent also with the adoption of the US Model
3 BIT provisions, the AANZFTA definitions of "investment"
4 and "covered investment", as well as the definition of
5 "investor" itself, are very broad. The definition of
6 "investor" should be interpreted in this context.
7 The need to consider the definitions of "investment"
8 and "covered investment" is even more acute because the
9 verb "make", simply as a matter of English grammar, is
10 a transitive or delexical verb, taking its meaning from
11 the noun that it is paired with; in this case,
12 "investment".
13 This is not a matter of the effet utile principle.
14 The words must be given their plain meaning. And to
15 "make an investment" must take account of the meaning of
16 "investment": to own shares.
17 As the Addiko tribunal said (RLA-52, paragraph 352),
18 making an investment is simply "the act of obtaining
19 title or possession" over that investment. This is the
20 plain and ordinary meaning of the treaty provision, when
21 interpreted in context and in good faith.
22 When taken together, all of these points are made
23 clear in the case authorities that I have referenced,
24 and they lead to only one conclusion: there is no
25 requirement for an active contribution to make

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15:30 1 an investment. The Claimant simply has to show that
2 it legitimately acquired the shares to have made
3 an investment, and it has done so.
4 I wish to just briefly touch on the returns point
5 before I hand it back to Mr Palmer. This point we say
6 is fatal to the Respondent --
7 THE PRESIDENT: Maybe before we go there, let us just check
8 with the court reporter whether we should not have
9 a break, because this morning he was ready to go on, but
10 the day gets longer. (Pause)
11 MR PALMER: Maybe we should have a break. We have probably
12 about half an hour, maybe a bit less.
13 THE PRESIDENT: Yes.
14 MR PALMER: But maybe we should have a break for 20 minutes
15 or 10 minutes, and this is probably an appropriate time.
16 THE PRESIDENT: Is it fine if we take a 10-minute break, or
17 you would rather complete this?
18 DR DONAGHUE: It's fine with us. We're in the Tribunal's
19 hands.
20 THE PRESIDENT: Yes. Fine.
21 Then let's take 10 minutes now, and once you're
22 done, we can continue with the procedural aspects.
23 Good.
24 MR PALMER: Good.
25 THE PRESIDENT: That leads us to 3.45.

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15:35 1 (3.32 pm)
2 (A short break)
3 (3.46 pm)
4 THE PRESIDENT: Dr Kirk, you were about to go to another
5 topic.
6 DR KIRK: Yes. Thank you, Professor Kaufmann-Kohler. I was
7 about to talk very briefly about the returns issue,
8 which the Claimant says is fatal to the Respondent's
9 investor objection.
10 It's quite noticeable that Mr Wordsworth's
11 submissions on this point focused almost exclusively on
12 the term "dividend". But the definition of "returns" is
13 far wider, and includes profits yielded.
14 It is clear that Mineralogy yielded profits
15 regardless of whether a dividend was paid, and that
16 these profits can constitute investments in and of
17 themselves under the treaty.
18 It is also undisputed that the Claimant, Zeph,
19 approved those profits remaining in Mineralogy when it
20 signed off on the accounts which specifically retained
21 those profits within Mineralogy. The Claimant,
22 Mineralogy's parent, has reinvested the profits returned
23 by Mineralogy in that business by approving those
24 profits being left in the business for Mineralogy's use.
25 I just want to take you to the case of OI European



15:47 1 Group v Venezuela, which is CLA-189, which we say is
2 very apposite.
3 The tribunal held in that case (paragraph 241) that:
4 "When a shareholder decides not to collect profits
5 in full, but to leave them -- in whole or in part --
6 with the company, it is waiving a right and making
7 a contribution of cash to the company, which is enriched
8 to the extent of the amount that the shareholder
9 relinquished."
10 The tribunal goes on to say (paragraph 242):
11 "It is true that the funds provided by the foreign
12 investor [in that case] to Venezuelan Companies would
13 have been generated in the destination country itself.
14 But this is irrelevant: ..."
15 And just skipping down a little to paragraph 243:
16 "The Respondent also raises one last argument: OIEG
17 could not have made a contribution by means of its own
18 inaction -- that is, by not withdrawing the profits
19 generated in the form of dividends.
20 244. The argument is not persuasive [says the
21 tribunal]: it is not true that the investor has remained
22 inactive. The creation of a reserve requires
23 an agreement of the company's governing bodies,
24 controlled by the OIEG, in which it decides to
25 distribute only part of the profits, and apply the rest



15:48 1 to reserves."
2 Now I note that, just like in this case, in
3 OI European Group, the dividends were declared or not
4 declared, as the case may be, by the directors of the
5 subsidiary company, not by the shareholder, and the
6 reference for that is paragraph 597.
7 That is, of course, standard corporate practice.
8 It's very usual that the directors of the company itself
9 declare the dividends, not the shareholder. But this
10 did not prevent a finding that the retained profits were
11 investments. The economic reality is that the directors
12 act in accordance with the wishes or consensus of the
13 shareholders.
14 This is especially the economic reality of a closely
15 held, single-shareholder company. The shareholder can
16 take out the profits of the investment if it wishes to
17 do so, and it would be naive to suggest otherwise.
18 Finally, I briefly want to touch on a point raised
19 by the President yesterday with Mr Birkett about needing
20 to retain some cash in the company -- in this case,
21 Mineralogy -- in order to allow Mineralogy to operate.
22 Now, of course, normally that would be true. But
23 Mineralogy is rather unique: it requires virtually no
24 working capital to maintain its source of income. It is
25 likely the largest privately owned royalty stream in the



15:50 1 world.
2 If Mineralogy or its shareholder, Zeph, chose to
3 reinvest zero dollars in its operations, Mineralogy
4 would still maintain the vast majority of its income.
5 It is only because it chooses to reinvest that it did
6 not pay out virtually all of the earnings as dividends.
7 And that reinvestment is the will of the shareholder.
8 The retention of profits in 2019 and 2020 are returns,
9 and are "investments" under the treaty.
10 So to conclude on the overall
11 "investor"/"investment" objection, it's the Claimant's
12 position that to imply into the AANZFTA the requirement
13 of an active contribution runs contrary to the plain
14 meaning of the definition of "investor" in the treaty,
15 interpreted in good faith.
16 It also runs contrary to the consistent approach of
17 investment treaty tribunals that have repeatedly
18 rejected the arguments now made by the Respondent and
19 have acknowledged that tribunals must not imply
20 additional conditions into a treaty, including the
21 condition of active contribution.
22 As the tribunal in RENERGY v Spain (CLA-179)
23 observes:
24 "The Tribunal's [job] is to apply the treaty, not to
25 rewrite it."

15:52 1 That's at paragraph 558. And we would say that that
2 is applicable not just to the definition of "investor"
3 but also to Article 11 on substantive investment. It is
4 clearly the role of the Tribunal to interpret that
5 provision and apply it.
6 Just on that point, I think it's important to
7 emphasise that it's the Claimant's position that the
8 Claimant was acting in good faith when it invested in
9 these Singapore businesses. And just to remind the
10 Tribunal that it is of course legitimate to restructure,
11 as we all agree, in order to obtain treaty protection.
12 So it must also be legitimate to bring oneself within
13 the provisions of the treaty in order to ensure that
14 treaty protection exists, and that would include
15 ensuring you have a substantive business, if that's
16 a requirement under the treaty.
17 So as long as the restructuring and the treaty
18 protection itself is legitimate, there could be no basis
19 to say that the denial of benefits "substantive
20 business" section is illegitimate or an abuse,
21 separately from that general abuse of right point.
22 Thank you.
23 MR PALMER: Thanks, Madam President.
24 I'd like to summarise for the Tribunal the decision
25 I made to offshore in June 2018 and the subsequent



15:53 1 events that are demonstrated by the evidence, and bring
2 all that together; in so doing, answering some of the
3 obvious questions that the Tribunal and the Respondent
4 raised during my cross-examination yesterday.
5 This matter is addressed in the evidence in my first
6 witness statement at paragraphs 113 to 139 and evidence
7 given by me yesterday.
8 I'd like to start at the beginning. Firstly, I'd
9 refer to Exhibit [C-]166, which I did in my opening,
10 which is a letter dated 12 December 2017 from the
11 Premier of Queensland to the Prime Minister of Australia
12 vetoing funding of $1 billion for the Adani Coal
13 Project.
14 In paragraph 123 of my first witness statement,
15 I explained that the Adani Coal Project is located
16 alongside the Claimant's project in Queensland. And as
17 I stated in the Claimant's opening, I note that the
18 Adani Coal Project was eventually funded through
19 Singapore.
20 Secondly, I refer to Exhibit R-484, which is a draft
21 bill entitled "Coal-Fired Funding Prohibition Bill",
22 which was legislation then currently before the
23 Australian Parliament, inter alia, banning the funding
24 of coal projects.
25 Thirdly, I refer to Exhibit C-165, which is



15:55 1 an article evincing that Mineralogy's own bank had
2 decided not to fund any new coal projects.
3 So in early June 2018, as the evidence shows at
4 paragraphs 119, 122 and 123 of my first witness
5 statement, these three documents were in my possession.
6 And I reached the conclusion, after considering the
7 documents in June 2018, that the coal project's chances
8 of obtaining the billions of dollars needed for its
9 development in Australia were non-existent.
10 The Claimant would submit that that decision I faced
11 was then, as a director of Mineralogy and Waratah Coal
12 and personally, was: should the project be closed, and
13 over $125 million sunk cost written off or lost, or was
14 there some other possibility to obtain coal funding? In
15 short, was there a positive decision I could take, for
16 long-term commercial reasons, to avoid this type of
17 major and significant downside?
18 The answer can be found in Exhibit [C-]167, which is
19 a news article from The Straits Times in Singapore which
20 confirms that coal funding was available in Singapore.
21 In my evidence before the Tribunal yesterday
22 I explained the purpose of seeking to raise debt funding
23 in Singapore, with the assistance of international banks
24 whose regional headquarters were based in Singapore, and
25 [that] that was how the system worked; and how such



15:56 1 arrangements were available in Singapore and were not
2 available in Australia.
3 I also explained in my evidence given in
4 cross-examination to the Tribunal that I had been
5 involved in and was familiar with fundraisings in
6 Singapore. I explained -- and I'll go to the sections
7 on the transcript in a second -- I explained that one of
8 my companies had previously borrowed $100 million to
9 fund three ships in Singapore. Construction funding had
10 been raised by each ship transaction incorporating
11 a separate company that had been established to fund
12 each ship's constructions.
13 We see the transcript at Day 2, page 29, from
14 lines 2 to 6; and page 272, from lines 21 to 23.
15 The Claimant submits that it's logical, considering
16 the previous success my company had experienced in
17 borrowing funds in Singapore, that the structure used in
18 doing so could be adopted in raising loan funds in
19 Singapore.
20 Paragraphs 126 to 130 of my first witness statement
21 further expand on why Singapore was attractive from
22 a fundraising perspective. The Claimant submits it was
23 a simple commercial decision, being: should the coal
24 project be closed down and millions of dollars written
25 off, or should the project have a go and seek to

15:57 1 restructure in Singapore? A simple, straightforward
2 commercial decision. The Claimant submits that most
3 commercial companies would choose life over death while
4 there were prospects of obtaining funding offshore, and
5 that is what I decided to do in June 2018, as the
6 evidence shows.
7 I adopted in my fifth witness statement at
8 paragraph 51 matters set out in the witness statement of
9 Nui Harris dated 29 January 2024. I confirmed in that
10 statement that I instructed Mr Harris on or about
11 July 2018 to engage London economist Mr James King to
12 prepare a comprehensive report in respect of the coal
13 project that could be used to provide to potential
14 lenders in Singapore.
15 These reports --
16 DR DONAGHUE: Madam President, we object to this.
17 Mr Harris's statement was withdrawn for the purposes of
18 this jurisdictional hearing, including the King reports
19 to which it referred.
20 MR PALMER: No, no.
21 DR DONAGHUE: Mr Palmer can't now, in closing submissions,
22 proceed as if that report is in evidence.
23 MR PALMER: With respect, Madam Chairman, you will recall
24 that in the pre-conference hearing there was the
25 question about the exhibits, and it was ruled at that



15:59 1 same time that the exhibits were not being withdrawn,
2 and that was stressed to the other side. I realise
3 Mr Donaghue wasn't there at that time, but that was what
4 was discussed.
5 And I referred to paragraph 51 of my statement,
6 which was made on 29 January 2024, and I have not
7 withdrawn my statement from any evidence.
8 THE PRESIDENT: It's fine, certainly your statement is in
9 the record; that is not an issue. Can you rephrase what
10 you have said just without referring to Mr Harris? Or
11 stick to your statement.
12 MR PALMER: In my statement, I confirm -- in my statement at
13 paragraph 51, if Mr Donaghue wants to look at it -- that
14 I instructed Mr Harris to do certain things --
15 THE PRESIDENT: Yes.
16 MR PALMER: -- and that's what I'm confirming now.
17 And I'm also confirming that in the current
18 exhibits, the reports that were developed for the coal
19 project are current exhibits in this arbitration. And
20 those exhibits weren't withdrawn.
21 THE PRESIDENT: Let us just check, because I don't remember
22 what we said at the pre-hearing conference about the
23 exhibits to the statements that were withdrawn. It's
24 addressed at paragraph 6 of PO5.
25 DR DONAGHUE: Perhaps, Madam President, I should clarify,



16:00 1 having checked with my team: we do accept that the King
2 exhibits are in. But the Harris statement is not.
3 MR PALMER: That's correct, yes.
4 THE PRESIDENT: But clarified that the withdrawal did not
5 extend to the exhibits, absolutely. Right.
6 So the reference to the Harris statement can be
7 made -- you can refer to your statement, of course, that
8 says you asked Mr Harris to do this. You cannot refer
9 to his statement.
10 MR PALMER: I haven't.
11 THE PRESIDENT: You can refer to the exhibits to his
12 statements.
13 MR PALMER: That's correct.
14 THE PRESIDENT: Is that a clear direction?
15 MR PALMER: That's how I look at it.
16 So in my statement, I confirmed that I instructed
17 Mr Harris on or about July 2018 to engage London
18 economist Mr James King to prepare a comprehensive
19 report in respect of the coal project which could be
20 used to provide for potential lenders. These reports
21 can be found at Exhibit C-472 and Exhibit C-474, and
22 each of the members of the Tribunal should read them.
23 Mr King provided his independent report in late
24 September 2018, and the two Singapore companies --
25 which is on the record -- were incorporated on



16:01 1 30 November 2018.
2 In my evidence yesterday -- I will give the
3 transcript and lines in a minute -- I confirmed that it
4 was proposed that a Singapore company be used to raise
5 loan funds. And the Claimant submits that this was in
6 accordance with the structure that my companies had
7 previously used when raising loan capital in Singapore.
8 I also explained in my evidence yesterday that I was
9 interested in the shipping industry in Singapore, indeed
10 had raised money in the shipping. And during
11 yesterday's hearing, I stated at page 35 of the
12 transcript, from line 22:
13 "Well, I'd have to look at his statements at the
14 time. But at the time, anyway, this is what he said to
15 me, right? And we wanted to get into shipping because
16 we'd already funded three ships through Singapore in our
17 nickel business, all carriers, and we thought that that
18 was a good sector to get into."
19 In my cross-examination evidence yesterday, further
20 detailed on page 175 of the transcript, from line 20, as
21 follows:
22 "Our evidence has always been that we purchased
23 those companies because we wanted to get into the marine
24 sector, and that they had significant licences and
25 facilities in Singapore which we thought we could invest

16:03 1 in and expand. That's our evidence."
2 That was the quote.
3 Continuing on page 176 of the transcript for Day 2,
4 in answer to a question from the Respondent, I stated:
5 "... it was pretty hard to get government licences
6 and concessions. So when it became available,
7 Michael Mashayanyika thought we should move quickly, and
8 I accepted his recommendation and did it."
9 As set out in Exhibit C-70, the Claimant was
10 incorporated on 21 January 2019, and Exhibit C-507
11 confirms that the engineering companies
12 [GCS] Engineering Service Pte Ltd, Visco Engineering
13 [and] Visco [Offshore] were acquired by the Claimant on
14 31 January 2019.
15 During my cross-examination yesterday, commencing at
16 line 9 of page 176 of the transcript, I stated:
17 "... the first thing we did was to look at the
18 conditions of the Indian workers that were brought in to
19 be contract labourers on ships, and we thought that they
20 weren't up to a proper human rights standard. And then
21 we increased those facilities and tried to make sure
22 there was additional concessions. In Singapore, the
23 human -- the health and safety regulations for immigrant
24 workers are less than they should be, and not the same
25 as Singaporean workers. So that was our first concern."



16:04 1 The Claimant submits that once the Claimant had
2 acquired the engineering companies, it found that they
3 were, in effect, labour hiring companies keeping Indian
4 immigrant workers in subhuman conditions that were
5 a disaster. The Claimant submits that by the end of
6 [2019], worker condition matters had been remedied.
7 As stated at page 179, line 6 to page 190, line 20
8 of the transcript from Day 2, the Claimant entered into
9 the Kleenmatic joint venture on 24 January 2020 and
10 acquired a 90% interest, about a year after the Claimant
11 acquired the engineering companies. The remaining 10%
12 interest was later acquired. See transcript page 191
13 from line 2.
14 During my cross-examination yesterday, at transcript
15 page 181 from line 8, I referred to these cleaning
16 companies Mr Mashayanyika had brought to my attention.
17 I stated:
18 "... we were getting, I think about 2% or 3% for the
19 funds we had on term deposit, or on deposit generally
20 with banks, and this is showing a yield close to 10%."
21 The Claimant submits that it is normal business
22 decisions to seek high returns on investment when it is
23 available. The Claimant accepts the proposition of the
24 Respondent that the engineering companies were not
25 profitable. As stated in my fifth witness statement at



16:05 1 paragraph 86, the engineering companies provided
2 contract maintenance to major shipyards operating in
3 Singapore. During the Covid-19 pandemic, there was
4 an unexpected slowdown in demand and they went into
5 voluntary liquidation.
6 As the Amendment Act was enacted on 13 August 2020,
7 if the Claimant had been incorporated for the purpose of
8 treaty protection purposes, it would not have placed the
9 engineering companies into liquidation in October 2020.
10 The engineering companies would have been maintained for
11 the purposes of that protection. The facts are that the
12 engineering companies were not maintained. This is
13 a telling fact which destroys the unsubstantiated and
14 scandalous allegations of the Respondent in this regard.
15 I will now deal with the abuse of process objection,
16 before calling on Dr Kirk to continue.
17 The evidence is clear that the Claimant has
18 a substantive business in Singapore, and did at the time
19 the Amendment Act became law on 13 August 2020. As the
20 Tribunal noted in Procedural Order No. 4, the Respondent
21 has confirmed the Amendment Act was not foreseeable.
22 All claims before the Tribunal in the dispute that
23 the Tribunal is considering are as a consequence of the
24 Amendment Act. If there was no Amendment Act, there
25 would be no dispute and there would be no arbitration.



16:07 1 The Claimant has complied with the terms of the treaty
2 and has a substantive business in Singapore, which
3 it has established in good faith, perfectly properly,
4 inter alia, on 24 January 2020. Consequently, the
5 [Claimant] meets the test set out in the treaty.
6 Before I turn to a few closing observations of the
7 facts, can I seek to emphasise the following in relation
8 to the rationale for incorporation of the Claimant,
9 while it is only relevant if the Tribunal rejects our
10 case on foreseeability.
11 I would like to make it clear that there is no
12 proper basis to reject the Claimant's evidence on
13 rationale. As I hope the Tribunal will have gathered
14 from my evidence yesterday, I am an honest person who
15 deals with matters swiftly and fairly. I was prepared
16 to make concessions yesterday even when the point
17 arguably cut across the Claimant's case. And
18 I explained to the President how I manage my business.
19 I'm an honest man and gave my evidence honestly.
20 I am dismayed that the Respondent persists in using
21 words like "bad faith", "sham", "lack of credibility",
22 in circumstances where I have made clear my position.
23 They have sought to adduce expert evidence about
24 questions and rationale, but it does not mean that the
25 Tribunal should reject my evidence on the facts. That

16:08 1 is the reality of the position. It's why speculation
2 from third parties, none of whom are witnesses of fact,
3 about what might or might not have been done should be
4 rejected.
5 I will now turn to some of the facts. I will now
6 hand over to Dr Kirk to complete this section of the
7 Claimant's case.
8 DR KIRK: Thank you very much.
9 I just want to start by addressing the
10 15 October 2019 letter (R-145) that Dr Donaghue spoke
11 about this morning.
12 The Claimant submits that there is no connection to
13 be drawn between the Amendment Act and the threats made
14 by Mr McGowan over the CITIC dispute by virtue of this
15 October 2019 letter. The cases are clear: to be
16 reasonably foreseeable, the dispute has to be a real or
17 reasonable prospect; not just something you can imagine,
18 not just a mere possibility.
19 In January 2019, the Claimant did not even know for
20 certain that it had the right to claim damages in the
21 BSIOP dispute. That was not confirmed until the
22 October 2019 award in the second BSIOP arbitration.
23 One could hardly say that removal of that right was
24 a real prospect in January 2019, ten months before the
25 right had even been confirmed. Surely, for a measure



16:10 1 removing a right to be a real prospect, the right itself
2 must first exist.
3 When Mineralogy did learn that it had the right to
4 damages, it sent off what might be described -- and in
5 fact, the Solicitor-General also described it this
6 morning -- as "a shot across the bows", warning the
7 Government not to interfere with its newly confirmed
8 right.
9 Again, as the Solicitor-General said, there had been
10 no threat by Western Australia that it would interfere
11 in any way with Mineralogy's rights in the BSIOP
12 dispute. Indeed, there has never been any threat on the
13 record that it would interfere with the BSIOP dispute.
14 Mineralogy might, of course, have been concerned;
15 it might even have been slightly paranoid. It might
16 have been imagining all sorts of potential ways its
17 rights could be interfered with, given the size of the
18 dispute. But this does not make the Amendment Act
19 a real prospect in either October 2019 and certainly not
20 in January 2019.
21 Quite frankly, it appears the letter had no effect
22 at all, and went largely unnoticed.
23 The Western Australian Government continued,
24 quite properly, the process that had been started back
25 in 2012. In accordance with the relevant arbitration



16:11 1 statute, it challenged the second award in the courts,
2 and it lost. It then participated in the third
3 arbitration. It signed the arbitration agreement. It
4 attended directions hearings. It agreed a timetable for
5 submissions. It agreed a hearing date and a date on
6 which the award for damages in the third arbitration
7 would be issued. It signed the mediation agreement.
8 Now, if it's the Respondent's position, as it said
9 this morning, that abuse of right is a fact-specific
10 enquiry, then these are the facts that are very, very
11 important. All the indicators were that Western
12 Australia would go through the normal dispute resolution
13 process required by the State Agreement and the
14 Western Australian Arbitration Act. In these
15 circumstances, it is just not plausible to say that the
16 Amendment Act was a real prospect at any time in 2019,
17 or indeed before it was passed.
18 To this end, it is agreed by the parties, and
19 established or recorded in Procedural Order 4, that the
20 Amendment Act was not even conceived of until May 2020.
21 I have popped up on the screen again that text from
22 Mr Quigley. There is no mention here in this text of
23 the CITIC dispute or of any earlier threats. To all
24 intents and purposes, this is a sudden idea that has
25 occurred to Mr Quigley in the middle of the night,



16:13 1 thanks, apparently, to the fact that he no longer had
2 a girlfriend. This sudden idea dreamed up in the wee
3 hours of 23 May 2020 cannot possibly have been
4 reasonably foreseeable or a real prospect in
5 January 2019 or in October 2019.
6 The Tribunal will know that the facts in this case
7 are markedly different from many of the cases where the
8 abuse of rights argument has succeeded. In these cases,
9 like in Philip Morris, discussed this morning, they
10 involved detailed announcements by governments of
11 well-thought-through policies.
12 Even in Clorox v Venezuela, a case we have discussed
13 a lot, where the government announced that it was going
14 to implement price control measures to regulate products
15 that exceeded a certain profit margin and create a new
16 entity charged with implementing those measures -- the
17 announcement that prompted Clorox to undertake
18 a corporate restructure and obtain treaty protection --
19 even this announcement was not enough to make the law
20 enacted six months later foreseeable.
21 The tribunal held, and the Swiss court agreed, that
22 the President's speech was so general that a reasonable
23 observer could not objectively have foreseen the
24 specific dispute that eventuated. Clorox could not
25 reasonably have anticipated from the President's speech

16:15 1 announcing the measure what range of products would be
2 impacted by the new price law, nor the manner in which
3 the law would be applied.
4 Applying this reasoning to the present case, there
5 is no possibility that the vague statements made by
6 Mr McGowan in November 2018 about Western Australia
7 considering its options in the best interests of the
8 people, which might even include perhaps amending the
9 State Agreement, could ever foreshadow the present
10 dispute or even, quite frankly, any dispute that might
11 have eventuated, but didn't, on the CITIC matter. His
12 statements were simply too vague.
13 It is not conceivable when one considers the terms
14 of the Amendment Act that it could have been foreseeable
15 in a western democracy. Of course, as we know, it was
16 developed in secret. And it went further than even just
17 considering options; indeed, it went so far as to
18 curtail judicial power and to exempt politicians and
19 government officials from the criminal law. How that
20 could be foreshadowed from the statements of Mr McGowan
21 in November 2018 is hard to know.
22 There are a number of cases in the record where
23 disputes or disagreements between the parties existed
24 prior to the restructure for treaty protection, and
25 these disputes were often the reason for the



16:17 1 restructure: simply to gain treaty protection. However,
2 the tribunals in those cases have confirmed that it does
3 not constitute abuse of right or process where that
4 dispute is separate or only tangentially connected to
5 the dispute to be decided by the tribunal.
6 A heightened state of tension, hostility or dispute
7 between an investor and the host state simply does not
8 mean any particular adverse measure or specific dispute
9 is reasonably foreseeable. I have already referred to
10 the Clorox decision (CLA-182), which is apposite.
11 In Tidewater v Venezuela (RLA-93), the claimant's
12 subsidiary had been engaged in an ongoing commercial
13 dispute with a state entity over arrears payable under
14 various invoices and whether the subsidiary's contract
15 with the state entity should be renewed. It was
16 a significant dispute at that time between the Tidewater
17 subsidiary and the Venezuelan state entity.
18 After this dispute arose, the Tidewater Group
19 restructured to gain treaty protection. And the claim
20 before the tribunal related to a law that was then
21 enacted by the state after the restructure which
22 expropriated the assets of the subsidiary. Venezuela
23 alleged that the treaty claim was merely an extension of
24 the pre-existing commercial dispute and that the
25 claimant had been incorporated to access investment



16:19 1 treaty jurisdiction for a dispute that was already in
2 existence.
3 The Tidewater tribunal dismissed that argument,
4 saying that the subject of the treaty claim was the law
5 expropriating assets, and that this was clearly distinct
6 from the commercial dispute between the subsidiary and
7 the state entity. The existence of that commercial
8 dispute did not mean that Venezuela's later
9 expropriatory actions should have been expected.
10 Importantly, it was relevant to the tribunal's
11 assessment of foreseeability that at the time of the
12 restructure, the subsidiary and the state entity were
13 acting in a manner consistent with continuing the will
14 to trade, and in the usual way that would be expected to
15 resolve the dispute between them. The conduct pointed
16 against a reasonably foreseeable expropriation of the
17 claimant's investment.
18 Similarly in this case, the Western Australian
19 Government at all times acted in a manner that would
20 objectively appear as though they were anticipating
21 their participation in the domestic arbitration process.
22 From May 2020 onwards, this was clearly a deliberate
23 ploy to ensure that Mineralogy did not anticipate the
24 Amendment Act.
25 Similarly in Mobil v Venezuela (RLA-92), that case



16:21 1 concerned a corporate restructure designed specifically
2 and expressly to gain treaty protection at a time where
3 there were already existing disputes with the host
4 state. The state had already started to impose
5 increased royalties and income tax rates on the claimant
6 when the claimant restructured to obtain treaty
7 protection. And Mr Palmer referred to this earlier.
8 Mobil was quite candid that its motivation for the
9 restructure was to gain treaty protection, due to its
10 concerns about the possibility of more adverse treatment
11 in the future. After the restructure, the government
12 implemented various measures to nationalise certain oil
13 projects, including the claimant's.
14 The Mobil tribunal held that the existence of the
15 pre-existing disputes, which were not the subject of the
16 arbitration before that tribunal, did not disqualify the
17 tribunal's jurisdiction in respect of the
18 Nationalisation Law, which was enacted after the
19 restructuring.
20 Finally, in Aguas del Tunari v Bolivia (CLA-185),
21 it was a case that involved an investment that had faced
22 strong popular opposition for a considerable time. At
23 the time of the restructure, citizen groups and civil
24 society organisations had expressed strong concern about
25 the concession, and had, in some cases, called for its

16:22 1 annulment. The protests eventually turned violent and
2 the Bolivian President declared a state of siege. The
3 Bolivian authorities then terminated the concession.
4 Bolivia objected that the restructure had occurred
5 at a time when the level of protests meant that the
6 events that followed, including termination, were
7 foreseeable. The tribunal disagreed. The general
8 public unpopularity and calls from interest groups for
9 the concession to be annulled made it imaginable that
10 the concession would be cancelled, but did not raise
11 a foreseeable prospect that the government would in fact
12 act to terminate the concession. That measure was
13 imaginable, but not foreseeable in the relevant sense
14 until the riots broke out on a larger scale in the
15 following year after the restructuring had occurred.
16 I think I'll leave those there, given the time.
17 MR PALMER: I think our time has run out.
18 THE PRESIDENT: No, I have seen that you are now
19 five minutes over time. But I thought that with the
20 permission of the Respondent, to whom you offered time
21 yesterday, I would not interrupt you.
22 MR PALMER: Thank you.
23 THE PRESIDENT: But I don't know how much more time you
24 have.
25 MR PALMER: I think we can conclude there, if we could just



16:24 1 have perhaps one minute of extra time.
2 THE PRESIDENT: Sure. No, no, I didn't want to cut you off.
3 So if you have a few more things to say, you may do so.
4 MR PALMER: I think we're happy to conclude there.
5 We just wanted to spend a minute to thank
6 Mr McGowan, our court reporter here, for the excellent
7 job that he's done. I thought that was important, to
8 thank Mr McGowan for that. And certainly to thank the
9 Tribunal for coming here. And also to thank the
10 Respondent, and every member of the Respondent's team,
11 who acted very professionally. It's very important that
12 we recognise that they're doing a professional job, and
13 they've certainly done that, and we want to thank them
14 very much.
15 Also the Claimant would like to thank the [PCA] team
16 for all the hard work that they've put in, and having
17 these facilities; and also all of the employees of the
18 Peace Palace that we can't forget. We couldn't be here
19 without them. So I think it doesn't hurt to pause to
20 remember those people and to think what they've done to
21 make this possible, because it really is important; not
22 just for this dispute, for other disputes, and for the
23 rest of the world. That's what the Peace Palace was
24 established for.
25 So I think it can't hurt to stop and I'd like to



16:25 1 thank all of those people, Madam Chair. Thank you.
2 THE PRESIDENT: Thank you.
3 So we have now concluded your closing remarks and
4 your answers to the Tribunal questions. Let me just see
5 whether my colleagues have any additional questions.
6 No. I don't either. And you don't either. Fine.
7 Thank you very much for addressing our questions in
8 a detailed fashion. That will be very helpful in our
9 deliberations.
10 I would like now to summarise what the Tribunal has
11 this mind with respect to procedural aspects that we
12 need to cover. If needed, we can have a break
13 thereafter and you can consult within teams to see how
14 you want to react; or if it is obvious and a break is
15 not needed, we can just carry on.
16 The first point is that we will need transcript
17 corrections to have a final transcript available. That
18 is pre-redaction process. And we are in your hands
19 about the time limit. That time limit, once we have the
20 final transcript, then the redaction process as it is
21 specified in PO3 starts; and once that is concluded, the
22 transcript will be uploaded on the PCA website.
23 We had said at the pre-hearing conference, and also
24 in PO5, that in principle there would be no post-hearing
25 briefs unless the Tribunal has specific questions. We



16:27 1 have asked our questions, and for now I think we feel
2 that we have what we need to deliberate and reach
3 a decision.
4 That being said, there's always a slight reservation
5 to be made that in case in the course of the
6 deliberation a specific issues comes up, then we would
7 ask for the parties' input. But that would be quite
8 a limited, specific question.
9 We would like to have statements of costs for this
10 phase of the proceedings. When I say "statements of
11 costs", I don't think we need submissions on costs,
12 because we know that we are under the UNCITRAL Rules;
13 we know that the UNCITRAL Rules have provisions on
14 allocation of costs. And unless the parties wish to
15 provide more, I don't think we need it.
16 What we need is, of course, an itemisation of the
17 costs by category. We do not need supporting
18 documentation, unless a party were to raise it after,
19 once the cost statement is filed or the Tribunal
20 ex officio would ask questions.
21 For that, we will also need a time limit. That has
22 to come when the different publication issues are
23 resolved, because that will still involve some time on
24 both teams' accounts.
25 So that leads me to the publication aspects. We

16:29 1 have already mentioned the transcript. There is also
2 a provision in the annex to PO3 for publication of all
3 the submissions following the hearing to which the
4 submissions relate, and it is specified that this
5 implies the Notice of Arbitration, that was deemed
6 a statement of claim, and of course the four specific
7 preliminary objection submissions.
8 They cannot yet be published because the redaction
9 process with respect to the Rejoinder is not completed,
10 and the Tribunal would propose that we wait to have all
11 the submissions publishable to upload them on the
12 website. I think that was the idea of doing it after
13 the hearing.
14 We have asked ourselves what happens with the
15 PowerPoint presentations that were used during the
16 hearing. There is no provision in the annex to PO3.
17 However, there is a provision on supporting
18 documentation that says that supporting documentation
19 shall not be published. And we thought that, by analogy
20 to this provision, it might make sense not to publish
21 the PowerPoints, because they are a hybrid nature of
22 submission, and reproduction of exhibits and other
23 documents that are within the supporting documentation
24 are not publishable.
25 Then the last point is Procedural Order No. 5,



16:31 1 the publication: that the redaction process is also in
2 course. The Respondent has said that it has nothing to
3 redact, and the Claimant has not yet said. But the
4 deadline has not expired, so you will do it whenever --
5 unless you have an answer now; then that simplifies.
6 But the deadline is around 25 or 26 September.
7 Let me see whether my co-arbitrators have anything
8 to add to what I tried to summarise from our
9 discussions. No? No?
10 So a question to you: do you wish to have a moment
11 to confer before you react? Then we can have a break.
12 Or you can react immediately.
13 How is it on the Respondent's side?
14 MR WORDSWORTH: I think we can react immediately,
15 Madam President.
16 THE PRESIDENT: And that is also the case of the Claimant,
17 yes?
18 MR PALMER: (Inaudible: no microphone)
19 THE PRESIDENT: Good.
20 So let me turn to the Respondent. Mr Wordsworth.
21 MR WORDSWORTH: Thank you.
22 On transcript corrections, I think the only real
23 issue is the first date for completing corrections.
24 We'd suggest three weeks for that, just to enable the
25 parties to return to base and get on top of everything.



16:33 1 THE PRESIDENT: Fine. I see that the Claimant agrees. So
2 we can go for three weeks from today.
3 MR WORDSWORTH: Thank you very much.
4 Then on issue 2, in principle, no PHBs, and you've
5 indicated no need for them. And the Respondent
6 understands and is content with that.
7 There is just one exception, where, as to
8 question 5, the Tribunal earlier today was emphasising
9 the issue on interpretation of 27(2), and suggesting
10 that the Tribunal may not have in fact any discretion so
11 far as concerns approaching the treaty parties.
12 Australia has not understood 27(2) in that way.
13 There are various textual reasons why that is. And we
14 are wondering whether the Tribunal would be assisted --
15 because obviously it's quite an important point -- on
16 hearing more from the parties on that specific issue;
17 just that issue. And those would be, obviously, limited
18 submissions, directed at assisting you, which would be,
19 I would have thought, up to five pages; but you could,
20 if you wished to, set a shorter limit.
21 But we hope that would be of assistance to the
22 Tribunal. And of course we are saying that in
23 circumstances where the Claimant has never stated
24 a specific position as to the interpretation of these
25 wordings; it has just maintained the position that no



16:35 1 issues on interpretation arise.
2 MR PALMER: I think we're content to limit submissions to,
3 say, three pages, in a limited period, at a time where
4 the Respondent could put its submissions in and we'd
5 have a seven-day period to respond, something like that.
6 I don't think it's a big issue.
7 THE PRESIDENT: I would have thought simultaneous
8 submissions, because you're both starting from the same
9 basis, which is what 27(2) means, essentially, for this
10 Tribunal.
11 DR KIRK: I was thinking there's probably a lot of common
12 ground between the parties on this, and I just wondered
13 if the Respondent wanted to put in a submission --
14 THE PRESIDENT: There is a lot of common ground, and
15 we understand that. And we want to specifically note on
16 the record that both parties have told us that they do
17 not consider that a joint interpretation should be
18 requested. We note that, and that is certainly helpful
19 for our purposes.
20 Maybe we take the proposal on board, and then I have
21 a short discussion when we have all the points with my
22 co-arbitrators and get back to you. But it is noted.
23 MR WORDSWORTH: Thank you very much, Madam Chairman.
24 Statement of costs: we understand the point that
25 there are to be no submissions on that; you are just

16:37 1 interested in information and itemisation. That does
2 call into question the issue of -- obviously there are
3 the costs of this hearing, there are costs of the
4 proceeding overall, but also separate cost elements with
5 respect to, for example, the interim measures
6 application and the like.
7 We are approaching this on the basis that the
8 Tribunal will be assisted by an itemisation that sets
9 out those individual cost limbs. And although the
10 Tribunal is not requiring submissions, on the basis that
11 there is a rule or a potential rule as to costs
12 following the event, then we would submit it would be
13 useful for those matters to be itemised, and very
14 brief -- I mean truly brief -- submissions being made as
15 to why that itemisation is taking place.
16 THE PRESIDENT: When I said "itemisation", I said "by
17 category", and thereby I wanted to say: legal fees,
18 travel and other expenses and the like. I had not meant
19 by subject matter, whether it was for this hearing,
20 whether it was for the provisional measures.
21 Is that the proposal, that you identify according to
22 topic?
23 MR WORDSWORTH: That would be, Madam President.
24 THE PRESIDENT: Yes.
25 MR WORDSWORTH: Or at least identify what, if any, different



16:39 1 rule, or how the rule would apply so far as concerns
2 those individual parts of the proceeding.
3 THE PRESIDENT: It's also a point that I am noting now, and
4 we can discuss it among the Tribunal members and revert
5 when we have all the different points.
6 MR WORDSWORTH: Then just as to procedure for that,
7 we wouldn't see there's any huge rush in getting the
8 statement of costs to you, but obviously we'd be guided
9 by when the Tribunal wants those submissions. And we
10 are presuming the Tribunal is only going to want one
11 round of submissions.
12 Thank you.
13 THE PRESIDENT: Nothing on the different points of
14 publication?
15 MR WORDSWORTH: Yes, but I was thinking that possibly the
16 Claimant would be wanting to come in straight away on
17 the issue of statement of costs.
18 MR PALMER: Yes. You will remember during my
19 cross-examination we cut the broadcast at one stage in
20 relation to some of our directors' ability and duties
21 and bank accounts and things of that nature. So we are
22 requesting, I guess, in the publication of submissions
23 or the transcript, that that sort of material is
24 redacted.
25 THE PRESIDENT: It will be redacted. And once we have the



16:40 1 final transcript -- that is the transcript established
2 on the basis of the parties' corrections. If there are
3 disagreements on corrections, the Tribunal will deal
4 with them, and then there will be a final transcript.
5 And that transcript will be subject to a redaction
6 process, like any submission.
7 MR PALMER: Okay.
8 THE PRESIDENT: So these matters should not be in the
9 publishable version for which the feed was cut, but
10 there might be others.
11 MR PALMER: Sure.
12 THE PRESIDENT: Yes. And then only will we publish the
13 transcript.
14 But the point was on the statement of costs.
15 MR WORDSWORTH: On the statement of costs -- sorry,
16 I thought perhaps you wanted me to complete first, the
17 Claimant having just addressed the issue of
18 publications.
19 I don't think we've got anything particular to add
20 so far as concerns the procedure you have outlined on
21 publication. The issue you raised was as to the
22 treatment of PowerPoints, and Australia is content with
23 the suggestion of the Tribunal thereto.
24 Then issue 5 I think is for the Claimant anyway
25 only.



16:42 1 MR PALMER: The Claimant is content with that too,
2 Madam President, yes.
3 THE PRESIDENT: There was the suggestion with respect to the
4 statement of costs that this would be itemised by topics
5 and there would be some submission.
6 MR PALMER: Well, we tend to agree with you that just by
7 category I think is the best way to go about it.
8 Otherwise we'll embark upon a very lengthy process which
9 may then distract from other things.
10 THE PRESIDENT: The idea was just to have one round, no --
11 MR PALMER: Yes, that's what I mean, I think.
12 THE PRESIDENT: Yes, good.
13 DR KIRK: Could I just ask the Tribunal a clarification
14 question around the transcripts.
15 Would it be helpful, when we are looking at
16 correcting the transcript, to add in any Opus 2
17 references that weren't expressly stated for documents
18 referred to, so that they can be hyperlinked for the
19 Tribunal? It could be something you consider.
20 THE PRESIDENT: The Tribunal works from -- at least for my
21 part -- the C-and R-references, and not from the Opus
22 references. But let me look at my colleagues. Same
23 thing?
24 PROFESSOR McRAE: Same with me.
25 MR KIRTLEY: The same.

16:43 1 THE PRESIDENT: Yes. So there is no need to spend time on
2 doing this.
3 DR KIRK: Thank you.
4 THE PRESIDENT: Anything that you wish to add, or any
5 question, before we discuss the very few points that
6 remain among the Tribunal members?
7 MR PALMER: No.
8 THE PRESIDENT: No?
9 MR WORDSWORTH: No, thank you.
10 (4.44 pm)
11 (The members of the Tribunal withdraw)
12 (5.04 pm)
13 THE PRESIDENT: So we looked at the different steps, and
14 I am summarising them. And where there were open
15 issues, I will make the proposals that the Tribunal has
16 about those.
17 So the first thing would be the transcript
18 corrections; if possible, agreed. And because I am
19 adding the "if possible, agreed", I add also a week. So
20 we would have four weeks from now, which is 16 October.
21 We confirm: no post-hearing briefs. However, it is
22 true that it would be helpful for us to have short
23 submissions on Article 27(2) of the treaty, about three,
24 five pages. I mean, we are not in kindergarten; you
25 will know what needs to be provided. It seemed to us



17:06 1 that 16 October might be a good deadline for that.
2 Then the statement of costs. And to get to the time
3 limit, I need to explain how we arrived at it. It is
4 driven by the completion of the redaction process.
5 The last item for the redaction process will be the
6 transcript. So once the transcript is final -- which
7 should be, hopefully, 16 October, or shortly thereafter
8 if there are outstanding matters -- then there is
9 a first 30-day time limit for designation and then there
10 is a 30-day time limit for objections. So that's
11 60 days. That leads us to just before Christmas.
12 So we thought that that would mean a statement of
13 costs could be prepared in the course of January. Now,
14 we understand that may not be a popular proposal in
15 Australia, so we thought end of January. But if you
16 want something early February, that should be fine with
17 us too. Not much later, because in the meantime we
18 will, of course, proceed with deliberation.
19 So we have now provided 31 January. But if you tell
20 us that is too soon, we can arrange that.
21 In terms of content of the statement of costs,
22 we would think it would be helpful that we have costs
23 distinguished between preliminary relief and other
24 costs; that means all other costs with respect to this
25 phase of the proceedings. If short explanatory comments



17:08 1 are useful/appropriate from your point of view, you may
2 provide them, but the idea is that these are concise
3 comments.
4 We could provide application for reply if necessary.
5 That would really be if one of the parties thinks that
6 one specific aspect needs to be commented on. And the
7 application would have to be filed seven days after
8 submission. So if we keep to 31 January, it would be
9 application by 7 February.
10 As I mentioned just before, in the meantime, of
11 course the Tribunal will proceed to deliberate. It is
12 difficult for us to give you now an indication of when
13 an award on preliminary objection will be ready. We
14 will certainly want to be diligent and render an award
15 as soon as possible. At the same time, this hearing has
16 shown that there are a number of rather complex issues,
17 both factual and legal; there are certain aspects of
18 legal principle as well. And we understand the high
19 stakes involved in this case, which means that we want
20 to be careful in the way we handle this and issue
21 a good-quality decision.
22 So, having said that, I just would need the
23 reactions on this summary, if there is anything that
24 requires comment or clarification.
25 Mr Wordsworth.



17:10 1 MR WORDSWORTH: Only, Madam President, as you might have
2 anticipated, Australia would be very grateful, on the
3 statement of costs, if we could have that extra week, to
4 put us into early February.
5 THE PRESIDENT: Yes.
6 MR WORDSWORTH: I think that would be a 7 February date.
7 THE PRESIDENT: So that would be 7 February.
8 And that will make the application for reply --
9 we are not looking for replies really. The idea is that
10 if there is something burning that you feel needs to be
11 addressed, you may request that.
12 So that would be then, for the application,
13 14 February; and 7 February for the statement.
14 MR WORDSWORTH: Yes, absolutely. Thank you.
15 MR PALMER: That's acceptable to the Claimant.
16 THE PRESIDENT: Excellent. That's a wonderful consensus.
17 Is there anything that the parties would like to add
18 before we close this hearing?
19 MR CLARKE: Madam President, if you'll indulge me just very
20 briefly.
21 As is the nature of these disputes, many points are
22 contested, and some strongly. But I'd like to emphasise
23 that that does not extend to Mr Palmer's note of thanks
24 that he made earlier, with which the Respondent would
25 very much like to join, with respect to Mr McGowan, the

17:12 1 PCA and of course the members of the Tribunal. We are
2 in full agreement on that, Madam President.
3 Australia greatly appreciates the professionalism
4 and dedication of, indeed, the court reporter, the
5 technicians, particularly those responsible for the
6 public live stream, our Opus 2 colleagues, the PCA and
7 their staff, of course the Secretary to the Tribunal and
8 the members of the Tribunal themselves.
9 We of course extend our thanks to the Claimant and
10 its legal team for its professionalism and commitment to
11 a smooth and efficient hearing. And if you'll indulge
12 me, may I extend my thanks to the members of the
13 Respondent's team, particularly and perhaps especially
14 those who couldn't join us here in The Hague. And
15 I wish everyone safe travels home.
16 Thank you, Madam President.
17 THE PRESIDENT: Thank you.
18 Anything on your side?
19 MR PALMER: Well, the only thing I can add is "Happy
20 Christmas and Happy New Year", because we probably won't
21 meet again until after Christmas and New Year! So all
22 the best for the season. And that goes to everybody.
23 Thanks very much.
24 THE PRESIDENT: Thank you!
25 So it remains for the Tribunal to thank all of those

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17:13 1 who contributed to this hearing and to these
2 proceedings: the PCA team and the PCA for its
3 hospitality in the Peace Palace; the court reporter; the
4 technicians, the Opus technicians and those who handle
5 the live stream. It was logistically a relatively
6 complex hearing and it worked absolutely impeccably, so
7 that needs to be emphasised.
8 I would also like to thank the party representatives
9 who attended here and remotely. There are people who
10 are watching and participating, whom we are not seeing
11 but who have been part of this hearing, and we should
12 acknowledge that.
13 Then of course I would like to thank counsel for
14 very professional conduct of this arbitration, not only
15 during the hearing but also during the entire written
16 phase. It was remarkable in terms of the quality of the
17 submissions; but also, even though this is a difficult
18 dispute for both parties -- we understand that -- it has
19 been a very friendly, collegial atmosphere among
20 counsel. And that is very much appreciated because it
21 helps the Tribunal focus on the real issues, rather than
22 being distracted by all kinds of procedural incidents
23 and skirmishes.
24 So I wish now everyone a very safe trip back and
25 I close this hearing. Thank you very much to everyone.

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17:15 1 (5.15 pm)
2 (The hearing concluded)
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