UNDER THE 2021 ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

AND UNDER THE AGREEMENT ESTABLISHING THE ASEAN – AUSTRALIA – NEW ZEALAND FREE TRADE AREA

ZEPH INVESTMENTS PTE LTD
Claimant

and

THE COMMONWEALTH OF AUSTRALIA
Respondent

AUSTRALIA'S REPLY ON PRELIMINARY OBJECTIONS

19 July 2024

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LIST OF ABBREVIATIONS

Abbreviation	Full Form or Description
AANZFTA	Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area
AASB 137	*Australian Accounting Standard AASB 137 Provisions, Contingent Liabilities and Contingent Assets*
ACRA	Accounting and Corporate Regulatory Authority of Singapore
Alleged Coal Funding Rationale	Mr Palmer's asserted rationale for the incorporation of Zeph and its insertion into the chain of ownership of Mineralogy, i.e., to assist in securing funding for developing Waratah Coal's coal holdings in Queensland
Alleged Lithium Rationale	Mr Palmer's asserted rationale for the incorporation of MIL and its insertion into the chain of ownership of Mineralogy, i.e. that MIL was incorporated and inserted into the chain of ownership of Mineralogy because Mr Palmer wanted to undertake "lithium exploration" projects in New Zealand
Alleged Risk and Exposure Rationale	Mineralogy's asserted rationale for the incorporation of Zeph and its insertion into the chain of ownership of Mineralogy, i.e., to protect existing assets from risks and exposures in Australia
Alleged Tax Rationale	Mr Palmer's asserted rationale for the incorporation of Zeph and its insertion into the chain of ownership of Mineralogy, i.e. that this course of action would yield some tax advantages
Amendment Act	*Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA)
APEC	Asia-Pacific Economic Cooperation
ASIC	The Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001* (Cth)
ATO	Australian Taxation Office
AUD	Australian dollars
Australia or Respondent	The Commonwealth of Australia, the Respondent in this arbitration
Balmoral Dispute	PCA Case No. 2023-40 – *Zeph Investments Pte Ltd v. The Commonwealth of Australia (I)*
BIT	Bilateral investment treaty
Birkett Report	"Witness Statement" of Scott Birkett dated 15 February 2024 and "Expert Report" of Scott Birkett dated 14 February 2024
BSIOP	Balmoral South Iron Ore Project

Abbreviation	Full Form or Description
BSIOP Dispute	Dispute between Mineralogy and the WA Government concerning the BSIOP Proposal, pre-dating this arbitration
BSIOP and CITIC Disputes	The BSIOP Dispute and the CITIC Dispute
BSIOP Proposal	8 August 2012 proposal in respect of the Balmoral South Iron Ore Project
CAFTA-DR	Dominican Republic–Central America Free Trade Agreement, opened for signature 5 August 2004 (entered into force for all States Parties 1 January 2009)
CFO	Chief Financial Officer
CITIC	CITIC Ltd
CITIC Dispute	Dispute between Mineralogy, the CITIC Parties, and the WA Government concerning the Sino Iron and Korean Steel Projects, pre-dating this arbitration
CITIC Parties	CITIC Pacific Ltd, CITIC Ltd, Sino Iron Pty Ltd and Korean Steel Pty Ltd
Claimant or Zeph	Zeph Investments Pte Ltd
Cooper Report	Expert Report of Professor Graeme Cooper, Consultant to Herbert Smith Freehills, Australia, and Professor Emeritus at the University of Sydney, filed with the ROPO and dated 18 July 2024
Corporations Act	*Corporations Act 2001* (Cth)
ECT	Energy Charter Treaty
Engineering Companies	GCS Engineering Service Pte Ltd, Visco Engineering Pte Ltd, and Visco Offshore Engineering Pte Ltd
FATA	*Foreign Acquisitions and Takeovers Act 1975* (Cth)
FCA	Federal Court of Australia
FIRB	Foreign Investment Review Board
First BSIOP Arbitration	2013 arbitration between Mineralogy, International Minerals and WA in relation to the WA Government's rejection of the BSIOP Proposal
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IIA Handbook	APEC International Investment Agreements negotiators handbook
International Minerals	International Minerals Pty Ltd

Abbreviation	Full Form or Description
ITLOS	International Tribunal for the Law of the Sea
IPO	Initial public offering
JVA	Joint venture agreement
Kleenmatic Companies	Kleen Venture Pte Ltd and One Kleenmatic Pte Ltd
Korean Steel	Korean Steel Pty Ltd
Korean Steel Project	Project Proposal submitted by Mineralogy Pty Ltd and Korean Steel Pty Ltd under Clause 6 of the State Agreement, approved on 11 June 2009. Once approved this project has become known by this name
Lys First Report	First Expert Report of Professor Thomas Lys, Eric L Kohler Professor Emeritus at the Kellogg School of Management, Northwestern University, in Evanston, Illinois, United States of America, filed with the SOPO and dated 20 January 2024
Lys Supplementary Report	Supplementary Expert Report of Professor Thomas Lys, Eric L Kohler Professor Emeritus at the Kellogg School of Management, Northwestern University, in Evanston, Illinois, United States of America, filed with the ROPO and dated 18 July 2024
Martino WS	Witness Statement of Mr Domenic Martino, dated 13 January 2023
MIL	Mineralogy International Ltd (the company incorporated in New Zealand on 14 December 2018)
Mineralogy	Mineralogy Pty Ltd
Mineralogy Group	Mineralogy Pty Ltd, Zeph Investments Pte Ltd and Mineralogy International Ltd and its related entities, owned and controlled by Mr Palmer
MIPL	Mineralogy International Pte Ltd
Mr Palmer	Mr Clive Palmer
NZD	New Zealand dollars
Palmer Fifth WS	Fifth Witness Statement of Mr Clive Palmer dated 14 March 2024
Palmer First WS	First Witness Statement of Mr Clive Palmer dated 22 March 2023
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
Phua Report	Expert Report of Professor Phua, Associate Professor, Faculty of Law, National University of Singapore, filed with the ROPO and dated 17 July 2024
PO1	The Tribunal's Procedural Order No. 1 dated 1 September 2023

Abbreviation	Full Form or Description
Premier McGowan	Mr Mark McGowan, former Premier of WA 17 March 2017 – 8 June 2023
Prospectus Meeting Agenda	Project Blast: Prospectus Drafting Session, Meeting Agenda
Qld	The State of Queensland
QRO	Queensland Revenue Office
Respondent or Australia	The Commonwealth of Australia
Revenue WA	The Western Australian Office of State Revenue
Rogers Supplementary Report	Supplementary Expert Report of Mr George Rogers, of Rockface Capital Advisors Ltd, London, United Kingdom, filed with the ROPO and dated 17 July 2024.
ROPO	Reply on Preliminary Objections, dated 19 July 2024
SAFTA	*Singapore-Australia Free Trade Agreement*, signed 17 February 2003, I-40221 UNTS 2257 (entered into force 28 July 2003), as amended by Agreement to Amend SAFTA, signed on 13 October 2016 (entered into force 1 December 2017).
Second McHugh Award	Mr McHugh's Arbitral Award of 11 October 2019
SEHK	Hong Kong Stock Exchange
SGD	Singaporean dollars
Share Purchase Agreement	Share Purchase Agreement between MIL and MIPL (Zeph) [Exhibit 20 to Annexure A to Notice of Intent dated 20 October 2022]
Singapore	Republic of Singapore
Sino Iron	Sino Iron Pty Ltd
Sino Iron Project	Name by which the Sino Iron Pellet Proposal was known once approved
SODPO	Statement of Defense on Preliminary Objections, dated 14 March 2024
SOPO	Statement on Preliminary Objections, dated 22 January 2024
SPR	Singapore Permanent Residency
State Agreement	Iron Ore Processing (Mineralogy) Agreement
State Solicitor	WA Government's State Solicitor
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	2021 Arbitration Rules of the United Nations Commission on International Trade Law

Abbreviation	Full Form or Description
USD	United States dollars
Vienna Convention	*Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980)
Vickers WS	Witness Statement of Mr Bruno Vickers, of JS Held LLC, Singapore, filed with the SOPO and dated 19 January 2024
WA	The State of Western Australia
WA Government	Government of the State of Western Australia, including the relevant ministers and decision-makers
WA Premier	The leader of the WA Government
Waratah Coal	Waratah Coal Pty Ltd, a subsidiary of Mineralogy
Zeph or Claimant	Zeph Investments Pte Ltd
Zeph Share Swap	29 January 2019 transaction leading to the insertion of the newly incorporated Singaporean company, Zeph (then known as MIPL), into the corporate chain as the direct owner of Mineralogy

I. INTRODUCTION

1. The Commonwealth of Australia ("**Australia**" or "**the Respondent**") provides this Reply on Preliminary Objections ("**ROPO**"), which is filed in accordance with the procedural calendar annexed to the Tribunal's *Procedural Order No. 1* ("**PO1**"), as amended by agreement and as confirmed by the Tribunal by its email dated 12 December 2023. The Respondent's ROPO is submitted in response to the Claimant's Statement of Defence on Preliminary Objections, filed on 14 March 2024 ("**SODPO**"), which responded to the Respondent's Statement on Preliminary Objections, filed on 22 January 2024 ("**SOPO**").

2. The Claimant's SODPO – which is 303 pages and 683 paragraphs long – is noteworthy in its mischaracterisation of the Respondent's preliminary objections, its failure to respond to them, and its distinct lack of any relevant and contemporaneous evidentiary support. Instead of attempting to meet the preliminary objections on their merits, the Claimant has sought to muddy the waters by making unmeritorious arguments based on the principles of estoppel and acquiescence. Thus, it argues (for instance) that because Mineralogy Pty Ltd ("**Mineralogy**") filed certain documents with the Australian Securities and Investments Commission ("**ASIC**"), Australia's corporate regulator, or because the Queensland and Western Australian State revenue authorities granted Mineralogy an exemption from the payment of landholder duty (applying legal tests specific to that domestic context), the Respondent must be taken to have accepted that the Claimant is a qualifying investor under Chapter 11 of AANZFTA. These arguments are obviously without foundation, and underscore the fundamental weakness of the Claimant's position and the fact that it has no proper answer to the Respondent's preliminary objections.

3. The reality – as has become apparent from the Claimant's SODPO and its document production – is that there is no credible evidence to support Zeph's claims about why it was incorporated in Singapore and inserted into the chain of ownership of Mineralogy (through a share swap in which it contributed nothing of value). None of its purported rationales for the Mineralogy Group Restructure withstand scrutiny. Further, while almost no evidence of any kind is advanced in support of any of the purported rationales, if any of these had any substance, extensive contemporaneous documents would certainly exist.

4. By contrast, the evidence submitted by Australia – much of which is unchallenged – provides compelling support for the conclusion that the Claimant's incorporation in Singapore, its insertion via a share swap into the chain of ownership of Mineralogy, and then its rapid acquisition of three (failing) pre-existing Singapore businesses (the Engineering Companies) and its entry into a joint venture with an existing cleaning business, were nothing more than a sham.

As is supported by the contemporaneous and unchallenged newspaper reporting, the real motivation was to provide a foreign corporate vehicle that Mr Palmer, an Australian national, could use to submit an investment treaty claim against Australia in light of anticipated conduct by the State of Western Australia to the detriment of Mineralogy.[1] Consistently with that rationale, Zeph was threatening to bring investment treaty claims against Australia less than a week after it acquired the shares in Mineralogy. Only that rationale explains the apparent urgency of incorporating Zeph. And only that rationale explains Zeph's otherwise inexplicable acquisition of the Engineering Companies and its entry into the Kleenmatic joint venture: both were an attempt to create the appearance that the Claimant had "substantive business operations" in Singapore, in the apparent hope that this would prevent Australia from invoking the denial of benefits clause in Chapter 11 of AANZFTA (or the equivalent clause in Chapter 8 of SAFTA).

5. The Claimant's SODPO is also characterised by its failure to respond to the arguments that the Respondent has actually advanced in support of its preliminary objections, as well as its habit of responding to points that the Respondent has not made. Of particular note, the Claimant rests its response to the Respondent's abuse of process objection on the non-foreseeability of the adoption of the *Amendment Act* by the State of Western Australia.[2] Yet that misses the point: as the Respondent explained, the claim is abusive because the acquisition of the Mineralogy shares was made for the objective purpose of securing treaty protection in respect of inter-related disputes that were already in existence, or which were (at the very least) reasonably foreseeable at the time of the restructuring.[3] The unilateral amendments by Western Australia of Mineralogy's rights under the State Agreement plainly being foreseeable (and, indeed, having been foreseen), it is immaterial whether the precise form that this unilateral amendment took (the enactment of the *Amendment Act*) was foreseeable. Further, with respect to the Respondent's objection that the Claimant is not an "investor" which is protected by Chapter 11 of AANZFTA, the Claimant dedicates a section of its SODPO to an argument that Chapter 11 of AANZFTA does not contain

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1 The same rationale explains the incorporation of MIL in New Zealand on 14 December 2018, and its acquisition of shares in Mineralogy two days later, which was likewise followed with threats to commence investor-State dispute settlement proceedings, before it was apparently recognised that, by reason of an exchange of letters between Australia and New Zealand, Ch 11 of AANZFTA does not create any rights or obligations between Australia and New Zealand, and nor does the Protocol on Investment to the Australia – New Zealand Closer Economic Relations Trade Agreement [2013] ATS 10, **Exh. RLA-27** provide for investor-State dispute settlement.

2 See, e.g., SODPO, paras. 487-527.

3 SOPO, para. 282.

an "origin of capital" requirement.[4] But the Respondent has not argued that there is any such requirement.

6. The Claimant's obfuscation should not distract the Tribunal from its important task of carefully considering and analysing the Respondent's preliminary objections, all of which are strong, and any one of which would dispose of the Claimant's unmeritorious claim.

Structure of ROPO

7. This ROPO is structured as follows:

   (a) In **Section II**, the Respondent explains that the Claimant's invocation (in Section II of the SODPO) of the doctrines of estoppel and acquiescence is inapposite and should be rejected;

   (b) In **Section III**, the Respondent maintains its preliminary objection that the Claimant is not an "investor" which is protected by Chapter 11 of AANZFTA, and submits that the Claimant's submissions (in Section IV(A) of the SODPO) should be rejected;

   (c) In **Section IV**, the Respondent maintains its preliminary objection that the Claimant has not made an "investment" within the meaning of Article 2(c) of Chapter 11 of AANZFTA, and submits that the Claimant's submissions (in Section IV(B) of the SODPO) should be rejected;

   (d) In **Section V**, the Respondent maintains its preliminary objection that it has validly and properly denied the benefits of Chapter 11 of AANZFTA to the Claimant and its investments, and submits that the Claimant's submissions (in Section V of its SODPO) should be rejected;

   (e) In **Section VI**, the Respondent maintains its preliminary objection that the Claimant's claim should be dismissed on the grounds of inadmissibility as it is an abuse of process, and submits that the Claimant's submissions (in Section VI of the SODPO) do not answer the Respondent's objection; and

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4 SODPO, paras. 335-344.

(f) In **Section VII**, the Respondent submits that the Claimant's claims should be dismissed in their entirety and that the Claimant should be ordered to pay all of the Respondent's costs as well as the costs of the arbitration.

8. In accordance with PO1, Australia's ROPO is accompanied by four expert reports:

(a) The Supplementary Expert Report of Professor Thomas Lys, Eric L Kohler Professor Emeritus at the Kellogg School of Management, Northwestern University, in Evanston, Illinois, United States of America, dated 18 July 2024 ("**Lys Supplementary Report**"), which addresses, from an economics perspective, whether Zeph made an investment, whether Zeph incurred a risk in the transaction by which it acquired the Mineralogy shares, and other matters relevant to his First Report;

(b) The Supplementary Expert Report of Mr George Rogers, of Rockface Capital Advisors Ltd, London, United Kingdom, dated 17 July 2024 ("**Rogers Supplementary Report**"), which addresses the purported reasons for the Claimant's corporate restructure relating to financing a large-scale coal project;

(c) The Expert Report of Professor Graeme Cooper, Consultant at Herbert Smith Freehills and Emeritus Professor at the University of Sydney Law School, dated 18 July 2024 ("**Cooper Report**"), which addresses issues of Australian taxation law raised by the Claimant's Alleged Tax Rationale for the insertion of the Claimant and MIL into the chain of ownership of Mineralogy;

(d) The Expert Report of Associate Professor Stephen Phua, of the National University of Singapore, dated 17 July 2024 ("**Phua Report**"), which addresses issues of Singapore taxation law raised by the Claimant's Alleged Tax Rationale for the insertion of the Claimant and MIL into the chain of ownership of Mineralogy; and

(e) 873 fact exhibits and 170 legal authorities, in total.[5]

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[5] In accordance with PO1, the Respondent's fact exhibits accompanying this ROPO begin at R-500 and the Respondent's legal authorities accompanying this ROPO begin at RLA-104.

II. THE CLAIMANT'S INVOCATION OF ESTOPPEL AND ACQUIESCENCE MUST BE REJECTED

9. In Section II of its SODPO, the Claimant submits that the Respondent should not be permitted to object to the Tribunal's jurisdiction under Chapter 11 of AANZFTA "either because it has itself already accepted that the Claimant is a foreign Singaporean investor, and meets the jurisdictional requirements of the AANZFTA, or because, by reason of the Respondent's previous conduct and the Claimant's reliance on that conduct" it should not be permitted to make such objections.[6] This reliance on estoppel and acquiescence is inapposite, misplaced and should be rejected.

A. THE CLAIMANT MISSTATES THE APPLICABLE TEST FOR ESTOPPEL

10. Beginning with the principle of estoppel, the Claimant says that "the Respondent cannot now advance arguments which are inconsistent with the positions it previously adopted",[7] and that, "because of its previous conduct", the Respondent should be estopped from advancing its preliminary objections.[8]

11. The Respondent agrees that the principle of estoppel is a general principle of law. However, in order for the Claimant to invoke estoppel, it must demonstrate:

    (a) that there are clear, consistent, unequivocal and/or unambiguous statements or conduct on the part of Australia;

    (b) that such statements or conduct were made or performed voluntarily, unconditionally and under authority; and

    (c) that the Claimant has reasonably relied on such statements and conduct, causing it some detriment or producing some benefit to Australia ("detrimental reliance").

12. The Claimant appears to accept (without specifically addressing) the first and second elements above, but argues in relation to the third element that "it is not necessary to establish any form of prejudice or detriment on the part of the Claimant in order to establish such an estoppel".[9] That is incorrect. Each of these three elements must be satisfied, as has been

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6 SODPO, para. 49.
7 *Id*., para. 188.
8 *Id*., para. 189.
9 *Id*., para. 193.

repeatedly emphasised in the writings of jurists,[10] in judgments of the Permanent Court of International Justice ("**PCIJ**") and International Court of Justice ("**ICJ**"), as well as in the decisions and awards of investment treaty tribunals.

13. In the *Serbian Loans* case, for example, the PCIJ set out the requisite elements for estoppel when rejecting its application to the facts in that case. It observed that:

> "when the requirements of the principle of estoppel to establish a loss of a right are considered, it is quite clear that no sufficient basis has been shown for applying the principle in this case. There has been no clear and unequivocal representation by the bondholders upon which the debtor State was entitled to rely and has relied. There has been no change in position on the part of the debtor State. The Serbian debt remains as it was originally incurred; the only action taken by the debtor State has been to pay less than the amount owing under the terms of the loan contracts. It does not even appear that the bondholders could have effectively asserted their rights earlier than they did, much less that there is any ground for concluding that they deliberately surrendered them."[11]

14. The ICJ has invoked the principle of estoppel in multiple judgments.[12] In *Obligation to Negotiate Access to the Pacific Ocean*,[13] the ICJ restated the requirements for the application of the principle of estoppel in the following terms:

> "158. The Court recalls that the 'essential elements required by estoppel' are 'a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making

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10 See, e.g., D W Bowett, "Estoppel before International Tribunals in Relation to Acquiescence" (1957) *British Yearbook of International Law* 176, 176, **Exh. RLA-104**; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (first published 1953; Cambridge University Press, 2006), pp. 143-144, **Exh. CLA-169 and Exh. RLA-101**; James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9th ed, 2019), p. 407, **Exh. RLA-105** ("A considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency. The essence of estoppel is the element of conduct which causes the other party, in reliance on such conduct, detrimentally to change its position in reliance on such conduct.").

11 *Case Concerning the Payment of Various Serbian Loans Issued in France* [1929] (ser A) No 20, p. 39, **Exh. RLA-106**.

12 E.g., *Barcelona Traction (Belgium v Spain) (Preliminary Objections)* [1964] ICJ Rep 24, **Exh. RLA-107**; *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)* [1969] ICJ Rep 3, para. 30, **Exh. RLA-108**; *Delimitation of the Maritime Boundary in the Gulf of Maine (United States / Canada)* [1984] ICJ Rep 246, paras. 138-147, **Exh. CLA-230**; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Jurisdiction)* [1984] ICJ Rep 392, pp. 414-415, para. 51, **Exh. RLA-109**; *Elettronica Sicula SpA (United States v Italy)* [1989] ICJ Rep 15, pp. 43-44, paras. 53-54, **Exh. CLA-79**; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) (Judgment)* [1990] ICJ Rep 92, pp. 118-119, para. 63, **Exh. RLA-110**; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Preliminary Objections)* [1998] ICJ Rep 275, pp. 303-304, paras. 48-60, **Exh. RLA-111**.

13 *Obligation to Negotiate Access to the Pacific (Bolivia v Chile) (Judgment)* [2018] ICJ Rep 507, **Exh. RLA-112**.

> it' (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 118, para. 63). When examining whether the conditions laid down in the Court's jurisprudence for an estoppel to exist were present with regard to the boundary dispute between Cameroon and Nigeria, the Court stated:
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> > An estoppel would only arise if by its acts or declarations Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues alone. It would further be necessary that, by relying on such an attitude, Nigeria had changed position to its own detriment or had suffered some prejudice.' (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 303, para. 57.)
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> 159. The Court finds that in the present case the essential conditions required for estoppel are not fulfilled. …"[14]

15. Other international courts and tribunals have also accepted these elements, including detrimental reliance, as necessary for estoppel.[15] Thus, the tribunal in the *Chagos Marine Protected Area Arbitration* held that:

> "[E]stoppel may be invoked where (a) a State has made clear and consistent representations, by word, conduct, or silence; (b) such representations were made through an agent authorized to speak for the State with respect to the matter in question; (c) the State invoking estoppel was induced by such representations to act to its detriment, to suffer a prejudice, or to convey a benefit upon the representing State; and (d) such reliance was legitimate, as the representation was one on which that State was entitled to rely."[16]

16. Investment tribunals have also emphasised these elements.[17]

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14 *Obligation to Negotiate Access to the Pacific (Bolivia v Chile) (Judgment)* [2018] ICJ Rep 507, pp. 558-559, paras. 158-159, **Exh. RLA-112**.

15 E.g., *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh /Myanmar) (Judgment)* (International Tribunal for the Law of the Sea, Case No. 16, 14 March 2012), paras. 119-125, **Exh. RLA-113**; *Railway Land Arbitration (Malaysia v Singapore)* (PCA Case No. 2012-01, Award of 30 October 2014), para. 199, **Exh. RLA-114**.

16 *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Award)* (2015) 31 RIAA 359, para. 438, **Exh. RLA-115**.

17 *Pope & Talbot, Inc v Canada* (Interim Award of 26 June 2000), para. 111, **Exh. RLA-116**; *BP America v Argentina* (ICSID Case No. ARB/04/8, Decision on Preliminary Objections of 27 July 2006), paras. 160-161, **Exh. RLA-117**; *Cambodia Power Company v Kingdom of Cambodia* (ICSID Case No. ARB09/18, Decision on Jurisdiction of 22 March 2011), para. 261, **Exh. RLA-118**; *Bankswitch Ghana Ltd v Ghana* (PCA Case No. 2011-10, Award Save as to Costs of 11 April 2014), para. 11.81, **Exh. RLA-119**; *Oded Bessedrglik v Mozambique* (ICSID Case No. ARB(AF)/14/2, Award of 28 October 2019), para. 423, **Exh. RLA-120**.

17. As noted above, the Claimant does not take issue with the first two requirements for estoppel but disputes the third.[18] However, none of the decisions cited by the Claimant support its position:

(a) The ICJ's judgment in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* is inapposite to the Claimant's position on estoppel, because the ICJ analysed the conduct of the parties not by reference to estoppel, but rather on the basis of whether the "text recording commitments" of the States constituted an "international agreement creating rights and obligations for the Parties".[19]

(b) The ICSID tribunal in *Middle East Cement Shipping v Egypt* also did not analyse the relevant issue by reference to "estoppel". It nonetheless implicitly applied an element of reliance in its analysis, holding that the claimant's failure to ensure that its vessel was covered by a licence had arguably been induced by the respondent's previous representations that the claimant was the owner of the vessel.[20]

(c) As for *CME v Czech Republic*, when read in context, it is clear the quote extracted by the Claimant refers to the need for detrimental reliance. In this respect, the *CME* tribunal observed that the respondent's change in position "cannot easily be reconciled with the principle that a party cannot be heard to deny that which it has previously affirmed and on which the party has acted in reliance".[21]

(d) It is evident on the face of the tribunal's award in *Fraport AG v Philippines* that it did not analyse the issue of estoppel; this was unnecessary, since the tribunal found that the State could not have made any representation as to the lawfulness of the investment given the claimant's unlawful and covert investment arrangement. In the view of the tribunal, that arrangement "cannot be any basis for estoppel".[22] The tribunal's analysis stopped at the second element, but it is in any case evident that the tribunal proceeded on the basis that reliance was necessary: the claimant had argued that "[a] foreign

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18 SODPO, para. 193.

19 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility)* [1994] ICJ Rep 112, pp. 122-123, **Exh. CLA-173**. Cf SODPO, para. 193.

20 *Middle East Cement Shipping and Handling v Egypt* (ICSID Case No. ARB/99/6, Award of 12 April 2002), paras. 131-138, **Exh. CLA-174**. Cf SODPO, para. 194(a).

21 *CME Czech Republic BV v Czech Republic* (Final Award of 14 March 2003), para. 488, **Exh. CLA-175**. Cf SODPO, para. 194(b).

22 *Fraport v Philippines* (ICSID Case No. ARB/03/25, Award of 16 August 2007), para. 347, **Exh. CLA-176**. Cf SODPO, para. 194(c).

investor is … entitled to reasonable reliance upon the state's contemporaneous manifestations of its understanding of its laws".[23] The claimant was unable to establish such detrimental reliance given its concealment of the true ownership of the shares.[24]

(e) The decision in *Kardassopoulos v Georgia* was predicated both on the basis of the claimant's legitimate expectations, as well as the respondent being estopped from maintaining that the relevant agreement was invalid under Georgian law. It does not appear to have been contested by the parties that the claimant had relied on the respondent's representations to its detriment.[25] It is otherwise difficult to understand the basis of the claimant's claim regarding its "legitimate expectations".[26] The tribunal in any event did not expressly consider and reject a requirement of detrimental reliance.

(f) The same applies with respect to the ICSID award in *Karkey v Pakistan*, where the tribunal at least implicitly accepted that there had been detrimental reliance by the claimant on the respondent's statements that a contract was valid.[27]

(g) Finally, the tribunal in *Chevron Corporation v Ecuador* made clear that it was applying estoppel as articulated by Professor Cheng and Professor Bowett, which includes as a necessary predicate that the other party "has acted to his detriment or the party making the statement has secured some benefit".[28] Indeed, as the tribunal observed, the international law principle of estoppel it was applying seeks to remedy "a deliberate want of good faith by a party's inconsistent statements calculated to thwart the integrity of the judicial process for its own benefit and to the other party's prejudice".[29]

18. In summary, there is clear and very well-established authority that, as explained by the ICSID tribunal in *Government of the Province of East Kalimantan v PT Kaltim Prima Coal*: "(i) the

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23 *Fraport v Philippines* (ICSID Case No. ARB/03/25, Award of 16 August 2007), para. 392, **Exh. CLA-176**.

24 *Id*., paras. 346-348.

25 *Kardassopoulos v Georgia* (ICSID Case No. ARB/05/18, Decision on Jurisdiction of 6 July 2007), paras. 185-194, **Exh. CLA-64**. Cf SODPO, para. 194(d).

26 *Kardassopoulos v Georgia* (ICSID Case No. ARB/05/18, Decision on Jurisdiction of 6 July 2007), para. 173, **Exh. CLA-64**.

27 *Karkey Karadeniz Elektrik Uretim A.S. v Pakistan* (ICSID Case No. ARB/13/1, Award of 22 August 2017), paras. 621-628, **Exh. CLA-177**. Cf SODPO, para. 195(a).

28 *Chevron Corporation and Texaco Petroleum v Ecuador* (PCA Case No. 2009-23, Second Partial Award on Track II of 30 August 2018), paras. 7.89, **Exh. CLA-178**. Cf SODPO, para. 195(b).

29 *Chevron Corporation and Texaco Petroleum v Ecuador* (PCA Case No. 2009-23, Second Partial Award on Track II of 30 August 2018), para. 7.105, **Exh. CLA-178**.

statement of fact must be clear and unambiguous; (ii) the statement of fact must be made voluntarily, unconditionally, and must be authorized; (iii) there must be reliance in good faith upon the statement, either to the detriment of the party relying on the statement or to the advantage of the party making the statement."[30]

B. THE CLAIMANT CANNOT ESTABLISH ESTOPPEL ON THE FACTS

19. Zeph cites various statements and conduct on the part of Australia that concern matters not put into contention by Australia and/or matters of domestic law which have no relevance to the question of whether there is an "investor" or an "investment" that is protected by Chapter 11 of AANZFTA. Applying the established test for estoppel to the facts, the Claimant has therefore failed to identify any sufficiently clear and unambiguous statements and conduct on the part of Australia on any matters relevant to the preliminary objections. Moreover, it has not come close to demonstrating that it reasonably relied on such statements and conduct to its detriment or to Australia's benefit (which is presumably why it claims that there is no need for detrimental reliance).

20. Beginning with the statements and conduct of the Australian Securities and Investments Commission ("**ASIC**"), the Claimant asserts that ASIC has "approved and accepted" that it is a foreign company which is an investor in Australia because "it is carrying on business in Australia".[31] In this respect, the Claimant argues that:

    (a) ASIC approved the Claimant's application to be registered as a foreign company under section 601CD of the *Corporations Act 2001* (Cth) ("**Corporations Act**"), and the Claimant has been so registered since 29 March 2019.[32] The Claimant asserts it to be "axiomatic" that a foreign company carrying on business in Australia has investments in Australia.[33] The Claimant goes on to assert that this also establishes that it has an "active role in managing Mineralogy".[34]

    (b) The Claimant also asserts that ASIC "accepted and published" the Claimant's audited Financial Statements, arguing that it shows that it had "made an investment in

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30 *Government of the Province of East Kalimantan v PT Kaltim Prima Coal* (ICSID Case No. ARB/07/3, Decision on Jurisdiction of 28 December 2009), para. 211, **Exh. RLA-121**.
31 SODPO, para. 64.
32 *Id*., paras. 65-71.
33 *Id*., para. 72.
34 *Id*., paras. 73-83.

Mineralogy, that it acquired 6,002,896 shares in Mineralogy, that consideration was paid for the shares and that the value of Mineralogy … is substantial".[35]

21. ASIC is a statutory body established under the *Australian Securities and Investments Commission Act 2001* (Cth) ("**ASIC Act**"). ASIC has functions and powers under the Corporations Act,[36] advises the Minister on various matters under the ASIC Act and Corporations Act,[37] and has responsibility for the general administration of the ASIC Act and Corporations Act.[38] It also has other functions and powers under certain other statutes pertaining to corporations.[39]

22. The fact that the Claimant applied to be registered by ASIC as a foreign company,[40] and that ASIC registered the Claimant as a foreign company,[41] plainly does not say anything about whether the Claimant is an "investor of a Party" within the meaning of Chapter 11 of AANZFTA. ASIC's statutory authority extends only to the administration and management of the ASIC Act and the Corporations Act. ASIC has no responsibility for matters under Chapter 11 of AANZFTA.

23. ASIC's function when registering a foreign company is mechanical. The Corporations Act defines "foreign company" relevantly as "a body corporate that is incorporated … outside Australia".[42] Accordingly, Zeph satisfies that definition based solely on its incorporation in Singapore. If a foreign company lodges an application for registration that is in the prescribed form, and that is accompanied by the information listed in section 601CE of the Corporations Act (e.g., the certificate of incorporation, current constitution, list of directors, address of registered office), ASIC must "grant the application and register the foreign company under this Division by entering the foreign company's name in a register kept for the purposes of this Division".[43] Accordingly, the Claimant's reliance on ASIC having "approved" its application to be registered as a foreign company establishes nothing more than that it made an application for registration that ASIC found to be in the prescribed form and accompanied by the required

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35 SODPO, paras. 84-97.
36 ASIC Act, section 11(1), **Exh. CLA-163**.
37 *Id*., Act, section 11(3).
38 *Id*., Act, section 11(6); Corporations Act, section 5B, **Exh. CLA-161**.
39 ASIC Act, section 12A, **Exh. CLA-163**.
40 SODPO, paras. 64-67; **Exh C-97**.
41 SODPO, paras. 68-71; **Exh C-483**.
42 Corporations Act, section 9, **Exh. CLA-161**.
43 *Id*., Act, section 601CE(h).

supporting documentation. That is all. It does not establish that the Claimant made an investment of any kind. It does not even establish that the Claimant carries on business in Australia.[44]

24. Given the above, registration of Zeph as a foreign company is obviously incapable of constituting a "clear", "consistent", "unequivocal", and/or "unambiguous" representation by the Respondent to the effect that it considers the Claimant to be an "investor of a Party" within the meaning of Chapter 11 of AANZFTA. Not only did ASIC have no authority to consider that question, it had no reason to consider that question, and its registration of the Claimant as a foreign company said nothing at all about whether the Claimant had made an investment in Australia or satisfied any other requirements under Chapter 11 of AANZFTA. By virtue of being incorporated in Singapore, Zeph is a foreign company and this is all that ASIC was required to ascertain in order to perform its relevant function.

25. Nor does the fact that the Claimant filed its consolidated accounts[45] and financial statements[46] with ASIC, or reported various changes in the composition of its Board of Directors to ASIC,[47] mean that the Respondent has given the Claimant a "clear", "consistent", "unequivocal", and/or "unambiguous" representation that the Claimant is regarded as an "investor of a Party". A registered foreign company is required to lodge such statements with ASIC at least once in every calendar year and at intervals of not more than 15 months.[48] The fact that the Claimant complied with that obligation is not reflective of any action being taken by ASIC. ASIC has the power to require foreign companies to lodge certain further documents "if it is of the opinion that the balance-sheet, the profit and loss statement and the other documents referred to in subsection (1) do not sufficiently disclose the company's financial position".[49] But that provides no basis to treat ASIC as having somehow positively endorsed the contents of any documents lodged by the Claimant, let alone as treating the failure to request more information as to the Claimant's financial

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44 At most, it reveals that the Claimant was concerned that it might carry on business in Australia, and therefore needed to apply for registration as a foreign company: Corporations Act, section 601CD, **Exh. CLA-161**. Further, a company can be "carrying on business in Australia" in a range of circumstances short of making an "investment" within the meaning of Chapter 11 of AANZFTA: see Corporations Act, ss 21, 601CD. Section 21(1) makes clear that merely having a place of business in Australia is sufficient to "carry on business in Australia".

45 SODPO, paras. 73.

46 *Id*., paras. 84-97.

47 *Id*., paras. 75-82.

48 Corporations Act, section 601CK(1), **Exh. CLA-161**.

49 *Id*., section 601CK(3).

position as a positive and unequivocal representation that the Claimant has made an investment in Australia within the meaning of Chapter 11 of AANZFTA (that being an issue which ASIC is not required to consider at all).

26. While Zeph has cited no particular act of reliance on ASIC's conduct, for it to have relied on that conduct as constituting a representation of the matters now alleged would have been manifestly unreasonable. No company could reasonably interpret its filing of such documents with ASIC as an active endorsement by ASIC of the contents of those documents, let alone a representation about Zeph's ability to invoke the protections of Chapter 11 of AANZFTA. ASIC maintains several registers containing vast amounts of documents and information. The companies and business name registers alone contain the details of more than 3.2 million companies and 2.7 million business names.[50]

27. The Claimant further argues that the Foreign Investment Review Board ("**FIRB**") and Australian Taxation Office ("**ATO**") have treated Mineralogy as a "foreign person" within the meaning of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) ("**FATA**") in the context of its acquisition of real estate in Perth, Western Australia.[51] Zeph's reliance on the conduct of these bodies is equally unavailing.

28. The FIRB advises the Treasurer on the implementation of the FATA, and the ATO administers the FATA in respect of acquisitions by foreign persons of real estate in Australia. The application of Australia's foreign investment regime to the Claimant arose as a result of the ATO's findings that Mineralogy was a "foreign person" for the purposes of the FATA and, as a result, that its acquisition of an existing residential property without FIRB approval was in breach of section 94(1) of the FATA.[52] As to this, Australia notes:

    (a) The FATA defines "foreign person" as any corporation in which "a foreign corporation … holds a substantial interest".[53] A "substantial interest" is further defined as an

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50 ASIC, "ASIC Business Registers", available at https://asic.gov.au/about-asic/dealing-with-asic/asic-business-registers/ (last accessed 1 July 2024), **Exh. R-602**.

51 SODPO, paras. 98-108.

52 Letter from Australian Tax Office to Clive Palmer dated 30 July 2021 (Exhibit 29 to Annexure A to NoI), **Exh. C-63**, pp. 327-238 (citation to PDF page number); Letter from Australian Tax Office to Clive Palmer dated 7 March 2022 (Exhibit 30 to Annexure A to Notice of Intent dated 20 October 2022 ('**NoI**')), **Exh. C-63** pp. 329-330 (citation to PDF page number).

53 FATA, section 4, **Exh. CLA-166**.

interest of at least 20%,[54] and "foreign corporation" refers to "a corporation formed outside the limits of the Commonwealth [of Australia]".[55]

(b) The determination that Mineralogy was a "foreign person" under the FATA followed from the fact that Zeph is a foreign corporation under the FATA because it was incorporated in Singapore. As Zeph's ownership in Mineralogy exceeded this 20% threshold, it followed that Mineralogy was a "foreign person". Plainly, these definitions require the application of tests under domestic law that turn solely on formal criteria, and do not require (or even permit) any consideration to be given to whether the foreign corporation has made an investment with the meaning of an international treaty.

(c) Accordingly, the fact that the ATO and/or FIRB regarded the Claimant's subsidiary, Mineralogy, as a "foreign person" for the purposes of the FATA does not mean that the Respondent has given the Claimant a "clear", "consistent", "unequivocal", and/or "unambiguous" representation that it is regarded as an "investor of a Party", or that it has made an "investment", within the meaning of Chapter 11 of AANZFTA. The FATA deals with actions that result in a change in control of certain Australian assets,[56] not with characterising that change of control as the making of an "investment" or otherwise for the purposes of international law. The FATA does not even use the term "foreign investment" for this purpose.[57] The definition of "investment" that appears at paragraph 101 of the Claimant's SODPO is not contained in the FATA, nor in the Treasury Guidance Note referenced in that paragraph.

(d) Nor has the Claimant attempted to demonstrate that it reasonably relied on the statements or conduct of FIRB or the ATO, or that it changed its position in reasonable reliance on those statements or conduct to its detriment or to Australia's benefit. Very obviously, it could not reasonably have done any such thing.

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54 FATA, section 4, **Exh. CLA-166**.

55 *Ibid.*; *New South Wales v Commonwealth* 1990 (1990) 169 CLR 482, p. 498 (Deane J), **Exh. RLA-121**. See also: The Treasury, "Guidance Note 2 on Australia's Foreign Investment Framework" (1 July 2021), at https://foreigninvestment.gov.au/sites/foreigninvestment.gov.au/files/2023-07/guidance_note_2_key_concepts.pdf, **Exh. R-603** pp. 5-6.

56 FATA, section 3 ("simplified outline of this Act"), **Exh. CLA-166**.

57 *Id.*, section 122, contains the only reference to 'foreign investment' in the FATA and merely outlines the circumstances where a person may disclose FATA protected information to a Minister who has responsibility for foreign investment.

29. As for the statements and conduct of the Queensland Revenue Office ("**QRO**") and the Western Australian Office of State Revenue ("**Revenue WA**"), the Claimant submits that the Respondent, through these agencies, "determined that the Claimant *made* an acquisition in Mineralogy when the 29 January 2019 … share transaction occurred".[58] The Claimant also argues, on the basis of Revenue WA's decisions, that the Respondent should be precluded from denying the benefits of Chapter 11 of AANZFTA to the Claimant, because Revenue WA determined – in the context of imposing a transfer duty in connection with Mineralogy's purchase of property in Western Australia on 16 August 2019 – that Mineralogy was a foreign corporation that was owned or controlled by the Claimant.[59] However:

(a) The decisions of the QRO and Revenue WA were made in the context of their administration of the *Duties Act 2001* (Qld) and *Duties Act 2008* (WA) respectively. Their determinations concerned whether there had been a "relevant acquisition" for the purposes of those Acts. Such determinations were made in response to applications by the Mineralogy Group in August 2019 for exemptions from landholder duties under these Acts.[60] The relevant tests in these Acts have no overlap with the definition of "investment" in Chapter 11 of AANZFTA. Thus:

(i) The QRO determines whether "landholder duty" is payable on "relevant acquisitions". Mineralogy is a "landholder" within the meaning of the *Duties Act 2001* (Qld) because it has landholdings in Queensland with an unencumbered value of AUD $2 million or more.[61] The Claimant's acquisition of the shares in Mineralogy was a "relevant acquisition" because it thereby acquired a "significant interest" (defined as being a 50 per cent shareholding or more[62]) in a landholder.[63] The QRO applied an exemption from the usual requirement of landholder duty on the basis that the Claimant's acquisition of Mineralogy

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58 SODPO, para. 110 (emphasis in original).
59 *Id*., paras. 136-143.
60 Section 411 Applications for exemptions in respect of corporate reconstruction transactions dated 27 August 2019 (Exhibit 22 to Annexure A to NoI), **Exh. C-63,** p. 182 (citation to PDF page number); Application for exemption pursuant to section 262 of the WA Duties Act dated 21 August 2019 (Exhibit 23 to Annexure A to NoI), **Exh. C-63,** p. 211 (citation to PDF page number).
61 *Duties Act 2001* (Qld), section 165, **Exh. CLA-167**.
62 *Id*., section 159(2).
63 *Id*., section 158(1).

resulted from a corporate restructure.[64] The QRO thus did not consider or determine whether the Claimant had made an "investment" within the meaning of Chapter 11 of AANZFTA.

(ii) Similar facts attend Revenue WA's determination with regard to the payment of "landholder duty", as the *Duties Act 2008* (WA) contains materially identical provisions to the *Duties Act 2001* (Qld).[65] Revenue WA is required to provide an exemption from the payment of landholder duty if the Commissioner is satisfied that the relevant acquisition was made solely for the purpose of a corporate consolidation.[66] Revenue WA duly granted the exemption.[67]

(iii) Revenue WA's determination under the *Duties Act 2008* (WA) that Mineralogy is a foreign corporation because it is owned or controlled by the Claimant was made in the context of the imposition of transfer duty in connection with Mineralogy's purchase of residential property in WA on 16 August 2019 and was not a determination in relation to the Claimant.

(b) Once again, these decisions cannot, and do not, constitute "clear", "consistent", "unequivocal", and/or "unambiguous" representations that the Claimant is to be regarded as an "investor of a Party" that has an "investment" within the meaning of Chapter 11 of AANZFTA, or that it is entitled to invoke the benefits of that Chapter. They do not concern those topics at all.

(c) Further, the Claimant again has not argued that it reasonably relied on these representations or changed its position to its detriment or to Australia's benefit. For the reasons already addressed, that would itself answer the Claimant's estoppel claim.

30. The Claimant further argues that the Respondent accepted the Claimant's claims as an "unquantified contingent liability" in federal Budget Papers, which it asserts is "inconsistent with the Respondent's denial of benefits objection and … abuse of process arguments which should not be allowed to be brought".[68] That is untenable. The reporting of a contingent liability cannot possibly constitute a "clear", "consistent", "unequivocal", and/or

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64 *Id.*, section 409.
65 *Duties Act 2008* (WA), sections 155, 160, 161, **Exh. CLA-168**.
66 *Id.*, sections 259, 263.
67 Letter from Revenue WA to PwC dated 14 February 2020 (Exhibit 27 to Annexure A to NoI), **Exh C-63**, p. 319 (citation to PDF page number).
68 SODPO, paras. 127-135.

"unambiguous" representation that the Claimant and its purported investments are entitled to the protections of Chapter 11 of AANZFTA:

(a) That the Respondent has listed a contingent liability in its Budget Papers cannot be construed as a representation, let alone an admission, that the Claimant is an "investor" entitled to the protections of Chapter 11 of AANZFTA, or that it has made a protected "investment".

(b) This contingent liability was reported under domestic accounting standards which have nothing to do with the question of whether the Claimant is an "investor" that has made an "investment" under Chapter 11 of AANZFTA. Australia accounts for contingent liabilities in accordance with *Australian Accounting Standard AASB 137 Provisions, Contingent Liabilities and Contingent Assets* ("**AASB 137**"). Paragraph 10 of AASB 137 defines a "contingent liability" as follows:

> "A contingent liability is:
> (a) a possible obligation that arises from past events and whose existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the control of the entity; or
> (b) a present obligation that arises from past events but is not recognised because:
>
> (i) it is not probable that an outflow of resources embodying economic benefits will be required to settle the obligation; or
> (ii) the amount of the obligation cannot be measured with sufficient reliability."[69]

(c) This tribunal's decision constitutes a future event not within the Respondent's control within the meaning of this domestic accounting standard.[70] This is reflected in the Respondent's 2023/2024 Budget Paper, which states:

> "Should Australia be unsuccessful in this proceeding, Australia would be liable for any compensation found to be payable to the claimant. Any such potential liability cannot be quantified at this stage."[71]

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69 *Australian Accounting Standard AASB 137 Provisions, Contingent Liabilities and Contingent Assets* ("**AASB 137**"), **Exh. C-538**, p. 7.

70 This is supported by Department of Finance's "October 2022-23 Budget – Statement of Risks Update – Supporting Information and Disclosure Considerations' which refers to contingent liabilities as "a specific category of fiscal risks … that may arise from past events but can only be confirmed by the incidence or non-occurrence of uncertain future events that are not within the control of the entity or Government.", **Exh. R-604.**

71 Budget Strategy and Outlook - Budget Paper No. 1 dated 9 May 2023, **Exh. R-605**, p. 290.

(d) A report recognising a contingent liability is inherently equivocal and conditional, and so unable to satisfy the requisite test for estoppel.

31. Finally, the Claimant argues that the Respondent should be precluded from making its abuse of process objection on the basis of various allegations about the Respondent's purported lack of "good faith".[72] The Claimant submits, in particular, that the Respondent "failed to make timely disclosure to the Claimant that it contended that the Claimant's investments were not covered by AANZFTA on abuse of process grounds",[73] and that the Respondent continued to accept "duties, fees and taxes from the Claimant" despite contesting the jurisdiction of this tribunal to hear its claims.[74] The Respondent rejects these scattergun allegations, which in any event are not grounded in the applicable principles of estoppel, which the Respondent has explained above.

32. In summary, the Claimant has failed to demonstrate that the Respondent has made any representations to the Claimant that were "clear and unambiguous" and "unconditional" concerning its rights under Chapter 11 of AANZFTA. Its estoppel arguments should be rejected for that reason alone.

33. However, even if any such representations had been made, the Claimant has not demonstrated that it relied in good faith on any representations either to its detriment or to the benefit of the Respondent.[75] The Claimant suggests that Mr Palmer, as the sole director of Mineralogy, decided to retain dividends rather than pay them to the Claimant.[76] In Section III below, Australia highlights the flaws in this position as a matter of fact. The short point is that the Claimant has not provided any minutes or records which establish any link between Australia's conduct and this alleged act of reliance (which in any case appears to be reliance on the part of Mr Palmer, rather than on the part of Zeph). And, even if such reliance had occurred (which is denied), it would not be reasonable for the reasons set out above.

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72 SODPO, paras. 146-161.
73 *Id*., para. 151(a).
74 *Id*., para. 151(b).
75 *Government of the Province of East Kalimantan v PT Kaltim Prima Coal* (ICSID Case No. ARB/07/3, Decision on Jurisdiction of 28 December 2009), para. 211, **Exh. RLA-121**.
76 SODPO, para. 208.

C. THE CLAIMANT'S INVOCATION OF THE PRINCIPLE OF ACQUIESCENCE IS MISPLACED

34. The Claimant's reliance on the principle of acquiescence is similarly misplaced.

35. The Respondent agrees that acquiescence may apply when a State is silent or passive in the face of well-known (or notorious) circumstances, such that the State may be taken to have tacitly recognised, and acquiesced in, those circumstances.[77]

36. Acquiescence and estoppel, as the ICJ Chamber observed in the *Gulf of Maine* case, are "based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion".[78] The ICJ Chamber's judgment has been cited with approval in *Sovereignty over Pedra Branca/Pulau Batu Puleh, Middle Rocks and South Ledge*,[79] and *Obligation to Negotiate Access to the Pacific*.[80] The principle of acquiescence has also been considered and applied by inter-State[81] and investment treaty[82] tribunals, although the arbitral practice in respect of the latter is more limited.

37. Zeph contends that it is "clear that Australia acquiesced in the Claimant's status [as a] foreign company that enjoyed the benefits of protection under investment treaties".[83] Specifically, it contends that the Respondent has acquiesced in the Claimant's restructuring as a *bona fide* restructuring due to the conduct of QRO and Revenue WA in providing an exemption from the payment of "landholder duty" in respect of the Claimant's acquisition of the shares in Mineralogy (which has been addressed above).[84] It further submits that, following MIL's

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77 See, e.g., James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9th ed, 2019), p. 405, **Exh. RLA-105**.

78 *Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) (Judgment)* [1984] ICJ Rep 246, para. 130, **Exh. CLA-230**.

79 *Sovereignty over Pedra Branca/Pulau Batu Puleh, Middle Rocks and South Ledge (Malaysia v Singapore) (Judgment)* [2008] ICJ Rep 12, para. 121, **Exh. RLA-123**.

80 *Obligation to Negotiate Access to the Pacific (Bolivia v Chile) (Judgment)* [2018] ICJ Rep 507, para. 152, **Exh. RLA-112**.

81 E.g., *Republic of Iraq v Republic of Turkey* (ICC Case No. 20273/AGF/ZF/AYZ/ELU, Final Award of 13 February 2023), para. 463, **Exh. RLA-124**.

82 *Veolia Proprete v Egypt* (ICSID Case No. ARB/12/15, Award of 25 May 2018), para. 131, **Exh. RLA-125**; *Tethyan Copper Company Pty Ltd v Pakistan* (ICSID Case No. ARB/12/1, Decision on Respondent's Application to Dismiss the Claims (With Reasons) of 10 November 2017), paras. 238-240, **Exh. RLA-126**; *UAB E energija (Lithuania) v Latvia* (ICSID Case No. ARB/12/33, Award of 22 December 2017), paras. 534-536, **Exh. RLA-127**.

83 SODPO, para. 209.

84 *Id*., para. 205.

letter dated 4 February 2019, which made reference to a potential claim under SAFTA, "the Respondent was made aware of the protections afforded to Claimant [and] any failure to then deny benefits to the Claimant must be treated as acquiescence".[85]

38. However:

(a) As the Respondent has explained above, the statements and conduct invoked by the Claimant do not constitute a tacit recognition of Zeph's status as an "investor of a Party" having made an "investment" which is protected by Chapter 11 of AANZFTA. Further to this, and in any event, the Respondent disputed the Claimant's status as an "investor" with an "investment" that was entitled to invoke Chapter 11 of AANZFTA at the earliest opportunity and within the time permitted under applicable procedural rules.[86]

(b) The Claimant has not cited any support for its proposition that the Respondent is not permitted to deny the benefits of Chapter 11 after the investment has been made.[87] The recent practice of investment tribunals confirms that a respondent State is permitted to deny the benefits of the relevant treaty to the investor up until the time at which the respondent State is required to identify its preliminary objections in arbitration proceedings.[88] In one case, where the respondent State delayed its denial of benefits for three years after being put on notice of the claimant's claim, the tribunal held that this was too late.[89] But the facts of that case are in stark contrast to the present proceedings, in which the Respondent exercised its right to deny benefits more than 18 months before the Claimant even submitted its claim to arbitration.

39. Finally, the Respondent notes that the Claimant asserts (in an argument that is barely developed) that there is an inconsistency between the Respondent's "no investor" and "no

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85 SODPO, para. 209.
86 See UNCITRAL Rules, Article 23, **Exh. R-164**.
87 SODPO, para. 209.
88 E.g., *Ulysseas, Inc v Republico f Ecuador* (Interim Award of 28 September 2010), para. 172, **Exh. RLA-87**; *Empresa Eléctrica del Ecuador, Inc. v Republic of Ecuador* (ICSID Case No. ARB/ 05/0, Award of 2 June 2009), para. 71, **Exh. RLA-84**; *Pac Rim Cayman LLC v El Salvador* (ICSID Case No. ARB/09/12, Decision on Jurisdiction of 1 June 2012), paras. 4.3–4.5, **Exh. RLA-33**; *Guaracachi America, Inc. and Rurelec PLC v Plurinational State of Bolivia* (PCA Case No. 2011-17, Award of 31 January 2014), para. 378, **Exh. RLA-69**.
89 *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain* (ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles of 12 March 2019), paras. 268–269, **Exh. RLA-74**.

investment" objections on the one hand, and the Respondent's "denial of benefits" objection on the other, because the Respondent made the "denial of benefits" objection first, and because this objection presupposes that the Claimant is an investor of Singapore.[90]

40. That argument is absurd. Respondent States frequently make multiple preliminary objections to investment treaty claims, and they are not precluded from advancing preliminary objections in the alternative, simply because one objection was made at an earlier stage of proceedings. In any event, manifestly, the Respondent's denial of benefits objection does not implicitly accept that the Claimant is an "investor" of Singapore within the meaning of Article 2(d) of Chapter 11 of AANZFTA, which has "investments" within the meaning of Article 2(c) of Chapter 11 of AANZFTA, given that those propositions are expressly denied in the same document (the SOPO) in which the denial of benefits objection is developed.

41. For the foregoing reasons, the Claimant's submissions on estoppel and acquiescence should be rejected.

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[90] SODPO, paras. 122-126.

III. ZEPH IS NOT AN "INVESTOR"

42. In order for this tribunal to have jurisdiction, Zeph must establish that it qualifies as an "investor of a party" under Chapter 11 of AANZFTA. It cannot discharge that burden for the reasons set out in Section III of the SOPO. Zeph's claims are therefore outside the Tribunal's jurisdiction.

43. It is recalled that, under Article 21(1) of Chapter 11 of AANZFTA, only a "disputing investor" may submit a claim to arbitration. Article 18(4)(e) of Chapter 11 defines a "disputing investor" as "an investor of a Party that makes a claim against another Party on its own behalf under this Section, and where relevant includes an investor of a Party that makes a claim on behalf of a juridical person of the disputing Party that the investor owns or controls". Zeph purports to bring its claims against Australia on its own behalf. It follows that Zeph can be a "disputing investor" only if it establishes that it is "an investor of a Party" to AANZFTA other than Australia. This much is not in dispute.[91]

44. It is also recalled that Article 2(d) of Chapter 11 of AANZFTA defines "investor of a Party" as follows:

> "investor of a Party means a natural person of a Party or a juridical person of a Party that seeks to make[4], is making, or has made an investment in the territory of another Party".[92]

45. Zeph has acknowledged that it bears the burden of establishing that it is an investor that has made an investment.[93]

46. The Respondent's position, as set out in Section III of the SOPO, is that Article 2(d) requires an investor to make an active contribution:

    (a) The term "make … an investment" has an ordinary meaning, which must be given effect as per Article 31(1) Vienna Convention on the Law of Treaties ("**Vienna**

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91 See SODPO, para. 225.

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

93 *Procedural Order No. 4*, 10 May 2024 ("**PO4**"), Annex B, The Claimant's Overall Objection, para. 17(a)(ii) (p. 10), para. 23 (p. 12).

Convention"). That ordinary meaning connotes some form of activity. "Making" an investment is different to "having", "holding", "owning" or "controlling" an investment.[94]

(b) This is supported by the context in which the words "make … an investment" appear in Article 2 (which is also to be taken into account under Article 31(1) of the Vienna Convention). The definition of "investment" in Article 2(c) refers to an "asset owned or controlled by an investor". That the drafters instead used the term "make" in Article 2(d) was evidently a deliberate choice which imposes a free-standing requirement.[95]

(c) The requirement embedded in the term "make" for an active contribution is supported by a significant body of cases which Australia has already addressed,[96] including *Gold Reserve Inc v Bolivarian Republic of Venezuela*,[97] as well as further cases addressed below.[98]

47. Thus, Article 2(d) requires the "making" of an investment by a putative investor. The requirement of having "made an investment" in the territory of (in this case) Australia entails that there has been some form of active investment, whether by way of a contribution of capital or otherwise. This is supported by the contextual point that, as follows from Article 8(1)(a), the AANZFTA parties envisaged that an investment would entail an "initial contribution" (see further below).

48. Contrary to this requirement, Zeph acquired its shares in Mineralogy as a result of a share swap with its New Zealand parent company, MIL.[99] This transaction did not involve an active investment by Zeph. All that happened when Zeph acquired its shares in Mineralogy from MIL was that Zeph issued the same number of its own shares to MIL, thereby being inserted into the chain of corporate ownership above Mineralogy. In that transaction, Zeph expended nothing, and contributed nothing to Mineralogy – its shares being of no value because it was at that time simply an empty corporate vehicle.[100] A transaction of that kind

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94 See SOPO, paras. 146-147.
95 See *Id*., para. 148.
96 See *Id*., paras. 150-159.
97 *Gold Reserve Inc v The Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm), [2016] 1 WLR 2829, paras. 35, 37, 44 (Teare J), **Exh. RLA-44**.
98 See para. 55 below.
99 SOPO, paras. 162-181.
100 See Lys First Report, paras. 79, 82-84; Lys Supplementary Report, paras. 219-223.

does not result in Zeph having "made" an investment, as required by Article 2(d), because it did not involve a contribution by Zeph. Further, there is no evidence of Zeph having made any contribution since first acquiring the shares in Mineralogy.

49. Instead, far from making an investment in Australia, Zeph actually extracted value from Mineralogy, through the interest-free loans that it received from Mineralogy.[101] In its SODPO, the Claimant implicitly acknowledges the occurrence of the loans, and that they were interest free, but contends that "it is not uncommon for there to be short-term interest-free loans within such wholly owned groups", and further that the loans were "repaid in full by the Claimant to Mineralogy within 18 months of it originally being advanced".[102] As to each of those contentions:

(a) Whether intra-group zero-interest loans are "uncommon" or not in general (on which Australia expresses no view), Professor Lys has explained that the loans which Mineralogy extended to Zeph were contrary to Mineralogy's own Constitution[103];

(b) It is clear that, although Zeph ultimately repaid the loaned amounts by crediting dividends declared by Mineralogy against that loan, it did so considerably later than it claims to have done in the SODPO[104]; and

(c) In any event, although Zeph repaid the principal of the loan in this fashion, the loan nonetheless imposed a considerable burden on Mineralogy "because it was interest-free and thus Mineralogy did not earn any return on the funds it deployed for between 22-30 months".[105] Professor Lys has further explained that by "issuing the interest-free loans to Zeph, Mineralogy had foregone between SGD $406,578 and SGD $664,040 in interest."[106]

50. Notably (and rightly), Zeph does not contend that it made an investment simply by repaying sums that were loaned to it; thus, even if its contentions as to repayment of loaned sums are correct, they do not assist Zeph in establishing that it is an investor.

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101 Professor Lys' Supplementary Report identifies that there appear to have been multiple loans: see Lys Supplementary Report, paras. 185, 207-209.
102 SODPO, paras. 245-246.
103 Lys Supplementary Report, paras. 265-274.
104 *Id*., paras. 188-190.
105 *Id*., para. 196.
106 *Id*., para. 202. See also *Id*., paras. 197-201.

51. In the SODPO, Zeph attempts to counter both: (i) Australia's interpretation of Article 2(d) of Chapter 11 of AANZFTA; and (ii) Australia's contention that Zeph has not, in fact, made a contribution. However, its arguments on both aspects of this preliminary objection fail. Each is addressed in turn below.

A. ZEPH'S INTERPRETATION OF ARTICLE 2(D) OF CHAPTER 11 OF AANZFTA IS INCORRECT

52. Zeph's position is that Article 2(d) of Chapter 11 of AANZFTA does not require an investor to have engaged in any activity or to have made any form of contribution. It contends that an investor can be taken as having "made an investment" for the purposes of Article 2(d) even if it is entirely passive.[107] This argument is premised on a contention that the word "make" in Article 2(d) has no meaning of its own and is no more than a generic verb introducing (and even deriving its meaning from) the key term "investment".[108] This contention is incorrect for a number of reasons.

53. First, this approach is contrary to the principle of *effet utile* in that it ignores the words "make, is making, or has made" and the choice of the drafters of the treaty in selecting the verb "make" as opposed to a different choice: they could have selected, but did not select, a different verb (such as "acquire", "hold" or "have") or they could have omitted a verb altogether (by referring, for example, to an investment "of" an investor or an investor "with" an investment).[109] The choice of the verb "make" is all the more significant in the context of the different formulation in Article 2(c), as set out above.

54. Second, Zeph's approach is contrary to basic principles of treaty interpretation – i.e. the role played by ordinary meaning. To "have a meal" is not the same as to "make a meal". Even on Zeph's own example,[110] "take a photograph" is different to "own", "have" or "acquire" a photograph.

55. Cases highlighting the ordinary meaning of the word "make" as connoting an active contribution have already been addressed in the SOPO.[111] In addition to those cases:

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107 SODPO, para. 279.
108 *Id*., paras. 262, 264.
109 SOPO, para. 159(b).
110 SODPO, para. 262.
111 SOPO, paras. 150-159.

(a) In *Pugachev v Russia*, the tribunal concluded that "[n]othing in the [France–Russia] BIT … would allow the Tribunal to conclude that the terms 'made' ('*effectués*' or '*réalisé*') and the term 'held' ('*détenus*') are synonymous or have the same meaning".[112] It subsequently reiterated that "the Treaty refers to investments made ('*investissements effectués*' or '*investissement réalisé*') by a national of one Contracting Party on the territory of the other Contracting Party, rather than investments simply held",[113] and further that, "[a]ccording to the ordinary meaning of Article 1.2(a), 'to make investments' cannot be assimilated to simply 'held an investment'".[114] This reasoning underscored the difference between these two terms, and the significance of the drafters' selection of the verb "make".

(b) In *Gramercy v Peru*, Article 10.28 of the relevant treaty (the Peru–United States Trade Promotion Agreement) defined "investor of a Party" as "a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts through concrete action to make, is making, or has made an investment in the territory of another Party".[115] The tribunal found that GPH, a putative investor, fell within this definition because it "purchased the [investment] with its own funds, acting on its own behalf, and thus became the legal and beneficial owner of the [investment]".[116] The tribunal distinguished the facts before it from cases concerning "corporate restructurings where shell corporations acquire the investment for a nominal price, from a national of the host State or a third-party investor who does not benefit from the treaty"[117] – a description analogous to the means by which Zeph acquired its shareholding in Mineralogy.

(c) In the recent award in *Montauk Metals v Colombia* (dated 7 June 2024), the treaty at issue required that an investor "seeks to make, is making, or has made" an investment.[118] In light of this language, the tribunal accepted the need for "active

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112 *Sergei Viktorovich Pugachev v The Russian Federation* (Award on Jurisdiction of 18 June 2020), para. 413, **Exh. RLA-34**.

113 *Id*., para. 417.

114 *Id*., para. 423.

115 *Peru–United States Trade Promotion Agreement,* signed on 12 April 2006 (entered into force 1 February 2009), **Exh. RLA-170.**

116 *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v The Republic of Peru* (ICSID Case No. UNCT/18/2, Final Award of 6 December 2022), para. 606, **Exh. CLA-86**.

117 *Ibid*.

118 *Montauk Metals Inc. (formerly known as Galway Gold Inc.) v Republic of Colombia* (ICSID Case No. ARB/18/13, Award of 7 June 2024), para. 411, **Exh. RLA-147**.

conduct" in the "making" of an investment, which "can take place either by committing resources at the time of acquiring the investment or afterwards".[119]

56. Third, contrary to Zeph's argument,[120] the fact that similar language to that contained in Article 2(d) is used in the US Model BIT 2004 is irrelevant. Even if the AANZFTA drafters were inspired by that instrument, that does not diminish the fact that they had a variety of instruments that they could have used as the basis for their draft and this was the language which they selected.

57. Fourth, Zeph is not assisted by other parts of the text of Chapter 11 of AANZFTA to which it points.

(a) Zeph highlights that Article 2(a) defines the term "covered investment" as meaning (in relevant part) "an investment … in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter", Zeph emphasising the underlined words.[121] However, the purpose of the underlined words is to indicate that an investment may be a "covered investment" irrespective of whether it came into being, was acquired by the investor, or was enlarged after the time AANZFTA entered into force. These words address that temporal issue. They are not intended to replace the separate requirement in Article 2(d) that an investor "make" an investment. If the two provisions had been intended to refer to the same thing, then the drafters would have used the same terms in both provisions.

(b) The footnote amplifying the meaning of "seeks to make", to which Zeph refers,[122] similarly addresses a different point. It conveys that an intention to make an investment must not be an abstract desire, but rather one accompanied by having actually taken steps in that direction (i.e. the wording is comparable to that in *Gramercy v Peru* referred to above).

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119 *Montauk Metals Inc. (formerly known as Galway Gold Inc.) v Republic of Colombia* (ICSID Case No. ARB/18/13, Award, 7 June 2024), para. 414, **Exh. RLA-147**.

120 SODPO, paras. 274, 276.

121 *Id*., para. 267.

122 *Id*., paras. 274-275. The relevant footnote reads: "For greater certainty, the Parties understand that an investor that "seeks to make" an investment refers to an investor of another Party that has taken active steps to make an investment. Where a notification or approval process is required for making an investment, an investor that "seeks to make" an investment refers to an investor of another Party that has initiated such notification or approval process."

58. Fifth, Zeph is incorrect to claim that the object and purpose of AANZFTA support its interpretation.[123]

(a) Zeph (at one point) asserts that the "primary purpose" of AANZFTA is "investor protection".[124] Such a slanted characterisation of the purpose of investment treaties has been rejected by other tribunals in favour of a more balanced and neutral approach.[125] Zeph's tendentious description of the treaty's purpose is particularly unjustifiable in relation to a multidisciplinary free trade agreement such as AANZFTA.[126]

(b) In order to ascertain the true object and purpose of AANZFTA, it is necessary to scrutinise the text of the treaty itself. As Australia has already highlighted,[127] one of AANZFTA's objectives, as stated at Article 1(c) of Chapter 1, is to "facilitate, promote and enhance investment opportunities among the Parties through further development of favourable investment environments" while, pursuant to Article 1(d) of Chapter 1, a related objective is to "establish a co-operative framework for strengthening, diversifying and enhancing … investment". Formal changes in corporate ownership structures do nothing to strengthen, diversify or enhance investment, unlike investments which are effected through some form of active contribution by an investor.

(c) Separately, and six paragraphs later, Zeph asserts that the "primary purpose" of AANZFTA "appears to be to strengthen the economic linkages between the States parties" and to "enhance[e] trade and investment among the Parties"[128] – language that is drawn from the Preamble to AANZFTA. However, "economic linkages" between the Parties are not strengthened (and nor is trade and investment enhanced) by transactions whereby an entity is incorporated in one State to acquire an asset in another State, without actually making any form of active contribution.

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123 SODPO, paras. 271, 277-278.
124 *Id*., para. 271.
125 See, e.g., *Saluka Investments BV v The Czech Republic* (PCA Case No. 2001-04, Partial Award of 17 March 2006), para. 300, **Exh. RLA-40**; *ST-AD GmbH v The Republic of Bulgaria* (PCA Case No. 2011-06, Award on Jurisdiction of 18 July 2013), para. 384, **Exh. RLA-43**.
126 SOPO, para. 159(d).
127 *Id*., para. 149.
128 SODPO, para. 277.

59. Sixth, Zeph is wrong to claim that the "weight of authority" favours its interpretation of Article 2(d).[129] None of the cases it cites in fact support its case (save for *Addiko Bank AG v Montenegro*, which Australia has already identified in its SOPO as an outlier and as unpersuasive).[130] For each of the cases on which Zeph relies, it is critical to look at what was being decided by reference to the specific treaty language then at issue. Specifically:

(a) The first judgment of the Swiss Federal Tribunal in *Clorox v Venezuela* is the decision on which Zeph places the greatest weight.[131] But that decision is inapposite, because the Swiss Federal Tribunal's reasoning was very closely tied to the specific words "invested by investors" in the treaty definition of "investment". The claimant in *Clorox* satisfied the treaty definition of "investor",[132] which contained no language equivalent to Article 2(d) of Chapter 11 of AANZFTA. In fact, the relevant treaty required a natural person to have "made" an investment in order to qualify as an investor, but did not impose the same requirement on legal persons,[133] that distinction clearly indicating a choice by the drafters that legal persons (such as the claimant in *Clorox*) did not need to "make" an investment. In the context of that treaty language, the Swiss Federal Tribunal was right to say that "the BIT does not contain any requirements going beyond the holding by an investor … of assets".[134] The Swiss Federal Tribunal also placed great weight on the absence in the treaty of provisions aimed at protecting against treaty shopping, such as a denial of benefits clause.[135] AANZFTA, of course,

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129 SODPO, para. 228.

130 See *Addiko Bank AG v Montenegro* (ICSID Case No. ARB/17/35, Excerpts of Award of 24 November 2021), **Exh. RLA-52**, cited at SODPO, para. 310; SOPO, para. 159.

131 See, e.g., SODPO, paras. 268-270, 293, 311, citing "*Clorox Spain SL v Venezuela*, Decision of the Swiss Federal Tribunal, 20 May 2022 … (**Exh. CLA-182**)" (emphasis in original). The Claimant presumably intended to refer to *Clorox Spain SL v Venezuela (I)*, Decision of the Swiss Federal Tribunal, 146 III 142 (4A_306/2019), 25 March 2020 (***Clorox v Venezuela I***). For the Tribunal's convenience, the Respondent hereby submits this 2020 decision of the Swiss Federal Tribunal, *Clorox v Venezuela I*, as **Exh. RLA-144**, together with an updated translation of the 2022 decision of the Swiss Federal Tribunal (148 III 330 (4A_398/2021) dated 20 May 2022) (***Clorox v Venezuela II***) as **Exh. RLA-142**.

132 The respondent State accepted this: *Clorox v Venezuela I*, Swiss Federal Tribunal, 2020, para. 3.4.2.4, **Exh. RLA-144**.

133 See *Agreement between the Kingdom of Spain and the Republic of Venezuela on the Reciprocal Promotion and Protection of Investments*, adopted 2 November 1995, entered into force 10 September 1997, **Exh. RLA-151**.

134 *Clorox v Venezuela I* (Swiss Federal Tribunal, 2020), para. 3.4.2.7, **Exh. RLA-144**, cited at SODPO, para. 269 (referring to **CLA-182** – see above footnote 131).

135 *Clorox v Venezuela I* (Swiss Federal Tribunal, 2020), paras. 3.4.2.6-3.4.2.7, **Exh. RLA-144**.

does contain such a clause,[136] which provides a further basis on which the decision is distinguishable.

(b) Zeph points to a passage from the judgment of Butcher J in *Tatneft v Ukraine*, which states that "the phrase 'are invested by' does not import a requirement that, in order to be an investment, there should have been an active process of the commitment of resources by the investor therein".[137] However, Butcher J expressly distinguished the words "are invested by" from treaty wording requiring the investor to have "made" an investment, which he noted had been accepted as requiring "an active relationship between the investor and the investment".[138]

(c) Zeph relies on *Renergy v Spain*,[139] where the tribunal rejected an argument that the Energy Charter Treaty ("**ECT**") entailed a requirement that an investor have made an active contribution. But this was again based on the specific wording of that Treaty, which states only that an investment need be "owned or controlled" by the "investor", a term which in turn is defined purely with reference to the place of its incorporation (and not, for example, by any requirement to have "made" an investment). Not surprisingly, the tribunal held that this treaty language did not allow for any additional requirements to be implied, and that "the only required relationship between investor and investment is ownership or control", with there being "no need for the investor to have played an active role in the making of the investment".[140] In so holding, the tribunal gave effect to the clear language of the treaty.

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136 See also para. 138 regarding Article 11(1)(b) of Chapter 11 of AANZFTA as evidence of the parties' intention to prevent treaty-shopping.

137 *PAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm), [2018] 1 WLR 5947, para. 68, **Exh. RLA-51**, cited at SODPO, paras. 265, 319.

138 *PAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm), [2018] 1 WLR 5947, paras. 78-79, **Exh. RLA-51**. Zeph refers at SODPO, footnote 284, to *Mytilineos Holdings SA v The State Union of Serbia & Montenegro and Republic of Serbia (I)* (Partial Award on Jurisdiction of 8 September 2006), **Exh. CLA-181**. In that case, the respondent State had argued that the words "invested by" in the definition of "investment" meant that there had to be some activity or contribution: para. 127. Like the Swiss Federal Tribunal in *Clorox v Venezuela I* (2020), **Exh. RLA-144**, the tribunal in *Mytilineos,* **Exh. CLA-181**, was making a specific finding about the words "invested by" in a context where those words played a purely connective role rather than performing any substantive function. That is different to the words "make, is making, or has made" Article 2(d) of Chapter 11 of AANZFTA.

139 SODPO, para. 313, citing *RENERGY S.à r.l. v Kingdom of Spain* (ICSID Case No. ARB/14/18, Award of 6 May 2022), **Exh. CLA-179**.

140 *RENERGY S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/14/18, Award, 6 May 2022), paras. 554-555, 568, **Exh. CLA-179**.

(d) In *Nachingwea v Tanzania*,[141] all that was required for an investment dispute to be submitted was that there was "an investment of [an investor]". The term "made" was in a less prominent part of the treaty which did not set out the fundamental parameters for an investment dispute.[142] This is why the tribunal did not consider that it changed the basic requirements of an investment.[143] This case is among those which have criticised the finding in *Standard Chartered Bank v Tanzania*,[144] as highlighted by Zeph.[145] However, what the tribunal in *Nachingwea* specifically criticised was the weight which the tribunal in *Standard Chartered Bank* placed on the word "made" given that it appeared only in subsidiary places in the relevant treaty[146] – an aspect of that award which Australia has already acknowledged.[147] In contrast, in the present case, the requirement to "make" an investment is unambiguously part of the definition of an investor. The criticism of *Standard Chartered Bank*, including in *Nachingwea*, does not address the actual substance which that tribunal attributed to the verb "make", and for that reason that award has been expressly recognised as being relevant to cases (like the present) involving "investment treaties which require investments to be made within the territory of the host state".[148]

(e) In *Kim v Uzbekistan*,[149] what the tribunal decided was that the word "made" did not require the investor to continue actively managing the investment after its initial acquisition.[150] There was no question as to whether a contribution had been made

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141 SODPO, para. 312.

142 The *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments*, signed 7 January 1994, [1996] UKTS 90 (entered into force 2 August 1996) defined the term "investment" at Article 1(a) as "every kind of asset admitted in accordance with the legislation and regulations in force in the territory of the Contracting Party in which the investment is made", followed by a non-exhaustive list of types of assets, **Exh. RLA-154**.

143 *Nachingwea UK Limited, Ntaka Nickel Holdings Limited and Nachingwea Nickel Limited v United Republic of Tanzania* (ICSID Case No. ARB/20/38, Award of 14 July 2023), paras. 150-160, **Exh. RLA-47**.

144 *Standard Chartered Bank v United Republic of Tanzania* (ICSID Case No. ARB/10/12, Award of 2 November 2012), **Exh. RLA-45**.

145 SODPO, para. 317.

146 *Nachingwea UK Limited, Ntaka Nickel Holdings Limited and Nachingwea Nickel Limited v United Republic of Tanzania* (ICSID Case No. ARB/20/38, Award of 14 July 2023), paras. 152, 155-156, **Exh. RLA-47**.

147 SOPO, para. 156.

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

149 SODPO, para. 314.

150 *Vladislav Kim and others v Republic of Uzbekistan* (ICSID Case No. ARB/13/6, Decision on Jurisdiction of 8 March 2017), para. 310 (finding that the term "made" does not entail "a requirement that Claimants

given that the claimants had "undertaken not just to hold a financial interest in the BC and KC plants but also to manage and develop those plants".[151] Notwithstanding that there was no requirement for ongoing management, the tribunal noted that, on the facts of that case, the investors did have an active role in the management of the investment after having made the investment in the first place.[152]

(f) Zeph cites *Antonio del Valle Ruiz v Spain*,[153] but this case is squarely against it. The tribunal there confirmed that the term "investment" "has an objective meaning which requires the presence of the elements of contribution, or commitment of resources, duration and risk".[154] In the passage cited by Zeph, the tribunal confirmed that, having made an initial commitment of resources (having "purchased [the] shares and/or bonds for a price"), there was no additional "requirement for 'active' contribution or management of the investment".[155]

60. Against these cases which Zeph cites but which do not assist it, as stated above Australia has identified a large body of cases which support its interpretation of Article 2(d) of Chapter 11 of AANZFTA.[156]

61. Zeph directs considerable attention to a number of objections to jurisdiction which have been raised in other cases, but which are distinct to the specific objection raised by Australia in this case arising from the requirement of an active contribution connoted by the words "seeks to make, is making, or has made an investment" in Article 2(d) of Chapter 11 of AANZFTA.[157] Thus, this part of Zeph's case attacks a number of straw men. Specifically:

(a) Contrary to Zeph's suggestion,[158] Australia does not rely on any argument concerning the adequacy of the consideration provided by Zeph. Its argument is that Zeph was

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must have an ongoing 'active' role in the investment"), para. 311 (the definition of "investor" should not be "read … to require a greater degree of involvement in the management of the investment by Claimants than would otherwise be the case"), **Exh. CLA-190**.

151 *Vladislav Kim and others v. Republic of Uzbekistan* (ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017), para. 313, **Exh. CLA-190**.

152 *Id*., para. 312.

153 *Antonio del Valle Ruiz and Others v Kingdom of Spain* (PCA Case No. 2019-17, Final Award of 13 March 2023), **Exh. RLA-28**, cited at SODPO, para. 315.

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

155 *Id*., para. 373.

156 See para. 55 above and SOPO, paras. 150-159.

157 SODPO, paras. 322-329.

158 *Id*., paras. 330-334.

required to make an active contribution, which cannot be achieved if Zeph provided nothing of value.

(b) Likewise, despite Zeph dedicating attention to this issue,[159] Australia's argument regarding the need for an active contribution should not be conflated with an argument regarding the origin of capital. Australia's argument is not that Zeph is disqualified from being an "investor" because it made a contribution that was derived from a source other than itself (whether inside or outside Singapore or Australia). Its argument is that Zeph did not make an active contribution at all. The distinct nature of these two issues was recognised by the tribunal in *Komaksavia Airport Invest v Moldova*, in which the claimant similarly tried to conflate these issues. The tribunal responded by stating that its findings regarding the requirement for an active contribution had "nothing to do with the origin of capital used in investments, which was the subject of several of the cases Komaksavia cited".[160] It proceeded to state:

> "Whatever the ultimate origin of funds used by an investor, 'the capital must still be linked to the person purporting to have made an investment,' in the sense of proof that the putative investor itself actually engaged in the activity of investing, through making a contribution. In this case, there is no evidence that Komaksavia ever did. All that has been shown is that it received shares in Avia Invest. But as the *Quiborax* tribunal found, a distinction must be made between the objects (or 'legal materialization') of an investment, such as shares or title to property, and the action of investing, which requires some contribution of money or assets."[161]

(c) Zeph also relies on a miscellany of cases which it groups under the banner of addressing whether "value" needs to be "transferred into" the host State.[162] Those cases do not address the issue in dispute here.[163] *Abaclat v Argentina*[164] held that a party was not disqualified from being an "investor" because of "the allegedly remote

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159 SODPO, paras. 335-344.

160 *Komaksavia Airport Invest Ltd. v Republic of Moldova* (SCC Case No 2020/074, Final Award of 3 August 2022), para. 176, **Exh. RLA-63**.

161 *Ibid*. (internal citations omitted).

162 SODPO, paras. 325-329. As to *Gold Reserve v Venezuela*, the tribunal decision which Zeph cites at SODPO, para. 323 (*Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1, Award of 22 September 2014), **Exh. CLA-32** and **Exh. CLA-72**), was disagreed with on this question by the High Court of England and Wales: *Gold Reserve Inc v The Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm), [2016] 1 WLR 2829 (Teare J), **Exh. RLA-44**. The High Court's judgment has been analysed in detail in SOPO, paras. 151-154, as well as in the present ROPO, para. 71.

163 *Renée Rose Levy v Peru* (ICSID Case No. ARB/10/17, Award, 26 February 2014), para. 148, **Exh. CLA-188**, cited at SODPO, para. 326, is addressed at para. 71.

164 SODPO, para. 325.

connection between the security entitlements and the original underwriters and underlying bonds", but this was in circumstances where the security entitlements and bonds in question had already been found to qualify as "investments".[165] *Orascom v Algeria*[166] concerned whether the investor was required to hold the relevant investment "directly" or could have done so indirectly[167] – an issue which is not in dispute in the present case (as elaborated on below),[168] and which has been expressly distinguished from the question of whether a contribution has been made.[169] In *MNSS v Montenegro*,[170] the tribunal had "no difficulty" finding that the investor had made an investment because, "in acquiring shares, the investor made a financial contribution, incurred risk and expected a return, and the investment was for a certain duration".[171] In the paragraph cited by Zeph, all that the tribunal added was that, having made its initial investment, the investor was not required "to make further investments or be particularly active in the management of the investment".[172] And in *Flemingo v Poland*,[173] the term "investor" was defined in the relevant treaty exclusively with reference to (in the case of corporations) the place of incorporation, while the term "investment" included assets either "established" or "acquired" by an investor of the other State.[174] The tribunal held that "the inclusion of 'acquired' assets within the definition allows for investments that have already been made in Poland to fall within the scope of the Treaty as soon as they are acquired by an Indian investor".[175] Under the treaty, there was no requirement of an active contribution and thus that was not what was in issue.

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165 *Abaclat v Argentina* (ICSID Case No. ARB/07/5, Decision on Jurisdiction of 4 August 2011), paras. 411-412, **Exh. CLA-192**.

166 Cited at SODPO, footnote 338.

167 *Orascom TMT Investments Sarl v People's Democratic Republic of Algeria* (ICSID Case No. ARB/12/35, Award of 31 May 2017), para. 382, **Exh. CLA-193**.

168 See further paras. 109-113 below.

169 *Antonio del Valle Ruiz and Others v Kingdom of Spain* (PCA Case No. 2019-17, Final Award of 13 March 2023), paras. 314-328, 372, **Exh. RLA-28**; *Sergei Viktorovich Pugachev v The Russian Federation* (Award on Jurisdiction of 18 June 2020), para. 412, **Exh. RLA-34**. The same distinction was drawn by the Swiss Federal Tribunal in *Clorox v Venezuela I* (Swiss Federal Tribunal, 2020), para. 3.4.2.3, **Exh. RLA-144**.

170 Cited at SODPO, para. 327.

171 *MNSS B.V. v Montenegro* (ICSID Case No. ARB(AF)/12/8, Award of 4 May 2016), para. 202, **Exh. CLA-194**.

172 *Id*., para. 204.

173 Cited at SODPO, paras. 328-329.

174 *Flemingo DutyFree Shop Private Limited v The Republic of Poland* (UNCITRAL, Award of 12 August 2016), paras. 313, 324, **Exh. RLA-48**.

175 *Id*., para. 324 (emphasis in original).

B. ZEPH DID NOT MAKE A CONTRIBUTION AND THUS IS NOT AN "INVESTOR"

62. As stated above, Australia has already shown that Zeph did not make a contribution either through its acquisition of the shares in Mineralogy or subsequently. Zeph, however, contends that it did make a contribution in three forms: (i) by way of its initial acquisition of Mineralogy shares in exchange for shares in itself; (ii) by way of its asserted involvement in the management of Mineralogy; and/or (iii) by way of profits which Mineralogy has not distributed as dividends.

63. None of those matters show that Zeph has made a contribution. Each is addressed in turn below.

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

64. Zeph goes to some length to demonstrate that the Zeph Share Swap was a valid and effective transaction,[176] noting that the Share Purchase Agreement between Zeph and MIL was "a detailed, 12-page document" which had been "prepared by the reputable law firms representing the parties to the transaction", and that the transaction complied with relevant laws and regulations.[177] Zeph's focus on those matters is surprising, as Australia does not dispute that the share swap was both lawful and effective in transferring ownership of the shares in Mineralogy to Zeph. However, notwithstanding Zeph's claim to the contrary,[178] it does not follow that Zeph "made" an investment in Australia through this transaction, as is required in order for it to qualify as an "investor" under Article 2(d) of Chapter 11 of AANZFTA.

65. Australia has previously described the two transactions by which MIL and Zeph were inserted into the corporate chain above Mineralogy.[179] It is recalled that the Zeph Share Swap occurred on 29 January 2019 and that in this transaction:

(a) Zeph (which had only recently been incorporated, and which at that time was known as MIPL) issued 6,002,896 new ordinary shares to MIL; and

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176 SODPO, paras. 230-237.
177 *Id*., paras. 233, 235.
178 *Id*., paras. 280-283.
179 SOPO, paras. 164-177.

(b) MIL transferred all 6,002,896 of Mineralogy's shares to Zeph.[180]

66. As is plain, and as Professor Lys has confirmed, as a result of this transaction, "Zeph was a 'shell' that held all the previously issued Mineralogy shares".[181] No cash exchanged hands in this transaction.[182] Further, as a matter of accounting treatment, it is clear that the new corporate structure reflects the economic reality that Mineralogy is the accounting parent of the group.[183] Substantively, Zeph did not contribute anything to Mineralogy.[184]

67. Zeph responds in three ways, none of which has any merit.

68. First, Zeph misrepresents Australia's argument as being that an investment can never be made through a cashless transaction.[185] That is not Australia's position. What is required of an investor in order to "make" an investment is a contribution. A contribution will often take the form of a capital injection, but this is not essential. In this case, Zeph did not make any contribution, whether by way of capital or otherwise.

69. Second, Zeph claims that it "paid value for the shares [in Mineralogy] by transferring newly-issued, fully-paid 'Consideration Shares' to MIL".[186] That ignores the substance of the transaction. Immediately before it acquired the shares in Mineralogy, Zeph was an empty corporate vehicle. The shares it issued to MIL were therefore of no value whatsoever; as Professor Lys has explained, "the newly issued Zeph Consideration Shares had no intrinsic value".[187] Zeph has provided no answer to this basic point.

70. Documents produced by Zeph in the document production phase of these proceedings confirm this analysis. For example, the minutes of a meeting of the directors of Zeph (then MIPL) dated 29 January 2019 (i.e. the date of the Zeph Share Swap) stated that Zeph had "no assets and liabilities other than share capital of 1 fully paid ordinary share of SGD $1

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180 SOPO, paras. 169-170, citing Share Purchase Agreement between MIL and MIPL (Zeph) dated 29 January 2019 (Exhibit 20 to Annexure A to NoI), **Exh. C-63**, p. 168-181 (citation to PDF page number); Lys First Report, paras. 63-66; SOPO, paras. 169-170.

181 Lys First Report, para. 64.

182 Lys First Report, paras. 60, 180.

183 SOPO, para. 175, citing Lys First Report, paras. 76, 80.

184 SOPO, para. 176.

185 SODPO, paras. 256, 268, 281.

186 *Id*., para. 283.

187 Supplementary Lys Report, para. 36.

held by the initial member of the Company".[188] Further, the Share Purchase Agreement stated:

> "… the Buyer must on the Completion Date, allot and issue the Consideration Shares to the Seller, such that the Seller will receive a parcel of newly issued Consideration Shares in the Buyer being equal in number and value to the particular parcel of Mineralogy Shares …"[189]

As Professor Lys explains in his Supplementary Report, these documents reveal that "the Consideration Shares have no value outside of the exchange".[190] Zeph therefore did not make any "contribution" by acquiring shares in Mineralogy.

71. Third, Zeph refers to cases which it says show that "[a] share swap is a perfectly valid mechanism for making an investment".[191] For the avoidance of doubt, Australia does not deny that a share swap *may* constitute an active contribution in certain circumstances. Its case is that the Zeph Share Swap does not do so, because it did not entail Zeph providing anything of value. None of the cases which Zeph cites are inconsistent with Australia's position.

(a) It is recalled that, in *Gold Reserve*, Teare J (disagreeing with the analysis of the tribunal in that case) held that the "making" of an investment required an active contribution by the investor, which had not been achieved by the share swap in that case.[192] Zeph seeks to turn that case to its advantage by highlighting the finding that the putative investor had not made a contribution because the investor's shareholders had transferred the shares in question.[193] However, as a matter of substance, that is closely akin to the present case where Zeph issued shares but those shares had no value and Zeph was an empty corporate vehicle. In contrast, in *Gold Reserve*, the investor (the

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188 MIPL Minutes of Meeting of Directors dated 29 January 2019 (Exhibit 16 to Annexure A to NoI), **Exh. C-63**, p. 158 (citation to PDF page number).

189 Attachment to Exh. R-554: Share Purchase Agreement between MIL and MIPL dated 29 January 2019, **Exh. R-535**, p. 6, cl 2.3.

190 Lys Supplementary Report, para. 39. See also para. 37: "Because the Consideration Shares represent ownership of an enterprise with no assets and no intrinsic value immediately prior to the restructuring transaction, they have zero value outside of this exchange."; Attachment to R-554: Share Purchase Agreement between MIL and MIPL dated 29 January 2019, **Exh. R-535,** p. 6, cl. 2.3.

191 SODPO, para. 284.

192 *Gold Reserve Inc v The Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm), [2016] 1 WLR 2829, paras. 35, 37, 44 (Teare J), **Exh. RLA-44**.

193 SODPO, paras. 287-291.

subsidiary) was not an empty corporate vehicle, which is why it would have made a difference if it, rather than its shareholders, had been the one to transfer shares.

(b) As to *Clorox*,[194] the Swiss Federal Tribunal's judgment does not show that a share swap evidences an active contribution. In that case, as already highlighted,[195] the Swiss Federal Tribunal found that no active contribution was necessary pursuant to the relevant treaty.[196] Thus, it was not determining whether the share swap before it qualified as such a contribution. In fact, in the underlying arbitral proceedings, where the tribunal *did* consider that an active contribution was required, it held that an internal restructuring whereby the Spanish claimant had acquired the shares in the Venezuelan asset in exchange for issuing shares in itself to a US parent company did *not* amount to an investment.[197]

(c) In *Westwater v Türkiye*,[198] the transfer of shares was not the only contribution by the relevant investor. In determining that the investor had made a contribution, the tribunal stated:

> "While Westwater did not spend cash in the share swap, it paid for its investment in the form of its Treasury Shares. … Westwater brought to Turkey considerable uranium mining expertise and know-how as well as USD 1,283,000 in development expenditures."[199]

(d) In *Renergy v Spain*, although (as explained above) the tribunal did not find that the ECT required a putative investor to have made an active contribution, it nonetheless considered the requirement of an active contribution in the context of addressing the inherent characteristics of an investment under the ICSID Convention.[200] However, contrary to Zeph's suggestion,[201] this case lends no support to the idea that its share swap is sufficient to constitute a contribution. Instead, the *Renergy* tribunal found it

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194 Cited at SODPO, para. 293.
195 See para. 59 above.
196 *Clorox v Venezuela I* (Swiss Federal Tribunal, 2020), paras. 3.4.2.6-3.4.2.7, **Exh. RLA-144**.
197 *Clorox Spain S.L. v Bolivarian Republic of Venezuela* (PCA Case No. 2015-30, Award of 20 May 2019), para. 831, **Exh. RLA-148**.
198 Cited at SODPO, para. 294.
199 *Westwater Resources, Inc. v Republic of Türkiye*, ICSID Case No. ARB/18/46 of Award, 3 March 2023, para. 148, **Exh. CLA-187**.
200 *RENERGY S.à r.l. v Kingdom of Spain* (ICSID Case No. ARB/14/18, Award of 6 May 2022), para. 564, **Exh. CLA-179**.
201 SODPO, para. 295.

unquestionable that the investment in that case evidenced a contribution and other characteristics of an investment:

> "The Wind Farms and the CSP Plants as well as Claimant's indirect shareholding and loan participation in them are contributions to Spain's economy. These investments are designed for a period of at least 25 years and involve substantial risk as evidenced by the present dispute. Moreover, they have the potential to contribute to Spain's economic and social development."[202]

The claimant had paid EUR 72 million to acquire the relevant shareholding which gave it a shareholding in the 'Wind Farms'.[203] It further purchased an interest in the 'CSP Plants' for EUR 1 million.[204]

72. Zeph also refers to four cases that it says establish "the legitimacy of acquiring an investment through a corporate restructuring".[205] As stated above, Australia does not question that an acquisition by way of share swap is "legitimate" in the sense that it can be a lawful and valid transaction which effects a change in ownership. However, it does not follow that in all cases a share swap will entail the "making" of an investment. None of the cases cited by Zeph show otherwise.

(a) To the extent that *Tidewater v Venezuela*, *Aguas del Tunari v Bolivia* and *Mobil v Venezuela* addressed the propriety of corporate restructurings, they did so in the context of considering whether it had been abusive for the claimant to seek to pursue a claim following a restructuring carried out to obtain treaty protection; they did not consider whether the claimants had, in the course of the relevant restructuring, made a contribution.[206]

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202 *RENERGY S.à r.l. v Kingdom of Spain* (ICSID Case No. ARB/14/18, Award of 6 May 2022), para. 564, **Exh. CLA-179**.

203 *Id*., para. 121.

204 *Id.*, para. 126.

205 SODPO, para. 296.

206 See *Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe C.A. et al v The Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5, Decision on Jurisdiction of 8 February 2013), para. 184, **Exh. RLA-93**; *Aguas del Tunari SA v Republic of Bolivia* (ICSID Case No. ARB/02/3, Decision on Jurisdiction of 21 October 2005), para. 330, **Exh. CLA-185**; *Venezuela Holdings B.V. et al (formerly known as Mobil Corporation, Venezuela Holdings, B.V. et al) v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27, Decision on Jurisdiction of 10 June 2010), paras. 204-205, **Exh. RLA-92** (and see also paras. 196-197, noting that there was no dispute that the claimant had committed to investing USD 1.3 billion in the project and that it was "not disputed that the Claimants contributed their part to [the relevant] investments").

(b) As for *Levy v Peru*,[207] the paragraph to which Zeph refers does not concern the question of whether the investor made an investment; instead, it concerns whether the assets in question did not qualify as "investments" on the grounds that they "had no value because [the bank] had been illiquid and insolvent" at the time the relevant treaty came into force.[208] In the present case, Australia's objection has nothing do with the underlying investment (Mineralogy) itself lacking value at the time Zeph acquired shares in it. Even putting that issue aside, the facts in *Levy* are clearly distinguishable from this case. The tribunal in *Levy* emphasised that, prior to the claimants' acquisition of shares, there had been a contribution by another French national (i.e. another person entitled to invoke the treaty protections) and that the treaty-protected investment had entailed risk, had existed for some duration and had contributed to the development of Peru.[209] Similar facts do not arise in the present case.[210]

73. Zeph has therefore failed to establish that, by acquiring shares through the Zeph Share Swap, it made any active contribution as is necessary for it to qualify as an investor under Article 2(d) of Chapter 11 of AANZFTA.

(ii) Zeph has not made a contribution in the form of management of Mineralogy

74. Next, Zeph claims that it has made a contribution on the grounds that it has "played an active role in managing Mineralogy".[211]

75. There are certainly cases to the effect that contributing sector-specific expertise and know-how can be one component of a contribution relevant to whether an investment has been

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207 Cited at SODPO, paras. 296, 326.

208 *Renée Rose Levy v Peru* (ICSID Case No. ARB/10/17, Award of 26 February 2014), para. 147-148, **Exh. CLA-188**. It was in response to that argument that the tribunal emphasised the "very considerable investments" which had been made by the parties from whom the claimant acquired her shares and other rights, meaning that it could not be said that "the investment … was valueless". Subsequently, the tribunal briefly addressed the separate question of whether there had been an investment meeting the requirements of the ICSID Convention. The Respondent's argument turned on essentially the same question as to whether the investment had had any value when the claimant had acquired it. See the respondent State's submissions at *Id*., paras. 118(c), 121-122.

209 *Id.*, paras. 134, 141, 151.

210 Given that the facts are clearly distinguishable in any event, the Tribunal in the present case need not consider the persuasiveness of the legal analysis in *Renée Rose Levy*. Australia notes that the *Levy* tribunal's reasoning on this issue is only two paragraphs long, does not refer to any of the numerous cases on the fundamental characteristics of an investment, and appeared (contrary to other cases) to consider this not to be a jurisdictional issue: *Id*., paras. 151-152, **Exh. CLA-188**. There is thus some doubt about whether it was correctly decided, even on its own facts.

211 SODPO, para. 248.

made. However, the cases where this has been accepted have all had concrete evidence of the nature and reality of this contribution.[212] This is consistent with the fact that "one of the main goals that is sought with foreign investment is to improve the management skills of domestic companies".[213]

76. In the present case, Zeph goes so far as to assert that it "is closely involved in, and monitors, all aspects of Mineralogy's business including its investments".[214] But its SODPO proves no such thing. All it shows is that there is some overlap between the corporate officers of Zeph and Mineralogy. And, in fact, confirming that Zeph made no contribution, all of the individuals to whom the SODPO refers[215] in the context of this argument were involved in Mineralogy before being involved in Zeph:

(a) Mr Palmer has held various roles (including as a director) in Mineralogy since the 1980s.[216] He has served as a director of Mineralogy for almost all of the company's

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212 *Westwater Resources, Inc. v Republic of Türkiye*, ICSID Case No. ARB/18/46, Award, 3 March 2023, para. 148 (referring to, along with significant cash contributions, "considerable uranium mining expertise and know-how"), **Exh. CLA-187**; *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco* (ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001), para. 53 ("It is not disputed that they used their know-how, that they provided the necessary equipment and qualified personnel for the accomplishment of the works, that they set up the production tool on the building site, that they obtained loans enabling them to finance the purchases necessary to carry out the works and to pay the salaries of the workforce, and finally that they agreed to the issuing of bank guarantees", **Exh. RLA-54**; *Luigiterzo Bosca v Republic of Lithuania* (PCA Case No. 2011-05, Award of 17 May 2013), para. 168 (finding that "the Claimant contributed considerable know-how to Boslita during the duration of the Service Agreement", in light of "the totality of the evidence submitted by the Parties, such as the list of services the Claimant provided under that Service Agreement, his many trips to Lithuania during the relevant time, his testimony and that of Dr. Skorupskas to that effect … as well as the payment he received in return for his services"), **Exh. RLA-128**; *Rasia FZE and Joseph K. Borkowski v Republic of Armenia* (ICSID Case No. ARB/18/28, Award of 20 January 2023), para. 394 (referring to non-monetary contributions "including specifically Rasia's use of its 'business connections' to offer Armenia the 'advantage[s]' of specialized know-how and capital from third parties"), **Exh. RLA-129**. It is also to be borne in mind in considering a contribution by way of management that, under the AANZFTA, the treaty parties envisaged that there would be an initial contribution of capital (Article 8(1)(a)).

213 *OI European Group v Venezuela* (ICSID Case No. ARB/11/25, Award of 10 March 2015), para. 245, **Exh. CLA-189**.

214 SODPO, para. 249.

215 SODPO, paras. 248-249, referring to Palmer Fifth WS, paras. 30-39.

216 Mr Palmer's longstanding connection to Mineralogy is well-documented. See, for example: Frank Robson, "The Palmersaurus party", *The Sydney Morning Herald* (20 July 2013), at https://www.smh.com.au/national/the-palmersaurus-party-20130715-2pyvl.html (last accessed 9 July 2024), **Exh. R-606** ("In 1984 he set up his principal company, Mineralogy"); *Parbery v QNI Metals Pty Ltd* [2018] QSC 107, **Exh. R-165**, para. 6(c) ("A second group of companies, of which Mr Palmer is also both a director and the ultimate beneficial owner, namely … Mineralogy Pty Ltd"); Richard Pallardy, "Clive Palmer", *Britannica Money*, at https://www.britannica.com/money/Clive-Palmer (last accessed 9 July 2024), **Exh. R-607** ("In 1984 he established the mining concern Mineralogy, which acquired gold and iron deposits in Western Australia …"); Various Mineralogy website pages, available at https://mineralogy.com.au/ (last accessed on 9 July 2024), **Exh. R-608**, p. 6 ("Mr Palmer stated … 'The

existence.[217] Self-evidently, his involvement in Mineralogy significantly predates his appointment as a director of Zeph, which occurred on 23 January 2019.[218]

(b) Declan Sheridan, who was appointed a director of Zeph on 28 February 2019,[219] was already employed by Mineralogy as its Head of Finance and Financial Relationships.[220] He is resident in Australia.[221]

(c) Baljeet Singh was employed by Mineralogy on 14 January 2019 and became a director of Mineralogy on 9 November 2020 (having previously served as a director from 31 July 2012 until 21 January 2013).[222] She was appointed a director of Zeph on 22 October 2021.[223] She is resident in Australia.[224]

(d) Emily Palmer, who was appointed a director of Zeph on 28 February 2019,[225] was already involved in Mineralogy's operations as Mineralogy's Administration Manager and [redacted] at the time of Zeph's incorporation.[226] She is a resident of Australia,[227] and was director of Mineralogy from 13 May 2021 to 23 August 2021.[228]

(e) Chitondo Mashayanyika was a director and Chief Investment Officer of the Claimant from 21 January 2019 to 12 February 2021.[229] Mr Palmer's evidence is that,

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ASIC summons relates to two payments that were paid by Mineralogy from its own account with its own money approved by its sole director and its sole beneficial shareholder, me'"); Waratah Coal, ASX Announcement, "Mineralogy to take up additional Waratah shares and prepares for compulsory acquisition" (13 January 2009), **Exh. R-609** ("Mineralogy is a privately-held Australian resource company controlled by Professor Clive Palmer that is engaged in the exploration for and development of mineral resources"). See also ASIC, Current & Historical Company Extract of Mineralogy Pty Ltd, extracted on 9 February 2023, **Exh. C-74**.

217 Lys Supplementary Report, para. 310.

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

219 *Ibid*.

220 Palmer Fifth WS, para. 34; ACRA, Register of Directors of Zeph Investments Pte Ltd dated 2 February 2023), **Exh. C-73**.

221 Statutory Declaration of [redacted], 19 June 2020, para. 2, **Exh. C-146**.

222 Palmer Fifth WS, para. 35; ASIC, Current & Historical Company Extract of Mineralogy Pty Ltd, extracted on 9 February 2023, **Exh. C-74** (also serving as Company Secretary from 23 November 2020).

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

224 *Ibid*.

225 *Ibid*.

226 SODPO, para. 34; Palmer Fifth WS, para. 34.

227 Palmer Fifth WS, para. 34.

228 See **Exh. C-74**.

229 Palmer Fifth WS, para. 32, citing ACRA, Register of Directors of Zeph Investments Pte Ltd dated 2 February 2023), **Exh. C-73**; Statutory Declaration of [redacted] (attachment to

throughout this period, he was Chief Financial Officer at Mineralogy and a resident of Australia.[230]

(f) Bernard Wong has been employed as Group Chief Financial Officer and Finance Director of the Mineralogy Group of Companies since March 2021.[231] He was appointed as Executive Director and Chief Investment Officer of Zeph no earlier than August 2021.[232] He is resident in Australia.[233]

77. Zeph has not provided any specific information as to which Zeph directors were involved in which of Mineralogy's activities, nor the specific duties that they had.[234] Indeed, it is noted that (as shown in documents disclosed by Zeph) there are Mineralogy Board documents signed solely by Mr Palmer, without other Board members (including those overlapping with Zeph's Board) being involved at all.[235] There is, moreover, "no evidence that anything substantially changed" vis-à-vis the governance and management of Mineralogy following the interposition of Zeph following the corporate restructure.[236]

78. Further, from a tax perspective and as Professor Cooper has indicated, the insertion of MIL and Zeph into Mineralogy's corporate chain could have had highly adverse tax implications for the entire Mineralogy Group unless they were both treated as Australian resident companies, for which purpose it was necessary for them to be managed and controlled from Australia.[237] Thus, by far the most credible explanation for the overlap in personnel between Zeph and Mineralogy was not any sort of contribution by Zeph, but rather: Mr Palmer's desire, under Australian tax law, for Zeph to be regarded as managed and controlled from Australia, such that it would be treated as an Australian tax resident.[238]

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letter from Volterra Fietta to the Office of International Law of the Attorney-General's Department of Australia dated 21 January 2021), **Exh. C-154**.

230 Palmer Fifth WS, para. 32. As well, Mr Mashayanyika served as a director of Mineralogy from 4 to 23 November 2020 and Company Secretary from 24 October to 11 November 2019 and 9 to 23 November 2020: ASIC, Current & Historical Company Extract of Mineralogy Pty Ltd, extracted on 9 February 2023, **Exh. C-74**.

231 LinkedIn Profile of Mr Bernard Wong, screenshot dated 29 October 2023, **Exh. R-344**.

232 *Ibid*. Zeph's corporate records indicate that Mr Wong became a director only on 22 October 2021: ACRA, Register of Directors of Zeph Investments Pte Ltd dated 2 February 2023, **Exh. C-73**.

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

234 Lys Supplementary Report, para. 147.

235 See, e.g., Signed resolution of directors of Mineralogy Pty Ltd dated 2 December 2019, **Exh. R-610.**

236 Lys Supplementary Report, para. 149.

237 Cooper Report, paras. 18-19, 21, 24-27, Appendix C Section 1.3.

238 *Id*., para. 24. See paras. 234-237 below.

79. Accordingly, all that Zeph has established is that certain personnel with a pre-existing role within Mineralogy have also been given roles within Zeph.[239] Professor Lys illustrates this point as follows:

> "151. Consider for example Mr. Wong who is both Zeph's CIO and Mineralogy's CFO. Mr Wong's activities as Zeph's CIO are supervised by Zeph's board of directors (of which he is a member). In contrast, his activities as Mineralogy's CFO are supervised by Mineralogy's board of directors. Moreover, these dual roles are independent from each other. Even if Mr. Wong were not Zeph's CIO, he still could/would perform his duties as Mineralogy's CFO. Similarly, if he were not Mineralogy's CFO, he still could/would perform his duties as Zeph's CIO. I am unconvinced by the assertion that Mr Wong is "actively involved in the day-to-day operations" of Mineralogy in his capacity as Zeph's CIO as opposed to in his capacity as Mineralogy's CFO.
>
> 153. Similarly, Mr. Palmer's managerial involvement in Mineralogy is in his capacity as CEO of Mineralogy, and not in his capacity as a board member of Zeph. Also, Mr. Palmer and Ms. Emily Palmer execute their [redacted] privileges at Mineralogy in their capacities as Mineralogy executives (where he is the CEO and director, and she is "administration manager" and director during 2021).
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> 154. The same applies to Mr. Sheridan, who is on Mineralogy's management team in Australia as Head of Finance and Financial Relationships, and is also a director of Zeph. His activities as a manager of Mineralogy are supervised by Mineralogy's board of directors and although there is insufficient information in the record, economic logic implies that he is being compensated by Mineralogy (and not by Zeph) for his managerial activities at Mineralogy."[240]

80. Zeph has thus not established (and could not establish) that the overlapping appointments of these individuals to roles within Mineralogy and Zeph shows that Zeph has made a contribution to Mineralogy by way of 'active management'.

(iii) Zeph has not made a contribution by reinvesting returns

81. Zeph places great weight on the assertion that it has made an investment in the form of reinvesting returns in Mineralogy.[241] However, this argument is misconceived and also fails on the facts: Zeph has not, in fact, made any contribution in this form.

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239 There are only two directors of Zeph who had no pre-existing roles with Mineralogy. These two individuals, who are based in Singapore, are not said to have any role with Mineralogy: see Palmer Fifth WS, para. 37; see also Lys Supplementary Report, Appendix A (Board of Directors Analysis), paras. 309-323.

240 Lys Supplementary Report, paras. 151-154, citations omitted.

241 SODPO, paras. 238-243, 297-307, 345(b).

82. Zeph's argument relies on the text in Article 2(c) of Chapter 11 of AANZFTA, which states:

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

83. It is an explicit requirement of Article 2(c) that only "returns that are invested" qualify as investments. It follows that Zeph must have received a "return" and must have "invested" it in order for this part of Article 2(c) to be engaged. A profit (or other form of return) of Mineralogy does not fall within this term.

84. Article 2(j) defines a return as "an amount yielded by or derived from an investment, including profits, dividends, interest, capital gains, royalties and all other lawful income". It follows that the existence of a "return" is predicated on there having been an "investment" in the first place by which the putative return is yielded or from which it is derived. This is consistent with the finding in *Inmaris v Ukraine*, where a protocol to the relevant treaty referred to "[r]eturns from the investment". The tribunal confirmed that this provision showed that the parties "conceive[d] of 'returns' and 'the investment' as distinct concepts" and further held that the "Treaty protection for 'returns from the investment' is predicated on the existence of 'the' covered investment from which the returns are generated", meaning that it "could not be stretched to give BIT protection to returns from a transaction that is not an investment".[242] In this case, as set out above, Zeph has not established the existence of an investment separate from the putative "returns" (either in the form of the initial share swap or any involvement in the management of Mineralogy), and thus there can be no "returns" within the meaning of Article 2(j). That point, by itself, is sufficient reason to reject Zeph's argument about reinvesting returns.

85. Further, independently of this key point on interpretation, Zeph's argument also fails on the facts. Its argument is premised solely on the fact that Mineralogy earned profits which it could have distributed, but did not distribute, as dividends. Specifically, it claims that Mineralogy's "retained profits each constitute separate investments under the AANZFTA",[243] because "Mineralogy held these funds in Australia and [they] thus remained at Mineralogy's disposal to further invest and develop its activities within the territory of Australia".[244] However, as is developed further below, if Mineralogy decides not to distribute

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242 *Inmaris Perestroika Sailing Maritime Services GmbH and others v Ukraine* (ICSID Case No. ARB/08/8, Decision on Jurisdiction of 8 March 2010), paras. 105-106, **Exh. RLA-149**.

243 SODPO, para. 243 (and see also para. 307).

244 *Id*., para. 304.

any profits as dividends, that is a decision for Mineralogy. Under Mineralogy's Constitution, Zeph, as the sole shareholder, had no right to receive dividends. It was only if Mineralogy chose to declare a dividend to Zeph that any question could have arisen as to Zeph reinvesting such dividends. Only to the extent that this occurred could any question arise as to whether Zeph decided to reinvest dividends. But Zeph has not identified any evidence that it made such a decision (and, indeed, it claims to have reinvested profits that it never had any entitlement to receive). It thus cannot be said that these retained profits are "returns that are invested", as required by Article 2(c).

86. The case on which Zeph relies,[245] *OI European Group v Venezuela*, only reinforces Australia's position. As would be expected, it suggests that a return could only be taken as having been invested by an investor when the shareholder (the investor) has taken some active decision. It states that a shareholder will make "a contribution of cash to the company" when it "decides not to collect profits in full".[246] In such circumstances, it has consciously "relinquished" a benefit, "waiving a right" to receive the profit by way of dividend, and has correspondingly enriched the company.[247] The tribunal in that case specifically denied that the "investor ha[d] remained inactive", given that:

> "The creation of a reserve requires an agreement of the company's governing bodies, controlled by the OIEG, in which it decides to distribute only part of the profits, and apply the rest to reserves."[248]

87. Thus, in that case, the investor (OIEG) controlled the governing bodies which decided not to distribute the profits in question as dividends and instead to retain them within the subsidiary company.

88. The present case bears no resemblance to *OI European Group*. Zeph has not filed evidence to show that either: (i) Zeph declined to accept or decided to reinvest any dividends declared by Mineralogy; or (ii) Zeph was in any way involved in any decision by Mineralogy to reserve profits instead of declaring a dividend, let alone in directing how those reserves should be reinvested. There is not even on the record any evidence that Mineralogy made a decision to reserve cash that would otherwise have been paid out as a dividend. Even if a

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245 SODPO, para. 299.

246 *OI European Group v Venezuela* (ICSID Case No. ARB/11/25, Award of 10 March 2015), para. 241, **Exh. CLA-189** (emphasis added).

247 *Ibid*.

248 *Id*., para. 244.

decision of that last kind had been made, that would reflect a reinvestment by Mineralogy and not Zeph. As Professor Lys explains (emphasis in original):

> "Importantly, … neither Mr. Palmer nor Mr. Birkett provide any economic analysis on how or why Mineralogy retaining earnings and reserves (as opposed to paying them out as dividends) constitutes an investment by Zeph in Mineralogy. To be clear, the issue is not whether, from an economics perspective, Mineralogy's retention of earnings and reserves is an investment (or reinvestment) **by Mineralogy** in its operations. Rather, the issue is whether, from an economics perspective, retention of profits by Mineralogy is an investment **by Zeph** in Mineralogy in Australia."[249]

89. The need for active decision-making in this regard is evident in Mineralogy's own corporate documentation:

(a) The Constitution of Mineralogy as adopted in 2002 provides that dividends must be specifically "declare[d]" by the Company in general meeting.[250] Clause 31.1 clearly states that "[Mineralogy] in general meeting may declare a dividend if, and only if the directors have recommended a dividend and such dividend shall not exceed the amount recommended by the directors".[251]

(b) The Constitution also specifically distinguishes between profits and dividends. It provides that "before recommending any dividend," the directors may "set aside out of the profits of the Company such sums as they think proper as reserves" and "the reserves may, at the discretion of the directors, be used in the business of the Company or be invested in such investments as the directors think fit".[252] Further, the directors "may carry forward so much of the profits remaining as they consider ought not to be distributed as dividends without transferring those profits to a reserve".[253] This indicates that reserved profits must also be specifically identified by a decision of the directors and/or that their reinvestment could follow only if such a decision had been made. Again, Zeph has not provided any evidence of such a decision having been made in this case – let alone that it played any role in relation to any such decision.

90. As Professor Lys observes:

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249 Lys Supplementary Report, para. 94.
250 Company Constitution of Mineralogy Pty Ltd dated 3 May 2002, **Exh. C-553**, cl. 31.1.
251 *Id*., p. 33, cl. 31.1.
252 *Id*., p. 33, cls. 31.4, 31.5.
253 *Id*., cl. 31.6.

> "61. In 2019 Mineralogy's directors did not recommend any dividends and Mineralogy did not pay any dividends. Thus, irrespective of any amounts compiled by Mr. Birkett, Zeph was not entitled to any dividends and therefore, from an economics perspective, could not have invested any amount in Mineralogy.
>
> 62. In 2020, the directors recommended, the member approved, and Mineralogy declared and paid AUD $8,115,000 in dividends. However, based on the plain English reading of Mineralogy's Constitution, Zeph was not entitled to receive any amounts in excess of the AUD $8,115,000, and therefore could not have "reinvested" any amounts in excess of the AUD $8,115,000.
>
> 63. Thus, as a matter of the procedures defined by Mineralogy's Constitution, the amounts compiled by Mr. Birkett … are irrelevant. Zeph did not invest any of the AUD $8,115,000 and, since it was not entitled to receive any additional amounts, Zeph did not make any real, implicit, or even hypothetical, investments in Mineralogy in either fiscal 2019 or fiscal 2020."[254]

91. Mr Palmer's Fifth Witness Statement is not persuasive on this issue. He claims that, for the financial years ending 30 June 2019 and 20 June 2020, he, in his "capacity as a director of Mineralogy", approved Mineralogy's annual accounts, and that then Mineralogy's accounts were approved by Zeph (as Mineralogy's sole shareholder).[255] He seeks to suggest that a decision by Zeph to forego a dividend is in some way implicit in its approval of the annual accounts, stating:

> "In approving the accounts, the Claimant made the decision reflected in the Approved Accounts that the amount of dividend that Mineralogy would retain in Australia and not pay to the Claimant by way of a dividend for the Account Years exceeded $240 million. … [T]he Claimant made the decision not to pay out those amounts by way of dividend by approving Mineralogy Accounts for the Account Years."[256]

92. Mr Palmer's own description makes clear that, to the extent his own conduct in approving the accounts is concerned, he was acting in his capacity as a director of Mineralogy and not on behalf of Zeph.[257] It is also clear that, in merely approving the accounts as Mineralogy's shareholder, Zeph was not making any decision about dividends; it lacked the power to do so. The power to determine whether a dividend should be declared is expressly conferred

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254 Lys Supplementary Report, paras. 61-63, citations omitted.
255 Palmer Fifth WS, para. 42.
256 *Ibid*.
257 *Ibid*.; and see Lys Supplementary Report, paras. 153.

under Clause 30 of the Mineralogy Constitution and is vested exclusively in the company's Board, rather than its shareholders.[258] As Professor Lys observes:

> "Mineralogy's Constitution clearly separates the roles of directors and members (e.g., shareholders): Directors solely control if (and to what extent) accounting records are open to shareholders who do not have the right to inspect any document. It is clear from this passage that without the inherent right to even look at any documents, shareholders also do not have the inherent right to approve Mineralogy's financials.
>
> … Mr. Palmer's statement is in direct conflict with Mineralogy's Constitution which clearly indicates that Mineralogy's directors propose a dividend and members (i.e. Zeph) can only approve dividends proposed by Mineralogy's directors."[259]

93. The simple fact is that Zeph had no power to decide whether or not Mineralogy paid a dividend, that being a decision for Mineralogy alone (as explained in paragraph 92 above).[260] It having had no power to decide whether Mineralogy reinvested profits, to the extent that occurred, it cannot have been a reinvestment by Zeph. That is a further fatal problem with this branch of Zeph's argument.

94. Zeph seeks to derive assistance from an expert report produced by Mr Scott Birkett. Mr Birkett claims to be an "independent expert",[261] and Zeph also refers to him as such.[262] However, Mr Birkett's profile on the BDO website discloses that he has performed "over more than (sic) twenty valuations for utilities and mining assets, including: … Mineralogy",[263] and BDO has also provided a letter of advice to Zeph regarding Mr Palmer's residency for taxation purposes, on which Zeph relies.[264] But even putting this aside, Mr Birkett's report does not assist the Tribunal in any way. All that his report shows is that, across relevant years, Mineralogy had certain funds available to it, and he alleges that these

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258 Company Constitution of Mineralogy Pty Ltd dated 3 May 2002, **Exh. C-553**.
259 Lys Supplementary Report, paras. 158, 160.
260 Company Constitution of Mineralogy Pty Ltd dated 3 May 2002, **Exh. C-553**, cl. 31.1.
261 Birkett Report, para. 6.
262 SODPO, para. 239.
263 See BDO Profile, Scott Birkett, at https://www.bdo.com.au/en-au/our-people.scott-birkett (last accessed 28 May 2024), **Exh. R-782**. Mr Birkett and/or the company with which he is affiliated, BDO (Birkett Report, para. 3), appear to have provided professional services to the Mineralogy Group, and to other companies controlled by Mr Palmer, from at least 2014 onwards, in domestic Australian litigations and other commercial contexts. See, e.g., *Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 5]* [2014] WASC 471, para. 13, **Exh. R-784**; *Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 16]* [2017] WASC 340, paras. 222, 234, 607, 763-765, **Exh. CLA-5**; *Parbery v QNI Metals Pty Ltd (No. 15)* [2020] QSC 143, paras. 167, 179, 254, **Exh. R-836**.
264 **Exh. C-495**.

amounts exceeded the sums which it distributed as dividends. Professor Lys provides detailed analysis of why Mr Birkett's analysis is flatly incorrect from an accounting perspective as he relies on certain accrual amounts which do not in fact reflect the cash which Mineralogy had available to distribute as dividends.[265] Beyond Mr Birkett's wrongful conflation of different accounting measures, his analysis does not get Zeph anywhere. He provides no substantive analysis that could support his conclusion that any funds held by Mineralogy which could hypothetically have been distributed as dividends constitute an investment by Zeph. Rather, as appears obvious, and as Professor Lys has confirmed, "the Claimant posed a leading question to Mr Birkett who then simply repeated that same language in his report but did not provide any analysis supporting the claim that the retention of funds by Mineralogy is an investment by Zeph".[266]

95. In short:

(a) There was no prior "investment", and thus there can be no "return" which has been "yielded by or derived from an investment"; and

(b) Zeph did not make any decision to relinquish dividends, thereby enriching Mineralogy.

96. Zeph's claim to have made a contribution (through no act of its own) by Mineralogy not declaring dividends should therefore be rejected.

C. CONCLUSION ON "NO INVESTOR" OBJECTION

97. In light of the above, Australia repeats its First Preliminary Objection that Zeph has not "made" an investment in Australia, given its failure to establish any sort of active contribution. It follows that Zeph is not an "investor of a Party" under Article 2(d) of Chapter 11 of AANZFTA, meaning that it is not a "disputing investor" under Article 18(4)(e) and thus is not entitled to submit a claim to arbitration under Article 21. Its claims are therefore outside the Tribunal's jurisdiction and should be dismissed.

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265 Lys Supplementary Report, paras. 95(a), 96-124.

266 *Id*., para. 89. See also para. 96: "[I]n essence, all Mr. Birkett does is transcribe balances from Mineralogy's financial statements." The Supreme Court of Western Australia has in previous proceedings involving Mineralogy similar described Mr Birkett as playing a purely computational role involving no substantive analysis. In *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 16)* [2017] WASC 340, para. 765, Kenneth Martin J described Mr Birkett's role as "to act as, essentially, a 'human calculator": **Exh. CLA-5**.

IV. ZEPH HAS NOT ESTABLISHED THE EXISTENCE OF A RELEVANT "INVESTMENT"

98. Australia established in Section IV of the SOPO that Zeph's claims are outside the Tribunal's jurisdiction because Zeph has not established the existence of an "investment" and thus there can be no "investment dispute" within the meaning of Article 20 of Chapter 11 of AANZFTA. This is because Zeph has not established that any of its asserted "investments" bear the fundamental characteristics which are inherent to that term.

99. In its SODPO, Zeph has failed to engage with the argument actually made, instead raising cases dealing with the separate question of whether an investment must be direct or can also be indirect[267] (a point which Australia does not contest). It has also provided no meaningful response to the evidentiary position established by Australia regarding the lack of an "investment".[268]

A. THE CORRECT INTERPRETATION OF ARTICLE 2(C) OF CHAPTER 11 OF AANZFTA

100. Australia's position, set out in Section IV of SOPO, is that the ordinary meaning of the term "investment" in Article 2(c) of Chapter 11 of AANZFTA requires consideration of the inherent characteristics of an investment and, in particular, requires that there be some form of contribution by the investing party. Australia makes three further points in answer to Zeph's SODPO, focusing in turn on:

(a) The wording of Article 2(c), including its footnote 3;

(b) The context in which Article 2(c) appears; and

(c) The relevant (and irrelevant) cases.

101. First, AANZFTA protects only "covered investments", defined in Article 2(a) of Chapter 11 as "an investment in its territory of an investor of another Party", with "investment" defined in turn in Article 2(c) by reference to a non-exhaustive list of assets. It is plain that the AANZFTA parties' intention was <u>not</u> that every asset that could be said to fall within Article 2(c) would be an "investment" capable of attracting treaty protection. Indeed, the footnote (footnote 3) to "claims to money or to any contractual performance" states "for greater certainty" that "investment does not mean claims to money that arise solely from: (a)

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267 SODPO, paras. 354-357.
268 SOPO, paras. 197-199.

commercial contracts for sale of goods or services; or (b) the extension of credit in connection with such commercial contracts". This is expressly cast as a clarification, rather than as a free-standing carve out. It follows that, on the correct interpretation, Article 2(c) would anyway exclude such assets – because assets such as a claim to money under a commercial contract for the sale of goods or services lack the inherent characteristics of an investment. This reveals the intention of the parties more generally so far as concerns Article 2(c), i.e. that the term "investment" has an inherent meaning.

102. Second, the same conclusion follows also from a consideration of the context. As to this:

(a) As already discussed in Section III above, Article 2(c) provides that: "For the purpose of the definition of investment in this Article, returns that are invested shall be treated as investments …", while Article 2(j) states that "return means an amount yielded by or derived from an investment, including profits, dividends …". Thus, the treaty parties proceeded on the basis that, in the usual course, investments would be capable of yielding returns, which is one of the frequently cited inherent characteristics of an investment (as opposed to a stagnant or dormant "asset").

(b) Article 8(1) provides that the treaty parties "shall allow all transfers relating to a covered investment to be made freely …" and then establishes a non-exclusive list as follows:

> "Such transfers include:
> (a) contributions to capital, including the initial contribution;
> …".

It follows that the treaty parties envisaged that an investment would involve some form of "initial contribution", as is consistent with Australia's interpretation.

103. Third, Australia's interpretation of Article 2(c) is supported by a significant body of cases that support the point that the term "investment" has an inherent meaning, necessitating consideration of certain fundamental characteristics, including the making of a contribution. The relevant cases, arising in both the ICSID and non-ICSID context (including under the UNCITRAL Rules), are canvassed in the SOPO.[269]

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269 SOPO, paras. 188-193.

104. In addition to the cases cited in the SOPO, in the recent case of *Rasia v Armenia* (determined by an experienced tribunal consisting of Jean Kalicki, John Beechey CBE and J. Christopher Thomas KC), the tribunal stated that "inherent in the ordinary meaning of 'investment' is some *contribution of resources* which is made in an attempt to earn a return over a period of time, a process that necessarily involves the possibility or risk of not earning a return".[270] In persuasive reasoning, the Tribunal explained that the fact that the BIT contained a non-exhaustive list of assets, which could qualify as investments, "cannot trump the objective, ordinary meaning of the word 'investment'".[271] Thus, it was stated:

> "As the Romak tribunal and others have observed, unless the term 'investment' is given some inherent meaning, the non-exclusive nature of the asset list in most BITs provides no benchmark by which a tribunal could evaluate the qualifications of other forms of assets outside the illustrative list. Without any such benchmark, the circularity of the rest of Article I(1)(a)'s definition of 'investment' (that the term ''investment' means every kind of investment') provides no guidance whatsoever as to the evaluation of non-listed assets. The same is true for the common formulation in other BITs, which defines 'investment' sweepingly as 'every kind of asset.' Unless some intrinsic meaning is assigned to the term ['investment'], such general formulations risk permitting even transactions that bear none of the traditional hallmarks of investment to qualify as such".[272]

105. Although this was an ICSID case, the tribunal's reasoning explicitly also applied to the definition of the term "investment" in the underlying BIT, which did not expressly refer to the characteristics of an investment.[273] Based on its analysis, the tribunal concluded that "the objective definition of "investment" requires some contribution of resources of cognisable value".[274]

106. In a further recent case, *Gabriel Resources v Romania*, the UK–Romania BIT stated in Article 1(a) that ""investment" means "every kind of assert admitted in accordance with the laws and regulations in force in the territory of the Contracting Party in which the investment is made",[275] followed by a non-exhaustive list. The tribunal (consisting of Prof. Pierre D.

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270 *Rasia FZE and Joseph K. Borkowski v Republic of Armenia* (ICSID Case No. ARB/18/28, Award of 20 January 2023), para. 376, **Exh. RLA-129**.

271 *Id.*, para. 373.

272 *Ibid*.

273 *Id.*, paras. 372, 374.

274 *Id.*, para. 378.

275 *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Romania for the Promotion and Reciprocal Protection of Investments*, opened for signature on 13 July 1995, Treaty series No. 84 (1995) (entered into force 10 January 1996), Article 1(a), **Exh. RLA-165**.

Tercier, Prof. Horacio A. Grigera Naón and Prof. Zachary Douglas KC) held that, despite the relevant treaty containing a "rather broad definition" of the term "investment", that term has an "ordinary meaning" connoting "certain inherent characteristics that must be taken into account when determining jurisdiction *ratione materiae*".[276] It emphasised that "one should look for a concept of investment that distinguishes ordinary commercial transactions from genuine investments", recognising that the term "investment" is in investment treaties "an economic term of art, i.e., a cross-border activity that requires some type of contribution and generates an expectation of a commercial return".[277]

107. Such cases show that it is not sufficient for a given asset to fall within a broad asset-based definition in order to qualify as an "investment", because the ordinary meaning of the word directs attention to certain inherent core characteristics. This must be correct.

(a) It is this inherent meaning that explains why, for example, a foreign national who owns some minor asset, such as a car, in the host State does not thereby have an "investment". Further, such would not yield returns (cf. Articles 2(c) and (j)).

(b) The inherent meaning also means that treaty protection will not apply to individuals or companies that make no contribution to the host State.

(c) This approach gives effect to the ordinary meaning of the term "investment", consistent with orthodox rules of treaty interpretation (including context, i.e. the need for an "initial contribution" as per Article 8(1)(a)),[278] and also aligns with the object and purpose of AANZFTA.[279]

108. In its SODPO, Zeph does not engage with the cases to which Australia has referred and which are on point. It asserts that the incorporation of the inherent characteristics of an investment is specific to cases decided under the ICSID Convention.[280] This simply ignores the cases

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276 *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v Romania* (ICSID Case No. ARB/15/31, Award, 8 March 2024), paras. 647, 649, **Exh. RLA-150**.

277 *Id*., paras. 649-650.

278 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1908), Article 31(1), **CLA-17**.

279 SOPO, para. 194.

280 SODPO, para. 352.

which have persuasively reasoned that the term "investment" has an intrinsic meaning outside of the ICSID context.[281]

109. Instead, Zeph's SODPO focuses on a different and irrelevant target: it refers to cases which have found that, in treaties which do not distinguish between direct and indirect investments, both should be taken as included in the definition of investment.[282] Indeed, Zeph repeats the contention that Article 2(c) of Chapter 11 of AANZFTA encompasses both direct and indirect investments.[283] The passages quoted from *Siemens v Argentina*[284] and *Deutsche Telekom v India*[285] self-evidently deal with this issue. In addition, although not immediately apparent from the quotation in the SODPO itself, the passage cited from *Lee-Chin v Dominican Republic* is drawn from a section of the jurisdictional award addressing the respondent's objection that indirect investments were excluded from the treaty.[286] The same is true of the parts of the awards in *Cemex v Venezuela*,[287] *Anglo-American v Venezuela*[288] and *Kardossopoulos v Georgia*[289] which Zeph cites.

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281 The relevant authorities outside of the ICSID context are *Romak S.A. v Republic of Uzbekistan* (PCA Case No 2007-07/AA280, Award of 26 November 2009), paras. 180-181, 207, **Exh. RLA-60**; *Christian Doutremepuich and Antoine Doutremepuich v Republic of Mauritius* (PCA Case No 2018-37, Award on Jurisdiction of 23 August 2019), paras. 117-118, 125-126, **Exh. RLA-61**; *Komaksavia Airport Invest Ltd. v Republic of Moldova* (SCC Case No 2020/074, Final Award of 3 August 2022), para. 148, **Exh. RLA-63**; *Nova Scotia Power Incorporated v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/1, Excerpts of the Award of 30 April 2014), paras. 76-78, 80-81, 84, **Exh. RLA-64**; *Isolux Infrastructure Netherlands B.V. v Kingdom of Spain* (SCC Case No. V2013/153, Award of 12 July 2016), paras. 683-685, **Exh. RLA-65** (unofficial English translation of excerpts); *Air Canada v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/17/1, Award of 13 September 2021), paras. 293-294, **Exh. RLA-66**; *AMF Aircraftleasing Meier & Fischer GmbH & Co KG v Czech Republic* (PCA Case No 2017-15, Final Award of 11 May 2020), paras. 469-472, **Exh. RLA-49**; *Antonio del Valle Ruiz and Others v Kingdom of Spain* (PCA Case No 2019-17, Final Award of 13 March 2023), paras. 372-373, **Exh. RLA-28**.

282 SODPO, paras. 354-358.

283 See, e.g., *Id*., paras. 356, 358.

284 *Siemens A.G. v Argentina* (ICSID Case No. ARB/02/8, Decision on Jurisdiction of 3 August 2004), para. 137, **Exh. CLA-60**, cited at SODPO, para. 356.

285 *Deutsche Telekom v The Republic of India* (PCA Case No. 2014-10, Interim Award of 13 December 2017), para. 142, **Exh. CLA-201**.

286 *Lee-Chin v Dominican Republic* (ICSID Case No. UNCT/18/3, Jurisdiction Award of 15 July 2020), paras. 208-219, **Exh. CLA-39**, cited at SODPO, para. 354.

287 *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15, Decision on Jurisdiction of 30 December 2010), paras. 151-158, **Exh. CLA-62**, cited at SODPO, footnote 360.

288 *Anglo American PLC v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/14/1, Award of 18 January 2019), paras. 191-204, **Exh. CLA-63**, cited at SODPO, footnote 360.

289 *Ioannis Kardassopoulos v Georgia* (ICSID Case No. ARB/05/18, Decision on Jurisdiction of 6 July 2007), paras. 123-124, **Exh. CLA-64**, cited at SODPO, footnote 360.

110. Zeph's argument is misguided, because Australia does not dispute that Article 2(c) covers both direct and indirect investments. But that is a separate issue from Australia's argument that the term "investment" bears an inherent meaning, necessitating an inquiry into whether Zeph's putative investments bear the relevant fundamental characteristics.

111. The difference between the arguments is highlighted by the fact that, in cases where "asset-based" definitions of investments have been taken as implicitly including direct and indirect investments, this has not precluded analysis of whether a putative investment has the inherent characteristics of an investment. For example, in the recent award in *Antonio del Valle Ruiz v Spain*, the Mexico – Spain BIT contained an asset-based definition, which did not distinguish between direct and indirect investments, and which did not refer expressly to the fundamental characteristics of an investment.[290] The tribunal (chaired by Professor Kaufmann-Kohler) held both that: (i) the definition was sufficiently wide to encompass direct and indirect investments;[291] and (ii) the term "investment" as defined in the treaty had "an objective meaning which requires the presence of the elements of contribution, or commitment of resources, duration and risk".[292] This shows that the two issues are distinct and Zeph is wrong to conflate them.[293]

112. By way of further example, the tribunal in *Anglo-American v Venezuela*, after finding that indirect investments were included in a treaty definition which did not expressly exclude them, proceeded to state as follows:

> "However, protecting indirect investments does not imply protecting entities who are not allowed to enjoy the protection of the Treaty because of their nationality. Quite the opposite. When considering the ultimate holder of the investment and not the companies interposed between the investment and whoever is the ultimate owner, reality is preferred and legal fiction is disregarded."[294]

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

291 *Id*., paras. 314-328.

292 *Id.*, para. 372.

293 Likewise, the issue of whether an investment can be merely "held" or must be actively "made" is also "entirely different from the debate related to indirect investments that has taken place in other investment disputes": *Sergei Viktorovich Pugachev v The Russian Federation* (Award on Jurisdiction, 18 June 2020), para. 412, **Exh. RLA-34**.

294 *Anglo American PLC v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/14/1, Award of 18 January 2019), para. 200, **Exh. CLA-63** (internal citations omitted).

In other words, the tribunal recognised that, even a definition of the term "investment" is sufficiently wide to capture indirect investments, a separate enquiry may be necessary into the genuineness of the investment. The tribunal went on to endorse the finding in *Standard Chartered Bank v Tanzania* (cited in relation to Australia's first preliminary objection above) that treaty protection did not arise in circumstances where "the claimant had not actively controlled the assets which formed the investment, it merely held such investment passively through a subsidiary and thus could not have been considered to have invested in the respondent State".[295] It held that in *Standard Chartered Bank* "the rejection of its jurisdiction by the tribunal was not due to the indirect nature of the investment but the claimant's lack of investment in Tanzania".[296]

113. The conclusion to be derived from the above analysis is that Article 2(c) of Chapter 11 of AANZFTA requires that the term "investment" be interpreted in light of its ordinary meaning, with reference to characteristics including contribution, the assumption of risk and duration.

B. THE CLAIMANT HAS NOT ESTABLISHED THE EXISTENCE OF AN "INVESTMENT" WITHIN THE MEANING OF ARTICLE 2(C) OF CHAPTER 11 OF AANZFTA

114. Zeph has not established the existence of any investment bearing the characteristics inherent in that term, as required by Article 2(c). Australia has already set out the relevant analysis in the SOPO.[297]

115. The core feature of an investment is a "contribution". This requirement is not met in cases where a party has acquired shares without contributing anything of value,[298] especially given the acceptance that in this context a commitment of capital must be "substantial".[299] In this case, Zeph acquired its shares in Mineralogy by way of a share swap in which it contributed nothing of value: it was an empty corporate vehicle whose shares were worth nothing immediately before their transfer to MIL in exchange for 100% of the shares in

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295 *Anglo American PLC v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019), para. 200, **Exh. CLA-63**.

296 *Ibid*.

297 SOPO, paras. 197-199.

298 *Id*., para. 196, citing *Capital Financial Holdings Luxembourg SA v Republic of Cameroon* (ICSID Case No. ARB/15/18, Award of 22 June 2017), paras. 445-462, **Exh. RLA-53** (unofficial English translation of excerpts); *KT Asia Investment Group BV v Kazakhstan* (ICSID Case No. ARB/09/8, Award of 17 October 2013), paras. 188-206, **Exh. RLA-68**.

299 *Kaloti Metals & Logistics, LLC v Republic of Peru* (ICSID Case No. ARB/21/29, Award, 14 May 2024), para. 354, **Exh. RLA-130**.

Mineralogy.[300] That transaction did not have the inherent characteristics of an "investment". Further, for the reasons set out in relation to Australia's first preliminary objection above, there is also no merit to Zeph's contentions that it made a contribution through investing returns or by contributing to Mineralogy's ongoing management.[301] Zeph's only argument in the SODPO in response to Australia's second preliminary objection is to repeat these contentions,[302] which fail in this context for the same reasons as they fail in relation to the first preliminary objection.

116. In relation to the characteristic of an assumption of risk, Zeph argues that the very fact that it held shares in Mineralogy qualifies as relevant 'risk' on the grounds that "holding shares in an entity by its very nature involves risk".[303] The risks it identifies (without further particularisation) are "a risk of deprivation of dividends or a distribution on winding up", "market risk", "sovereign risk", "normal industry risks", "exchange risk" and "risk of a medical pandemic".[304] In the same vein, it highlights various factors which mean that, at the time it acquired its shares in Mineralogy, it could not know the scale of the returns it would receive, including the fact that the Second McHugh Award had not been issued, that the CITIC Parties had appealed against an adverse judgment in their dispute with Mineralogy, and uncertainties over funding for Mineralogy's coal projects.[305]

117. Undoubtedly, all of these sources of uncertainty could have meant that Zeph's shareholding in Mineralogy yielded greater or lesser benefits for Zeph. But that is not "risk" in the sense required for an investment, which requires more than the risk which arises in an ordinary commercial transaction.[306] "Risk" in this context requires Zeph to have assumed some exposure – in other words, for it to have borne some "financial burden" as a matter of "economic reality".[307] Further, the risk has to be "specific to the investment which did take

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300 See para. 48 above.

301 See paras. 74-80 ("(*ii) Zeph has not made a contribution in the form of management of Mineralogy*") and paras. 81-96 ("(*iii) Zeph has not made a contribution by reinvesting returns"*) above.

302 SODPO, para. 359.

303 *Id*., para. 362.

304 *Id*., paras. 362, 363.

305 *Id*., para. 362(a)-(c).

306 *Nova Scotia Power, Inc v Venezuela* (ICSID Case No. ARB(AF)/11/1, Excerpts of the Award of 30 April 2014), para. 105, **Exh. RLA-64**.

307 *Rand Investments Ltd, William Archibald Rand, Kathleen Elizabeth Rand, Allison Ruth Rand, Robert Harry Leander Rand and Sembi Investment Limited v Republic of Serbia* (ICSID Case No. ARB/18/8, Award of 29 June 2023), para. 237, **Exh. RLA-67**.

place, not the lost opportunity to make a different investment or commercial decision".[308] Where a party has acquired shares without inserting some value into the transaction, it has not undertaken a relevant risk.[309] A putative investor, "having made no contribution", necessarily "incurred no risk of losing such (inexistent) contribution".[310] Zeph put none of its own resources at stake when it acquired its shares in Mineralogy; it bore no "burden" and contributed no value. On that basis, it did not assume any relevant "risk".

118. This analysis is consistent with Professor Lys' analysis of what is required for a party to assume a risk. He explains that, "[i]n an exchange, each party faces the risk that what it receives in the exchange has a value different to, and in fact less than, the consideration they provide".[311] He continues:

> "220. Applying this concept to the current situation, in the exchange, Zeph faces the risk that it may lose the value of the Consideration Shares it exchanged for the 'parcel of Mineralogy shares'.
>
> 221. For example, if the Mineralogy shares unexpectedly turn out to be worthless, Zeph stands to lose the value of the Consideration Shares it 'paid' to obtain that parcel of Mineralogy shares. However, as I have already established, … the Consideration Shares issued by Zeph have no value outside of the share exchange. Therefore, it is my expert opinion that the exchange of shares between MIL and Zeph did not involve any risk to Zeph."[312]

119. In other words, it would not be possible for Zeph to be put in "a more adverse position than the one it enjoyed prior to the transfer of shares"; the fact that it was exposed to fluctuations in the value of the Mineralogy shares "does not imply that the transfer per se was risky from Zeph's perspective".[313]

120. As to the duration of the investment, Zeph claims that it meets this requirement because it "has now owned Mineralogy for over five years".[314] However, in circumstances where the share swap by which Zeph was inserted into the corporate chain above Mineralogy did not involve a contribution of anything of value (because it contributed only shares in an empty

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308 *Nova Scotia Power, Inc v Venezuela* (ICSID Case No. ARB(AF)/11/1, Excerpts of the Award of 30 April 2014), para. 105, **Exh. RLA-64**.

309 See, e.g., *Komaksavia Airport Invest Ltd. v Republic of Moldova* (SCC Case No. 2020/074, Final Award of 3 August 2022), paras. 173, 175, 177, **Exh. RLA-63**.

310 *KT Asia Investment Group BV v Kazakhstan* (ICSID Case No. ARB/09/8, Award of 17 October 2013), para. 219, **Exh. RLA-68**.

311 Lys Supplementary Report, para. 217.

312 *Id*., paras. 220-221.

313 *Id*., paras. 224-225.

314 SODPO, para. 361.

corporate vehicle), and where it assumed no risk (because, having contributed nothing of value, it had nothing to lose) the duration requirement is never reached. That follows because holding of shares, even for a period of years, does not demonstrate an "investment" of any duration if the acquisition of those shares was incapable of constituting an investment because they were acquired without any contribution being made and without any risk being assumed.

C. CONCLUSION

121. In light of the above, Zeph lacks an "investment" within the meaning of Article 2(c) of Chapter 11 of AANZFTA, and thus there can be no "investment dispute" within the meaning of Article 20. Accordingly, Zeph's claims are outside the Tribunal's jurisdiction and should be dismissed.

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

122. In Section V of its SODPO, the Claimant asserts that the conditions under Article 11(1)(b) for the Respondent to deny Zeph the benefits of Chapter 11 of AANZFTA have not been met. Those submissions should be rejected for the reasons set out below. The Respondent has validly and properly denied the benefits of Chapter 11 of AANZFTA to the Claimant and its investments pursuant to Article 11(1)(b).

123. The Parties agree that the Respondent's ability to deny the benefits of Chapter 11 of AANZFTA to the Claimant is subject to two substantive requirements: that the Claimant be "owned or controlled" by an Australian national; and that the Claimant have no "substantive business operations" in the territory of any State party to AANZFTA other than Australia.[315] The Claimant contests whether both requirements have been met, but the principal issue between the Parties is whether the Claimant had "substantive business operations" in Singapore at the relevant time.

124. In this Section the Respondent submits: (i) that the Claimant is "owned or controlled" by an Australian national (Mr Palmer) (**Subsection A**); (ii) that the Claimant did not have "substantive business operations" in Singapore at the relevant time (**Subsection B**); and (iii) that Australia complied with the procedural requirement in Article 11(1) (**Subsection C**).

125. The key issue for the determination of the denial of benefits objection is that when the Claimant's activities are put under proper scrutiny, the Claimant cannot escape the fact that its operations in Singapore (which, on analysis, consist of the operations of other persons and businesses) were (and remain) nothing more than a sham designed to avoid the possibility of the Respondent exercising its right to deny it the benefits of Chapter 11 of AANZFTA. The Tribunal should not permit the Claimant to circumvent the proper invocation of the denial of benefits clause by such an artificial façade.

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315 SOPO para. 203; SODPO paras. 370-372.

A. THE CLAIMANT IS "OWNED OR CONTROLLED" BY AN AUSTRALIAN NATIONAL

126. The first substantive requirement of Article 11(1)(b) is that "an investor of the denying party" owns or controls "an investor of another Party that is a juridical person of such other Party".

127. The ordinary meaning of the terms "owns" and "controls" includes both direct and indirect ownership and control. This has been confirmed by multiple arbitral tribunals, including in the context of the interpretation and application of denial of benefits clauses.[316] The Claimant has not sought to address those decisions and awards, let alone to contend that they were incorrectly decided. In fact, the Claimant has expressly agreed that the concepts of "ownership" and "control" in Chapter 11 of AANZFTA include both direct and indirect ownership and control.[317]

128. In the SODPO, Mr Palmer's ownership and control of the Claimant is not denied.[318] That is not surprising, for on Mr Palmer's own evidence the Claimant is a Singapore company, of which he is the ultimate owner.[319] The first of the two substantive requirements of Article 11(1)(b) is plainly fulfilled.[320] For completeness, the Claimant's submission that Revenue WA's determination as to the ownership of Mineralogy is relevant to this issue[321] is without foundation, as has been explained in Section II of this ROPO.[322] Revenue WA, in making a determination for the purpose of assessing the imposition of transfer duty in connection with Mineralogy's purchase of residential property in WA in 2019, determined that Mineralogy is owned or controlled by the Claimant. That determination, which was made with respect to the ownership of Mineralogy (and applying legal standards specified in domestic legislation) says nothing about the ownership or control of the Claimant. The Claimant does not have "substantive business operations" in Singapore.

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316 SOPO, paras. 215-217.

317 Addendum: Legal Principles – Operation of AANZFTA (Annexure 6C to Amended NoA), paras. 31-34.

318 SODPO, para. 373, which asserts that, because Zeph claims to have substantive business operations in Singapore, "it is irrelevant whether a national of Australia owns or controls the company".

319 SOPO, paras 218-219. The Respondent notes for completeness that no assertion has been made by the Claimant that it has substantive business operations in the territory of any Party other than Singapore (see SOPO para. 220). The Palmer First WS states that the legal and 100% beneficial ownership of Zeph's shares is held by MIL (at para. 34) and shares in MIL are ultimately beneficially held by him (at paras. 92-93).

320 SOPO, paras 218-219. The Respondent notes for completeness that no assertion has been made by the Claimant that it has substantive business operations in the territory of any Party other than Singapore (see SOPO, para. 220).

321 SODPO, paras. 56-57.

322 ROPO, para. 29.

129. The key issue between the Parties is whether Zeph had "substantive business operations" in Singapore at the relevant time.[323]

130. This Subsection addresses: (i) the relevant date for the application of the test of substantive business operations; (ii) the correct interpretation to be given to "substantive business operations"; and (iii) the facts relevant to concluding that Zeph did not have substantive business operations in Singapore as at the relevant date (or, indeed, at any other time).

(i) The relevant date for application of the "substantive business operations" test

131. Article 11(1)(b) requires the threshold of "substantive business operations" to be met at a particular point in time. There is, in fact, only narrow disagreement between the Parties as to the relevant date for application of the test: the Claimant's position is that "the date is 13 August 2020, the date of the Amendment Act",[324] whereas Australia's position is that the relevant date is "at the latest" 14 October 2020 (when the Claimant submitted its Written Requests for Consultations, including under Chapter 11 of AANZFTA).[325] For practical purposes, the common ground between the Parties is that the relevant date to be used by the Tribunal to assess "substantive business operations" in this proceeding is the date nominated by the Claimant – 13 August 2020.

132. Important ramifications follow from identification of the relevant date. As outlined below, the Claimant has submitted a large amount of evidence of its alleged operations in Singapore after 13 August 2020, and has even pointed to its asserted operations in Singapore up to 2024.[326] That material is irrelevant to whether the Claimant had "substantive business operations" in Singapore for the purposes of Article 11(1)(b), as it is after the relevant date. It therefore does not matter whether or not the Claimant's operations in Singapore have been "expanding".[327] All that matters is the position as at 13 August 2020. However, for the avoidance of doubt (and as is addressed in more detail below), Australia's submission is that at no point in time has the Claimant had "substantive business operations" in Singapore.

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323 SODPO, para. 374*ff*.
324 *Id*., para. 450.
325 SOPO, para. 258
326 See, for example, SODPO, paras. 375, 376.
327 *Id*., para. 379.

(ii) The correct interpretation to be given to "substantive business operations"

133. As the Respondent has set out in the SOPO, the phrase "substantive business operations" differs from the formulation used in the denial of benefits clauses of other investment treaties, which usually refer to "substantial business activities". For reasons the Respondent has explained, by reference to the difference between "substantive" and "substantial", and "operations" and "activities", the preferable view is that Article 11(1)(b) sets a more exacting standard than the more common formulation.[328] The Claimant denies that, asserting that "substantive business operations" provides either the lower, or alternatively the same (i.e., no higher), threshold than "substantial business activities".[329] However, that position is simply asserted, without any supporting analysis by reference to the interpretation of the text.

134. In any event, the Claimant accepts that "substantive" "may connote '*authenticity and genuineness*'".[330] It also accepts, by reference to *Gran Colombia Gold Corp. v Republic of Colombia*,[331] the need for a "genuine" connection in order to meet the "substantive business operations" threshold.[332] There is therefore no dispute as to those baseline requirements.

135. As the Respondent submitted in its SOPO, both the "substantive business operations" threshold in Article 11(1)(b), as well as the more usual "substantial business activities" threshold, preclude claimants from being able to rely on artificial arrangements that are designed to extend the protection of investment treaties to domestic disputes.[333] Moreover, as the *Alverley v Romania* tribunal explained, particular care should be exercised in assessing the genuineness of a putative investor company's connection to its State of incorporation if that company is in fact ultimately owned or controlled by a national of the respondent State. That tribunal, chaired by Sir Christopher Greenwood, observed that if:

> "… all that is happening is that a Romanian investor is recycling funds into an existing Romanian investment through a holding company in Cyprus which really is no more than a paper façade, it is difficult to see such an operation as something within the contemplation of the parties to the BIT. That makes it particularly important to scrutinise the evidence to see whether

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328 SOPO, paras. 221-222.
329 SODPO, para. 459 and 471.
330 *Id*., para. 458(a) (emphasis in original).
331 *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v Republic of Colombia* (ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue of 23 November 2020), **Exh RLA-80**.
332 SODPO, paras. 455-458.
333 SOPO, paras. 221-224.

> the Cyprus holding company is exercising some form of effective management and not simply discharging formalities."[334]

136. The Claimant has no good response to this.[335] In particular, it has no response to the need to exercise particular care in assessing the genuineness of a company's connection to its State of incorporation given the facts of this case, and the position of Mr Palmer (an Australian national) as the ultimate beneficial owner of the Mineralogy Group. As explained by Australia in the SOPO, *Alverley* concerned the question of the seat of the investor, but that does not diminish the analogy and applicability of the observations made by the *Alverley* tribunal in the context of the operation of a denial of benefits clause where a domestic investor seeks to bring an investment claim through a vehicle incorporated in another State.[336]

137. The interpretation of the term "substantive business operations" as requiring that a corporation demonstrate "genuineness", and the existence of a "real and continuous link" between the corporation and its State of incorporation in order to access the benefits of a treaty is consistent with the treaty practice of numerous States, both in the context of trade in services,[337] as well as investment.[338]

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

335 SODPO, para. 461, where the Claimant notes that the *Alverley* tribunal was determining the location of the investor's "real seat" (which the Respondent of course acknowledged in its SOPO, para. 223.) The legal questions are, however, analogous.

336 SOPO, paras. 223-224.

337 See, e.g., General Agreement on Trade in Services (Marrakesh Agreement Establishing the World Trade Organisation ("**WTO**"), Annex 1B), opened for signature 15 April 1994, 1869 UNTS 183 (entry into force 1 January 1995) ("**GATS**"), Arts. V(6) and XXVIII(m), **Exh. RLA-157**. Australia and Singapore both became Member States of the WTO on 1 January 1995, with the entry into force of the Marrakesh Agreement Establishing the WTO: see WTO, "Members and Observers" webpage, at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last accessed 19 June 2024), **Exh. R-611**.

338 E.g., the European Union considers that the phrase "substantive business operations" is equivalent to the term "effective and continuous link with the economy": EU Parliamentary Question E-004978/2018(ASW), "Answer Given by Ms Malmström on Behalf of the European Commission" (15 November 2018), para. 29, **Exh. RLA-158**; General Secretariat of the Council, "Comprehensive and Economic Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part" (27 October 2016), EU Doc No 13463/1/16 (REV), p. 22, para. 31, **Exh. RLA-162***; Investment Protection Agreement between the European Union and its Member States, of the One Part, and the Republic of Singapore, of the Other Part*, signed on 15 October 2018 (entered in force 21 November 2019), Article 1.2(1)(5) **Exh. RLA-163**; Netherlands Model Bilateral Investment Treaty (2019), Article 1(c), **Exh. RLA-159**; *Agreement on Trade Continuity between the United Kingdom of Great Britain and Northern Ireland and Canada*, signed 9 December 2020, (entered into force 1 April 2021), **Exh. RLA-160**; see *Joint Interpretative Instrument on the Agreement on Trade and Continuity Between the United Kingdom of Great Britain and Northern Ireland and Canada*, signed 9 December 2020 (not yet in force), s. 6(d), **RLA-161**.

138. In accordance with Article 31(1) of the Vienna Convention, Article 11(1)(b) should be interpreted in light of its object and purpose. That purpose – being the normal purpose of denial of benefits clauses – is to prevent "treaty shopping". Thus:

(a) In *Waste Management v Mexico II,* the tribunal explained that the denial of benefits clause in Chapter 11 of NAFTA served to deal with "possible 'protection shopping'".[339] It addressed "situations where *the investor is simply an intermediary for interests substantially foreign*", and it allowed relevant treaty protections "to be withdrawn in such cases."[340] The same logic evidently applies, *a fortiori*, where ownership or control of the claimant lies with nationals of the host State of the investment, who similarly are not afforded protection under the treaty.

(b) To similar effect, the tribunal in *AMTO v Ukraine* held that "the purpose of Article 17(1) is to exclude from ECT protection investors which have adopted a *nationality of convenience*. Accordingly, 'substantial' in this context means 'of substance, and not merely of form.'"[341]

(c) States often emphasise the role that denial of benefits clauses play in preventing treaty shopping.[342]

139. Consistently with this purpose, the tribunal should not accept that an investor can incorporate a shell company in a State that is a party to an investment treaty, and then satisfy the "substantial business activities" test by purchasing a pre-existing business in that State (even if that business has no connection with the existing business of the investor or, more

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339 *Waste Management v Mexico (II)* (ICSID Case No. ARB(AF)/00/03, Final Award of 30 April 2004), para. 80, **Exh. CLA-74**.

340 *Ibid*.

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

342 In *Pac Rim Cayman LLC v Republic of El Salvador,* (ICSID Case No. ARB/09/12), the United States made a non-disputing Party submission as to why they include denial of benefits clauses in their treaties. The stated reason was to avoid 'treaty-shopping'. The United States submitted that: "this treaty right is consistent with a long-standing U.S. policy to include a denial of benefits provision in investment agreements to safeguard against the potential problem of *'free rider' investors*, i.e., third-party entities that may only as a matter of formality be entitled to the benefits of a particular agreement." See Submission of the United States of America on the Interpretation of the Agreement of 20 May 2011, para. 3. The United States also submitted: "In testimony before the U.S. House of Representatives, Ambassador Peter Allgeier, one of the U.S. negotiators of CAFTA-DR, explained that the denial of benefits provision of CAFTA-DR was intended to 'protect against … establishment of an affiliate that is merely a 'shell.' A similar provision, included in Article 1113 of North American Free Trade Agreement, has been described by commentators as permitting a Party 'to deny benefits to an enterprise if it is merely a "sham company" having no "substantial business activities" in the… country in which it is established.'" Submission of the United States of America on the Interpretation of the Agreement (20 May 2011), para. 3), **Exh. RLA-33**.

importantly, with the putative investment). If "substantial business activities" could be established in that way, that would defeat the sole purpose of denial of benefits provisions, because those provisions could be so easily circumvented by "treaty-shopping" investors.

140. As explained in the APEC International Investment Agreements negotiators handbook ("**IIA Handbook**"), referring to APEC and UNCTAD modules on "Denial of benefits", one of the grounds for denying benefits is that:

> "the company is owned or controlled by nationals of the host State and does not have a genuine economic connection with the home state:
>
> ⇒ It prevents *'roundtrip' investments whereby nationals of the host State establish a foreign legal entity and channel their investment through it solely for the purpose of obtaining treaty protections*.
>
> ⇒ It *diminishes the risk that a person starts international arbitration proceedings against its own State*, which may be seen as an abusive practice that defeats the purpose of the treaty".[343]

141. The same IIA Handbook also notes that "[w]ithout a Denial of Benefits clause, *nationals of the host State may incorporate an entity in the other Contracting Party, so as to take advantage of the protection afforded by the treaty against their own country*".[344] That is precisely what has happened in the present case.

142. The decisions of previous arbitral tribunals do not support the Claimant's interpretation of "substantive business operations" in Article 11(1)(b). It is telling that all of the arbitral decisions and awards that the Claimant points to in its SODPO have already been discussed at length by the Respondent in its SOPO.[345] Yet, despite having the benefit of having seen the reasons that the Respondent considers these decisions and awards to support its position in these proceedings, the Claimant does not engage with those reasons. That supports the inference that it has no answer to the points that the Respondent has already made. The Respondent makes the following additional points as to the cases invoked by the Claimant:

(a) As to *AMTO v Ukraine*, both parties now bring the Tribunal's attention to the same passage concerning (in the context of a "substantial business activities" test found in

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343 APEC Committee on Trade and Investment Experts Group, "International Investment Agreements Negotiators Handbook: UNCTAD MODULES", p. 106 (emphasis added), **Exh. RLA-153**.

344 *Ibid.*

345 SODPO, para. 463.

Article 17(1) of the ECT) "the materiality not the magnitude of the business activity" as the "decisive question".[346] But this does not indicate, as the Claimant asserts, that "substantive business operations" entails a lower threshold.[347] Further, while the Claimant points to the role that a "small but permanent staff" played in the factual outcome of that case, it ignores other factors that were also present, including that the company in question was carrying out "investment related activities",[348] maintained Latvian bank accounts and paid taxes in Latvia.[349] As Australia demonstrates in Section VI below, at the critical date Zeph, by contrast, was doing a bare minimum to construct Singaporean corporate nationality while in fact setting up its arrangements to maintain its Australian tax residency (which required it to ensure that Zeph was tax resident in Australia, and managed from Australia: see further below).[350]

(b) The facts of *Masdar Solar v Spain*, which adopted the test in *AMTO v Ukraine*, do not assist the Claimant.[351] As the Respondent noted in the SOPO at para. 226(c), in *Masdar Solar* the tribunal pointed to various factors when evaluating the facts as a whole, including in combination: (i) the holding of major investments in The Netherlands; (ii) the presence of two Dutch directors on the Board of Directors; (iii) the holding of Board Meetings four times a year in Amsterdam; and (iv) the holding of bank accounts in The Netherlands.[352] Those basic facts are not remotely analogous to the case before this tribunal.

(c) Similarly, the facts of *9Ren Holding SARL v Spain* do not assist the Claimant, as again they are not analogous.[353] One of the main factors considered in *9Ren* included that "meetings of the boards of 9Ren Holding and its Luxembourg parent companies are regularly held in Luxembourg" and major decisions were made there.[354] In the present case, Zeph's meetings for which there is evidence were held in Brisbane, and there is

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346 SOPO para 226(b); SODPO, para. 463(a).
347 SODPO, para. 463(a).
348 *Limited Liability Company Amto v Ukraine* (SCC Case No 080/2005, Final Award of 26 March 2008), para. 69, **Exh. RLA-72**.
349 *Ibid.*
350 See, e.g., Cooper Report, para. 26, Appendix C, s. 1.3.
351 SODPO, para. 463(b).
352 *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain* (ICSID Case No. ARB/14/1, Award of 16 May 2018), paras. 224-229, 254, **Exh. RLA-81**.
353 SODPO, para. 463(e).
354 *9Ren Holding SARL v Spain* (ICSID Case No. ARB/15/15, Award of 31 May 2019), para. 180, **Exh. RLA-82**.

no evidence on the record that any of Zeph's meetings were held in Singapore, or that any investment decisions were made in Singapore.[355]

(d) The Claimant's analysis of *Bridgestone Licensing Services, Inc v Panama*, which it submits shows that "firms that maintain their central administration or principal place of business in the territory of, or have a real and continuous link with, the country where they are established"[356] satisfy the test of "substantial business activities" misses the point. It seeks to emphasise disjunctive phrasing used by the tribunal in an attempt to dismiss the significance of the reference to "real and continuous link".[357] However, when the extract is read fairly and in context, it is clear that the tribunal was articulating the need for some form of genuine connection.

(e) As to *NextEra v Spain*,[358] by emphasising the distinction drawn by the tribunal between quality and quantity of business activities, the Claimant only highlights what lies at the heart of the analysis applied by all tribunals on this issue: the need for proper evaluation of the factual circumstances in their context to ascertain whether the relevant threshold has been met.[359]

(f) The Claimant's analysis of *Aris Mining v Colombia* (which is the case referred to above at 134 as *Gran Colombia*)[360] only draws attention to the significant differences with the facts of the present case.[361] While the tribunal saw no requirement that the "business activities" be of the same nature as the activities of the claimant in other jurisdictions, that was not an endorsement that any type of business activity, when

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355 E.g., Attachment to **Exh. R-554**: Minutes of Meeting of Directors of Mineralogy International Pte Ltd dated 29 January 2019, **Exh. R-536**; Minutes of Meeting of Directors of Mineralogy International Pte Ltd dated 29 January 2019 (Exhibit 16 to Annexure A to NoI), **Exh. C-63**, pp. 158-162 (citation to PDF page number); Mineralogy International Pte Ltd Minutes Under section 179(6) of the Companies Act dated 29 January 2019 (Exhibit 19 to Annexure A to NoI), **Exh. C-63**, pp. 166-167 (citation to PDF page number); Mineralogy International Pte Ltd Ordinary Resolution Share Buy Back Exercise dated 29 January 2019 (Exhibit 17 to Annexure A to NoI), **Exh. C-63**, pp. 163-164 (citation to PDF page number).

356 *Bridgestone Licensing Services, Inc v Panama* (ICSID Case No. ARB/16/34, Decision on Expedited Objections of 13 December 2017), para. 290, **Exh. RLA-30**; see also SODPO, 463(c).

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

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

359 SODPO, para. 463(d).

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

361 SODPO, para. 463(f).

examined in its proper factual context, will be sufficient. Nor does it suggest that the business activities of an asserted investor should not be scrutinised. Indeed, the *Aris Mining* tribunal pointed to the very support activities one might expect from an investment vehicle.[362]

(g) By focussing on the facts of *Pac Rim Cayman LLC v El Salvador*,[363] the Claimant does not engage with the point of principle as to the need for a genuine connection in order to reach the threshold of – for the purposes of that case – "substantial business activities" (see above at paragraphs 135 to 137).[364] In any event, the Claimant appears to accept the necessity for the activities to be of the relevant enterprise.[365]

143. In short, the Claimant's submissions as to the interpretation of the term "substantive business operations" are not supported by a proper interpretation of that term, nor by the cases invoked by the Claimant. The "substantive business operations" requirement entails a need for genuine activities to be undertaken in the purported home State, evidencing a real connection between the investor and its State of incorporation.

(iii) The Claimant did not have "substantive business operations" in Singapore as of 13 August 2020

144. The evidence, such as it is, does not establish that Zeph had a genuine to Singapore as at 13 August 2020.

a. <u>Zeph's activities must be assessed as at 13 August 2020</u>

145. Zeph states that its "current business operations comprise two primary components", which consist of "(i) running the cleaning business in Singapore; and (ii) actively managing its investments in Australia".[366] But, as noted above, the Claimant's "current business

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362 *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v Republic of Colombia* (ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue of 23 November 2020), paras. 139-140, **Exh. RLA-80**.

363 *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No. ARB/09/12, Decision on Jurisdiction of 1 June 2012), **Exh. RLA-33**; SODPO, para. 464-466.

364 *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No. ARB/09/12, Decision on Jurisdiction of 1 June 2012), paras. 4.68-4.70, 4.72-4.74, **Exh. RLA-33**.

365 SODPO, para. 465.

366 *Id*., para. 404.

operations" are irrelevant, since the Claimant itself acknowledges that it has to demonstrate that it had "substantive business operations" in Singapore as of 13 August 2020.[367]

146. As at 13 August 2020, the Claimant's "business operations" consisted of: (a) holding three engineering companies, being GCS Engineering Services Pte Ltd, Visco Engineering Pte Ltd, and Visco Offshore Engineering Pte Ltd (the "**Engineering Companies**"), which it acquired on 31 January 2019;[368] and (b) participation in a Joint Venture Agreement (the **"JVA"**) with the Kleenmatic Companies, which it entered into on 24 January 2020.[369] It is only those activities that are relevant to whether the Claimant had "substantive business operations" in Singapore within the meaning of Article 11(1)(b) of Chapter 11 of AANZFTA. As to the second of those matters:

(a) The Claimant did not acquire the Kleenmatic Companies until 4 August 2022, some two years after the relevant date for assessing its "substantive business operations" in Singapore. … The joint venture must be assessed as it was in operation as at August 2020, when it was no more than a contractual arrangement between companies.

(b) The Claimant's lists of employees for 2023 and 2024 are wholly irrelevant,[370] as is the photograph of the Claimant's Chinese New Year Party in February 2024.[371]

b. <u>The Claimant's claimed operations in Singapore are a paper façade designed to escape the application of the denial of benefits clause</u>

147. In the period from its incorporation on 21 January 2019 until at least 13 August 2020 (and, the Respondent submits, until the present), the Claimant has carried out no business operations in Singapore of its own. The Claimant's acquisition of the Engineering Companies, and its subsequent joint venture with the Kleenmatic Companies, was nothing more than a "paper façade":[372] a sham aimed at defeating the Respondent exercising its right to deny the Claimant the benefits of Chapter 11 of AANZFTA.

148. This is consistent with the contemporaneous media reporting of the incorporation of MIL in December 2018 (which was followed only a month or so later by the incorporation of Zeph

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367 SODPO, para. 450.
368 *Id*., paras. 385, 425.
369 *Id*., paras. 410, 413.
370 *Id*., paras. 445-446.
371 *Id*., paras. 447-448.
372 SOPO, paras. 241, 243.

in Singapore, for the same apparent purpose). As the Respondent noted in the SOPO, *The Australian* newspaper reported Mr Palmer stating on 22 January 2019 that:

> "the move offshore meant Mineralogy would be able to claim compensation from the Australian government under the investor protection provisions of the Australia-NZ free trade agreement. He vowed to launch a damages claim if West Australian Premier Mark McGowan carries through with his threat to legislate in favour of Chinese giant CITIC's interests in the $US10bn Sino Iron project in the Pilbara."[373]

149. To the same effect, the *Courier Mail* reported on 8 February 2019 that:

> "Mr Palmer has moved control of his business to an unoccupied office in New Zealand, telling the media if the WA Government were to intervene [in Mineralogy's dispute with the CITIC Parties], he would be forced to use international laws to 'sue the Australian taxpayer' for compensation to the tune of $45 billion."[374]

150. Neither the Claimant, nor Mr Palmer in his multiple Witness Statements, has disavowed what is reported in these newspapers. Nor could they credibly do so. It is against the reality of these express admissions as to the true purpose of the incorporation of MIL (and, subsequently, the Claimant) – as well as the lack of credibility of any of the Claimant's asserted rationales for the incorporation of these two new entities – that the Tribunal should evaluate the genuineness of the Claimant's asserted business operations in Singapore. The purpose of the parties in including a denial of benefits clause must be central to that evaluation, because Article 11(1)(b) must be interpreted and applied in a way that gives effect to the purpose of the parties to AANZFTA in including that article: to prevent treaty shopping, including by nationals seeking to use investment treaties against their own State.

151. A useful starting point in analysing the genuineness of the Claimant's links with Singapore concerns the well-established elements of "genuineness" that direct attention to whether the putative investor has a "continuous physical presence" in its State of incorporation and whether it is "managed and organised from [its] claimed home State". Those elements are particularly pertinent to the Claimant in circumstances because, from the moment of Zeph's

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

374 Phoebe Loomes, "Clive Palmer's bizarre big reveal", *The Courier Mail* (8 February 2019), at https://www.couriermail.com.au/news/regional/clive-palmers-bizarre-big-reveal/news-story/1dd280fbfa6d11bc8694e61b68f5756e (last accessed 9 January 2024), **Exh. R-160**.

incorporation, it is clear that Mr Palmer and Mineralogy were anxious to ensure that Zeph was regarded as a resident of Australia for taxation purposes. Thus:

(a) Immediately following the incorporation of the Claimant, Mr Palmer received advice from PwC – the long-term Australian tax advisor of the Mineralogy Group – that was premised on the need to ensure that the Claimant established Australian tax residency in connection with the Share Swap. This included advice that the resolutions effecting the Share Swap be made in Australia, and that the majority of the Claimant's directors be Australian residents.[375]

(b) The Claimant appears to have acted on this advice: Mr Palmer became a director of the Claimant on 23 January 2019 (before the Share Swap occurred),[376] and the Board Meeting of Zeph and the extraordinary general meeting of its shareholders which were held on 29 January 2019 in order to effect various aspects of the Mineralogy Group Restructure are both recorded as having taken place at Level 17, 240 Queen Street, Brisbane, Queensland (in Australia).[377]

(c) Moreover, at this meeting of the Zeph Board, four of the six "other resolutions" made by the Board were clearly focussed on the *Australian* aspects of Zeph's business: the company accounts were to be in Australian dollars; applications were to be made to the relevant Australian authorities to acquire Australian tax file and registered body numbers for Zeph; Mr Palmer was appointed "as the Public Officer of the Company for Australian taxation purposes"; and Zeph's "principal place of business" was designated as in Australia.[378] The other two resolutions concerned the making of

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375 Emails between and among [redacted], Mr Palmer, [redacted] and others (Proposed Incorporation of Mineralogy International Pte. Ltd.) dated 21-22 January 2019, **Exh. R-600.**

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

377 Attachment to Exh. R-554: Signed minutes under section 179(6) of the Companies Act, Chapter 50 of Singapore - Mineralogy International Pte. Ltd. dated 29 January 2019, **Exh. R-612**; Attachment to Exh. R-554: Minutes of Meeting of Directors of Mineralogy International Pte Ltd dated 29 January 2019, **Exh. R-536.** The EGM was held in order for MIL as Shareholder to authorise the buy back of the original share that had been issued at the formation of the company.

378 Attachment to Exh. R-554: Signed minutes under section 179(6) of the Companies Act, Chapter 50 of Singapore - Mineralogy International Pte. Ltd. dated 29 January 2019, **Exh. R-612**; Attachment to Exh. R-554: Minutes of Meeting of Directors of Mineralogy International Pte Ltd dated 29 January 2019, **Exh. R-536**.

applications for business and tax registrations in Singapore, and keeping the registered address in Singapore.[379]

(d) Since 23 January 2019, i.e., two days after its incorporation, the Claimant has had at least three directors, and at all times the majority of those directors have been Australian residents.[380]

(e) By 29 January 2019, one week after its formation, the Zeph Board of Directors was composed of [redacted], Mr Palmer and [redacted].[381] Both [redacted] and Mr Palmer were at the time (and continue to be) residents of Australia. As Professor Lys notes in his Supplementary Report, [redacted] likely served as a nominee director to satisfy certain Singaporean procedural requirements.[382] This can be seen in documents produced by the Claimant.[383] The make-up of the Board as at 29 January 2019 was in line with the advice that the Mineralogy Group had received from PwC and appears to have been adopted in order to preserve the tax status of Zeph as an Australian tax resident.[384]

152. Next, it is instructive to turn to the steps taken by the Claimant in Singapore immediately after its incorporation. Those steps did not involve establishing a corporate head office or hiring staff with the expertise to engage with Singaporean banks about coal financing. As Professor Lys has confirmed, "[t]here is no evidence that any professional staff with experience in corporate finance and/or the ability to supervise (future) mining operations ever served in Singapore."[385] Nor is there any evidence of steps being taken in preparation for Mr Palmer to move his residence to Singapore. Instead, Zeph's immediate activities in Singapore confirm that it was a paper façade designed to escape the application of the denial of benefits clause. Specifically, those activities "amounted to buying three Engineering

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379 Attachment to Exh. R-554: Signed minutes under section 179(6) of the Companies Act, Chapter 50 of Singapore - Mineralogy International Pte. Ltd. dated 29 January 2019, **Exh. R-612**; Attachment to Exh. R-554: Minutes of Meeting of Directors of Mineralogy International Pte Ltd dated 29 January 2019, **Exh. R-536**.

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

381 *Ibid*.

382 Lys Supplementary Report, Appendix A (Board of Directors Analysis), para. 318(a).

383 [redacted] to [redacted], 21 January 2019 02:57:29 +1100 in emails between and among [redacted] and [redacted] (RE: Empowerment Investments Asia Pte. Ltd.), **Exh. R-549**.

384 Emails between and among [redacted], Mr Palmer, [redacted] and others (Proposed Incorporation of Mineralogy International Pte. Ltd.) dated 21-22 January 2019, **Exh. R-600**.

385 Lys First Report, para. 540.

businesses (of doubtful value)"[386] and, about a year later, entry into a joint venture with an established cleaning business.

153. Zeph has cited no credible business purpose for acquiring the Engineering Companies or for entering into the joint venture with the Kleenmatic Companies. Mr Palmer asserted in his First Witness Statement that he considered engaging in a corporate restructure (*inter alia*) to "increase the availability of financing opportunities for Mineralogy's major coal projects",[387] and to maximise the cash flows from the Royalty Judgment.[388] Yet the Claimant's acquisition of the Engineering Companies and its joint venture with the Kleenmatic Companies did nothing to further those aims.

154. Despite the absence of any apparent rationale for it, Zeph's purchase of the Engineering Companies was completed in haste. It occurred on 31 January 2019, less than two weeks after Zeph was incorporated and mere days after the Share Swap. As Professor Lys explains, there is "no evidence that any due diligence was performed", and there was no obvious business purpose for the acquisition, which "resulted in what appears to be a total loss of the committed funds."[389] The only credible explanation for the purchase occurring, and occurring with such haste, is that it was intended to give the appearance that Zeph was engaged in business activities in Singapore.

155. There is a sparsity of contemporaneous evidence as to the rationale for Zeph's entry into the JVA. As Professor Lys noted, there are no synergies between the cleaning businesses and Mineralogy's operations in Australia.[390] During the document production phase, the Tribunal ordered that the Claimant produce:

> "(i) minutes, agendas and notes of meetings of the Boards of Directors of the Claimant; (ii) draft and final resolutions of the Boards of Directors of the Claimant; (iii) draft and final Board papers and reports prepared for meetings of the Boards of Directors of the Claimant; containing discussions, decisions, due diligence and risk analyses relating to the entry into, and terms of, the JVA, the Option Agreement (as defined in the JVA) and any share purchase agreement between the Claimant, One Kleenmatic and Kleen Venture".[391]

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386 Lys First Report, para. 540.
387 Palmer First WS, para. 115.
388 *Id*., paras. 118-126.
389 Lys Supplementary Report, para. 280.
390 Lys First Report, para. 540.
391 Category 15 of the Respondent's Document Requests, see also *Procedural Order No. 4* for the relevant orders made by the Tribunal.

156. All that was produced by the Claimant in response was a single document: minutes of a meeting of the Claimant's Board of Directors dated 3 February 2020 (therefore post-dating the entry into the JVA) with a resolution confirming that the JVA and Share Option Deed had been "completed".[392] It is surprising, to say the least, that Zeph's Board entered into such an arrangement without being presented with any papers or reports, or any form of due diligence, and moreover that it passed no resolutions providing for entry into the Joint Venture before it was signed. The fact that none of those things occurred is consistent with the fact that the Claimant had no business purpose for entering into the joint venture, and that doing so did not represent a genuine business activity. It was simply part of the stratagem to attempt to shore up its planned treaty claim, by adding a further layer to the paper façade.

c. <u>The Claimant has not established that it had substantive business operations in Singapore as at 13 August 2020</u>

157. Turning to the detail of the Claimant's alleged operations as put forward in the SODPO:

(a) The Claimant alleges that it has had "a physical presence in Singapore since the year of its incorporation" in 2019, and in 2020, from an office at 1 Joo Koon Way, and subsequently at 80 Genting Lane.[393] However, as the Respondent explained in its SOPO, the address at 1 Joo Koon Way was the address associated with the Engineering Companies,[394] and Mr Vickers explained that there was no evidence of any operations by the Engineering Companies at 1 Joo Koon Way when he visited that address in November 2020.[395] This has not been challenged by the Claimant.

(b) As for the address at 80 Genting Lane this was (and remains) the address of the Kleenmatic Companies, and Mr Vickers has given evidence (which has not been challenged) that One Kleenmatic was the registered owner of the property as of November 2020.[396] Mr Vickers has also given evidence (again, unchallenged) that when he visited the 80 Genting Lane address in November 2020, it bore the name and logo of "Kleenmatic"; there was no signage for Zeph; the building directory contained no reference to Zeph; two vehicles there were marked with the names of two of the

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392 Minutes of Directors of Zeph Investments Pte Ltd dated 3 February 2020, **Exh. R-528**.
393 SODPO, paras. 381-384.
394 SOPO, paras. 237, 245(b).
395 *Id*., para. 245(b), Vickers WS, paras. 63-67.
396 SOPO, para. 250(b).

Engineering Companies; and a security guard reported that he had never heard of Zeph.[397]

(c) The Claimant's assertion that it "has had a physical presence in Singapore" at these premises, from which it "operates", is plainly incorrect, and could only result from the activities of the Engineering Companies (such as they were) and the Kleenmatic Companies.

(d) As for the Claimant's statement that it has had a "registered address" in Singapore, this was, again, simply the registered address of the Engineering Companies (until August 2020), and thereafter the registered address of the Kleenmatic Companies.[398]

158. Most of the factors on which the Claimant relies as providing evidence of its "substantive business operations" are no more than the business operations of the Engineering Companies, or of the Kleenmatic Companies (which, at the relevant date of 13 August 2020, were simply in a contractual relationship with the Claimant).[399] They are not business operations of the Claimant itself.[400]

159. As to the Claimant's assertion that it was engaged in "substantive business operations" because it was, or is, engaged in "actively managing its investments in Australia",[401] there is no material evidence to support that claim. The reality is that the Claimant's directors are (to a large extent) also the directors of Mineralogy,[402] and Mineralogy continues to be managed

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397 Vickers WS, para. 33(a)-(g).

398 SODPO, paras. 407-409.

399 The ledgers produced by the Claimant in response to Document Request No. 18 confirm that there was no ledger for the JVA itself. Instead, the business operations of the JVA appear in the individual ledgers of One Kleenmatic (Ledger of One Kleenmatic, 24 January 2020-13 August 2020, Excel spreadsheet, **Exh. R-613**) and Kleen Ventures (Ledger of Kleen Ventures, 24 January 2020-13 August 2020, Excel spreadsheet, **Exh. R-614)**, rather than in Zeph's ledger (Zeph General Ledger, 1 January 2020-13 August 2020, Excel Spreadsheet, **Exh. R-543)**. An email that was produced in response to this Request, from Vincent Wong to Bernard Wong dated 31 May 2024 states: the "the Joint Venture's operations are entirely sourced from the business activities of OK and KV" (Email from Vincent Wong to Bernard Wong (Background and Worksteps for the Joint Venture financial statements) dated 31 May 2024, **Exh. R-615**).

400 SOPO, paras. 229-234, referring to *Pac Rim Cayman LLC v El Salvador* (ICSID Case No. ARB/09/12, Decision on Jurisdiction of 1 June 2012), para. 4.68-4.70, 4.72-4.74, **Exh. RLA-33**; *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v Ukraine* (SCC Case No. V 2015/092, Final Award of 4 February 2021), para. 625, **Exh. RLA-83**; *Plama Consortium Limited v Republic of Bulgaria* (ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005), para. 169, **Exh. RLA-73**; *NextEra v Spain* (ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles of 12 March 2019), para. 258, **Exh. RLA-74**.

401 SODPO, para. 404.

402 Lys Supplementary Report, paras. 174-179, and Appendix A (Board of Directors Analysis), where it is noted that four people have served on the Boards of Mineralogy and Zeph, at times simultaneously.

as it has always been. That fact that some of Mineralogy's directors have also been appointed as directors of the Claimant does not demonstrate that the Claimant manages Mineralogy. Indeed, as Professor Lys explains, for the Claimant to be engaged in "actively managing" Mineralogy would be inconsistent with principles of corporate governance, according to which boards of directors have "advisory and oversight functions", whereas the managers of a company are concerned "with the day-to-day operations of the corporation" and the implementation of "the strategic direction set by the board."[403]

160. Further, the Claimant is a shareholder of Mineralogy, and as Professor Lys explains:

> "In contrast to the board of directors and managers, shareholders (or members as they are referred to in the record) have no operational functions or operational authority within the corporation. Rather, they exercise their ownership rights by electing or appointing the board of directors. But to be clear, the election or appointment of directors is a normal corporate governance right that members have in most (if not all) corporations and it in no way provides any direct management rights."[404]

161. In summary, there is no evidence to support the Claimant's assertion that its Board of Directors and management are actively involved in Mineralogy's day-to-day operations, and this assertion is also inconsistent with principles of corporate governance.[405] To the extent that the same people occupy offices with both Mineralogy and Zeph, their involvement in the management of Mineralogy is properly viewed as being undertaken in their capacity as officers of that corporation.

162. As to the operations of the Engineering Companies, which the Claimant says it acquired "shortly after its incorporation":[406]

    (a) While the Claimant acquired the shares in those companies, they remained separate legal entities, such that their business operations (if any) remained those of the Engineering Companies, rather than the Claimant.

    (b) Mr Vickers concluded that it is "probable that the Engineering Companies did not have significant business operations after 2018".[407]

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403 Lys Supplementary Report, paras. 139-140.
404 *Id*., para. 142.
405 Id., para. 162.
406 SODPO, para. 385.
407 Vickers WS, para. 83.

(c) As Professor Lys has explained (in evidence the Claimant has not answered), GCS Engineering had "no long-term physical assets" in 2018 (the year prior to its acquisition by the Claimant), and had "accumulated losses (negative retained earnings) of SGD $166,913."[408] In 2018, it had recorded a loss of SGD $210,133, and it "was on a similarly negative loss trajectory in the first six months of 2019."[409] According to Professor Lys, "GCS Engineering was hardly a desirable acquisition target."[410] Consistently with that view, it entered into voluntary liquidation on 12 October 2020 (mere months after relevant date of 13 August 2020).[411]

(d) Turning to Visco Engineering, it also had "no long-term physical assets" in 2018 (the year before the Claimant acquired it), and it had "accumulated losses (negative retained earnings) of SGD $26,169."[412] In 2018, it had recorded a loss of SGD $112,336.[413] Professor Lys noted that "[p]oor performance continued after Zeph acquired the company", and that it "was hardly a desirable acquisition target."[414] Again, consistently with that opinion, it entered into voluntary liquidation on 12 October 2020.[415]

(e) The final engineering company, Visco Offshore Engineering, had some minimal long-term physical assets (which were worth SGD $56,451 in 2018). However, it had accumulated losses of SGD $19,048, which then "ballooned" to SGD $354,786 after its acquisition by the Claimant.[416] As Professor Lys observed, (again unchallenged) it was "hardly a desirable acquisition target in an arms-length transaction with an economic purpose."[417] It, too, entered into a voluntary liquidation process on 12 October 2020.[418]

(f) Contrary to the Claimant's assertions, the liquidation of the Engineering Companies had nothing to do with the "trading conditions experienced by these companies in 2020

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408 Lys First Report, para. 271.
409 *Id*., para. 273.
410 *Ibid*.
411 *Id*., para. 267.
412 *Id*., para. 298.
413 *Id*., para. 300.
414 *Id*., para. 300.
415 *Id*., para. 294.
416 *Id*., para. 325.
417 *Id*., para. 328.
418 *Id*., paras. 267, 294, 321.

during the COVID-19 pandemic."[419] As Professor Lys explains, the slowdown of the Engineering Companies' operations, "such as they were", had begun "well before the emergence" of the COVID-19 pandemic.[420] The Claimant is clearly unable to respond to Professor Lys's analysis on the viability of the Engineering Companies and their undesirability as an acquisition target. Professor Lys confirms in his Supplementary Report that none of the documents produced with Zeph's SODPO have altered his view.[421]

163. As to the operation of the cleaning business in Singapore, the sparse evidence that is currently available in relation to the entry into the JVA and its immediate implementation suggests the following sequence of events occurred:

(a) On 24 January 2020, Zeph, One Kleenmatic and Kleen Venture entered into the JVA and Option Agreement.[422] Those were contractual agreements. They did not involve the Claimant acquiring One Kleenmatic and Kleen Venture.

(b) On 25 January 2020, a handwritten document produced by the Claimant in document production[423] records that Zeph nominated Mr Palmer "to represent it and represent it as manager including at all meetings of the joint venture committee held in accordance with the joint venture agreement dated 24 January 2020".[424] This document is signed, but without identification of the signing director. On its face, the signature appears to be that of Mr Palmer. Under the terms of the JVA the "Joint Venture shall be vested" in this committee (Clause 12).

(c) On 25 January 2020, the "Joint Venture Committee" met. The only person recorded as present at the meeting in the handwritten meeting minutes was Mr Palmer, as Zeph's

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419 SODPO, para. 431, see also SODPO, para. 391.
420 E.g., Lys First Report, paras 274, 327.
421 Lys Supplementary Report, paras. 294-305.
422 Joint Venture Agreement between Claimant, One Kleenmatic Pte Ltd and Kleen Venture Pte Ltd, **Exh. C-469**.
423 The Respondent also notes that this document was the only document produced by the Claimant evidencing "minutes, calendar invites, resolution or decisions and agendas of meetings held by the Joint Venture Committee" and "Documents recording directions or requests made by the Manager" in Document Request 17(a) and (b), pursuant to PO4.
424 Handwritten document titled "25 January 2020 Meeting Minutes (Singapore JV Nomination)", **Exh. R-616**.

representative (ie acting as the representative of the "manager").[425] Mr Palmer was appointed Chair of the meeting. The meeting resolved, *inter alia*, that the resident Singapore directors of the manager (ie Zeph) "be responsible for all joint venture operations on behalf of the manger [sic]". The meeting minutes are signed by Mr Palmer as Zeph's representative.

(d) There was nothing irregular about Mr Palmer being the sole attendee of the meeting: it was a possibility expressly allowed for under the JVA. Although all the Parties are entitled to appoint members to the committee, the JVA allowed for a quorum to be one appointee of Zeph (Clause 16(a)).

(e) From 1 February 2020, the process of transferring the employees of the Kleenmatic Group to contracts with Zeph commenced.[426]

(f) On 3 February 2020, the Board of Zeph passed a resolution confirming that the JVA and Share Option Deed had been "completed". [427]

(g) On 4 February 2020, Wai Chan Loh (an owner of One Kleenmatic and Kleen Venture) commenced as a director of Zeph.[428]

164. This sequence of events is significant. It reveals the central role that Mr Palmer himself played in the initial set-up of the joint venture. It shows Mr Palmer, a resident of Australia and the ultimate beneficial owner of the Mineralogy Group, appointing himself as the representative of Zeph at the Joint Venture Committee Meetings, and thereafter conducting a meeting at which he was the only person present. Those events point to the need for this tribunal to carefully scrutinise the claim that the operation of the joint venture constitute substantive business activities of the Claimant, and that the Claimant's role in the joint venture is an activity that occurs in Singapore.

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425 Handwritten document titled "25 January 2020 Singapore JV Committee Meeting Minutes", **Exh. R-617**. The Respondent also notes that this document was the only document produced by the Claimant in response to Document Request 17(i) which sought "annual business plans and budgets prepared by the Claimant pursuant to clause 6 of the JVA, and Correspondence relating to annual business plans and budgets".

426 Employment Contracts Produced by Claimant at **Annexure A** to this ROPO.

427 Minutes of Directors of Zeph Investments Pte Ltd dated 3 February 2020, **Exh. R-528**.

428 Current and Historical Extract for Zeph Investments Pte Ltd, **Exh. C-483**.

165. The need for careful scrutiny is further enhanced by the fact that the Claimant offers its analysis of its financial statements through submissions, and through the witness evidence of Mr Palmer, rather than through any independent expert assessment of its financial statements.[429] It also makes claims regarding the value of assets and of its transactions in Singapore through to the 2022 financial year (distracting attention from its own acknowledgment that the relevant date is 13 August 2020).

166. Focusing on the position at 13 August 2020:

(a) While the Claimant described its role as the "controlling party" in the joint venture in accordance with the terms of the JVA,[430] the reality is that the Kleenmatic Companies continued to operate their cleaning business just as they had previously, with nothing having changed on the ground.

(b) That reality is reflected in the terms of the JVA:[431]

(i) The purpose of the Joint Venture, as disclosed in Clause 3.1, was "To operate all the businesses of the Second Party [One Kleenmatic] and Third Party [Kleen Venture] existing prior to the execution of this agreement which on execution of this agreement become Joint Venture Property". That is, the joint venture was to do no more than continue to operate the existing business of the Kleenmatic companies.

(ii) This is reiterated in Clause 3.2 which states that "the Parties have been associated as a joint venture for the following purposes… to carry out all the business previously carried out before the date hereof by the Second Party [One Kleenmatic] and Third Party [Kleen Venture] and all assets of such Parties are from the date hereof Joint Venture Property".

(iii) The bank accounts of One Kleenmatic and Kleen Venture were deemed to be the Joint Venture Bank Accounts (Clause 11).

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429 See, e.g., SODPO, paras. 390-392, 406, 432-442.

430 *Id*., paras. 389.

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

(iv) No separate legal entity (ie no joint venture company) was formed in order to carry out the joint venture.[432] Further, as at August 2020, Zeph had not acquired any shares in its joint venture partners, nor was any legal partnership established (see Clause 7).

167. The Claimant seeks to make much of the number of its employees (including in its SODPO a list of its employees as of 30 June 2023,[433] and a list of its employees as of 31 January 2024),[434] which are obviously irrelevant given the relevant date). It asserts that it has employed permanent staff "since its incorporation",[435] as well as contractors via a third party labour hire firm.[436] However, the vast majority of the Claimant's employees are employees who previously worked for the Kleenmatic Companies, whose formal employer became the Claimant as a result of the joint venture. The work of the employees who were transferred remained the same as it had previously been. The terms of the letter explaining to the former employees of the Kleenmatic Companies about their employment transfer to Zeph are telling as to in fact what was occurring: a formal transfer of contractual arrangements, but no change to the actual operations.[437] Far from assisting the Claimant, the transfer of cleaning employees to the Claimant serves only to highlights the extent to which the joint venture was a sham, the sole purpose of which was to contribute to the paper façade by which the Claimant planned to try to demonstrate that it engaged in substantive business operations in Singapore.

168. The documents produced by the Claimant confirm this.[438] In the document production phase of these proceedings, the Claimant was ordered to produce employment contracts for

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432 See Email from [redacted] to [redacted] (Background and Worksteps for the Joint Venture financial statements) dated 31 May 2024, **Exh. R-615**.

433 SODPO, para. 445.

434 *Id*., para. 446.

435 See, e.g., SODPO, paras. 393-395.

436 *Id*., para. 395.

437 The standard form letter stated "Following the acquisition of the Kleenmatic Group by Zeph Investments Pte Ltd, the Kleenmatic Group companies have agreed to transfer most of its employees to Zeph Investments Pte Ltd. We are pleased to inform you that your employment as a cleaner in the Kleenmatic Group has been transferred to Zeph Investments Pte Ltd effective from the date of this letter. The terms of your employment with Zeph Investments Pte Ltd remains the same as the terms of your Employment contract with the Kleenmatic Group ie, your duties, responsibilities, remuneration, leave details, termination clauses and terms of employment remain unchanged". See e.g. Employment contract of [redacted] dated 1 February 2020, **Exh. R-618**; Employment contract of [redacted] dated 1 February 2020, **Exh. R-619**; Employment contract of [redacted] dated 8 February 2020, **Exh. R-620**; Employment contract of [redacted] dated 1 February 2020, **Exh. R-621**.

438 Employment contracts Produced by Claimant at **Annexure A** to this SOPO.

employees of the Claimant, and records of transfer of employment or engagement contracts from One Kleenmatic and Kleen Venture pursuant to cl 24 of the JVA in the period 24 January 2020 to 13 August 2020. Of the 146 employment contracts produced by the Claimant, only six related to positions which were not cleaners. Even these six positions related to the management of the Kleenmatic Companies,[439] other than one administrative assistant (who, curiously, was employed by the Engineering Companies in the middle of 2020).[440] None of those six positions had responsibility for approaching banks for coal financing projects or carrying out any form of investment activity, highlighting the extent to which the reality of the personnel employed by Zeph departs from the claims made in the SODPO as to the purpose of its incorporation.

169. The Claimant's claims concerning its alleged employees are entirely artificial. They do not establish that the Claimant had "employees" in Singapore in any sense relevant to assessing whether it had "substantive business operations". Consistent with *NextEra*, *Spain* the question is whether individuals are performing services for the Claimant such that it was "engaged in investment activities from the [State of incorporation]", rather than whether a formal employment relationship exists between the Claimant and the employees.[441] In the present case, the individuals are working, just as they always have been, for the Kleenmatic Companies performing (mostly local cleaning) services for those companies.

170. Finally, it does not assist the Claimant that it has, in pursuance of the sham it has created through its acquisition of the Engineering Companies and its joint venture with the

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439 (1) Employment contract of [redacted] 1 February 2020, **Exh. R-655**. The contract lists the responsibilities as "responsibilities of full-set of account for Kleenmatic Services & Kleenmatic Management and other jobs arranged by the managements." (sic); (2) Employment contract of [redacted] dated 1 February 2020, **Exh. R-673** who as appointed Director of Kleenmatic Group and Marketing Manager for Kleenmatic Group and Zeph in the transfer and the listed responsibilities in the contract do not relate to organising any finances; (3) Employment contract of [redacted] dated 1 February 2020, **Exh. R-674.** The contract lists the responsibilities as to "to manage the day to day running of the cleaning operation of the Company and to assist the managers on other matters related to the company Business for (Kleenmatic Services & Kleenmatic Management); (4) Employment contract of Quek Adrian Siew Chang dated 1 February 2020, **Exh. R-700** "Senior Operations Executive" with the responsibilities listed are to "manage the day to day running of the cleaning operation of the Company and to assist the managers on other matters related to the company Business for (Kleenmatic Services & Kleenmatic Management)."; (5) Employment contract of [redacted] dated 1 February 2020, **Exh. R-701** who was appointed to Director of Kleenmatic Group and Business Development Manager in transfer. Note the listed responsibilities do not relate to organising any finances.

440 Employment contract of [redacted], **Exh. R-760**, entered into on 1 June 2020 with the role described as accounts and admin.

441 *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain* (ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles of 12 March 2019), paras. 257-258, **Exh. RLA-74**.

Kleenmatic Companies, taken out insurance policies,[442] and been issued licences (in order to carry out cleaning services) by the Singapore Government.[443] Nor does it assist it that it has registered its principal business activity with the Singapore Government,[444] or that it was entitled to receive COVID-19 subsidies (most of which in any event post-date 13 August 2020.)[445] The fact that the Claimant engaged three professional services firms in the relevant period to assist it with its incorporation, and with the maintenance of its sham presence in Singapore, similarly can be afforded no weight.[446] It would be perverse if steps taken in an attempt to give the appearance of substantive business operations were themselves treated as establishing the existence of such operations.

B. PROCEDURAL REQUIREMENTS

171. No serious attempt has been made by the Claimant to call into question the Respondent's compliance with the procedural (rather than substantive) requirements of Article 11(1)(b), save to repeat its submissions on estoppel and acquiescence which have already been addressed above in Section II.

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

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

173. The interaction between the denial of benefits preliminary objection and the abuse of process preliminary objection is addressed below in Section VI.

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442 SODPO, paras. 399, 421-422.
443 *Id*., paras. 399, 417-418.
444 *Id*., para. 409; ACRA, Business Profile – Zeph Investments Pte Ltd, **Exh. R -204**.
445 SODPO, paras. 419-420.
446 *Id*., para. 423.

VI. THE CLAIMANT'S CLAIM IS AN ABUSE OF PROCESS

174. The Parties agree that a claim will constitute an abuse of process where it is made possible by a corporate restructuring effected for the determinative or principal purpose of gaining access to treaty protection for an existing or foreseeable dispute.[447] The key area of disagreement between the Parties arises from how that test should be applied to the facts in issue in these proceedings.

175. In this Section, Australia demonstrates that the Claimant's SODPO does not credibly engage with the evidence that establishes that Zeph was created for the determinative or principal purpose of bringing a treaty claim (**Subsection A**) in relation to an existing or foreseeable dispute concerning the WA Government's unilateral conduct vis-à-vis the State Agreement (**Subsection B**). In such circumstances, Zeph's claim must be dismissed as an abuse of process (**Subsection C**).

A. THE PURPOSE OF THE RESTRUCTURE

176. Zeph (rightly) does not dispute the necessity of assessing whether it had a *bona fide* purpose for the January 2019 restructure.[448] The Parties' disagreement on this aspect of the objection is thus largely confined to whether the facts before the Tribunal disclose a genuine purpose for the January 2019 restructure.

177. Australia's position is that the principal – and likely sole – purpose for the incorporation of Zeph and its acquisition of Mineralogy shares was to position the Mineralogy Group to file a treaty claim in relation to a foreseeable dispute.[449] Zeph contends, by contrast, that its incorporation and its acquisition of Mineralogy shares in January 2019 "was not undertaken for any ulterior purpose",[450] but for a "genuine commercial purpose", namely to secure "significant potential financing, investment and tax advantages".[451]

178. Zeph's account of the precise advantages purportedly to be gained from the restructure has shifted even over the course of this arbitration. Several of the purported rationales that were

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447 See SOPO, pp. 99-137 ("Section IV: Zeph's Claim Constitutes an Abuse of Process"); SODPO, para. 4, 21.
448 See, for example, SODPO, para. 21(c) (see similarly paras. 45; 144-145, 489).
449 SOPO, paras. 317-348 (Section IV(E): "Purpose of the Restructure).
450 SODPO, para. 21(c) (see similarly para. 45; 144-145, 489).
451 *Id*., para. 489 (see similarly para. 46).

raised in Zeph's Statement of Claim – to which Australia responded with expert evidence in the SOPO – have not featured at all in Zeph's SODPO. It appears, in particular, that the '**Alleged Lithium Rationale**'[452] and '**Alleged Risk and Exposure Rationale**'[453] have now been abandoned by Zeph. This, of course, matters. The rationale for a given restructuring should be – so far as concerns the investor – a well-known fact. The investor should not be casting around, looking for reasons, and then abandoning reasons that it has suggested when they are shown to be implausible. And while it retains two other rationales – the '**Alleged Coal Funding Rationale**'[454] and the '**Alleged Tax Rationale**'[455] – Zeph's SODPO has failed to provide basic details for, let alone evidence supporting, either rationale.

179. In this Subsection, Australia (i) sets out evidence of the true purpose behind Zeph's incorporation and acquisition of Mineralogy shares, which Zeph has not refuted in its SODPO; and (ii) establishes that neither of the two remaining rationales proffered by Zeph actually motivated – or could reasonably have motivated – the January 2019 restructure. At a very obvious level, there is a complete lack of the documents that would undoubtedly have been generated if either of these two remaining rationales were genuine.

(i) The true purpose behind Zeph's incorporation and acquisition of Mineralogy shares

180. The purpose behind the Claimant's acquisition of Mineralogy shares must be assessed by reference to the Mineralogy Group's conduct and knowledge at the time of the Claimant's incorporation in January 2019, and by reference to other contemporaneous facts, which include Mineralogy's relationship with the WA Government,[456] which had considerably deteriorated by late 2018. Such purpose must be assessed subjectively (by reference to what the evidence discloses as to Zeph's actual purpose at the relevant time) and objectively (by reference to what a reasonable investor in Zeph's position could have had as its purpose).

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452 SOPO, paras. 329-332.
453 *Id*., paras. 344-348.
454 Palmer First WS, para. 115; SOPO, paras. 333-335; SODPO, para. 574.
455 SOPO, paras. 336-343; SODPO, paras. 575-603.
456 As to which, see e.g.,: *Mineralogy Pty Ltd v Sino Iron Pty Ltd, Korean Steel Pty Ltd, and CITIC Ltd (No 16*) [2017] WASC 340, para. 195, **Exh. CLA-5**; *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 7)* [2015] WASC 267, paras. 3-5, **Exh. R-773**; *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825, **Exh. R-91;** *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 3)* [2015] FCA 542, paras. 4–8, **Exh. R-832**.

a. The September 2008 meeting

181. The Claimant submits that the possibility of restructuring through Singapore was first contemplated "during 2008".[457] The paucity of documents to support this contention is telling. The contention is based almost wholly on Mr Palmer's recollections of a meeting in September 2008, as set out in his Fifth Witness Statement.[458] The Claimant relies on a single document – titled "Project Blast: Prospectus Drafting Session, Meeting Agenda" ("**Prospectus meeting agenda**") – in support of Mr Palmer's evidence as to what was discussed at this meeting.[459]

182. The reliance on this single document is indicative of much of the Claimant's case strategy. That strategy involves alleging *bona fide* purposes for incorporating in Singapore based on a strikingly bare evidentiary record. While the Respondent requested all "[a]dvices, emails, file notes, meeting minutes and meeting invites" related to this September 2008 meeting in the document production phase in these proceedings, it was informed by the Claimant that "[a]ll responsive documents have already been provided."[460] As a result, the Claimant's position is that the only document that relates to what is asserted to be a pivotal meeting involving the alleged potential restructuring of the Mineralogy Group through Singapore is the agenda for a "Prospectus Drafting Session".

183. Even the single document that has been produced does not support the inferences the Claimant asks the Tribunal to draw. The Tribunal need only look at the Prospectus meeting agenda to see the tenuous links the Claimant is now trying to draw between having done *anything* connected to Singapore – in this case holding a (possibly virtual[461]) meeting there in 2008 – and its alleged business rationales for incorporating a Singaporean company. As the Tribunal will see from the Prospectus meeting agenda:

(a) The document records a meeting that appears to be one in a series of meetings. It records an agenda of several items under the heading "[o]utstanding items from weekly call". No further record of such weekly calls has been disclosed by the Claimant.

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457 SODPO, paras. 553-554.
458 Palmer Fifth WS, para. 49.
459 Project Blast: Prospectus Drafting Session, Meeting Agenda dated 4 September 2008, **Exh. C-491**.
460 "Claimant's response to granted document requests", 7 June 2024, p. 4.
461 Rogers Supplementary Report, para. G.4.4.4.

(b) Mr Palmer and [redacted] are listed as attendees of the meeting for "RDI".[462] Australia understands this to be a reference to Resource Development International Ltd, a company controlled by Mr Palmer that, at this time, was preparing an initial public offering ("**IPO**") for the Hong Kong Stock Exchange ("**SEHK**").[463] Contemporaneous reporting indicates that RDI "appointed Macquarie Bank and UBS to manage the proposed IPO".[464] Representatives of both UBS and Macquarie Capital are listed as attendees at the 2008 meeting as "Global coordinator, sponsor and bookrunner"[465] and "Sponsor and bookrunner"[466] respectively, as are representatives from Blake Dawson (as "RDI legal advisor (Australia)"), Shearman and Sterling, and Linklaters ("Underwriter's counsel (Hong Kong and United States)"[467]).[468]

(c) The document indicates that the 2008 meeting was focussed on an IPO for the SEHK, for which a prospectus needed to be drafted. The document itself is titled "Prospectus drafting session". The agenda items for the first day of the meeting focussed, *inter alia*, on "SEHK valuation issues", "Timing of schemes (pre vs post listing)", "RDI submission to SEHK on exemptions", "SEHK issues" including "Response to SEHK's letter on Chapter 19 submission", and "RDI employee option scheme – does this need to be settled pre-listing?". The agenda records that the second and third day of the meeting was set aside for the "Advisors to address outstanding sections of the prospectus from Day 1".

(d) Several of the individuals who attended the meeting on behalf of Macquarie and UBS were based in Hong Kong,[469] and the contact address for Macquarie, the "sponsor and bookrunner", is listed as "maccapprojectblast**ipo**@macquarie.com."[470]

184. Accordingly, on the face of the Prospectus meeting agenda, a meeting took place over 10 years before the restructuring that is at issue in this proceeding, which concerned a proposed

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462 Project Blast: Prospectus Drafting Session, Meeting Agenda dated 4 September 2008, **Exh. C-491**, p. 3.
463 Rebecca Lawson, "Palmer proposes iron ore merger", *Business News* (24 July 2008), at https://www.businessnews.com.au/article/Palmer-proposes-iron-ore-merger, **Exh. R-764**.
464 Rebecca Lawson, "Palmer makes formal bid for Australasian", *Business News* (6 August 2008), at https://www.businessnews.com.au/article/Palmer-makes-formal-bid-for-Australasian, **Exh. R-544**.
465 Project Blast: Prospectus Drafting Session, Meeting Agenda dated 4 September 2008, **Exh. C-491**, p. 12.
466 *Id.*, p. 18.
467 *Id.*, p. 28.
468 *Id.*, p. 26.
469 Rogers Supplementary Report, Appendix 1.
470 Project Blast: Prospectus Drafting Session, Meeting Agenda dated 4 September 2008, **Exh. C-491**, p. 18.

IPO on the Hong Kong Stock Exchange. It had nothing to do with restructuring the Mineralogy Group through Singapore, or with obtaining debt financing for a coal mine from Singapore banks.

185. As appears obvious, and as Professor Lys confirms, this bare evidentiary record of the meeting is insufficient to establish that a restructure through Singapore was discussed at that time.[471] As Professor Lys observes in relation to the Prospectus meeting agenda:

> "… the evidence overwhelmingly indicates that not only did the series of meetings relate to a different Mr. Palmer-owned company, but that the company was contemplating equity financing through an initial public offering ("IPO"), and the venue was Hong Kong and not Singapore."[472]

186. As must be common ground, and as Professor Lys notes, moreover, at the time of the September 2008 meeting, Mineralogy did not yet even own Waratah Coal – the company for which it now says it needed to incorporate in Singapore in order to obtain coal financing. As Professor Lys explains:

> "…at the time of the September 2008 Singapore meeting Mineralogy did not own the Queensland coal properties which Mr. Palmer claims needed "urgent" funding that led to the Restructuring Transactions a decade later and the formation of Zeph."[473]

187. Mr Rogers, an expert with over 30 years' experience in the financing of mining projects, also explains as follows in relation to the September 2008 meeting:

> "G.4.2.1 Had there been an intention to discuss project finance at the meeting, I would have expected specialist mining project financiers to have been present …, and for there to be agenda items which related to debt. This does not seem to have been the case.
>
> G.4.2.2 Instead, there are repeated references which would lead one to conclude that this was a meeting about a potential listing, on the Hong Kong Stock Exchange. That is to say that the discussion seems to have been about possibly raising equity to progress the project definition …, not debt for the project's construction."[474]

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471 Lys Supplementary Report, para. 242.
472 *Id*., para. 247.
473 *Id*., para. 258.
474 Rogers Supplementary Report, paras. G.4.2.1-G.4.2.2.

188. For the above reasons, even the notably minimal evidence on which Zeph relies does not actually support its assertion that the prospect of restructuring through Singapore was contemplated prior to 2018.

189. Such position is, in any case, inconsistent with the Claimant's own evidence. Mr Palmer in his First Witness Statement, for example, stated that he "met with Mr Martino in March 2018" and that he first learned at that meeting that "it was going to be harder in the future for [Waratah Coal] to get finance from banks in Australia".[475] It was at this meeting in 2018, rather than at any earlier time – at least on Mr Palmer's initial characterisation in this First Witness Statement – that the possibility of restructuring through Singapore was raised.[476] Mr Martino's Witness Statement also refers to 2018, rather than any earlier date, as the time when a restructuring through Singapore was first floated.[477] While Mr Martino has been the corporate advisor to Mr Palmer and Mineralogy since "early 2008",[478] he makes no mention at all of the supposedly pivotal 2008 meeting in his evidence.

190. In any case, even if such an idea had been floated in 2008 (*quod non*), it was only acted on a decade later in 2018-2019, and it is the purpose of the restructure at that time that the Tribunal must determine.

191. Zeph itself emphasises these later dates in its own submissions.[479] It submits that its decision to restructure was made in "early June 2018",[480] with instructions provided to Singaporean firms in November 2018 for the incorporation of two Singaporean companies.[481] The paucity of documents in support of these developments is again striking. It is significant that, despite Mr Palmer's assertions that he discussed and received advice from Mr Martino during 2018 in relation to the Mineralogy Group Restructure, and despite Zeph being ordered by the Tribunal to produce documents relating to and recording those discussions, no documents relating to or recording any discussions between Mr Martino and Mr Palmer have been produced by Zeph, including any emails.[482]

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475 Palmer First WS, paras. 119-120.
476 *Id*., para. 121.
477 Martino WS, paras. 20-22, 27.
478 *Id*., para. 4.
479 SODPO, paras. 555-569.
480 *Id*., paras. 574, 595.
481 *Id*., para. 596.
482 Messrs Martino and Palmer share a long professional and personal history. See, e.g., Martino WS, paras. 4, 6, 10; *Palmer v McGowan (No. 5*) [2022] FCA 893, **Exh. R-166**, paras. 443-444, together with

b. <u>The purported urgency of the restructure</u>

192. From the limited materials that have been disclosed, it appears that Mr Palmer reached a view in November 2018 that the need to register "a new investment company in Singapore" was urgent. By email of 30 November 2018, Mr Palmer's representative ([redacted]) sent an email to a Singaporean law firm which stated:

> "I'm looking to register a new investment company in Singapore and hoping that you can assist me with that. In order to capitalise on an investment opportunity, time is of the essence, so I'm looking to move very quickly. I'm wondering if you have any shelf companies that are already registered that can expedite this process?"[483]

193. On 30 November 2018, the law firm responded to [redacted], commenting:

> "We are happy to receive your request to register a new investment company in Singapore and we will be very pleased to assist you with that. We also note the urgency so you can capitalise on an investment opportunity, and we will work with you to rush this.
>
> We do not maintain any shelf companies. However, we will be pleased to assist you to incorporate the new investment company as a private company limited by shares on an urgent basis. Here's our advice on how to proceed quickly. …"[484]

194. The asserted need to "capitalise on an investment opportunity" in these emails appears to be false. The record discloses no pursuit of any such opportunity.

195. Nevertheless, two Singaporean companies were created mere days later: Iron Holdings Pte Ltd (which was incorporated on 4 December 2018[485]) and Empowerment Investments Asia Pte Ltd (which was incorporated on 5 December 2018[486]). The Claimant acknowledges,

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underlying affidavit submitted by Mr Martino to support Mr Palmer's defamation action against Mr McGowan, 21 January 2021, **Exh. R-823**; United Australia Party, "Craig Kelly confirms shadow finance team", 15 February 2022, **Exh. R-825** (Mr Palmer's political party appoints Mr Martino as "Shadow Finance Minister" and refers to Messrs Palmer and Martino as the "United Australia Party's finance team"). Like Mr Palmer (see SOPO footnote 552 and sources cited therein), Mr Martino has been criticised by Australian courts. See, e.g., *Parbery v QNI Metals Pty Ltd* [2018] QSC 107, paras. 230-236, **Exh. R-165** ("Mr Martino's acts and omissions give rise to the inference that Mr Martino did not act in good faith…").

483 Emails between [redacted] and [redacted] ("Establishing a new company in Singapore") dated 30 November 2018, **Exh. C-502**.

484 *Ibid*.

485 ACRA, Iron Holdings Business Profile, **Exh. C-503**.

486 ACRA, EI Asia Business Profile, **Exh. C-504**.

without providing any further explanation, that neither of these companies were "ultimately utilised in the restructuring".[487]

196. On 12 December 2018, Mr Palmer gave instructions to incorporate a new company in New Zealand.[488] Two days later, on 14 December 2018, a New Zealand company – MIL – was incorporated.[489] Two days after that, on 16 December 2018, all the shares in Mineralogy were transferred to MIL.

c. The true rationale for the incorporation of MIL

197. The apparent "urgency" for incorporating three offshore companies in quick succession in late 2018 can readily be understood when it is recognised that it occurred at the same time as a major deterioration in relations between Mineralogy and the WA Government. The factual record set out in the SOPO provides a credible explanation,[490] both for the reason for the restructure, and for the urgency that Mr Palmer perceived in bringing it about, being his desire to secure treaty protection in respect of Mineralogy's rapidly escalating dispute with the WA Government.

198. Compelling contemporaneous media reporting excerpted in the SOPO confirms Mr Palmer's true purposes at this time. Those reports indicate that, in January 2019, "Mr Palmer said the move offshore meant Mineralogy would be able to claim compensation from the Australian government under the investor protection provisions in the Australia-NZ free trade agreement".[491] Mr Palmer quickly made good on such threats, with MIL writing to the WA Government and Australia on 18 January 2019 – mere days after returning from holiday[492] – to assert that any attempt by the WA Government to amend the State Agreement would result in "expropriation or measures equivalent to expropriation" in breach of Australia's international obligations, including under Chapter 11 of AANZFTA.[493] That letter further

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487 SODPO, para. 604.
488 Palmer Fifth WS, para. 113.
489 New Zealand Companies Office, Mineralogy International Limited Company Extract, **Exh. C-506**.
490 SOPO, paras. 283-299; see also Section VI(B) below.
491 SOPO, paras. 287-290.
492 SODPO, para. 601.
493 Letter from MIL to Premier McGowan dated 18 January 2019, **Exh. R-44**, p. 2; Letter from MIL to the Minister for Energy in the Commonwealth Government dated 18 January 2019, **Exh. R-45**.

noted that, "[i]f your Government proceeds with amending legislation, MIL will immediately make a claim for $45Bn against the Commonwealth."[494]

199. Zeph has not contested or responded to this evidence, which therefore stands unchallenged. Mr Palmer's media comments provide a contemporaneous and accurate statement of the true purpose behind the Mineralogy Group's restructure in late 2018 and early 2019.

200. No other plausible explanation exists for MIL's incorporation, and its insertion into the chain of ownership above Mineralogy. Consistent with this, Australia's SOPO has already demonstrated that the alleged reason for incorporating MIL in New Zealand that was asserted in Zeph's Statement of Claim (the **Alleged Lithium Rationale**) is not credible.[495] The contemporaneous documents produced by Zeph do not refer to any Alleged Lithium Rationale. Beyond asserting – with no plausible basis or supporting reasoning – that Australia's expert evidence in respect of this purported rationale should be "treated as inadmissible and/or accorded no weight",[496] Zeph's SODPO is entirely silent as to its purposes for incorporating MIL in New Zealand in December 2018. Indeed, documents contemporaneous with the creation of MIL that have been produced by Zeph as part of the document production phase only cast further doubt on this purported rationale.[497]

201. In circumstances where Zeph does not join issue on the substance of Australia's submissions and expert evidence concerning the Alleged Lithium Rationale, Australia respectfully submits that the Tribunal cannot accept the only rationale for the incorporation of MIL that Zeph has advanced. In those circumstances, the proper conclusion (which is entirely

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494 Documents disclosed by the Claimant indicate that, in an email to Mr Palmer dated 14 January 2019, Sarah Mole had attached "the current version of the letter to the Premier" and a "draft cover letter to Senator Mathias Cormann (Minister for Finance)" confirming also "[t]he list of people you wanted that cover letter sent to" as being "Leader of opposition", "All members of the WA cabinet", "Minster for finance", "Treasurer", "Minister for defence", "President of legislative council of WA", "Minister for Foreign Affairs": Emails between [redacted] and [redacted] (Fw: PREMIER LETTER) dated 30 May 2024, **Exh. R-765**. The covering letters appear to be Attachment to R 7-66: Draft letter from Clive Palmer on behalf of Mineralogy Pty Ltd to Senator Mathias Cormann, Minister for Finance and the Public Service dated 18 January 2019, **Exh. R-766**, and Letter from MIL to Premier McGowan, **Exh. R-44**.

495 SOPO, paras. 329-332.

496 SODPO, para. 621(e).

497 A form prepared for New Zealand Inland Revenue, for instance, lists MIL's "[b]usiness description" as "hotel operation" (attachment to Exh. R-774: Inland Revenue GST registration form – Mineralogy International Ltd. **Exh. R-767**), whereas an application for an Australian Business Number listed MIL's "main business activity" as "Holding company operation – holding shares in subsidiary companies" (attachment to Exh. R-796: Draft application for an Australian Business Number – Mineralogy International Limited, **Exh. R-768**).

consistent with Mr Palmer's contemporaneous statements) is that the principal reason for the incorporation of MIL was the misguided belief that such incorporation would secure treaty protection for Mineralogy in respect of its dispute with the WA Government under Chapter 11 of AANZFTA.[498]

d. The true rationale for the incorporation of Zeph

202. It is only in the context of the attempt to secure treaty protection that the insertion of the Claimant into the corporate chain between Mineralogy and MIL on 29 January 2019 becomes explicable. By that time, Mineralogy had recognised (as had been pointed out in contemporaneous media reports) that New Zealand companies have no right to initiate investor-State dispute settlement proceedings against Australia under Australia's investment agreements.[499] It was that fact that necessitated resort to a company incorporated in a different jurisdiction that was also party to investment treaties with Australia. Singapore met that criteria. The conclusion that this chain of reasoning is what led to the incorporation of the Claimant is made even more compelling when regard is had to the consistency of the terms in which Mineralogy's correspondence with Australia invoked treaty protections in respect of the escalating dispute with the WA Government – both prior and subsequent to the incorporation of Zeph, and right up to the passage of the *Amendment Act*.[500]

203. The stark paucity of documentation from the Claimant, including the total absence of any Board Minutes and of correspondence sent or received by Mr Palmer explaining the purposes behind the incorporation of Zeph, reinforces the above submission: while the purposes that the Claimant asserts would (if true) be expected to produce significant contemporaneous documentation, that is not true of the abusive purpose identified above.

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498 Letter from Simon Crean MP, Australian Minister for Trade, to Hon. Tim Groser, New Zealand Minister of Trade dated 27 February 2009, at https://www.dfat.gov.au/sites/default/files/minlet_aust.pdf, **Exh. R-769**; Letter from Hon. Tim Groser, New Zealand Minister of Trade, to Simon Crean MP, Australian Minister for Trade, dated 27 February 2009, at https://www.dfat.gov.au/sites/default/files/minlet_nz.pdf, **Exh. R-770**.

499 SOPO, paras. 8-10.

500 Letter from MIL to Premier McGowan dated 18 January 2019, **Exh. R-44**, p. 2; Letter from MIL to the Minister for Energy in the Commonwealth Government dated 18 January 2019, **Exh. R-45**; Letter from MIL to Premier McGowan dated 4 February 2019, **Exh. R-141;** Letter from Mineralogy to Premier McGowan dated 15 May 2019, **Exh. R-143**; Letter from MIPL to Premier McGowan dated 20 May 2019, **Exh. R-144;** Letter from Mineralogy to WA Attorney-General dated 15 October 2019, **Exh. R-145**; Letter from Mineralogy to Premier McGowan dated 25 November 2019, **Exh. R-146**; Letters from Volterra Fietta to the Minister for Foreign Affairs dated 14 October 2020, **Exhs. C-148**, **R-147**, **R-148**.

204. The documents that Zeph has disclosed during document production do, however, make it clear that – just as had occurred with the incorporation of MIL in December 2018 – there was again a sense of urgency in the creation of the Claimant. Zeph has disclosed an email chain which contains (some of) the communications that resulted in its incorporation and insertion into the chain of ownership above Mineralogy.[501] The chain begins with an email from [redacted] ([redacted]) to [redacted] (who had been responsible for instructing the incorporation of the two Singaporean entities in late 2018), and copies in the [redacted] corporate services team email address [redacted]:

(a) On 19 January 2019, [redacted] stated: "my instructions are now to pursue option B – incorporating a new Pte Ltd company", and requested [redacted] to investigate the availability of several names for the proposed new company.[502]

(b) On 20 January 2019, [redacted] requested that [redacted] complete an "incorporation questionnaire" and "note[d] the urgency of the incorporation of the entity by tomorrow".[503]

(c) On 21 January 2019, [redacted] instructed [redacted] to "[p]lease mirror the provisions in the MIL constitution I sent earlier on for a NZ company."[504]

(d) By email of 20 January, [redacted] – a partner at [redacted] –asked about the business plan for the new entity and by when it would be required.[505]

(e) Mr Mashayanyika replied by email of the same date as follows:

> "The new entity will be acquiring established businesses in Singapore and we require is [sic] to be incorporated tomorrow Monday 21st, a redeemable share is required similar to the one on the attached

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501 Emails between [redacted] (RE: Empowerment Investments Asia Pte. Ltd.) attaching "ASIC – Receipt Number 60179794, View company details – Mineralogy Pty Ltd.pdf" dated 18-21 January 2019, **Exh. R-771**. See, similarly: Emails between and among [redacted], Mr Palmer, [redacted], [redacted], [redacted] (Fwd: Proposed Incorporation of Mineralogy International Pte. Ltd.) dated 23 January 2019, attaching "Director's Particulars Form.doc" **Exh. R-772** (concerning the appointment of Mr Palmer as director of the Claimant, and requesting that Mr Palmer "complete this today and return to us [redacted] and [redacted] as soon as possible.")

502 **Exh. R-771**, pp. 6-7.

503 **Exh. R-549**, p. 1. The questionnaire is **Exh. R-552**.

504 **Exh. R-549**, p. 6.

505 **Exh. R-771**, p. 4.

constitution, I attach a similar constitution done for NZ company, we need one pretty much similar to this."[506]

(f) [redacted] was thereafter informed that under Singapore law "(i) it is not possible for the proposed new company to allot and issue redeemable ordinary shares; and (ii) it is not possible to incorporate the proposed new company with only 1 redeemable preference share …".[507]"[A]fter discussing with [his] boss", [redacted] issued instructions to "go ahead and incorporate the company with 1 ordinary share to Mineralogy International Limited as the corporate subscriber and not Clive Palmer as previously indicated."[508]

205. The Claimant was incorporated on 21 January 2019.[509] The business profile for the Claimant records its "Principal Activities" as "Other Holding Companies (64202)".[510]

206. A meeting to effect the implementation of "the proposed interposition of the new Singapore company" between Mineralogy and MIL took place "at the Queen Street offices of Mineralogy" in Brisbane, Australia on 29 January 2019.[511] Although [redacted] prepared documents to support the restructure, the Mineralogy Group's tax advisors at [redacted] indicated that they had "kept our Australian documents (where there was a double up)" rather than using Singaporean documents, "to ensure Australian Stamp Duty relief is obtained".[512] This again demonstrates that the Mineralogy Group actively sought and acted on tax advice when it was needed to avoid liabilities, and again shows how Australian-centric these considerations were. In fact, Mr Palmer was specifically advised by [redacted], from [redacted],

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506 **Exh. R-771**.

507 *Ibid.* Emphasis in original.

508 *Ibid*.

509 ACRA, Certificate of Incorporation dated 4 December 2019, **Exh. C-70**.

510 Attachment to Exh. R-600: Business Profile of Mineralogy International Pte Ltd dated 21 January 2019, **Exh. R-601**.

511 Emails between and among [redacted] and others (RE: Draft interposition documents), **Exh. R-554**.

512 Email from [redacted] dated 22 January 2019, in emails between and among [redacted] and others (RE: Draft interposition documents), **Exh. R-554**, p. 1. See, similarly: Email from [redacted] to Mr Palmer in emails between and among [redacted] Mr Palmer, [redacted] and others (Proposed Incorporation of Mineralogy International Pte. Ltd.) dated **Exh. R-600**. ("We need to be able to clearly demonstrate that the interposition resolutions were made in Australia and that the majority of the directors are Australian resident to ensure Australian tax residency is established for Mineralogy International Pte Ltd [the Claimant]".

to ensure the connection between the interposition resolutions and Australia for the purposes of the Claimant's "Australian tax residency status going forward".[513]

207. In an email of 29 January 2019, [redacted] – the partner at [redacted] who had previously described himself as "Mr Palmer's long time Australian adviser"[514] – wrote to Mr Palmer, [redacted], and [redacted] by email with the subject line "Singapore Interposition – Additional documents and queries".[515] In that email – to which Zeph has not produced a response – [redacted] raised the following query (bolding in original):

> "[redacted], could you please sign the attached minutes for Mineralogy Pty Limited. **Clive, in relation to this point, could you please consider any possible detrimental impact if the signing of the minutes does not occur promptly with your broader objectives, i.e. if Mineralogy International Pte Ltd is not registered as a shareholder are the broader asset protection aims met. Please reconsider where you still wish to defer.**"

208. Thus, even the limited documents that Zeph has produced do not support the rationales that Zeph maintains in attempting to explain its decisions to restructure in 2018-2019.[516] These

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513 Emails between and among [redacted], Mr Palmer, [redacted] and others (Proposed Incorporation of Mineralogy International Pte. Ltd.), **Exh. R-600**, p. 1.

514 Emails between [redacted], Mineralogy [redacted], [redacted] and others (Fwd: Mineralogy Companies – tax registration) dated 20 December 2018, **Exh. R-774**. Mr [redacted] witness statement states that his "area of specialty was and is corporate taxation", and discloses his company's "ongoing engagement with the Mineralogy Group to provide professional taxation services." Witness Statement of [redacted], 16 February 2023 (filed with NOA), paras. 3-4. This is consistent with documents produced by Zeph in this arbitration pursuant to PO4, confirming [redacted] involvement in the 2018-2019 corporate restructuring. See, e.g., Email from [redacted] to Mr Palmer regarding MIL taxation documents, 19 December 2018, **Exh. R-796**. Like Zeph's other witnesses/experts in this arbitration (Messrs Martino and Birkett – see above footnotes 263 and 482), Mr [redacted] has provided evidence to support Mr Palmer, and companies controlled by Mr Palmer, in domestic Australian litigations. See, e.g., *Parbery v QNI Metals Pty Ltd* (No 15) [2020] QSC 143, paras. 78, 80, 84, **Exh. R-836**.

515 Email from [redacted] to Mr Palmer, [redacted] and [redacted] (Singapore Interposition – Additional documents and queries), **Exh. R-775**, p. 1.

516 For completeness, the Respondent notes that several Australian judges have found Mr Palmer, and companies controlled by Mr Palmer, to have committed an "abuse of process", as that term is used in Australian law, for example by making allegations without factual basis and/or filing proceedings for an improper purpose. See, e.g., *Palmer v Magistrates Court of Queensland & Ors* [2024] QCA 8 (Queensland Court of Appeal – Dalton and Boddice JJA and Burns J), paras. 5, 75 (proceedings were "an abuse of the process of this Court because they interfered with the proper administration of criminal justice according to law", based on "complaints" which "were factually undeveloped and factually contentious"), **Exh. R-827**; *Palmer Leisure Coolum Pty Ltd v Magistrates Court* [2022] QSC 227 (Supreme Court of Queensland – Callaghan J), para. 59, **Exh. R-837**; *International Minerals Pty Ltd v State of Western Australia* [2022] FCA 938 (Federal Court of Australia – Downes J), paras. 49-50 ("the applicant sought to use the Court's processes as a weapon and to achieve a purpose other than that for which the proceedings are properly designed and exist."), paras. 52, 73; *Sino Iron Pty Ltd v Mineralogy Pty Ltd [No 7*] [2022] WASC 25 (Supreme Court of Western Australia – Kenneth Martin J), para. 47, **Exh. R-819**; see also *Mineralogy Pty Ltd v BGP Geoexplorer Pte Ltd* [2017] QSC 219 (Supreme Court of Queensland – Jackson J), para. 34, **Exh. R-834**.

documents make no reference to the Alleged Coal Funding Rationale or the Alleged Tax Rationale. Instead, the email chain itself states that Zeph was created for the purposes of "acquiring established businesses in Singapore". As is discussed above, that is wholly consistent with the purpose being to attempt to circumvent a denial of benefits claim so as to secure treaty protection. Indeed, the reference in [redacted] email quoted above to an urgent need to secure "asset protection aims" appears to be a euphemistic reference to that very purpose (given the escalating dispute with WA, and the absence of any other apparent basis on which the insertion of a shell company above Mineralogy would provide any "asset protection").

209. Moreover, the urgency with which the Claimant was incorporated and inserted into the Mineralogy Group is also inconsistent with its **Alleged Coal Funding Rationale**[517] and the **Alleged Tax Rationale**.[518] As Professor Lys explains in his Supplementary Report:

> "283. In my expert opinion, the first motive, raising debt financing in Singapore cannot be considered urgent because the Claimant has provided **no evidence** in support of several important preconditions:
>
> a. The project has matured sufficiently to require any financing;
>
> b. There is a prospective buyer; and
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> c. Preparations to obtain funding have been carried out.
>
> 284. The tax consideration also carries no urgency. From an *ex-ante* perspective, as a director of Mineralogy, Zeph, and MIL, Mr. Palmer controls the timing of when his wholly owned companies will pay dividends to him and he can delay any such payments to suit his tax strategies. Furthermore, my analysis shows that since the restructuring Mineralogy has paid out over SGD $800,000,000 in dividends, and yet, I have seen no evidence that Mr. Palmer has ever relocated to Singapore. This means that, according to his own words, Mr. Palmer has chosen to not take advantage of relocating to Singapore and has presumably paid significantly more in taxes than he could have despite claiming in this proceeding that this was one of his main goals for the restructuring."[519]

210. It is telling that Mr Palmer and Mineralogy apparently did not either seek or receive any other tax advice, legal advice, corporate and business advice, or strategic advice about whether and how the Mineralogy Group Restructure would achieve any legitimate purpose. The Claimant was ordered to produce any such advice and has neither done so, nor claimed

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517 Palmer First WS, para. 115; SOPO, paras. 333-335; SODPO, para. 574.
518 SOPO, paras. 336-343; SODPO, paras. 575-603.
519 Lys Supplementary Report, paras. 283-284.

to be entitled to withhold it on the ground of privilege. That reinforces the inference that the purpose of the restructure was not to obtain legitimate benefits, but rather to secure treaty protection for the Mineralogy Group in relation to the WA Government's conduct towards the State Agreement.

(ii) The Claimant's asserted rationales for the corporate restructure

211. As already noted, Zeph now appears to maintain only two of its rationales to explain the purposes behind incorporating Zeph and transferring Mineralogy shares to it in January 2019: the **Alleged Coal Funding Rationale**[520] and the **Alleged Tax Rationale**.[521] These are addressed in turn in this Subsection.

212. At the outset, Australia notes that, despite taking the view that identifying the purpose of the restructure "is a factual matter",[522] Zeph has not produced sufficient documentary, witness or expert evidence to show that *any* purported alternative purpose was a motivating purpose, let alone the principal or determinative purpose, for the restructure. The purposes it invokes instead are *ex post* rationales developed for these proceedings. This reinforces the conclusion above that the true purpose for the restructure was to attain treaty protection in respect of the foreseeable dispute with the WA Government.

a. Zeph's Alleged Coal Funding Rationale

213. There is no documentary evidence supporting the contention that the Alleged Coal Funding Rationale even informed – let alone motivated – the incorporation of the Claimant in 2019. Zeph has produced no contemporaneous documentary evidence to show that such a purpose was even within its contemplation in 2018-2019. Nor has Zeph established that there was any credible reason to consider that such funding would have been available, let alone more readily available, to a company incorporated in Singapore than in Australia. Other reasons to reject this claimed purpose include that it would not have explained the apparent urgency for Zeph's incorporation, or its immediate acquisition of the Engineering Companies. Furthermore, Zeph has never taken steps that are consistent with this rationale (including by making any approach to Singapore banks to attempt to obtain funding, or undertaking any due diligence in relation to potential funders). To the contrary, as Australia explained in the

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520 Palmer First WS, para. 115; SOPO, paras. 333-335; SODPO, para. 574.
521 SOPO, paras. 336-343; SODPO, paras. 575-603.
522 SODPO, para. 621(a).

SOPO, it acquired businesses shortly after its incorporation that had nothing to do with the Alleged Coal Funding Rationale, and it never engaged staff with the expertise necessary even to attempt to realise the Alleged Coal Funding Rationale (which, for reasons explained in the SOPO, was in any case objectively unachievable for reasons that Zeph must have understood).[523]

214. Zeph's SODPO does not engage with the Lys First Report on coal funding in any meaningful way. It simply suggests without any basis that the Lys First Report is "irrelevant" and should be accorded "no weight" because Professor Lys is not an "individual with experience of mining deals in Singapore".[524] Zeph's attempt to side step Professor Lys' analysis is striking, and all the more so because many of the comments made by Professor Lys reflect what is intuitively obvious and/or identify obvious gaps in the evidence. As Professor Lys notes in his Supplementary Report:

> "236. I summarized my concerns over the supposed business purpose of the transaction in eight separate points:
>
> (a) In my experience I would expect contemporaneous records documenting the planning of that restructuring that I did not see here;
>
> (b) Mineralogy confuses different funding alternatives in its various assertions;
>
> (c) The transaction proposed and undertaken by the Mineralogy Group did not assist it in accomplishing its stated objectives;
>
> (d) Mineralogy's stated objectives are not supported by the evidence in the record;
>
> (e) Mineralogy's timeline is not supported by the evidence in the record;

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523 In relation to "the requirements for such an arranger" of "funding from Singaporean banks and financial institutions", the Claimant "refers to the evidence of Mr Alberto Migliucci (the Claimant's expert in these proceedings)", SODPO, para. 574(d)(vi); see also Fifth Palmer WS, para. 58 ("The type of expert required to act as an arranger [of coal financing] is well demonstrated by the CV of the Claimant's expert in these proceedings, Mr Alberto Migliucci…."). Mr Migliucci appears to have provided professional services to companies controlled by Mr Palmer in other contexts. See, e.g., *Coal Market Commentary – Unlocking the Value at the Galilee Coal Project* (1 May 2020), **Exh. R-814** (produced by the Claimant during document production in this arbitration, pursuant to PO4). In past publications and interviews, Mr Migliucci has expressed reservations regarding opportunities for coal financing (contrary to the Claimant's position in this arbitration). See, e.g., "Prospective Riches in Asian Resources: An Interview with Alberto Migliucci, Chief Executive Officer and Founder, [redacted]" (2015) 38(2) *Leaders Magazine* pp. 64 and 65, **Exh. R-816** (Mr Migliucci quoted as stating that "nobody is investing in coal"); "Petromindo Interview: Hot Commodities" (4 April 2019) *Petromindo*, **Exh. R-839** (Mr Migliucci states that "Investment in coal has been subdued in the last few years with many of the developed countries cutting back on new coal-fired power projects due to social ideologies and environmental pressure…. Various industry estimates perceive global coal demand to be modest, with declines in Europe and flattish growth in China offset by demand from India and ASEAN countries, mainly Thailand and Indonesia").

524 SODPO, para. 621(b).

(f) Claimant omits disclosing important factual information regarding the transaction purposes;

(g) Evidence of Singapore banks' willingness to lend to a project such as WC is thin at best; and,

(h) Claimant made alternative representations to the Australian government regarding the purpose of the restructuring.

237. To the best of my knowledge, the Claimant has not responded to most of the opinions I raised in the First Lys Report."[525]

215. In stating these concerns, Professor Lys is confirming what appears to be intuitively obvious.

216. Zeph has also not engaged at all with the expert evidence of Mr Rogers as to the Alleged Coal Funding Rationale. Mr Rogers' conclusion is that there is no "serious basis" on which to conclude that Mineralogy actually held – or could reasonably have held – the view that the restructuring would increase the likelihood of attracting coal financing for Mineralogy projects therefore stands unchallenged.[526] In his Supplementary Report, Mr Rogers concludes that the material filed by Zeph with its SODPO "reinforces and supports" the conclusions set out in his first Report.[527] Specifically, he concludes:

> "The size of the financing Mr Palmer says he was contemplating (A$8bn), in the context of the widespread lack of market appetite for project financing of coal mines and the inadequate expertise and size of Mineralogy as a sponsor, means that the project would not have been financed. This would have been the case irrespective of corporate structure, and would apply had Mr Palmer spoken to all conceivable potential lenders. …
>
> I believe that the above would also have been obvious to a commercially orientated person, with a reasonable level of financial expertise, operating in the mining sector.
>
> The information provided also leads me to conclude that Waratah Coal's project, in 2018, was still 5+ years away from the stage that a project would need to reach in order to be debt financed (feasibility study, permits, environmental approvals, offtake contract, etc.) …."[528]

217. In his Supplementary Report, Mr Rogers also directly addresses the evidence of Mr Palmer that he was advised in 2008 that it would be "better to have a Singapore incorporated company raising debt finance" because it would streamline the "legal-sign off" that would

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525 Lys Supplementary Report, paras. 236-237.
526 Rogers Report, paras. E.1.1.1-E.1.1.3.
527 Rogers Supplementary Report, para. F.1.1.1.
528 *Id*., para. F.2.1.1- F.2.1.3 (footnotes omitted).

be required if the debt was "raised" in Singapore.[529] Mr Rogers' opinion is that any such advice would have contained a number of errors that he does not believe a specialist project financier would make.[530] In particular, it is "hard to see why the number of legal sign offs on the debt facility would rate as a material concern in comparison to all of the other challenges"[531] and that this is "an issue of so little consequence that it would not be a subject that any borrower would want to, or be advised to, focus on until the debt was in the final stages of being documented".[532]

b. <u>Zeph's Alleged Tax Rationale</u>

218. Zeph has repeatedly failed to clarify the precise tax advantages that it claims could have accrued from the restructuring in January 2019. Its position now appears to be that Mr Palmer contemplated relocating to Singapore and taking up permanent residency there in order (he asserts) to save AUD $90 million in tax, with the restructure apparently being connected in some way to achieving that alleged purpose.[533] Yet, this alleged rationale is not supported by any contemporaneous evidence, is not linked to the need to incorporate a Singaporean company, was not put into motion subsequent to the incorporation of Zeph, would have produced tax disadvantages for the Mineralogy Group, and is inconsistent with the urgency with which the restructure was undertaken. For these reasons, as outlined below, the Alleged Tax Rationale must also be rejected.

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529 Palmer Fifth WS, para. 50.
530 Rogers Supplementary Report, Section G.4.5.1.
531 *Id*., para. G.4.6.1.
532 *Id*., para. G.4.6.3.
533 E.g., Palmer Fifth WS, paras. 60-63.

Zeph's Alleged Tax Rationale is not supported by any contemporaneous evidence

219. Zeph has offered none of the evidence that would exist if there had truly been a consideration of *any* tax advantages motivating its decisions in late 2018-2019.[534] For example, it has not filed any Board Minutes, tax statements, or tax returns to substantiate this alleged purpose.[535] Nor has it filed evidence of substantive contemporaneous advice or analysis from a tax expert as to the alleged tax benefits. It is notable in this respect that, in the documents the Claimant has produced, there is evidence of the Mineralogy Group having involved Mr Palmer's "long term" Australian tax advisor to consider the tax liabilities associated with incorporating MIL in New Zealand, and the Australian duties payable on the transfer of Mineralogy shares to the Claimant in January 2019.[536] Yet no similar documents have been produced that evidence there having been *any* contemporaneous analysis as to tax liabilities or benefits associated with the incorporation of the Claimant in Singapore. In the absence of such evidence, there is no reason to consider that *any* tax advantages could reasonably have been contemplated as a result of that incorporation.

220. In fact, following the restructure, PwC wrote to Revenue WA on 21 August 2019 on behalf of Mineralogy, MIL and the Claimant seeking exemption from duties in connection with the restructure. In that letter, PwC noted that its instructions from the Mineralogy Group were to the effect that the restructure was not undertaken "for the sole or dominant purpose of avoiding or reducing any liability of a person for tax other than duty".[537]

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534 Mr Palmer's public statements are also inconsistent with this purported rationale. Throughout the relevant period, he publicly commented on the amount of tax "his" companies pay in Australia and criticised other companies for restructuring to achieve the types of tax benefits he now claims he was pursuing in 2018 and 2019. For example, on 9 October 2018, Mr Palmer stated: "I have blasted Glencore for unconscionable behaviour over new reports the multi-national mining company moved $30 billion of assets into offshore tax structures" (@CliveFPalmer (Twitter, 9 October 2018, 5:12 PM AEDT), at https://twitter.com/CliveFPalmer/status/1049543221838209025, **Exh. R-776**. On 21 May 2019, Clive Palmer tweeted: "Mr Palmer said Mineralogy had paid $44 million in tax this year while CITIC Limited had taken more than $4 billion dollars in Australian ore and paid zero tax to the Australian tax office." (@CliveFPalmer (Twitter, 21 May 2019, 12:42 PM AEDT), at https://twitter.com/CliveFPalmer/status/1130665078213054464, **Exh. R-777**.

535 This was pointed out in SOPO para. 336. Zeph has not sought to respond on this evidentiary void as it presumably could do if such considerations actively motivated the restructuring decisions at the relevant time.

536 Emails between [redacted], Mineralogy [redacted], [redacted] and others (Fwd: Mineralogy Companies – tax registration) dated 20 December 2018, **Exh. R-774**.

537 PwC Letter re Mineralogy Group – Application for Connected Entities Exemption under Duties Act 2008 (WA) (Exhibit 23 to Annexure A to NoI) dated 20 October 2022, **Exh. C-63**, p. 211, s. 6.1 (citation to PDF page number). Australia addresses the purposes put forward by PwC in this letter at SOPO, paras. 344-348, to which Zeph has not responded. As noted at para. [29] above, the Claimant's acquisition of the

221. The absence of any evidence in support of Zeph's purported tax rationales for the restructures undertaken in 2018-2019 is notable. This was highlighted in the SOPO,[538] and it is telling that Zeph has not sought to redress the evidentiary void in its SODPO. As Professor Cooper, an expert in Australian taxation law, states:

> "It is inconceivable that Mr Palmer would have pursued either Insertion without receiving comprehensive tax advice about the possible tax pitfalls in Australia, Singapore and New Zealand (as well as advice about how to avoid them) from specialist, external, insured tax advisers: the sums being moved, and the commensurate tax risks, are simply too big to be handled in a less than thorough manner."[539]

222. As Professor Cooper notes in his report, the email sent to the Mineralogy Group from [redacted] at [redacted][540] indicates that at least some tax advice may have been received.[541] However, that advice has not been put into evidence (despite the Claimant having an additional opportunity to do so, or at least to indicate its existence through a privilege log, given the Respondent's document production requests).[542] In any event, those emails from [redacted] indicate that, to the extent that *Australian* tax consequences of the restructure were considered, that advice was given in haste, effectively during the course of the transaction, and that it was directed to preserving the tax status quo for the Mineralogy Group despite the restructure. There is no evidence that the type of comprehensive tax advice Professor Cooper points to was ever sought, or that the restructure was undertaken with "careful and comprehensive planning and execution".[543] This strongly suggests that alleged tax benefits did not constitute the true purpose behind the January 2019 restructure.

The incorporation of Zeph was not necessary to achieve the Alleged Tax Rationale

223. Zeph's SODPO and the Palmer Fifth WS focus solely on the tax benefits that it is said would accrue to Mr Palmer personally as a result of the restructure. In his Fifth Witness Statement, Mr Palmer states that, for the financial year ending on 30 June 2018, Mineralogy's profits

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shares in Mineralogy triggered liability for landholder duty under the *Duties Act 2008* (WA). [Mineralogy's] representation that the restructure did not seek to avoid tax liabilities was a factor relevant to seeking the Commissioner's exemption from payment of applicable duties under the *Duties Act 2008*.

538 SOPO, para. 336.

539 Cooper Report, para. 22.

540 Emails between and among [redacted], Mr Palmer, [redacted] and others (Proposed Incorporation of Mineralogy International Pte. Ltd), 21-22 January 2019, **Exh. R-600**.

541 Cooper Report, para. 22

542 Category 2 of the Respondent's Document Requests, see also *Procedural Order No. 4* for the relevant orders made by the Tribunal including for the completion of a privilege log.

543 Cooper Report, para. 23.

would be in the order of AUD $250,000,000, and that if those profits (along with other retained profits, with a combined total of around AUD $370,000,000) were paid to him as dividends, he would be required to pay tax in Australia of around AUD $90,000,000. However, Mr Palmer states that "if I were to restructure and become resident in Singapore, I could be relieved of the requirement to pay around AU$90,000,000 tax in Australia. At the time, this was an important and persuasive reason for me to consider a restructure."[544]

224. That claim should not be accepted. The tax benefits that would allegedly have accrued to Mr Palmer would have accrued only if – following the incorporation of the new company in Singapore – Mr Palmer had moved to Singapore and attained Singapore permanent residency ("**SPR"**), and then caused the Mineralogy dividends to be paid to Zeph into a bank account not domiciled in Singapore.[545] The Claimant's case is that, under such an arrangement, Mr Palmer would have been entitled to personal tax advantages vis-à-vis Mineralogy dividends.

225. However, this isn't correct. The incorporation of Zeph in Singapore and the insertion into the corporate chain is "superfluous"[546] to Mr Palmer obtaining a personal tax advantage. In fact, as explained by Professor Phua, an expert in Singaporean tax law, obtaining permanent residency in Singapore could give rise to potential personal tax disadvantages. From a Singaporean tax law perspective, if Mr Palmer were not to obtain permanent residency in Singapore, Professor Phua states:

> "44. Dividends declared by MIL, River Crescent Pty Ltd or Closeridge Pty Ltd would be treated as foreign-source as I have assumed that they are not tax resident in Singapore. Thus, as long as Mr Palmer does not acquire tax residence in Singapore and remains a tax resident of Australia, he would be exempt from tax in Singapore even if the dividends declared by MIL, River Crescent Pty Ltd or Closeridge Pty Ltd are received in Singapore.
>
> 45. But I hasten to add that the tax treatment described above applies to any non-resident individual who receives foreign-source dividends in Singapore from a non-resident company. Thus, even without the restructuring, dividends received by Mr Palmer from MIL, River Crescent Pty Ltd and Closeridge Pty Ltd would have been exempt anyway since Singapore would treat them as foreign-source income paid to a non-tax resident. In this regard, the insertion of Zeph into the Mineralogy corporate structure was wholly unnecessary for Mr Palmer to obtain any personal tax advantage in respect of dividends received by him.

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544 Palmer Fifth WS, para. 62.
545 SODPO, paras. 577-587.
546 Phua Report, para. 20.

> 46. Further, if Mr Palmer's intention is for all his dividend incomes from MIL, River Crescent Pty Ltd and Closeridge Pty Ltd to be kept in a bank account in Monaco, he would not be subject to tax since they would not be received in Singapore. On this scenario, Mr Palmer's tax residence is totally irrelevant since there is no Singapore tax liability to speak of, and there would again be no need for him to acquire Singapore tax residence or insert Zeph into the Mineralogy corporate structure."[547]

226. If Mr Palmer were to obtain permanent residency in Singapore, Professor Phua observes that:

> "48. Be that as it may, and assuming Mr Palmer's eventual relocation to Singapore would allow him to successfully displace his Australian tax residence to become solely a tax resident of Singapore, any dividend from MIL, River Crescent Pty Ltd and Closeridge Pty Ltd (as the case may be) that he receives in Singapore would only be exempt from income tax in Singapore if he satisfies IRAS that granting him such an exemption is beneficial to him.
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> …
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> 50. For these reasons, I see no reason from a Singapore income tax perspective for Mr Palmer to obtain tax residence in Singapore. As this additional beneficial requirement only applies to individuals who are tax residents of Singapore, Mr Palmer would not be subject to such a requirement if he remains a non-tax resident of Singapore. Even assuming that becoming a tax resident of Singapore would actually enable Mr Palmer to displace his tax residence in Australia, I also see no purpose from a Singapore tax perspective for the insertion of Zeph into the Mineralogy corporate structure. The existence of Zeph has no Singapore income tax implications whatsoever on the income tax treatment of dividends received by Mr Palmer from MIL, River Crescent Pty Ltd and Closeridge Pty Ltd.
>
> 51. Thus, I am of the view that Mr Palmer's intended acquisition of Singapore tax residence, and the insertion of Zeph into the Mineralogy corporate structure, cannot be said to be tax advantageous moves from a Singapore income tax perspective. The acquisition of tax residence in Singapore by Mr Palmer would make it more difficult for him to claim tax exemption for foreign-source income. The insertion of Zeph creates potential tax liabilities in Singapore if and when dividends from Mineralogy are received in Singapore…"[548]

No steps were undertaken to achieve the Alleged Tax Rationale

227. The Claimant has provided no evidence that Mr Palmer took any steps to move to Singapore or attain SPR. As Professor Lys notes, "Mr. Palmer provided no evidence (or even assertions)

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547 Phua Report, paras. 44-46 (emphasis added).

548 *Id*., para. 48, 50-51 (emphasis added) (citations omitted).

that he contemporaneously (in 2018) consulted any experts on the details of the restructuring, including preemptively seeking professional advice about his ability to establish residency in Singapore and the consequences of any such move."[549]

228. Indeed, it appears that Mr Palmer sought advice as to his capacity to secure SPR only in March 2024, as part of these proceedings.[550] Mr Palmer now claims that he might have sought to obtain SPR under two Singapore programmes.[551] Yet, it appears that Mr Palmer has not taken – nor shown any intention of taking – any of the many steps necessary under either of those two permanent residency programmes to secure the tax advantages he now claims the restructure was designed to achieve.[552] And nor was the restructure implemented in such a way as to secure those available advantages.[553] Further, there is no evidence that

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549 Lys Supplementary Report, para. 260 (emphasis in original).

550 SODPO, paras. 587-594; Letter from Louis Lim & Partners to Zeph Investments, RE: Singapore PR Schemes, (June 2018, January 2019) dated 8 March 2024, **Exh. C-496**.

551 Palmer Fifth WS, para. 63; **Exh. C-496**. These were the SPR programme for individuals working in Singapore (also known as the "Professional/Technical Personnel and Skilled Worker Scheme" ("**PTS Scheme**")); and the SPR programme for investors (also known as the "Global Investor Programme" ("**GIP Scheme**").

552 For the PTS Scheme, this would have entailed Mr Palmer relocating to Singapore on a work visa, or holding a valid "Employment Pass" or "S Pass", which the Claimant has not provided any evidence of Mr Palmer ever applying for, nor having concrete plans to apply for. See, further, on these requirements: Immigration & Checkpoints Authority (ICA), 'Explanatory Notes: Application for Permanent Residence for Professionals, Technical Personnel and Skilled Workers', at https://www.ica.gov.sg/docs/default-source/ica/eservices/epr/explanatory_notes_and_document_list_for_pts.pdf?sfvrsn=da315e73_22 (last accessed 16 June 2024), **RLA-166**. In any event, in considering any such application, the ICA takes into account a wide range of factors and Mr Palmer would have had to demonstrate, inter alia, family ties to Singaporeans, length of residency, ability to contribute to Singapore and integrate into local society, and a commitment to sinking roots in Singapore: Immigration & Checkpoints Authority (ICA), 'Becoming a Permanent Resident', available at https://www.ica.gov.sg/reside/PR (last accessed 16 June 2024), **Exh. RLA-167**.
For the GIP scheme, there is no evidence that Mr Palmer had made a formal application to the EDB (with a five-year business plan) for permanent residency status under the GIP Scheme, and/or that he had had any discussions and/or interviews with EDB in connection with such an application: Contact Singapore, "Global Investor Programme" (Factsheet, 1 May 2017), pp. 2-3, **Exh. RLA-168**; see also EDB Singapore, "Global Investor Programme" (Factsheet, 1 April 2020), pp. 4, 12, **Exh. RLA-169**. Nor is there any evidence that Mr Palmer had received approval for any such application, provided any undertaking to make good his business plan, and/or received any in-principle approval from EDB. Mr Lim's letter acknowledges that Mr Palmer should have a "business proposal or an investment plan", but there is no evidence that such a business plan was ever submitted to EDB.

553 For the GIP scheme, and even setting aside for the moment whether Mr Palmer could have met the other criteria for the application, there is an evident timing issue that indicates that the Alleged Tax Rationale could not have motivated the restructure in 2019. The Claimant was already established in 2019, and the GIP Scheme does not apply to an existing pre-application investment: Contact Singapore, "Global Investor Programme" (Factsheet, 1 May 2017), p. 9, **Exh. RLA-168**; EDB Singapore, "Global Investor Programme" (Factsheet, 1 April 2020), p. 5, **Exh. RLA-169**. And further to this, the purported investment was not structured – as might have been expected if this were the motivating purpose – in accordance with the EDB's requirements pursuant to which the investment would have to be made by Mr Palmer, "from [his] personal bank account in [his] sole name opened in a Singapore-registered bank in Singapore.": Contact Singapore, "Global Investor Programme" (Factsheet, 1 May 2017), p. 9, **Exh. RLA-168**; EDB

Zeph opened a bank account in a non-Singaporean jurisdiction, into which Mineralogy dividends have been paid. The Claimant's assertions with respect to Mr Palmer's plans for permanent residency of Singapore should therefore be rejected.

229. Further, when MIL did pay out a dividend of $700 million in 2022, none of the above steps had been taken. As Professor Lys notes:

> "This means that Mr. Palmer consciously and intentionally caused a series of events that led to him not receiving the tax benefits that he claims were at the core of his urgent decision to restructure in 2018."[554]

230. The fact that Mr Palmer needed to become a permanent resident of Singapore to secure the claimed tax advantages, and yet did not take steps to secure that status, points strongly against acceptance of Zeph's claim that the purpose of the (allegedly urgent) restructure was to pursue those benefits. Instead, the facts on the ground are entirely consistent with this rationale being an after-the-event creation to attempt to mask the true purpose of the restructure.

231. Finally, even if the above matters had been within the active contemplation of the Mineralogy Group at the relevant time, the alleged saving of AUD $90,000,000 in tax does not have anything to do with the incorporation of a Singapore company. Zeph has produced neither contemporaneous documents nor expert evidence to show that any particular tax benefit for the Mineralogy Group – as opposed to personal tax advantages for Mr Palmer – was ever considered, much less available, as a result of the restructure.

The Alleged Tax Rationale would have produced tax disadvantages for the Mineralogy Group

232. The expert evidence of Professor Cooper and Professor Phua confirms that no tax advantages could accrue to the Mineralogy Group as a result of the January 2019 restructure:

    (a) From a Singapore tax perspective, Professor Phua concludes on the evidence available that "Zeph would not be subject to tax on dividend income from Mineralogy if it is not received in Singapore."[555] Professor Phua's opinion is that if the dividends were

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Singapore, "Global Investor Programme" (Factsheet, 1 April 2020), p. 6, **Exh. RLA-169**. There is no evidence that Mr Palmer contemplated making an investment from his own personal bank account in Singapore.

554 Lys Supplementary Report, para. 293.

555 Phua Report, para. 38.

received in Singapore, Zeph will be subject to Singaporean tax on those dividends, since it is unlikely to be able to avail itself of exemptions from tax under the domestic laws of Singapore,[556] or under the exemptions available under the Singapore-Australia Double Taxation Treaty.[557] Professor Phua concludes: "from an overall tax planning perspective, I find it inexplicable that the Mineralogy Group would expose itself to additional tax risks by routing its dividends through an entity in a new jurisdiction such as Singapore, when there is no indication in the documents made available to me that it was intended to address existent tax liabilities of the Mineralogy Group in another jurisdiction."[558]

(b) From an Australian tax perspective, Professor Cooper concludes the insertion of MIL and Zeph into the corporate chain "produced no *immediate* Australian income tax benefit, either for the Mineralogy corporate group or for Mr Palmer".[559]

233. Far from producing tax *advantages*, the tax regimes in Australia and Singapore are such that the restructure actually risked producing material *dis*advantages for the Mineralogy Group from a tax perspective. As Professor Cooper explains, the restructure "threatened immediate and ongoing Australian (and possibly foreign) income tax detriments for both the Mineralogy corporate group and Mr Palmer".[560] Those risks would not have arisen "if the Australian-sourced income of the Mineralogy Group had not been routed through two foreign-incorporated companies before being brought back to Australia".[561] Professor Cooper goes on to note that "[t]hose potential detriments were addressed by arranging the affairs of Zeph and MIL to make both companies Australian residents for Australian income tax purposes".[562]

234. Consistently with Professor Cooper's evidence summarised above, internal contemporaneous correspondence indicated an awareness within the Mineralogy Group that the incorporation of the Claimant in Singapore risked adverse tax implications unless it could satisfy conditions for Australian tax residency (ie unless Zeph was tax resident in Australia,

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556 *Id*., para. 35.
557 *Id*., paras. 36-37.
558 *Id*., para. 52.
559 Cooper Report, para 4.
560 Cooper Report, para 5.
561 *Id*., para. 21.
562 *Id*., para. 5.

despite its incorporation in Singapore). In an email of 22 January 2019, [redacted] advised Mr Palmer as follows:

> "Could you please add an additional Australian resident director to Mineralogy International Pte. Ltd [ie Zeph] - this should be done prior to the signing of any resolutions.
>
> In this regard, we will also need to ensure that all meetings for the interposition of Mineralogy International Pte Ltd are held in Australia, with the chairperson also located in Australia for each meeting. This will be particularly important if Michael is still in Singapore when the interposition resolutions are signed.
>
> We need to be able to clearly demonstrate that the interposition resolutions were made in Australia and that the majority of the directors are Australian resident to ensure Australian tax residency is established for Mineralogy International Pte Ltd.
>
> We will separately advise you regarding maintaining Australian tax residency status going forward for both Mineralogy International Limited (MIL) - New Zealand incorporated and Mineralogy International Pte Ltd - Singapore incorporated."[563]

235. As Professor Cooper notes, the desire to make the foreign-incorporated subsidiaries of the corporate group Australian residents for tax purposes is not the usual course, but it was necessary to head off the "tax threats" that were being created by the restructure.[564] However, making Zeph and MIL Australian tax residents created second-round tax problems which required ongoing management.[565] All of that points strongly against the conclusion that the incorporation of the Claimant in Singapore was intended to achieve tax *advantages*.

236. Finally, even from the perspective of the alleged tax benefits that is claimed to have been available to Mr Palmer (if he relocated his tax residence to Singapore), it is necessary to account for offsetting disadvantages to the Mineralogy Group. As Professor Cooper explains:

> "63. … focussing just on the tax saving for *Mr Palmer* distracts attention from examining the immediate Australian tax consequences that may be triggered for *Zeph and for MIL*, should Palmer change his residence:
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> • for MIL: immediate capital gains tax for MIL if Mr Palmer's loss of Australian tax residence means MIL too has ceased to be an Australia tax resident….

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563 Email from [redacted] to Mr Palmer titled "Proposed Incorporation of Mineralogy International Pte. Ltd.", **Exh. R-600**.

564 Cooper Report, para. 27.

565 *Id*., para. 28.

> • for Zeph or MIL or both: immediate CGT for Zeph if Mr Palmer's loss of Australian tax residence means Zeph too has ceased to be an Australia tax resident… And
>
> •for MIL: the immediate deconsolidation of the MIL TCG if Palmer's loss of tax residence means either MIL or Zeph has ceased to be an Australia tax resident…
>
> 64. These potential tax liabilities must be considered against any potential tax savings – that is, the potential liabilities triggered inside the entities which Mr Palmer owns could effectively reduce the benefit of any Australian tax saving enjoyed by Mr Palmer personally."[566]

The Alleged Tax Rationale is not consistent with the urgency with which the restructure was undertaken

237. The Alleged Tax Rationale is inconsistent with the contemporaneous documents indicating that the corporate restructures were being undertaken with some urgency. As Professor Lys notes, "the tax issue created no urgency because any tax benefit would only be derived if and when Mr. Palmer caused a dividend to be ultimately paid to him from Mineralogy (via Zeph and MIL)."[567] That was a matter that Mr Palmer controlled.

238. Zeph itself acknowledges:

> "The timing when a dividend would be paid out was in Mr Palmer's decision making hands in 2019 and 2020 as the sole director of Mineralogy. The retained earnings as at 30 June 2019 and 30 June 2020 could be declared at any time in the future and if Mr Palmer was then a resident of Singapore, then at that time he would not be subject to any tax in Australia or Singapore if the funds were actually paid to an account located in a tax free jurisdiction."[568]

Conclusion

239. For the above reasons, Zeph has failed to substantiate that any tax benefits could flow to the Mineralogy Group (or, indeed, to Mr Palmer) as a result of the restructure, let alone that this factor motivated the restructure at the relevant time. Nor could it reasonably have anticipated any such benefits under either Singaporean or Australian taxation law. So much would have been clear from due diligence of the type one would expect for a corporate re-organisation of this scale.

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566 *Id*., paras. 63-64.
567 Lys Supplementary Report, para. 293.
568 SODPO, para. 582.

240. Accordingly, neither of the two rationales that Zeph contends provide reasons that the restructure could be accepted as genuine. As neither of the Claimant's stated rationales were genuine or indeed realised, this strongly supports the conclusion that the restructuring was not "justified independently of the possibility of bringing" a treaty claim.[569]

B. FORESEEABILITY OF THE DISPUTE

241. Zeph has elected not to address Australia's argument as to the foreseeability of the dispute on the terms in which it has been put. All Zeph says, again and again, is that the *Amendment Act* was formulated in secret and hence could not have been foreseeable. That response misses the point. As Australia noted in its responses on document production, "the secrecy maintained in connection with the preparation of the Amendment Act is a fact that is already proven by the evidence on the record".[570] It is not in dispute. However, by focusing exclusively on the circumstances in which the *Amendment Act* was formulated, Zeph seeks to have the Tribunal ignore (i) the factual matrix of the *Balmoral* Dispute, and how Australia has put its case in relation to this aspect of the objection; (ii) the law relevant to foreseeability for the purposes of assessing abuses of process following corporate restructures; and (iii) the role to be played by foreseeability in a context where the motive for the incorporation of the claimant company is so clear.

(i) Zeph ignores the specific factual matrix of the Balmoral Dispute

242. The dispute before this tribunal (the *Balmoral* Dispute) is a dispute concerning the WA Government's conduct in relation to the BSIOP Proposal – a proposal made under the State Agreement between the WA Government and Mineralogy – which crystallised through the unilateral adoption by the WA Government of a measure of the type envisaged and contested by the parties in relation to the CITIC Dispute.[571] As Australia established in the SOPO:

(a) The BSIOP Dispute concerned the lawfulness of the WA Government's conduct in relation to the BSIOP Proposal. Between 4 September 2012 (when the WA Government rejected the BSIOP Proposal) and 13 August 2020 (when the *Amendment Act* commenced), Mineralogy and companies in the Mineralogy Group consistently

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569 *Philip Morris Asia Ltd v Australia* (PCA Case No 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015), para. 570, **Exh. RLA-95**.

570 Annex A to PO4, p. 8.

571 SOPO, paras. 305-316.

disputed the lawfulness of the WA Government's conduct in relation to the BSIOP Proposal, and sought to hold the WA Government to its obligations under the State Agreement.[572]

(b) The CITIC Dispute concerned the lawfulness of possible unilateral modification by the WA Government of Mineralogy's rights under the State Agreement to address a dispute between Mineralogy and the CITIC Parties. During November and December 2018, the WA Government put Mineralogy "on notice" that it would likely take unilateral action to address the dispute between Mineralogy and the CITIC Parties unless that dispute was resolved, and Mineralogy repeatedly requested that such action not be taken and threatened legal consequences if it was.[573]

(c) Although the CITIC Dispute related to another project approved under the State Agreement (the Sino Iron and Korean Steel Project), Mineralogy viewed the Mine Continuation Proposals that lay at the heart of the CITIC Dispute as being inconsistent with activities and rights sought through the BSIOP Proposal. Mineralogy itself recognised the connection when it agreed to waive interest on damages during a proposed suspension of the First BSIOP Arbitration while the Federal Court of Australia determined proceedings connected to the dispute with the CITIC Parties.[574]

243. In view of a likelihood of the WA Government taking unilateral action that was contrary to Mineralogy's rights under the State Agreement, the Claimant was incorporated in Singapore to serve as a vehicle that could file an international treaty claim if that occurred, and immediately advised the WA Government that it would do just that if the threatened unilateral action was taken. In so doing, the Mineralogy Group very clearly sought, abusively, to elevate evolving domestic disputes to the international level.

244. The BSIOP and CITIC Disputes evidence the deteriorating relations between the WA Government and Mineralogy at the time of the 2019 restructure, and the link between that

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572 See, e.g., SOPO, paras. 70-73.

573 See, e.g.: Ben Harvey, "State set to protect Sino Iron" *The West Australian* (3 November 2018), **Exh. R-130**; Letter from Mineralogy to Premier McGowan dated 6 November 2018, **Exh. R-132**; Letter from Mineralogy to Premier McGowan dated 5 November 2018, **Exh. R-131**; WA, *Parliamentary Debates,* Legislative Assembly (29 November 2019), **Exh. R-158**, p. 3; Brad Thompson, "CITIC: Clive Palmer raises China security concern in letter to WA Premier", *The Australian Financial Review* (2 December 2018), **Exh. R-135**.

574 SOPO para. 285(b), further citing Letter from Mineralogy to the WA Government State Solicitor dated 15 May 2013, **Exh. R-94**.

restructure and the Mineralogy Group's intention to obtain investment treaty protection if WA took unilateral action that would undermine its rights under the State Agreement. It is notable that, in its submissions as to the foreseeability of the *Balmoral* Dispute, Zeph elects not to engage with the relevance of the BSIOP Dispute at all, and engages with the CITIC Dispute only in passing.[575] This strongly indicates that it has no good answer to the points that Australia has made as to the connection between these plainly foreseeable disputes and the dispute before the present tribunal.

(ii) The law relevant to foreseeability for abuse of process objections

245. Zeph submits that the *Amendment Act* was not foreseeable at the time of the restructure, and that it was intended by the WA Government not to be foreseeable or foreseen.[576] However, as Australia established in the SOPO, multiple decisions of investment treaty tribunals confirm that disputes may evolve over time, and that treaty claims will be abusive where a treaty dispute is foreseeable, even if the precise measure that crystallises that dispute is unforeseen.[577]

246. This reflects a long line of jurisprudence to the effect that the identification of a "dispute" for the purposes of international proceedings focusses on substance and not form.[578] As the ICJ stated in its judgment in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*:

> "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.' … Whether there is a dispute in a given case is a matter for 'objective determination' by the Court …"[579]

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575 SODPO, paras. 523-524, 527.

576 *Id*., paras. 493, 503-517.

577 SOPO, paras. 312-316.

578 See, e.g., *Lao Holdings N.V. v Lao People's Democratic Republic* I (ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction of 21 February 2014), para. 124, **Exh. CLA-213**; *Achmea BV v Slovak Republic (II)* (PCA Case No. 2013-12, Award on Jurisdiction of 20 May 2014), para. 167, **Exh. RLA-131**. See, also, *Interpretation of Peace Treaties (Advisory Opinion)* [1950] ICJ Rep 65, p. 74, **Exh. RLA-132**; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia) (Preliminary Objections)* [2011] ICJ Rep 70, para. 30, **Exh. RLA-133**; *Fisheries Jurisdiction (Spain v Canada) (Jurisdiction)* [1998] ICJ Rep 432, para. 31, **Exh. RLA-134**; *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Award)* (2015) 31 RIAA 359, paras. 208, 211, 220, **Exh. RLA-115**; *Kingdom of Lesotho v Swissbourgh Diamond Mines* [2017] SGHC 195, para. 119, **Exh. RLA-135**.

579 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia) (Preliminary Objections)* [2011] ICJ Rep 70, para. 30 (citations omitted), **Exh. RLA-133**.

247. As the Tribunal recognised in *Procedural Order No. 4*, "[t]he determination of the relevant dispute (if any) for the purposes of foreseeability and of the [abuse of process objection] is a matter of law".[580] The Tribunal must thus analyse the contemporaneous exchanges between the Parties and their unilateral positions and statements to assess the connections between the BSIOP and CITIC Disputes, and the dispute before this tribunal.

248. As the decisions of investment treaty tribunals indicate, there will be an abuse of process where a restructure enables the filing of a treaty dispute that shares relevant "facets" with a foreseeable dispute not entitled to treaty protection, or which is "rooted" in a context of deteriorating relations that have impacted the investment prior to the restructure. Such a claim will be abusive irrespective of whether a precise measure (here, the *Amendment Act*) was foreseeable as at the time when the restructure was effected.

249. In *Alverley*, for example, the tribunal characterised the treaty dispute as a dispute about "whether the actions of [redacted] amounted to the expropriation of the [redacted] land contrary to the BIT".[581] The tribunal viewed disputes that related to "whether [redacted] had title to the land and whether the grant to [redacted] had been improper", as "two facets of the same dispute, since they involve two different but related threats from Romania to the right to use the land which was central to the viability of the entire [redacted] Project".[582] In view of this characterisation of the dispute, the tribunal held that:

> "It follows that the *'critical date'* for the purposes of determining whether there has been an abuse of right is the date when it became foreseeable that there was a reasonable prospect of a measure being adopted by an organ of the Romanian State which would severely impair the right and ability of [redacted] to use the land for the purposes of the project. … For the reasons already given, the Tribunal considers that the critical date is the point at which there became a reasonable prospect that the Romanian State would take a measure which might give rise to a treaty claim."[583]

250. Similarly, in *BRIF Tres*,[584] the tribunal stated:

> "… what needs to be foreseeable is a dispute originating from deteriorated circumstances affecting an investment in the host State. The abuse is in manipulating the system, being aware that facts at the root of a dispute have

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580 PO4, para. 36.
581 *Alverley Investments Limited and Germen Properties Ltd v Romania* (ICSID Case No. ARB/18/30, Excerpts of Award of 16 March 2022), para. 386, **Exh. RLA-71**.
582 *Id*., paras. 392-393.
583 *Id*., paras. 394 and 396.
584 *BRIF Tres v Serbia* (ICSID Case No. ARB/20/12, Award of 30 January 2023), **Exh. RLA-137**.

> already taken place negatively affecting the investment and could lead to investment treaty arbitration, irrespective of how a claimant labels the same facts as leading to a 'domestic' or an 'international' dispute."[585]

251. The tribunal ultimately concluded that the dispute in issue in those proceedings was foreseeable at the relevant time, on the basis that administrative proceedings and decisions had already impacted the project in 2007, when the investment was not protected under the relevant investment treaty.[586] In addressing the claimants' submission that the investment treaty claim reflected a distinct dispute, the tribunal stated:

> "Although the dispute has evolved since those events, as pointed out by Claimants, it persists nevertheless rooted in deteriorating circumstances which affected Claimants' investment before the entry into force of the BIT, almost 12 years before the acquisition of BRIF TRES by Beauvallon via the Share Purchase Agreement of 15 January 2019."[587]

252. As Australia established in the SOPO, the Mineralogy Group, through a series of letters, actively disputed the conduct of the WA Government in consistent terms both prior and subsequent to the incorporation of the Claimant in January 2019, and right up to the passage of the *Amendment Act* in August 2020.[588] The terms of such letters belie Mr Palmer's assertion in his Fifth Witness Statement that "the CITIC matter was a controversy between Mineralogy and CITIC, not the Respondent (or its State of Western Australia)."[589]

253. The Claimant's own submissions also undermine its position that the BSIOP Dispute was not foreseeable at the time of the restructure. The Claimant – as part of its new estoppel submission – asserts that Australia "was informed contemporaneously by the Claimant of the 2019 transaction, i.e. that the Claimant was an investor of Singapore and had made investments in the territory of Australia and that it considered its investments had the protection of AANZFTA."[590] It further argues that Australia *should at that point* have denied the benefits of AANZFTA to the Claimant and that the failure to do so means that Australia must have been taken to have acquiesced to its claims.[591] It cites in support of these rather startling submissions a letter to the WA Government from MIL dated 4 February 2019, which

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585 *Id*., para. 208.
586 *Id*., para. 209.
587 *Id*., para. 210.
588 SOPO, para. 307.
589 Palmer Fifth WS, para. 140. See similarly SODPO, para. 523.
590 SODPO, para. 152, citing Letter from MIL to Western Australia dated 4 February 2019, **Exh. R-141**.
591 SODPO, para. 209.

is titled "Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 (State Agreement)". After citing the protections of the SAFTA, the letter asserts:

> "Any interference in the rights of Mineralogy under the State Agreement will cause loss and damage to Mineralogy and the investors in Mineralogy (MIPL and MIL) will both strenuously pursue all their rights including under domestic law and under the SAFTA and / or CER for compensation."

254. The Claimant's internal documents indicate that this letter was drafted in the lead-up to the Share Swap of 29 January 2019. An email from Terry Smith to Sarah Mole of 28 January 2019, a day before the Share Swap, carries the subject line: "20191024 Letter to WA Premier re SAFTA", and the direction: "See me about this draft print do not send".[592]

255. Apparently, itself recognising the close connection between its treaty purpose and the restructure, in response to Australia's Document Request No. 3 (which sought correspondence "[i]n relation to the Mineralogy Group Restructure") Zeph produced 13 copies, emails and drafts of letters prepared over the period of 14 January 2019 to 21 May 2019 from the Mineralogy Group to Australia invoking treaty protection in relation to the WA Government's conduct vis-à-vis Mineralogy.[593]

256. Thus, mere days after the acquisition of Mineralogy shares by the Claimant, the Mineralogy Group was asserting rights as a Singaporean investor in respect of disputes mirroring closely the dispute now before this tribunal. Its own letters therefore demonstrate the foreseeability of the relevant dispute.

257. The present circumstances thus differ from those in *Mobil v Venezuela*,[594] where the tribunal held that a dispute about tax and royalty adjustments (which were foreseeable at the time of the restructure) were factually unconnected to a dispute about the nationalisation of the investment (which had not been foreseen at the time of the restructure). Key to the *Mobil* tribunal's distinction between these disputes was the terms of letters exchanged between the parties, and the distinct nature of the measures at issue. Whereas the tax and royalty measures had been adopted in relation to the sector as a whole, and were specifically contested by the

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592 Email from [redacted] [Clive Palmer] to [redacted] (Fw: 20191024 Letter to WA premier re SAFTA) dated 28 January 2019, **Exh. R-801**.

593 See Attachment to Exh. R-765: Signed letter from [redacted] on behalf of MIL to Premier Mark McGowan dated 18 January 2019, **Exh. R-778** foreshadowing a claim under AANZFTA.

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

claimants in correspondence with the host State, the nationalisation was undertaken unilaterally in respect of the specific investment and had not been foreseen or referred to by the claimants at the time of the restructure.

258. Zeph appears to be aware of the weakness of its position in this respect. Hence, it makes the weak argument that, as the Claimant, it is responsible for defining the "dispute" before the Tribunal, and further that the Tribunal has no jurisdiction over the CITIC Dispute.[595] In these submissions, Zeph conflates the right to frame its claim with the test to be applied to identify abuses of process, the elements of which are to be assessed objectively by the Tribunal.

259. As Zeph states, the *ne ultra petita* principle in Article 190(2)(c) of the PILA allows an arbitral award to be challenged where the arbitral tribunal has ruled beyond the scope of the claims brought before it.[596] However, the *ultra petita* principle refers to the prayers for relief. It is well-established that this principle restricts neither the facts that an arbitral tribunal may consider when deciding whether to grant relief, nor its legal characterisation of those facts in accordance with the *jura novit curia* principle.[597] The Swiss Federal Tribunal has held that, in determining whether a restructuring is tantamount to an abuse of rights, the foreseeability of the dispute at the time of such restructuring is a question of law, not fact.[598] Therefore, whilst an arbitral tribunal can only rely on the facts alleged by the parties, its determination regarding whether the dispute was foreseeable in light of those facts constitutes a legal determination to which the *jura novit curia* principle applies. As to the facts relevant to assessing whether a specific dispute was foreseeable at the time of the restructuring, the Swiss Federal Tribunal has held that "all the particular circumstances" should be taken into account.[599]

260. In another weak argument, Zeph argues that Australia should not be able to raise an abuse of process objection in circumstances where there has allegedly been bad faith conduct on the part of WA.[600] Any conduct on the part of the WA Government plainly cannot "cancel out"

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595 SODPO, para. 542.

596 *Id*., paras. 542-544 (Article 190(2)(c) is **Exh. CLA-207**).

597 See, e.g., Decision of Swiss Federal Tribunal 4A_374/2021, 23 November 2021, para. 6.1, **Exh. RLA-155**; Decision of Swiss Federal Tribunal 4A_430/2020, 10 February 2021, para. 6.1, **Exh. RLA-156**.

598 Decision of Swiss Federal Tribunal 4A_80/2018, 7 February 2020, para. 4.8, **Exh. RLA-144**; *Clorox Spain SL v Venezuela (II)*, **Exh. RLA-142**.

599 *Clorox Spain SL v Venezuela (II)*, **Exh. RLA-142**, para. 5.2.4.

600 See, e.g., SODPO, paras. 144-149, 170, 619(e), 620(a), 628, 633. Zeph has raised similarly unmeritorious arguments regarding alleged abuses of process in other parts of these proceedings. See, e.g., PO4, paras. 16, 23-25 (noting Zeph's positions). For completeness, the Respondent notes that Mr Palmer, and

Zeph's abuse of process in bringing a claim following the restructuring: the abuse of process objection would be rendered meaningless if such a submission were accepted. Furthermore, any evaluation of the WA Government's conduct is a matter for the merits.

(iii) The role to be played by foreseeability where purpose is clear

261. The timing of the relevant restructure may be relied on to support an inference – in the absence of clear evidence of purpose – that a given restructure is abusive on the basis that it has been taken in view of a foreseeable dispute that can be objectively identified by the Tribunal. The Tribunal in this case, however, is confronted with unusually clear and public evidence of the Mineralogy Group admitting that its decision to incorporate companies outside of Australia was intended to position the Mineralogy Group to bring treaty claims in respect of evolving disputes with the WA Government. These public admissions are further reinforced by the Claimant's internal documents, and even its submissions in these proceedings.

262. The Claimant seeks, for example, to explain the delay in acting on its alleged coal funding and tax purposes subsequent to incorporating in Singapore – as one might have expected it would have acted, had such purposes been urgent and genuine – by reference to the unfolding facts in Australia at that time. Tellingly, this is one of the only occasions in the SODPO where the Claimant cites the relevance of the evolving CITIC Dispute and the BSIOP Dispute to its decision-making at the relevant time. As Zeph itself explains:

> "609. Following the restructure in February 2019, the Chinese Government-owned companies (CITIC) had lodged an application for special leave in the High Court of Australia appeals against the Royalty Judgment. This application was to seek leave to appeal judgements of the Western Australian Supreme Court and the Western Australian Court of Appeal. Once the Royalty Judgement was certain and no longer subject to appeals the very substantial revenue of over $400 million dollars a year could be used as security in any proposed fundraising. So as to provide the best chance of a successful fund raising, no applications or appointments could sensibly be undertaken with any arrangers or Singapore banks until the appeals were resolved. It was determined that the prudent course was to await the outcome of the appeal process.

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companies controlled by Mr Palmer, have repeatedly and unsuccessfully raised "abuse of process" claims in domestic Australian litigations. See, e.g., *Palmer v Magistrates Court of Queensland & Ors* [2024] QCA 8, paras. 3, 5, 13, 75, and fn. 6, **Exh. R-827**; *Parbery v QNI Metals Pty Ltd (No 14)* [2019] QSC 207, paras. 1, 20, **Exh. R-828**; *Parbery v QNI Metals* [2018] QSC 107, para. 287, **Exh. R-165**; *The President's Club Limited 02* [2016] ATP 1, para. 99, **Exh. R-21**; *Sino Iron Pty Ltd & Anor v Palmer* [2014] QSC 259, paras. 1, 9, 34, 43, **Exh. R-830**.

> 610. In February 2020, the High Court of Australia finally refused special leave to the Chinese State-owned companies to further appeal against the Royalty Judgment. The Chinese State-owned companies had previously been unsuccessful in their appeal to the Western Australian Court of Appeal. The Claimant then considered if it was the right time for the Claimant to pursue a fund raising but, before the Claimant made a decision, the Claimant wanted to consider the High Court Judgment and understand how long it would be before Mineralogy and International Minerals had an award under the State Agreement Arbitration (defined in the Notice of Intent). The Claimants assessment in April 2020 was that the State Agreement Arbitration should be heard before the end of 2020 and an award made soon after.
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> 611. Mr Martino advised the Claimant in or around April 2020 that the Claimant should not appoint a Singapore arranger or advisor until after an award was made in the State Agreement Arbitration, because the damages that would be awarded to Mineralogy in the State Agreement Arbitration were likely to be in the tens of billions of dollars and the Claimant's subsidiary Mineralogy may then be able to fund coal projects internally or, at the very least, would be in a better position to approach banks."[601]

263. Read alongside Mr Palmer's express admissions to the media of the Mineralogy Group's treaty purpose (which stand unchallenged), the compelling conclusion must be that the Claimant rushed to incorporate foreign companies in 2018-2019 to secure treaty protection for Mineralogy and then waited for if and when the need to use those new foreign companies for this treaty purpose would materialise.

264. It would be an abuse of process to allow this claim to proceed in such circumstances, particularly when coupled with the clear contemporaneous statements and correspondence from Mineralogy at the time of the restructure, which expressly admitted the abusive purpose.

C. ZEPH'S CLAIM MUST BE REJECTED AS AN ABUSE OF PROCESS

265. Zeph is incorrect to argue that the AANZFTA denial of benefits clause "covers the field" and leaves no scope for Australia's abuse of process objection.[602]

266. On the contrary, this tribunal has a positive duty to assess whether the Claimant's reliance on the AANZFTA is abusive.[603] Several tribunals have noted that the capacity to reject

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601 SODPO, paras. 609-611.
602 SODPO, paras. 497-498.
603 *Clorox Spain SL v Venezuela (I)* (Decision of Swiss Federal Tribunal, 2020), para. 3.4.2.8, **Exh. RLA-144**.

claims brought other than in good faith derives from "general principles that exist independently of specific language to this effect in the Treaty",[604] or from the tribunal's "inherent powers required to preserve the integrity of its own process", including to ensure compliance by the parties with their "obligation to arbitrate fairly and in good faith".[605] The Swiss Federal Tribunal, too, has held that the doctrine of good faith, which gives rise to the abuse of process doctrine, applies even in the absence of specific language to that effect in the investment treaty.[606]

267. Both the abuse of process doctrine and denial of benefits clauses may, in certain circumstances, provide states with "a method for counteracting nationality planning".[607] In some cases (as in these proceedings), the two objections might thus operate in tandem.[608] However, due to their distinct elements and functions, a denial of benefits clause and the abuse of process doctrine will not necessarily always intersect in this way.[609] As a matter of treaty interpretation, there is little in the AANZFTA to support Zeph's argument that the inclusion of the former excludes application of the latter.

268. Zeph makes a related argument by which it submits that, to the extent the Tribunal rejects the denial of benefits objection on the basis that the Claimant has "substantive business operations" in Singapore, it cannot uphold the abuse of process objection.[610] However, the two tests focus on different economic activities. Whereas the denial of benefits objection focusses on Zeph's activities in its purported home State (Singapore), the abuse of process

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604 *Gustav Hamester v Ghana* (ICSID Case No. ARB/07/24, Award of 18 June 2010), paras. 123-124, **Exh. RLA-137**.

605 *Libananco Holdings v Turkey* (ICSID Case No. ARB/06/8, Decision on Preliminary Issues of 23 June 2008), para. 78, **Exh. RLA-138**.

606 Decision of Swiss Supreme Court, 4A_80/2018 (unofficial English translation), paras. 4.3 and 4.8, **Exh. RLA-143**; *Clorox Spain SL v Venezuela (I)* (Decision of Swiss Federal Tribunal, 2020), para. 3.4.2.8, **Exh. RLA-144**.

607 Crina Baltag, 'Denial of Benefits of Investment treaties: A Step Further?' (2015) 9 *Romanian Arbitration Journal* 1, p. 1, **Exh. RLA-139**. See, similarly, Jordan Behlman, 'Out on a Rim: *Pacific Rim's* Venture into CAFTA's Denial of Benefits Clause' (2014) 45 *University of Miami Inter-American Law Review* 397, pp. 399, 424, **Exh. RLA-140**; see also *Clorox Spain SL v Venezuela (I)* (Decision of Swiss Federal Tribunal, 2020), paras. 3.4.2.6 and 3.4.2.8, **Exh. RLA-144**; *Clorox Spain SL v Venezuela (II)* (Decision of Swiss Federal Tribunal, 2022), para. 5.2.2, **Exh. RLA-142**; Decision of Swiss Federal Tribunal 4A_80/2018, paras. 4.3 and 4.8, **Exh. RLA-143**.

608 Mark Feldman, "Setting Limits on Corporate Nationality Planning in Investment Treaty Arbitration" (2012) 27(2) *ICSID Review – Foreign Investment Law Journal* 281, p. 282, **Exh. RLA-141**.

609 See, for example: *Pac Rim Cayman LLC v El Salvador* (ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections of 1 June 2012), paras. 2.41-2.111, 4.73, **Exh. RLA-33**.

610 SODPO, para. 643.

objection focusses on whether Zeph was created for the purpose of undertaking genuine economic activities in its purported host State (Australia).[611]

269. The evidentiary record reveals that Zeph has invoked the procedural right of access to arbitration following a restructure effected for the determinative or principal purpose of filing a treaty claim in respect of an evolving and foreseeable domestic dispute.[612] In these circumstances, its claim must be dismissed as an abuse of process.

VII. REQUEST FOR RELIEF

270. On the basis of the foregoing, Australia respectfully requests the Tribunal to:

(a) declare that the claims submitted by Zeph are outside the Tribunal's jurisdiction and/or inadmissible;

(b) dismiss Zeph's claims in their entirety; and

(c) order that Zeph bear the costs of the arbitration, including Australia's costs of legal representation and assistance, pursuant to Article 42 of the UNCITRAL Rules, together with interest on these costs.

[redacted]

Jesse Clarke
General Counsel (International Law)
Office of International Law
Attorney-General's Department

Date: 19 July 2024

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611 See, further, *Phoenix Action v Czech Republic* (ICSID Case No. ARB/06/5, Award, 29 April 2009), paras. 140-142 (focussing on 'national economic activity' in the Czech Republic), **Exh. RLA-91**; *Cascade Investments v Turkey* (ICSID Case No ARB/18/3, Award of 20 September 2021), para. 340 ('a key objective in such analysis is to derive from the evidence a conclusion as to whether an investment transaction was made for the genuine 'purpose of engaging in economic activity' in the host State, or only apparently to obtain treaty protection in the face of a looming dispute'), **Exh. RLA-98**.

612 *Phoenix Action, Ltd v The Czech Republic* (ICSID Case No. ARB/06/5, Award of 29 April 2009), para. 140, **Exh. RLA-91**; *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4, Award of 20 September 2021), para. 340, **Exh. RLA-98**; *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No. 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015), para. 584, **Exh. RLA-95**; *Alverley Investments Limited and Germen Properties Ltd v Romania* (ICSID Case No. ARB/18/30, Excerpts of Award of 16 March 2022), para. 347, **Exh. RLA-71**.

UNDER THE 2021 ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

AND UNDER THE AGREEMENT ESTABLISHING THE ASEAN – AUSTRALIA – NEW ZEALAND FREE TRADE AREA

ZEPH INVESTMENTS PTE LTD
Claimant

and

THE COMMONWEALTH OF AUSTRALIA
Respondent

AUSTRALIA'S REPLY ON

PRELIMINARY OBJECTIONS

ANNEXURE A – EMPLOYMENT CONTRACTS PRODUCED BY CLAIMANT

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ANNEXURE A – EMPLOYMENT CONTRACTS PRODUCED BY CLAIMANT

Employee	Stated Position	Exh. Reference
Employment contract of [redacted]	Cleaner	R-618
Employment contract of [redacted]	Cleaner	R-619
Employment contract of [redacted]	Cleaner	R-620
Employment contract of [redacted]	Cleaner	R-621
Employment contract of [redacted]	Cleaner	R-622
Employment contract of [redacted]	Cleaner	R-623
Employment contract of [redacted]	Cleaner	R-624
Employment contract of [redacted]	Cleaner	R-625
Employment contract of [redacted]	Cleaner	R-626
Employment contract of [redacted]	Cleaner	R-627
Employment contract of [redacted]	Cleaner	R-628
Employment contract of [redacted]	Cleaner	R-629
Employment contract of [redacted]	Cleaner	R-630
Employment contract of [redacted]	Cleaner	R-631
Employment contract of [redacted]	Cleaner	R-632
Employment contract of [redacted]	Cleaner	R-633
Employment contract of [redacted]	Cleaner	R-634
Employment contract of [redacted]	Cleaner	R-635
Employment contract of [redacted]	Cleaner	R-636
Employment contract of [redacted]	Cleaner	R-637

Employee	Stated Position	Exh. Reference
Employment contract of [redacted]	Cleaner	R-638
Employment contract of [redacted]	Cleaner	R-639
Employment contract of [redacted]	Cleaner	R-640
Employment contract of [redacted]	Cleaner	R-641
Employment contract of [redacted]	Cleaner	R-642
Employment contract of [redacted]	Cleaner	R-643
Employment contract of [redacted]	Cleaner	R-644
Employment contract of [redacted]	Cleaner	R-645
Employment contract of [redacted]	Cleaner	R-646
Employment contract of [redacted]	Cleaner	R-647
Employment contract of [redacted]	Cleaner	R-648
Employment contract of [redacted]	Cleaner	R-649
Employment contract of [redacted]	Cleaner	R-650
Employment contract of [redacted]	Cleaner	R-651
Employment contract of [redacted]	Cleaner	R-652
Employment contract of [redacted]	Cleaner	R-653
Employment contract of [redacted]	Cleaner	R-654
Employment contract of [redacted]	Accounts Executive	R-655
Employment contract of [redacted]	Cleaner	R-656
Employment contract of [redacted]	Cleaner	R-657
Employment contract of [redacted]	Cleaner	R-658
Employment contract of [redacted]	Cleaner	R-659
Employment contract of [redacted]	Cleaner	R-660

Employee	Stated Position	Exh. Reference
Employment contract of [redacted]	Cleaner	R-661
Employment contract of [redacted]	Cleaner	R-662
Employment contract of [redacted]	Cleaner	R-663
Employment contract of [redacted]	Cleaner	R-664
Employment contract of [redacted]	Cleaner	R-665
Employment contract of [redacted]	Cleaner	R-666
Employment contract of [redacted]	Cleaner	R-667
Employment contract of [redacted]	Cleaner	R-668
Employment contract of [redacted]	Cleaner	R-669
Employment contract of [redacted]	Cleaner	R-670
Employment contract of [redacted]	Cleaner	R-671
Employment contract of [redacted]	Cleaner	R-672
Employment contract of [redacted]	Director of Kleenmatic Group and Marketing Manager for Kleenmatic Group and Zeph	R-673
Employment contract of [redacted]	Operations Executive	R-674
Employment contract of [redacted]	Cleaner	R-675
Employment contract of [redacted]	Cleaner	R-676
Employment contract of [redacted]	Cleaner	R-677
Employment contract of [redacted]	Cleaner	R-678
Employment contract of [redacted]	Cleaner	R-679
Employment contract of [redacted]	Cleaner	R-680
Employment contract of [redacted]	Cleaner	R-681
Employment contract of [redacted]	Cleaner	R-682

Employee	Stated Position	Exh. Reference
Employment contract of [redacted]	Cleaner	R-683
Employment contract of [redacted]	Cleaner	R-684
Employment contract of [redacted]	Cleaner	R-685
Employment contract of [redacted]	Cleaner	R-686
Employment contract of [redacted]	Cleaner	R-687
Employment contract of [redacted]	Cleaner	R-688
Employment contract of [redacted]	Cleaner	R-689
Employment contract of [redacted]	Cleaner	R-690
Employment contract of [redacted]	Cleaner	R-691
Employment contract of [redacted]	Cleaner	R-692
Employment contract of [redacted]	Cleaner	R-693
Employment contract of [redacted]	Cleaner	R-694
Employment contract of [redacted]	Cleaner	R-695
Employment contract of [redacted]	Cleaner	R-696
Employment contract of [redacted]	Cleaner	R-697
Employment contract of [redacted]	Cleaner	R-698
Employment contract of [redacted]	Cleaner	R-699
Employment contract of [redacted] Chang	Senior Operations Executive	R-700
Employment contract of [redacted]	Director of Kleenmatic Group and Business Development Manager for the Kleenmatic Group	R-701
Employment contract of [redacted]	Cleaner	R-702
Employment contract of [redacted]	Cleaner	R-703

Employee	Stated Position	Exh. Reference
Employment contract of [redacted]	Cleaner	R-704
Employment contract of [redacted]	Cleaner	R-705
Employment contract of [redacted]	Cleaner	R-706
Employment contract of [redacted]	Cleaner	R-707
Employment contract of [redacted]	Cleaner	R-708
Employment contract of [redacted]	Cleaner	R-709
Employment contract of [redacted]	Cleaner	R-710
Employment contract of [redacted]	Cleaner	R-711
Employment contract of [redacted]	Cleaner	R-712
Employment contract of [redacted]	Cleaner	R-713
Employment contract of [redacted]	Cleaner	R-714
Employment contract of [redacted]	Cleaner	R-715
Employment contract of [redacted]	Cleaner	R-716
Employment contract of [redacted]	Cleaner	R-717
Employment contract of [redacted]	Cleaner	R-718
Employment contract of [redacted]	Cleaner	R-719
Employment contract of [redacted]	Cleaner	R-720
Employment contract of [redacted]	Cleaner	R-721
Employment contract of [redacted]	Cleaner	R-722
Employment contract of [redacted]	Cleaner	R-723
Employment contract of [redacted]	Cleaner	R-724
Employment contract of [redacted]	Cleaner	R-725
Employment contract of [redacted]	Cleaner	R-726

Employee	Stated Position	Exh. Reference
Employment contract of [redacted]	Cleaner	R-727
Employment contract of [redacted]	Cleaner	R-728
Employment contract of [redacted]	Cleaner	R-729
Employment contract of [redacted]	Cleaner	R-730
Employment contract of [redacted]	Cleaner	R-731
Employment contract of [redacted]	Cleaner	R-732
Employment contract of [redacted]	Cleaner	R-733
Employment contract of [redacted]	Cleaner	R-734
Employment contract of [redacted]	Cleaner	R-735
Employment contract of [redacted]	Cleaner	R-736
Employment contract of [redacted]	Cleaner	R-737
Employment contract of [redacted]	Cleaner	R-738
Employment contract of [redacted]	Cleaner	R-739
Employment contract of [redacted]	Cleaner	R-740
Employment contract of [redacted]	Cleaner	R-741
Employment contract of [redacted]	Cleaner	R-742
Employment contract of [redacted]	Tea lady	R-743
Employment contract of [redacted]	Cleaner	R-744
Employment contract of [redacted]	Cleaner	R-745
Employment contract of [redacted]	Cleaner	R-746
Employment contract of [redacted]	Cleaner	R-747
Employment contract of [redacted]	Cleaner	R-748
Employment contract of [redacted]	Cleaner	R-749

Employee	Stated Position	Exh. Reference
Employment contract of [redacted]	Cleaner	R-750
Employment contract of [redacted]	Cleaner	R-751
Employment contract of [redacted]	Cleaner	R-752
Employment contract of [redacted]	Cleaner	R-753
Employment contract of [redacted]	Cleaner	R-754
Employment contract of [redacted]	Cleaner	R-755
Employment contract of [redacted]	Cleaner	R-756
Pay history of [redacted]	None	R-757
Employment contract of [redacted]	Cleaner	R-758
Employment contract of [redacted]	Cleaner	R-759
Employment contract of [redacted]	Accounts cum Admin Assistant	R-760
Employment contract of [redacted]	Cleaner	R-761
Employment contract of [redacted]	Cleaner	R-762
Employment contract of [redacted]	Cleaner	R-763