IN THE MATTER OF AN ARBITRATION UNDER THE 2021 RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
and
THE ASEAN-AUSTRALIA-NEW ZEALAND FREE TRADE AGREEMENT
(PCA Case No. 2023-40)

ZEPH INVESTMENTS PTE LIMITED

CLAIMANT

v

THE COMMONWEALTH OF AUSTRALIA

RESPONDENT

CLAIMANT'S REJOINDER TO RESPONDENT'S REPLY ON PRELIMINARY OBJECTIONS

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14 AUGUST 2024

Tribunal:

Prof. Gabrielle Kaufmann-Kohler
Mr William Kirtley
Prof. Donald McRae

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

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I. PRELIMINARY

a. Definitions

1. Terms and definitions used herein have the same meanings as used in the Notice of Arbitration as modified by the Response and this Rejoinder to the Respondent's Reply on Preliminary Objections other than the following terms, which have the following meanings:

   a. "**BSIOP Dispute**" or "**State Agreement Dispute**" is the dispute the subject of the State Agreement Arbitration which was terminated by the Amendment Act.

   b. "**MIL**" or **"Mineralogy International**" means Mineralogy International Limited, a company incorporated in New Zealand on 14 December 2018.

   c. "**Mineralogy Constitution**" means The Constitution of Mineralogy Pty Ltd A.C.N. 010 582 680 (As adopted by a Special Resolution of the Members dated 16 May 2014).[1]

   d. "**Objections**" means the Respondents Statement on Preliminary Objections dated 22 January 2024.

   e. "**Rejoinder**" means the Claimant's Rejoinder to the Respondent's Reply on Preliminary Objections.

   f. **"Reply**" or "**ROPO**" means the Respondent's Reply on Preliminary Objections dated 19 July 2024.

[1] Constitution of Mineralogy dated 16 May 2014, (**Exh. C-563**); Note that the Respondent relies on an incorrect version of the Constitution.

g. "**Response**" or "**SODPO**" means the Claimant's Response to the Respondent's Statement on Preliminary Objections dated 14 March 2024.

h. **"Returns**" has the same meaning as set out in the AANZFTA.

i. "**Share Swap**" means the transaction set out in the Share Purchase Agreement dated 29 January 2019 between MIL and the Claimant[2].

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

2. In addition to this Rejoinder, the Claimant relies upon its Response and the following witness statements and Notices:

a. the First Witness Statement of Clive Palmer dated 22 March 2023 (**First Palmer WS**),

b. the Second Witness Statement of Clive Palmer dated 4 August 2023 (**Second Palmer WS**),

c. the Third Witness Statement of Clive Palmer dated 26 September 2023 (**Third Palmer WS**),

d. the Fourth Witness Statement of Clive Palmer dated 2 October 2023 (**Fourth Palmer WS**),

[2] Share Purchase Agreement dated 29 January 2019 between the Claimant and Mineralogy International Limited, (**Exh. C-562**).

e. the Fifth Witness Statement of Clive Palmer dated 14 March 2024 (**Fifth Palmer WS**),

f. the Sixth Witness Statement of Clive Palmer dated 2 August 2024 (**Sixth Palmer WS**),

g. the Seventh Witness Statement of Clive Palmer dated 14 August 2024 (**Seventh Palmer WS**),

h. the First Witness Statement of Domenic Martino dated 13 January 2023 (**First Martino WS**),

i. the Expert Witness Statement of Alberto Migliucci dated 27 March 2023 (**Migliucci Report**),

j. the First Witness Statement of Nui Bruce Harris dated 29 January 2024 (**First Harris WS**),

k. the expert report of Scott Birkett of BDO Corporate Finance dated 14 February 2024 which is attached to the Witness Statement of Scott Birkett dated 15 February 2024 (**BDO Report**),

l. the supplementary expert report of Scott Birkett of BDO Corporate Finance dated 2 August 2024 which is attached to the Witness Statement of Scott Birkett dated 2 August 2024 (**Supplementary BDO Report**),

m. the expert report of [redacted] of BDO Services Pty Ltd dated 5 August 2024 which is attached to the Witness Statement of [redacted] dated 5 August 2024 (**BDO Services Report**),

n. the expert report of Peter Dunning KC dated 6 August 2024 (**Dunning Report**), and

o. **NOA** or the **Notice of Arbitration** which means the NOA dated 28 March 2023 (amended 30 September 2023) which incorporates the Claimant's Notice of Intent dated 20 October 2022 by reference.

b. Preliminary Points

3. The Claimant considers it helpful to highlight at the start of this Rejoinder two key points for the Tribunal to bear in mind when considering the position of the Parties.

4. As explained below, the first point is that the Respondent wrongly suggests that the Claimant has abandoned certain positions – this is not so. The second point is that the Respondent has made certain key admissions which are fatal to its arguments.

Preliminary Comments and Observations

Reliance

5. **The Respondent has wrongly stated in its Reply that the Claimant has "abandoned"[3] certain of its earlier positions as set out in the documents relied upon above. This is not true. For the avoidance of doubt the Claimant continues to rely upon all of the foregoing material as well as this Rejoinder and has not abandoned any of its positions that it has taken in respect of this Arbitration.**

6. The Claimant has not abandoned any of its positions including, *inter alia,* those referred to in paragraph 178 of the Reply and, without limitation, joins issue with all of the matters referred to in

[3] ROPO, para 178.

paragraphs 199 to 201 of the Reply. The Claimant's position has not changed in respect of its multiple purposes in incorporating in Singapore as set out in the above material. The Claimant takes issue with evidence of the Respondent's alleged experts, and does not accept any of their opinion evidence as having any relevance to the matters in dispute between the parties and being inadmissible – in that it does not amount to proper opinion evidence and instead is quasi-factual evidence given by individuals who are not in a position to give factual evidence. By contrast, the Claimant relies on the direct evidence of fact that the Claimant has placed before the Tribunal.

7. The Claimant notes that the Respondent recognises in paragraph 35 of the Reply and agrees with the Claimant 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.[4] The significance of this is explained later in this Rejoinder.

Respondent's Admissions in Respect of Investment & Investors

8. At paragraph 64, the Respondent has admitted that the Share Swap was both lawful and effective in transferring the ownership of the shares in Mineralogy to the Claimant.[5] In paragraph 68 of the Reply the Respondent acknowledges that investment can be made through cashless transactions. In paragraph 71 the Respondent does not deny that a Share Swap constitutes an active

[4] ROPO, para 35.
[5] ROPO, para 64; see also, the Claimant's SODPO, paras. 230-237.

contribution.[6] In paragraph 72 of the Reply, the Respondent does not question that the acquisition by way of a share swap is legitimate.[7] The Respondent also makes the admission in line 6 at paragraph 132 of the Reply that "*All that matters is the position as at 13 August 2020*". In paragraph 72(b), the Respondent states that its objection has nothing to do with the underlying investment (Mineralogy) lacking value at the time the Claimant acquired the shares in Mineralogy.[8] At paragraph 110 of the Reply, the Respondent does not dispute that Article 2(c) of Chapter 11 of the AANZFTA covers both direct and indirect investments.[9]

Foreseeability

9. The Respondent acknowledges at paragraph 241 of the Reply, that the fact that the Amendment Act was not foreseeable at the time the Claimant was incorporated in Singapore is not in dispute.[10] **Relevant to the Dispute before this Tribunal is the Respondent's admission in line 6 at paragraph 132 of the Reply that: "*All that matters is the position as at 13 August 2020*" which is the date the Amendment Act was enacted.**

c. <u>Introduction</u>

10. The Respondent's jurisdictional objections cannot succeed and should not be allowed to succeed in the context of this important investor-state dispute. When the correct law is applied to the

[6] ROPO para 71; see also, Claimant's SODPO, para. 284
[7] ROPO, para 72; see also, Claimant's SODPO, para. 296.
[8] ROPO, para 72(b), see also, Claimant's SODPO, paras 296, 326.
[9] See also, Claimant's SODPO, paras. 354-358
[10] See also, *Zeph Investments Pte Ltd v Australia* (PCA Case No. 2023-40, Procedural Order No. 4, 24 May 2024), (**Exh. CLA-261**), *A*nnex A, p.8.

relevant facts, it is clear that this Tribunal has jurisdiction to hear the Claimant's claims.

11. As acknowledged by the Respondent,[11] it bears the burden of proving its claims on the balance of probabilities – a burden it has not discharged.

> ***"As to the applicable standard of proof, arbitral tribunals have frequently applied the "balance of probabilities" standard, although there may be different ways in which this standard is expressed (such as the "preponderance of the evidence").[12]*** **As recently explained by the Carlos Sastre tribunal:**
>
> > "*This standard requires an evaluation by the Tribunal of all the evidence produced by Claimants and Respondent on the issues at hand to determine which party's claims are more likely to be true. Thus, Claimants must present persuasive evidence of the facts to establish jurisdiction for the Tribunal to be satisfied that the burden of proof has been discharged. … Respondent, in turn, must provide* ***persuasive evidence of the facts*** *that make out its objections to jurisdiction.*"[13] [**Emphasis added**]

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[11] SOPO, para 23.

[12] E.g. *Antonio del Valle Ruiz and Others v Kingdom of Spain* (PCA Case No. 2019-17, Final Award of 13 March 2023), para. 495, (**Exh. RLA-28**); *Churchill Mining and Planet Mining v Indonesia* (ICSID Case No. ARB/12/14 and ARB/12/40, Decision on Annulment of 18 March 2019), para. 215, (**Exh. RLA-31**); (and *Churchill Mining and Planet Mining v Indonesia* (ICSID Case Nos. ARB/12/14 and ARB/12/40, Award of 6 December 2016), paras. 240, 244), (**Exh. RLA-32**); *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12, Decision on Jurisdiction of 1 June 2012), para. 2.10, (**Exh. RLA-33**); *Sergei Viktorovich Pugachev v Russia* (Award on Jurisdiction of 18 June 2020), para. 256, (**Exh. RLA-34**).

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

12. Whereas the Claimant has provided substantial, clear and cogent evidence of facts by way of the witness statements served with its NOA/Statement of Claim, Response and the additional witness statements referred to above and filed with this Rejoinder, in contrast, the Respondent has provided little or no evidence of facts and has failed to contest the Claimant's factual evidence with any equivalent evidence of its own.

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

14. The Respondent's evidence consists of ill-informed and/or inadmissible opinion and speculation, which has little to no relevance to the factual inquiries that must be undertaken by the Tribunal. As stated in *Philip Morris v Australia*, "the threshold for finding an abusive initiation of an investment claim is high"[14]. In *Clorox*[15] it was stated:

> *It is up to the party claiming the existence of an abuse of rights to allege and prove the facts establishing the foreseeability of the dispute when the investment was restructured …*

15. Direct evidence of fact in witness statements filed by the Claimant, from multiple persons who were directly involved in the relevant events, cannot be displaced by speculative opinion evidence by

[14] *Philip Morris Asia v Australia* (PCA Case No 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015), (**Exh. RLA-95**) at [539].

[15] *Venezuela v Clorox* (Judgment 4A_398/2021 of the Swiss Federal Tribunal dated 20 May 2022) (**Exh. RLA-142**) at [5.2.4].

parties who were not contemporaneously involved in the matters about which they opine and who have no first-hand knowledge of the facts.

16. In the current circumstances, the opinion evidence is nothing more than a hypothetical analysis of what certain experts subjectively consider might have been done differently, in each case based on an expert's limited area of expertise which, by its very nature, isolates them from all the context of all the actual factual matters before the Tribunal.

17. Notwithstanding, the Claimant takes issue with all of the opinion evidence as not being relevant or factually supported by the witness statements provided by the Respondent. As the Respondent cannot meet the test of applying the law to the facts, the Respondent seeks to make scandalous hypotheses based on ill-informed speculation and unfounded suspicions.

Parties to the Arbitration

18. The parties to this Arbitration are the Respondent and the Claimant. Mr Palmer is not a party to the Arbitration and has no standing to be a Claimant or to bring a claim under AANZFTA. The Respondent's repeated personal attacks on Mr Palmer are uncalled for and represent an unwelcome distraction from the real issues.

The Respondent Ignore the Factual Evidence

19. In its Reply, the Respondent has ignored the substantial arguments and evidence that the Claimant has placed before the Tribunal. By contrast, the Claimant has provided convincing evidence and

properly addressed each of the Respondent's grounds for its Objections.

20. The impossibility of the Respondent's position is highlighted by the confused nature of its submissions. The Respondent mischaracterises legal tests, twists facts and uses contrived logic in order to present some semblance of an argument. The need for such distortion belies the credibility of the Respondent's objections.

21. It is telling that despite the protestations and promise of further grounds of objection at the procedural conference held on 10 August 2023,[16] the Respondent has not changed its objections or produced any factual evidence which make any of the Respondent's Objections arguable. The Respondent's objections in 2023 were unfounded and without merit, and nothing has changed since then.

22. In the Claimant's submission, it is now time to promptly decide the Respondent's three objections and move on to the merits of the case, to which the Respondent has no answer. While the proceedings are being delayed by unmeritorious jurisdictional objections, the damages are ever increasing. This is not in the interests of either Party, nor is it in the interests of Australian taxpayers.

The Pertinent Facts

23. The pertinent facts are straightforward:

[16] First Procedural Hearing Transcript – PCA 2023/40, 10 August 2023 (**Exh. C-575**); see below, para. 722.

a. The Claimant is a legitimate Singaporean company, having operated a substantive and substantial business in Singapore for almost six years.

b. In January 2019, the Claimant exchanged shares for the shares in Mineralogy.[17] Since that time, it has *inter alia* continued to invest Mineralogy's profits back into Mineralogy to allow Mineralogy to continue expanding its operations. It remains Mineralogy's 100% parent and actively conducts its investment activities.

c. The Claimant currently employs around 298 people in Singapore,[18] and earns income of over S$12,003,851 (excluding its Australian investments).[19] There are also assets domiciled in Singapore of S$173,333,083.[20] On the date of breach, the Claimant was operating a successful Joint Venture business in Singapore. It also owned and operated three engineering companies.

d. It is common ground that the Amendment Act could not have been foreseen at the time the Claimant acquired Mineralogy.[21] This Arbitration and all of the Claimant's Claims arises solely out of the Amendment Act. The dispute the Tribunal has been asked to determine is whether the

[17] See, SODPO, paras 230 – 237.

[18] Zeph Employee List as at 31 July 2024, (**Exh. C-583**); Seventh Palmer WS at para 7.

[19] Audited Financial Statements of Zeph Investments Pte Ltd for the Financial Year Ending 30 June 2024, (**Exh. C-579**) at page 7; Seventh Palmer WS at para 6.

[20] Audited Financial Statements of Zeph Investments Pte Ltd for the Financial Year Ending 30 June 2024, (**Exh. C-579**) at page 6; Seventh Palmer WS at para 6.

[21] ROPO, para 241.

measures contained in the Amendment Act breach the Respondent's obligations in Chapter 11 of the AANZFTA.

24. In the NOA, the Claimant set out the details of the Amendment Act, which was passed under urgency by the Western Australian Parliament on 13 August 2020.[22] The measures implemented by that Act are unprecedented.[23] They include terminating legitimate arbitral proceedings, invalidating legitimate arbitral awards, prohibiting the Claimant's Australian subsidiaries from pursuing their legal rights, imposing crippling indemnities and absolving the Respondent from all liability (civil and criminal) for its established contractual breaches and the Amendment Act itself.[24]

25. It is telling that the Respondent focused on jurisdiction in its Answer to the NOA and provided no substantive response to the allegations that the Amendment Act breached the Respondent's international obligations under the AANZFTA. This is because there is no answer to the allegations – a clearer breach of international law is rarely seen in modern-day investment treaty cases.

26. The Respondent's fervent objections to jurisdiction should be seen in this light. They are a last-ditch effort by the Respondent to avoid

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[22] Claimant's Notice of Intent, 20 October 2022, (**Exh. C-63**).

[23] See: Barnett, "State Agreements" [1996] *Australian Mining and Petroleum Law Association Yearbook* 314-323, at 317, (**Exh. C-104)**: "*Although State Agreement provisions are not capable of being changed unilaterally, State Agreements do not fetter the power of Parliament to repeal the ratifying Act. It is a testimony to the importance of State Agreements that no Parliament has event attempted such unilateral repeal action"*; see also, Transcript of Press Conference, 12 August 2020 (**Exh. C-465**), p 1: *"Late yesterday, as you know, the State Government urgently introduced a bill into Parliament in relation to the Mineralogy State Agreement … I accept this bill is unprecedented*…".

[24] Claimant's Notice of Intent, 20 October 2022, L305 to L445 (**Exh. C-63**); See generally, *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) Part 3, (**CLA-003**).

liability for its patent and clear wrongdoing. In its desperation, the Respondent seeks to confuse and befuddle by incorrectly espousing the relevant legal tests, mischaracterising the facts and focusing obsessively on Mr Palmer personally – and not on the Claimant or its Claim. The Tribunal should not be daunted or distracted by the Respondent's antics. When the relevant facts are analysed and the correct law is applied, it is clear that jurisdiction exists, and that the Tribunal should dismiss the Respondent's objections.

Structure of the Rejoinder

27. This Rejoinder on Preliminary Objections responds to the Respondent's Reply on Preliminary Objections dated 19 July 2024 ("**ROPO**" or "**Reply**").

28. The Claimant's Rejoinder is structured as follows:

    a. Section One sets out the Claimant's case on the jurisdictional objections raised by the Respondent. It divides the objections into three parts:

        i. Investor/Investment Objection;

        ii. Denial of Benefits Objection; and

        iii. Abuse of Process Objection.

    b. Section Two is divided into the following sections:

        i. Admission and Estoppel;

        ii. Good Faith;

        iii. Timing of Denial of Benefits, Acquiescence and Estoppel;

iv. Denial of Benefits – Timing Issue;

v. Issue of Principle in respect of Estoppel and Acquiescence;

vi. Respondent's Alleged Expert Witnesses;

vii. Responses to individual paragraphs of the Reply; and

viii. Orders which should be made in respect of the Respondent's Preliminary Objections.

29. The Claimant continues to rely on its submissions in the Response, with attached evidence, unless specifically stated otherwise. To the extent that the Claimant does not address a specific point raised by the Respondent in the ROPO or accompanying evidence, this should not be taken as acceptance of that point. For the avoidance of doubt, the Claimant denies all the Respondent's allegations and refutes its submissions, except as expressly accepted herein.

d. Admissions by the Respondent

30. In the following section the Claimant will set out briefly why the Respondent's Objections are unarguable and should be summarily dismissed. Before doing so, it is important to recall that a party to an arbitration (like a party to a court proceeding) is bound by admissions of fact that it makes to that court or tribunal. Once a party concedes a material fact at issue, it should not be permitted to contest that fact later in the proceedings or take positions to conflict with the prior admission.[25] As confirmed by respected

[25] See, for example, *Petersen and Eton Park v. Argentina and YPF* 15 Civ. 2739, 16 Civ. 8569, Opinion and Order of the United States District Court for the Southern District of New

jurist, Jeffery Waincymer, "[t]*ribunals will commonly see particular value in admissions against interest*", given there is not vested interest in making them.[26] It is also important to recall that a tribunal's decision should also be consistent with any agreed facts.[27]

The Respondent's First Objection – That the Claimant is not an investor & has not made an investment

31. In this Rejoinder the Claimant has addressed in the same section the Respondent's objection that the Claimant 'is not an investor of the party' with the Respondent's objection that 'the Claimant does not have an investment'. The Claimant is an "*investor of a Party*" with a "*covered investment*" under the AANZFTA. This is a simple matter that the Respondent attempts to over-complicate, in the hope that its obfuscation will lead to a finding in its favour. However, by reason of the matters referred to below, the Respondent's own admissions confirm that the Claimant is an investor and has an investment in Australia in accordance with the terms of AANZFTA.

Respondent's Admissions

32. The Respondent acknowledges at paragraph 64 of the Reply that:

> "*Australia does not dispute that the share swap was lawful and effective in transferring* ***ownership*** *of the shares in mineralogy to Zeph*"

York, para 83; *Davis v. City of New York*, 228 F. Supp. 2d 327, 333 n.12 (S.D.N.Y. 2002); NAFED v. Swarup Group of Industries, Judgment of the Delhi High Court, 28 February 2019, paras 8 and 14.

[26] Waincymer, *Procedure and Evidence in International Arbitration*, 10.4.14.

[27] Waincymer, *Procedure and Evidence in International Arbitration*, 10.4.13.

33. AANZFTA in Chapter 11, Article 2(c), inter alia states:

> "*Investment means* ***every kind of asset owned*** *or controlled by an investor, including but not limited to the following….*
> *…*
> *…****shares***"

34. Yet the Respondent disputes that the Claimant has made an investment, despite the fact the Respondent accepts the Claimant was the owner of the shares. The admission that the Share Swap was legal and effective in transferring **ownership of the shares in Mineralogy** to the Claimant is an **admission of ownership by the Claimant of the Mineralogy Shares and is an admission by the Respondent of the Claimant's investment under AANZFTA.**

35. Likewise, the Respondent's position is that the Claimant is not an investor. Yet, AANZFTA in Chapter 11, Article 2(d), states as follows:

> "*(d) investor of a Party means a natural person of a Party or a juridical person of a Party that seeks to make, is making, or* ***has made an investment*** *in the territory of another Party;*"

36. The Respondent's admission that "*the share swap was lawful and effective*" is an admission that the Claimant **owns the Mineralogy Shares and as such has made an investment which are shares in a company incorporated in Australia which operates a substantial business in Australia and accordingly the Claimant has made an investment in the territory (Australia)**.

Law

37. In terms of the applicable legal principles, and as set out in more detail in the Claimant's Response:[28]

a. As noted above, Article 2(d) of Chapter 11 of the AANZFTA requires that an "*investor of a Party*" has made, is making, or seeks to make an "*investment*" in the territory of the respondent State. As to the meaning of "*investor*":

i. On a proper construction of Article 2(d), an "*investor*" is simply a person or entity that owns or controls an asset (or is in the process of acquiring, or seeking to acquire, such ownership or control of an asset); and

ii. This interpretation is consistent with the natural meaning of the words, read alongside the remainder of Chapter 11 (including Article 2(c), as addressed below, and the definition of "*covered investment*" in Article 2(a)); the principles set out in the Vienna Convention; previous arbitral practice;[29] and the context, object and purpose of the AANZFTA.

b. Similarly, as to the meaning of "*investment*" for the purposes of Article 2(c) of Chapter 11 of the AANZFTA:

i. Contrary to the Respondent's submissions,[30] there is no general definition of the term "*investment*" under

[28] See ROPO, paras 252-344.

[29] *See*, by way of example, *PAO Tatneft v. Ukraine* (**Exh. RLA-51**); *Mytilineos Holdings SA v. Serbia and Montenegro* (**Exh. CLA-181**), paras 126-131; *Clorox Spain SL v. Venezuela* (**Exh. CLA-182**), paras 3.4.2.5-3.4.2.7; *Addiko Bank AG v. Montenegro* (**Exh. RLA-52**), paras 352-354; *Nachingwea v. Tanzania* (**Exh. RLA-47**), para 153.

[30] SOPO, section IV; ROPO, paras 100 – 113.

international investment law – it varies, depending on the investment treaty in issue;

ii. The requirement that the Respondent seeks to impose – i.e. that a qualifying investment must involve an "*active investment*", and in particular "*some form of contribution*" by the investor[31] – is nowhere to be found within the language of Article 2(c) itself;

iii. Rather, the provision adopts a much wider, asset-based definition that refers to "*every kind of asset*" (emphasis added);

iv. Since the decision in *Salini v. Morocco* – in which it was held that an "*investment*", within the meaning of the ICSID Convention, ordinarily entails a "*contribution*" by the investor[32] – several non-ICSID tribunals, including those proceeding (like this arbitration) under the UNCITRAL Rules, have criticised the application of such an approach outside of the ICSID context;[33]

v. On a proper construction of Article 2(c), therefore, again the focus is on assets owned or controlled by an investor, such that both direct and indirect investments are covered; and

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[31] *See*, for example, the Respondent's Reply, para 100.

[32] *See*, *Salini v. Morocco* (**Exh. RLA-54**), para 52.

[33] *See*, for example, *Guaracachi America v. Bolivia* (**Exh. RLA-69**), para 364 ("*… it is not appropriate to import "objective" definitions of investment created by doctrine and case law in order to interpret Article 25 of the ICSID Convention when in the context of a non-ICSID arbitration such as the present case. On the contrary, the definition of protected investment, at least in non-ICSID arbitrations, is to be obtained only from the (very broad) definition contained in the BIT …*" (emphasis added)).

vi. By contrast, there is no additional requirement, on such a construction, for "*some form of contribution*" by the investor.[34]

Conclusion

38. As set out above, and in further detail later in this Rejoinder, the Respondent has admitted that the Claimant is an "*investor*" and has made an "*investment*" in accordance with the requirements of the AANZFTA (properly construed). The Respondent's first preliminary objection, in respect of "*investor*" and "*investment*", is made contrary to its own admissions. This objection is therefore unarguable, and itself constitutes an abuse of process, such that it should be summarily dismissed.

The Respondent's Second Objection – Denial of Benefits

39. The Respondent makes an admission at paragraph 146 of the Reply as follows:

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

[34] Albeit, even if there is such an additional requirement, contrary to the Claimant's submissions, that requirement is in any event satisfied in this case: *see*, the Claimant's Response, para 359.

in Singapore within the meaning of Article 11(1)(b) of Chapter 11 of AANZFTA. …" (footnotes omitted).

40. The Respondent has admitted and acknowledged the existence of the Claimant's investments and businesses as at the only relevant date, being 13 August 2020.[35] It is beyond belief considering the evidence provided by the Claimant in respect of its operations in Singapore that the Respondent could seriously make this objection.

41. It is necessary to explain the context of the tribunal decisions relied upon by the Respondent at paragraph 38(b) of the Reply, and to demonstrate that Claimant's argument is supported by the text of the Treaty, and general principles of investment law that seek to give effect to the object of the treaty in promoting investment, and by numerous arbitral decisions.

42. As noted above the Respondent has formally admitted the Claimant and the Claimant's investment in Australia. On 29 March 2019, the Respondent approved the Claimant as a "foreign company" carrying on a business in Australia (as addressed more fully in Section II of the Response and Section Two of this Rejoinder).[36]

43. The Respondent cannot on the one hand formally admit the Claimant and its investments and have notice of the Claimant's substantive business in Singapore, and then subsequently seek to deny the Claimant the benefits of Chapter 11 of AANZFTA. Cogent factual evidence, as set out in (inter alia) the First Palmer WS at

[35] ROPO, para 131.
[36] Application for registration as a foreign company with ASIC, (**Exh. C-97**).

paragraphs 27 to 82, illustrates that the Claimant's business in Singapore is indeed "substantive". The Respondent cannot take a benefit as it has in this case of over $400,000[37] and then seek to deny a benefit. The saying "you cannot have your cake and eat it" comes to mind when one considers the actions of the Respondent.

Admissions in respect of the Respondent's Second Preliminary Objection

44. In essence the Respondent states without any factual evidence that the Claimant does not have a substantive business in Singapore.

45. The Respondent has admitted the following in the Respondent's Reply at paragraph 129:

> "*The key issue between the Parties is whether Zeph had "substantive business operations" in Singapore at the relevant time.*"[38]

46. In paragraph 146 of the Reply the Respondent admits as follows:

> "*As at 13 August 2020, the Claimant's "business operations" consisted of: (a) holding three engineering companies, being GCS Engineering Services Pte ltd, Visco Engineering Pte Ltd, and Visco Offshore Engineering Pte ltd (the "**Engineering Companies**"), which it acquired on 31 January 2019, and (b) participation in a Joint Venture Agreement (the "**JVA**") the Kleenmatic Companies, which it entered into on 24 January 2020. It is only those **activities that are relevant** to whether*

[37] Foreign Transfer Duty, Statement of Grounds, WA, (**Exh. C-63**, Annexure A, Exhibit 28).
[38] SODPO, para 374*ff.*

the Claimant had "substantive business operations" in Singapore within the meaning of Article 11(1)(b) of Chapter 11 of AANZFTA…"

[**Emphasis added**]

47. The Respondent acknowledges that the Claimant's business operations are "activities that are relevant".[39]

48. In paragraph 168 of the Reply the Respondent inter alia states as follows:

"*In the document production phase of these proceedings, the Claimant was ordered to produce employment contracts for employees of the Claimant, and records of transfer of employment or engagement contracts from One Kleenmatic and Kleen Venture pursuant to cl 24 of the JVA in the period 24 January 2020 to 13 August 2020. Of the 146 employment contracts produced by the Claimant, only six related to positions which were not cleaners.*"

49. In paragraph 170 of the Reply the Respondent admits that the Claimant was issued by the Singapore government a license in order to carry on a cleaning business. The Respondent further admits that it was a registered business with the Singapore government and was entitled to and did receive COVID-19 subsidies and further that it engaged three professional firms in Singapore to assist it in the relevant period.

[39] ROPO, para 146.

50. Based on the foregoing admissions (alone) made by the Respondent, it is open to the Tribunal to find that the Claimant has a substantive business in Singapore.

51. In addition, the Claimant has a substantive business in Singapore as the Claimant has demonstrated by overwhelming evidence to which the Respondent has not responded including but not limited to Annexure A of the NOI[40] and paragraphs 27 to 35 of the First Palmer WS and the matters set out below.

52. The Claimant, inter alia, at paragraphs 215 to 275 of this Rejoinder, refers to substantial amounts of evidence provided by the Claimant in support of the fact it has, since its incorporation in 2019, has had a substantive business in Singapore. This inter alia 'factual evidence' clearly meets and exceeds the test of a 'substantive business' and inter alia includes but is not limited to evidence of:

    a. The Claimant's activities in Australia and Singapore (see para 215 to 216 below),

    b. The Claimant's compliance with the Singapore Companies Act 1967 (see para 217 and 218 below),

    c. The Claimant's registered office in Singapore (see para 219 to 221 below),

    d. The Claimant's past and present directors, including directors resident in Singapore (see para 222 to 225 below);

    e. The Claimant's auditors (based in Singapore) and audited accounts (see para 226 and 227 below);

[40] Claimant's Notice of Intention to Submit Dispute to Arbitration, Annexure A, (**Exh.C-63**).

f. The Claimant's business operations in Singapore (see para 228 to 240 below);

g. The Claimants employees in Singapore (see para 241 to 244 below);

h. The Claimant's contributions to the Singapore Central Provident Fund (see para 254 below);

i. The third-party contractors engaged by the Claimant (see para 255 below);

j. The insurance policies held by the Claimant to conduct its business in Singapore (see para 256 and 257);

k. Licenses issued by the Singapore Government to the Claimant to conduct its business (see para 258 below);

l. COVID-19 government subsidies received by the Claimant (see para 259 and 260 below);

m. The Claimant's substantive business in Singapore as detailed in its audited financial statements (see para 261 to 272 below); and

n. The Claimant's Chinese New Year Party (see para 273 to 275 below).

Law

53. As to the applicable legal principles, in this regard:

a. The Respondent bears the burden of proof in relation to any assertions that are contrary to the Claimant's case on

jurisdiction, including in respect of its purported denial of benefits.[41]

b. Thus, the onus is on the Respondent to demonstrate that it is entitled to deny benefits to the Claimant on the grounds that it does not have "*substantive business operations*" in Singapore.

c. This means, in practice, that the Respondent must submit evidence that "*conclusively*" contradicts the Claimant's case; otherwise, the Claimant's case in relation of the "*substantive business operations*" test – properly supported, as it is, by factual evidence – should be accepted.[42]

d. The Respondent, however, has adduced no factual evidence at all, in respect of what is a question of fact – let alone any material that "*conclusively*" contradicts the Claimant's case. It follows that the Claimant's case is uncontroverted.

e. Even if the Tribunal considers that the Respondent's submissions are plausible on their face, unless they are sufficiently well supported – which plainly they are not, in the absence of any factual evidence – this should not lead to a rejection of jurisdiction; to do so would impermissibly reverse the burden of proof.[43]

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[41] See, SODPO, paras 647-657.

[42] *See*, for example, *Chevron v. Ecuador*, PCA Case No. 2007-02/AA277, Interim Award, 1 December 2008 (**Exh. CLA-211**), paras 100 and 112.

[43] *See*, Sourgens, Duggal and Laird, *Evidence in International Investment Arbitration* (OUP 2018), para 2.55.

Conclusion

54. The Respondent's preliminary objection in relation to denial of benefits, too, is an abuse of process, in circumstances where the Respondent has not produced any factual evidence that contradicts the Claimant's evidence and has admitted evidence that contradicts the Respondent's own position. Consequently, the Respondent's second preliminary objection should also be summarily dismissed by the Tribunal.

The Respondent's Third Objection – that the Claimant's claims are an abuse of process

55. Just as in court proceedings a plaintiff sets out in its statement of claim what the plaintiffs claim is against a defendant, the defendant can-not force the plaintiff to change its claim that the plaintiff wishes to bring so it is in Arbitration.

The Dispute

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

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

described in the notice of arbitration and defined by the Claimant as the party commencing the Arbitration.

58. In this case, the NOA was served on the Respondent on 29 March 2023 and it incorporated the Notice of Intent dated 20 October 2022[44], by way of paragraph 4 of the NOA. The NOA thereby incorporates by reference, in its entirety, the Notice of Intent. The Notice of Intent defined the dispute in section 6, from line 447, inter alia states as follows:

> "***6. The Dispute***
>
> ***6.1 Background***
>
> *The dispute to be submitted to arbitration under the AANZFTA arises out of the enactment of the 2020 Amendment Act on 13 August 2020. This Act terminated the 2020 Arbitration Agreement and thereby breached Articles 6 and 9 of the AANZFTA. The dispute between the Claimant and the Commonwealth* ***first arose on 13 August 2020****.*"
>
> [**Emphasis added**]

59. This Arbitration is about the Claimant's claims, the Amendment Act and the Rule of Law.

60. It is now common ground the Amendment Act was not foreseeable at the time the Claimant made its investment (see paragraphs 132 and 241 of the Reply and paragraph 37 of Procedural Order No. 4)[45].

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

[45] *Zeph Investments Pte Ltd v Australia* (PCA Case No 2023-40, Procedural Order No. 4, 24 May 2024), (**Exh. CLA-261**).

61. The Arbitration is about a “dispute”. The “dispute” is defined in the Notice of Intent and further repeated in paragraph 219 of the Response and inter alia states:

> “***The dispute to be submitted to arbitration under the AANZFTA arises out of the enactment of the 2020 Amendment Act on 13 August 2020. This Act terminated the 2020 Arbitration Agreement and thereby breached Articles 6 and 9 of the AANZFTA. The dispute between the Claimant and the Commonwealth first arose on 13 August 2020.***
>
> ***…The heart of the dispute is that the 2020 Arbitration Agreement made in writing and executed and accepted by all parties on or about 8 July 2020 was terminated by the Commonwealth in bad faith by the 2020 Amendment Act, in breach of the Expropriation and nationalization obligations of Article 9 and all of the obligations of Article 6 of AANZFTA……***”

62. Paragraph 221 of the Claimant’s Response further states:

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

Respondent’s Admissions

63. The Respondent in lines 3 and 4 at paragraph 131 of the Reply *inter alia* states as follows:

> "***the Claimant's position is that "the date is 13 August 2020, the date of the Amendment Act***",

and at lines 7, 8 and 9:

> "***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***"

64. The Respondent makes a further admission in line 6 at paragraph 132 of the Reply as follows:

> "***All that matters is the position as at 13 August 2020***"

65. The Respondent further admits at paragraph 144(a) of the Reply as follows:

> "**Zeph's activities must be assessed as at 13 August 2020**"

66. The effect of the Respondent admitting that the date of the substantive business operations test is 13 August 2020 (the date the Amendment Act was enacted)[46] is an admission by the Respondent that this represents the date on which the dispute crystallised – the date of breach. Because 13 August 2020 is the date of breach, it is also an admission that the dispute arises out the Amendment Act enacted on 13 August 2020, as contended for

[46] ROPO, para 131.

by the Claimant. This is the dispute before the Tribunal in this Arbitration.

67. The Respondent has already admitted that the Amending Act was not foreseeable at the time of the Share Swap and restructuring.[47] The Respondent Admission is recorded in Procedural Order No. 4 (Document Production) delivered on 24 May 2024 at paragraph 37,[48] stated as follows:

> "***However, the Tribunal understands that the Respondent acknowledges that the fact of the passing of the Amendment Act per se was not foreseeable to the Claimant at the time of the January 2019 Restructure.[46] Indeed, referring to evidence already in the record and in part furnished by the Claimant, the Respondent concedes that the Amendment Act was not conceptualized before March-May 2020;[47] that the draft bill that would become the Amendment Act was not approved before July 2020;[48] and that the draft bills were not only kept secret,[49] but were accessible only to a handful of high-level public officials.[50]***"

68. The definition of the "dispute" in the NOA clearly states that the dispute involves the "termination of the 2020 Arbitration

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[47] ROPO, para 241: "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 record'", citing *Zeph Investments Pte Ltd v Australia* (PCA Case No 2023-40, Procedural Order No. 4, 24 May 2024), (**Exh. CLA-261**), Annex A, p 8.

[48] The footnotes referred to in paragraph 37 of Procedural Order No. 4 (**Exh. CLA-261**), are reproduced in paragraph 301 of this rejoinder, below.

Agreement" and the State Agreement Arbitration by the Amendment Act.

69. The dispute defined by the Claimant is the only dispute which is before this International Tribunal. All of the Claimant's claims arise from the passing of the Amendment Act and nothing else.

70. It is beyond belief that a party reading the Amendment Act for the first time would not conclude that it created an entirely new dispute between the Respondent State of Western Australia and the Claimant (which is individually named in the Amendment Act).

Law

71. Turning to the applicable legal principles as examined further below, insofar as foreseeability (in the context of abuse of process) is concerned:

    a. The date upon which foreseeability is to be tested is the date on which a claimant acquires its investment in the State in question,[49] for example via a "*transfer*" to the claimant[50] or a change in its corporate structure.[51]

    b. For a claim to constitute an abuse of process, a future specific dispute must have been subjectively foreseen by,[52] or objectively foreseeable to,[53] the claimant, on the date that it acquired that investment.

[49] *See*, for example, *Ipek Investment Ltd v. Turkey*, ICSID Case No. ARB/18/18, Award, 8 December 2022 (**Exh. RLA-99**), para 327.
[50] *See*, for example, *Tidewater Inc v. Venezuela* (**Exh. RLA-93**), para 148.
[51] *See*, for example, *Philip Morris v. Australia* (**Exh. RLA-95**), para 554.
[52] *ibid*, para 587. *See*, also, *Cascade Investments v. Turkey* (**Exh. RLA-98**), para 343.
[53] *See*, for example, *Philip Morris v. Australia* (**Exh. RLA-95**), para 539.

c. Such a dispute must have been foreseeable as a "*very high probability*";[54] or, at the very least and alternatively, as a "*reasonable prospect*".[55] Thus, in both *Pac Rim Cayman LLC v. El Salvador* and *Philip Morris v. Australia*, it was only after the claimant actually learned of, or the respondent announced, the relevant legislative measure that the requisite degree of foreseeability arose.

d. As noted above, crucially, it must be a "*specific future dispute*" that was foreseeable to the claimant on the date that it acquired its investment, as opposed to a "*vague general controversy*" between the parties.[56]

72. The law on foreseeability and abuse is set out in this Rejoinder. The law is unequivocal that if the specific dispute is not reasonably foreseeable at the time of a corporate restructuring, there is no abuse of process.

73. The Respondent's acceptance that all that matters "is the position on 13 August 2020"[57] is an admission that this is the date of breach or the date on which the dispute subject to this Arbitration crystalised. As the tribunal in *Mobil v Venezuela* states "the dispute over measures can only be deemed to have arisen after the measures were taken." This finding was crucial in the *Mobil* case because there were other pending disputes at the time of the

[54] *See*, for example, *Pac Rim Cayman LLC v. El Salvador* (**Exh. RLA-33**), para 2.99; *Lao Holdings NV v. Laos* (**CLA-213**), para 76.

[55] *See*, for example, *Philip Morris v. Australia* (**Exh. RLA-95**), para 554; *Alverley Investments Ltd v. Romania* (**Exh. RLA-71**), para 384.

[56] *See*, for example, *Pac Rim Cayman LLC v. El Salvador* (**Exh. RLA-33**), para 2.99; *Philip Morris v. Australia* (**Exh. RLA-95**), para 554; *Alverley Investments Ltd v. Romania* (**Exh. RLA-71**), para 385.

[57] ROPO, para 131.

restructure, but the tribunal found that the dispute before it arose only on the date that particular measure was passed.

74. There was no dispute over the measures in the Amendment Act until that Act was passed on 13 August 2020. All claims the Claimant makes in this Arbitration are claims first brought into existence by the Amendment Act. It follows therefore that it is the measures in the Amendment Act that are the subject of this dispute. The Respondent has admitted that the Amendment Act was not foreseeable.[58]

75. Having accepted that the dispute arose out of the Amendment Act passed on 13 August 2020, the Respondent is not permitted to say now that the Amendment Act is not the dispute for foreseeability purposes.

Conclusion

76. As the Respondent has admitted both that the Amendment Act dispute is the specific dispute before the Tribunal in this arbitration and that the Amendment Act (as introduced on 13 August 2020) was not (subjectively or objectively) foreseeable to the Claimant (i.e. whether with a "*very high probability*", as a "*reasonable prospect*", or otherwise) at the time of the Share Swap and Restructuring in January 2019 (the critical date, for present purposes), there can be no abuse of process.[59]

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[58] ROPO, para 241: "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 record", citing Annex A to PO4, p 8 (*Zeph Investments Pte Ltd v Australia* (PCA Case No 2023-40, Procedural Order No. 4, 24 May 2024), (**Exh. CLA-261**).

[59] Claimant's Notice of Intention to Submit Dispute to Arbitration, Annexure A (**Exh. C-63**) page 42-43; Share Purchase Agreement dated 29 January 2019 between the Claimant and Mineralogy International Limited, (**Exh. C-562**).

77. Having accepted that the dispute arose out of the Amendment Act passed on 13 August 2020, the Respondent is not permitted to say now that the Amendment Act is not the dispute for foreseeability purposes.

78. Accordingly, the Respondent's submissions in its Reply in relation to its third preliminary objection should be treated as irrelevant, inarguable and themselves as an abuse of process. The Tribunal should, without further argument, dismiss the Respondent's abuse of process objection on the basis of the Respondent's own admissions.

A Party Cannot Walk Away from Its Admissions

Doctrine of Approbation and Reprobation

79. The following cases address the principle of law of general application that it is not possible for a party to approbate and reprobate:

a. Volpi v Volpi and Delanson:[60]

> *"[244] The abuse of process point is supported by reference to the observation of Sir Nicolas Browne-Wilkinson V.C. (later Lord Browne-Wilkinson) in Express Newspapers plc v. News (UK) Ltd. (1990) 1 WLR 1320, where he said:*
>
> *"There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the*

[60] *Volpi v Volpi*, Ad hoc Arbitration, Ruling of the Supreme Court of the Bahamas, Consolidated Appeals 2020APPsts00013, 2020APPsts00018, 28 December 2023, at para 244, (**Exh. CLA-262**).

attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them, and having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance."

b. *Arius v WPIL*:[61]

"Arius is indeed attempting to hedge its position by saying that the arbitral proceedings, which Arius itself commenced, will be withdrawn, but only upon dismissal of the present application. That is an entirely impermissible course which seems to approbate and reprobate and blow hot and cold at the same time. It is plain to me that the Statutory Demand was served for the improper purpose of exerting pressure on WPIL to pay an alleged debt that is hotly disputed. This Court will not countenance such an approach."

c. *V Goel v S Goel and Others*:[62]

"The plaintiff cannot be allowed to approbate and reprobate. If the Arbitration proceedings commenced even against the plaintiff by the said notice, surely the present suit is not maintainable and the parties are to be referred to arbitration. If the arbitration proceedings did not commence with the above notice, as it was not addressed to the plaintiff herein, the present suit and

[61] *Arius v WPIL*, DIAC Case No. 23-0065, Judgment of the High Court of Justice of the British Virgin Islands, 27 March 2024, at para 47, (**Exh. CLA-263**).

[62] *V Goel v S Goel and Others*, Judgment of the Delhi High Court 2023_DHC_5565, 8 August 2023, at para 43, (**Exh. CLA-264**).

the application being filed after the coming into force of the Amending Act, the Amending Act will apply."

d. *CLX v CLY and Others*:[63]

"The Court of Appeal, in BWG v BWF [2020] 1 SLR 1296 ("BWG") (at [102]) set out the law on approbation and reprobation as follows:

102 The foundation of the doctrine of approbation and reprobation is that the person against whom it is applied has accepted a benefit from the matter he reprobates (Evans v Bartlam [1937] AC 473 per Lord Russell of Killowen at 483). The doctrine of approbation and reprobation has also been referred to as a principle of equity that a person 'who accepts a benefit under an instrument must adopt it in its entirety giving full effect to its provisions and, if necessary, renouncing any other rights which are inconsistent with it' (Piers Feltham, Daniel Hochberg & Tom Leech, Spencer Bower: Estoppel by Representation (LexisNexis UK, 4th Ed, 2004) ('Estoppel by Representation') at para XIII.1.10). We endorse Belinda Ang Saw Ean J's description of the doctrine in Treasure Valley Group Ltd v Saputra Teddy and another (Ultramarine Holdings Ltd, Intervener) [2006] 1 SLR(R) 358 ('Treasure Valley') at [31]:

[63] *CLX v CLY and Others* [2022] SGHC 17 at para 41, (**Exh. CLA-265**).

The doctrine of approbation and reprobation precludes a person who has exercised a right from exercising another right which is alternative to and inconsistent with the right he has exercised. It entails, for instance, that a person 'having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit' : see Evans v Bartlam [1937] AC 473 at 483 and Halsbury's Laws of Australia vol 12 (Butterworths, 1995) at para 190-35 where the doctrine of approbation and reprobation is conveniently summarised as follows:

A person may not 'approbate and reprobate', meaning that a person, having a choice between two inconsistent courses of conduct and having chosen one, is treated as having made an election from which he or she cannot resile once he or she has taken some benefit from the chosen course."

e. *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, at paragraph 558:[64]

"According to the principle of national and international law known as approbate and reprobate,[639] Pakistan may not at the same time both rely on the Supreme Court decision and seek to have it recalled or modified. (As far as the Tribunal has been informed, the

[64] *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, (**Exh. CLA-266**).

procedure in Pakistan's Civil Review Petition has not been concluded.)"

For completeness, footnote 639 was as follows: *"See, for example, in the law of Pakistan, Secretary Economic Affairs Div, Islamabad v. Ahmed and others, Supreme Court of Pakistan 31 July 2013, §23 : "Even as a rule of evidence or pleading a party should not be allowed to and " [sic: approbate and reprobate?]. In the context of international law, Sir Ian Sinclair interpreted the reasoning of the International Court of Justice in the Aegean Continental Shelf case as "a specific application of the principle of intertemporal law, tempered by the equitable doctrine of approbation and reprobation": Sinclair, The Vienna Convention on the Law of Treaties, 2nd edition, Manchester 1984, p. 126 (emphasis added). See also Karkey's Post Hearing Brief, ¶¶ 77, 79 and 86 on estoppel."*

Application of Principles of Unilateral Acts, Good Faith and Approbation and Reprobation

80. Whilst in the following paragraphs, the statements and conduct of the Respondent is dealt with under the legal principle of 'admissions', for the sake of brevity, each statement or conduct should also be treated as if the customary international law principles of 'unilateral act' 'good faith' and "approbate and reprobate" were applied. Accordingly, each of the "Respondent's Admissions" should be found to be binding on the Respondent under each of the legal principles. In each case, the meaning and effect of the Respondent's Admissions should be construed on the

same basis as set out below in respect of the application of the legal principles for admissions. In each case, the Respondent should be found to be bound by its statement or prevented from averring an alternative or inconsistent position.

Dismissal of the Respondent's Objections

81. In considering the Respondent's admissions set out above, the Tribunal should reach the conclusion without further consideration of the matter and grant the relief requested by the Claimant at the conclusion of this Rejoinder. In the following sections, however, the Claimant deals with the Respondent's Objections in further detail and provides further submissions to assist the Tribunal in reaching the conclusion that all of the Respondent's objections lack substance and must be dismissed.

SECTION ONE: THE CLAIMANT'S CASE

82. In this section, the Claimant further sets out its position on the three Objections raised by the Respondent:

    a. Investor/Investment;[65]

    b. Denial of benefits; and

    c. Abuse of process.

83. As discussed below, the established facts in this case clearly demonstrate that jurisdiction exists under the AANZFTA. Indeed, the Claimant exceeds the relevant legal tests by some margin, as

[65] While the Respondent splits this objection into two parts (investor and investment), they are essentially the same objection. The Claimant, therefore, addresses them together.

shown by the considerable difference between the underlying facts of this case and those where objections of this nature have succeeded. To deny jurisdiction, this Tribunal would have to essentially rewrite the law and ignore decades of past practice. This would set a dangerous precedent and must be resisted.

II. OBJECTION ONE: INVESTOR/INVESTMENT

a. The Respondent's First Objection is that the Claimant is not an Investor and has not made an investment. For convenience the Claimant repeats the Respondent's admissions before embarking on other substantial grounds as to why the Respondent's grounds are entirely without merit and an abuse of process.

84. The Claimant is an "*investor of a Party*" with a "*covered investment*" under the AANZFTA. This is a simple matter that the Respondent over-complicates.

Respondent's Admission

85. The abuse of the Respondent's first objection and, the hollowness of the Respondent's first objection, is best illustrated by the fact that the Respondent has admitted the Claimant is an investor and has made an investment. The Respondent acknowledges at paragraph 64 of the Reply that:

> "*Australia does not dispute that the share swap was lawful and effective in transferring **ownership** of the shares in mineralogy to Zeph*"

86. AANZFTA in Chapter 11, Article 2(c), inter alia states:

> "*Investment means* ***every kind of asset owned*** *or controlled by an investor, including but not limited to the following*:"

87. (a) Despite these matters, the Respondent disputes that the Claimant has made an investment. The admission that the Share Swap was legal and effective in transferring ownership of the shares in Mineralogy to the Claimant, however, is an admission of ownership and therefore in accordance with the treaty terms and admission of investment.

(b) Likewise by acknowledging that the Share Swap is "legal and effective".[66] The Respondent has acknowledged that valuable consideration was paid for the purchase of the Mineralogy shares by the Claimant otherwise the transaction could not have been legal and effective under Australian contract law.[67]

88. Likewise, the Respondent's position is that the Claimant is not an investor. Yet, AANZFTA in Chapter 11, Article 2(d), states as follows:

> *"(d) investor of a Party means a natural person of a Party or a juridical person of a Party that seeks to make, is making, or* ***has made an investment*** *in the territory of another Party;"*

89. The Respondent's admission that "*the share swap was lawful and effective*"[68] is an admission that the Claimant owns the Mineralogy Shares and has made an investment in the territory (Australia).

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[66] ROPO, para 64.
[67] ROPO, para 64.
[68] ROPO, para 64.

90. Reference is made to the Sixth Palmer WS, and in particular paragraphs 28 to 48, which refer to the further investment and are highly relevant to that investment being the investment in paragraphs 23 to 27 of the Claimant's Response and which complies with Article 2(c) of Chapter 11 of AANZFTA. The Claimant relies upon the foregoing and paragraphs 28 to 48 of the Sixth Palmer WS in meeting all of the complaints of the Respondent in its Reply in respect of the Investor and Investment objection.

91. Article 2(c) of Chapter 11 of AANZFTA states:

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

92. It is an explicit requirement of Article 2(c) that "*returns that are invested*" qualify as investments.

b. <u>Article 2(j) Of Chapter 11 Of AANZFTA</u>

93. Article 2(j) of Chapter 11 of AANZFTA which 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*" (emphasis added).

94. The definition of return as set out in 2 (j) of AANZFTA **includes profits** that Mineralogy **yielded**; the profit for the years ended 30 June 2019 and 30 June 2020 was retained by Mineralogy, and that part of the profit that was retained was an investment under 2(c) of AANZFTA.[69] As required by Clause 31.1 and 32.1 of the Mineralogy Constitution,[70] only the Claimant as the sole

[69] Sixth Palmer WS at para 30.
[70] Constitution of Mineralogy dated 16 May 2014, (**Exh. C-563)**.

Shareholder of Mineralogy had the power to declare a dividend or make a distribution of profit which the Claimant never did in 2019 or 2020 in respect of the yielded amounts of profit (Returns) which have been retained by Mineralogy as set out in the 2019 Accounts[71] and 2020 Accounts[72].

c. <u>Constitution Of Mineralogy</u>

95. The Mineralogy Constitution, which was current as of 30 June 2019, as of 30 June 2020 and as of 13 August 2020 is "**Exh. C-563**".[73]

96. Clauses 22.3 and 29 of the Mineralogy Constitution states as follows:[74]

> ***22.3 Corporate Groups***
>
> *Where the Company is a wholly owned subsidiary and the Directors are also the Directors of the holding company,* ***the Directors may act in the best interests of the holding company and in a manner which is contrary to the best interests of the Company****, provided that the Company is not insolvent or does not become insolvent because of the Director's action under this clause.*
>
> ***29. PERMANENT GOVERNING DIRECTOR***

[71] Mineralogy's Audited Financial Reports for the FYE 20 June 2019, (**Exh. C-476**).
[72] Mineralogy's Audited Financial Reports for the FYE 20 June 2020, (**Exh. C-477**).
[73] Sixth Palmer WS at para 31.
[74] Constitution of Mineralogy dated 16 May 2014, **Exh. C-563,** pp19 & 24.

(a) The Company may, from time to time by ordinary resolution passed at a General Meeting, appoint a Permanent Governing Director (the "Governing Director").

(b) The Governing Director shall hold that office until he dies or vacates that office or until he ceases to be a Director subject to the provisions of this Constitution and at such remuneration as the Directors may from time to time determine.

(c) There shall be no shareholding requirement for eligibility as a Governing Director or Acting Governing Director.

(d) The Governing Director may, from time to time and at any time, appoint any person as his delegate, attorney or proxy; to act as Governing Director in his stead AND to exercise all his rights, powers, authorities and functions on his behalf, or any of them, which may be defined by such appointment; upon such terms as he shall determine AND he may at any such time revoke any such appointment or authority. Any such appointment or revocation shall be in writing, under the hand of the Governing Director.

(e) In the event that the Governing Director shall die while he holds the office of Governing Director, he may, by his will or any codicil thereto, appoint any person to be Governing Director in his place.

(f) In default of any such appointment being made by the Governing Director so dying, his legal personal representative may either before or after probate is granted, make such an appointment of any person to the office of Governing Director

AND every such appointment must be made in writing by the appointor.

(g) The Governing Director shall be the Chairman of Directors and Chairman of every General Meeting of the Members of the Company, which he shall attend.

(h) The Governing Director for the time being of the Company, shall have the authority to exercise all of the powers, authorities and discretions by these presents expressed in the Directors generally and in the Company in General Meeting; and all other Directors for the time being of the Company shall exercise such powers only as the Governing Director may delegate to them and they shall be under his control and direction in regard to the conduct of the Company's business.

(i) In exercising such authorities and discretions as aforesaid, it shall not be necessary for the Governing Director to describe himself as being or acting in the capacity of the Governing Director of the Company.

(j) The Governing Director may from time to time and at any time, appoint other persons to be Directors of the Company and may define, limit and restrict their powers and fix their remuneration and duties AND may at any time and without any notice, remove any Director from office. However, each such appointment or removal must be in writing, under the of the Governing Director.

(k) A resolution in writing, under the hand of the Governing Director or an Acting Governing Director, appointed in accordance with this provision for the time being, shall be as valid and binding on the Company or in relation to its affairs; as a resolution duly passed by the Board of Directors of the Members in General Meeting.

(l) The Governing Director may convene a Meeting of Directors at any time, in accordance with the Constitution of the Company.

(m) The Governing Director may convene a Meeting of the Members of the Company at any time, in accordance with the Constitution of the Company.

[Emphasis added.]

d. Director Appointments

97. Mr Palmer was appointed by the Claimant as a Director of Mineralogy on 27 February 2019,[75] and was appointed the Permanent Governing Director of Mineralogy by the Claimant on 9 February 2021,[76] and his appointments are, at the date of this Rejoinder, still current.[77]

[75] Current & Historical Extract for Mineralogy Pty Ltd, 14 February 2024, (**Exh. C-479**).
[76] Minutes of Meeting of General Members of Mineralogy Pty Ltd, 9 February 2021 (**Exh. C-564**).
[77] Sixth Palmer WS at para 33.

e. Approval of Accounts

Member's Meetings Approving the Mineralogy Accounts for 30 June 2019 and 30 June 2020

98. Mr Palmer was a director of the Claimant representing Mineralogy's sole member, the Claimant, when he attended the general meeting on behalf of the Claimant of the members of Mineralogy held on 2 December 2019 approving the Annual Accounts for Mineralogy for the year ended 30 June 2019 (**2019 Accounts**)[78] for Mineralogy and was also a director of the Claimant representing the Claimant when he attended the general meeting of the members of Mineralogy held on 13 April 2021 approving the Annual Accounts for Mineralogy for the year ended 30 June 2020 (**2020 Accounts**)[79] (together, the **Members Meetings**)[80]. The 2020 Accounts and the 2019 Accounts retained profits from their respective years which allowed Mineralogy to use those funds in respect of its operations and investments in Australia.[81]

99. The Minutes of the Member's Meetings of Mineralogy are exhibits "**Exh. C-565**" and "**Exh. C-566**".

Director's Meetings Approving the Mineralogy Accounts For 30 June 2019 and 30 June 2020

100. Mr Palmer was a director attending the meeting of directors of Mineralogy held on 2 December 2019 approving the 2019 Accounts,[82] and he also attended a meeting of directors of

[78] Minutes of Member's Meeting FYE June 2019 (**Exh. C-565**).
[79] Minutes of Member's Meeting FYE June 2020 (**Exh. C-566**).
[80] Sixth Palmer WS at para 34.
[81] Sixth Palmer WS at para 34.
[82] Minutes of Director's Meeting FYE June 2019 (**Exh. C-567**).

Mineralogy held on 15 July 2021 approving the 2020 Accounts,[83] (together, the **Directors Meetings**).[84]

101. Resolution number 3 in the Minutes of Directors Meeting to approve the 2020 Accounts held on 15 July 2021 states as follows:[85]

> *3. It was **NOTED** that a copy of the 2020 Audited Financial Records has been provided to the sole Member of the Company (Zeph Investments Pte Ltd).*

102. The Minutes of the Mineralogy Directors Meetings are exhibited to the Sixth Palmer WS as "**Exh. C-567**" and "**Exh. C-568**".

103. In deciding to recommend a dividend and/or approving the 2019 Accounts and the 2020 Accounts Mr Palmer confirms, in his evidence, that he was acting as a director of Mineralogy and the Claimant for the benefit of the Claimant in accordance with clause 22.3 of the Mineralogy Constitution.[86] Mr Palmer further states that he always acted in the best interests of the Claimant to ensure profits of Mineralogy would be reinvested in Australia and enhance the value of the Claimant's investment in Mineralogy's business and Mineralogy shares owned by the Claimant.[87] He also confirms that by approving the 2019 Accounts and the 2020 Accounts reserves were created in accordance with clause 31.5 of the Mineralogy Constitution.[88] He also states that he decided matters

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[83] Minutes of Director's Meeting FYE June 2020 (**Exh. C-568**).
[84] Sixth Palmer WS at para 36.
[85] Minutes of Director's Meeting FYE June 2020 (**Exh. C-568**).
[86] Sixth Palmer WS at para 39; Constitution of Mineralogy dated 16 May 2014, (**Exh. C-563**), p 19.
[87] Sixth Palmer WS at para 39.
[88] Sixth Palmer WS at para 39; Constitution of Mineralogy dated 16 May 2014, (**Exh. C-563**), p 25.

as a director of the Claimant and Mineralogy so that no dividend be paid more than the amounts set out in the Mineralogy audited accounts as requested by the Claimant.[89]

104. **Clause 31.5 of the Mineralogy Constitution states as follows:[90]**

> ***31.5 Application of Reserves***
>
> *Pending any such application, 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.*

105. **No dividend could be paid out by Mineralogy unless it was approved by the Claimant at a general meeting of shareholders under clause 31.1 of the Mineralogy Constitution.[91] As the Claimant was the only shareholder of Mineralogy, it always had the power to ensure profits were retained and reinvested in Mineralogy's business to enhance the Claimant's investment in Mineralogy shares and business[92].**

f. Mineralogy's Constitution – Dividends And Profits

106. Clause 31.1 and 32.1 of Mineralogy's Constitution state as follows:[93]

[89] Sixth Palmer WS at para 39.
[90] Constitution of Mineralogy dated 16 May 2014, (**Exh. C-563**), p 25.
[91] Constitution of Mineralogy dated 16 May 2014, (**Exh. C-563**), p 25.
[92] Sixth Palmer WS at para 41.
[93] Constitution of Mineralogy dated 16 May 2014, (**Exh. C-563**), pp 25 -26.

31.1 Declaration of Dividend

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

32.1 Resolution to Capitalise Profits

Subject to these Rules, the Company in general meeting may resolve that it is desirable to capitalise any sum, being the whole or a part of the amount for the time being standing to the credit of any reserve account or the profit and loss account or otherwise available for distribution to members, and that such sum be applied, in any of the ways mentioned in these Rules, for the benefit of members in the proportions to which those members would have been entitled in a distribution of that sum by way of dividend.

107. As Mineralogy is a wholly owned subsidiary of the Claimant, it is the Claimant who must approve any distribution of profits by way of dividend (Clause 31.1 of the Mineralogy Constitution)[94] or otherwise (Clause 32.1 of the Mineralogy Constitution) or not do so and have the profits retained in Mineralogy for reinvestment in Australia.

108. Further, Mineralogy's Constitution inter alia states at Clause 31.6 and Clause 31.11 as follows:[95]

[94] Constitution of Mineralogy dated 16 May 2014, (**Exh. C-563**), p 25.
[95] Constitution of Mineralogy dated 16 May 2014, (**Exh. C-563**), p 26.

31.6 Carry forward Profits

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.

31.11 Distribution of Dividends

Any general meeting declaring a dividend may, by resolution, direct payment of the dividend ***wholly or partly by the distribution of specific assets, including paid up shares in, or debentures of, any other corporation, and the directors shall give effect to such a resolution.***

109. Clause 31.11 meant that dividends did not have to be paid in cash, but wholly or partly by the distribution of specific assets, including paid up shares in, or debentures of, any other corporation and from carry forward profits (see Clause 31.6 of the Mineralogy Constitution).[96]

110. Clause 32.3 of the Mineralogy Constitution states:[97]

32.3 Application for Benefit of members

The ways in which a sum may be applied for the benefit of members under Sub-Rule 31.1 are:

(a) by paying up any amounts unpaid on shares held by members;

(b) by paying up in full unissued shares or debentures to be issued to members as fully paid; or

[96] Constitution of Mineralogy dated 16 May 2014, (**Exh. C-563**), p 26.
[97] Constitution of Mineralogy dated 16 May 2014, (**Exh. C-563**), p 27.

(c) partly as mentioned in Sub-Rule 32.2(a) and partly as mentioned in Sub-Rule 32.3(b).

111. Clauses 31.1, 31.6 and 31.11 of Mineralogy's Constitution in essence allowed the Claimant by resolution to distribute assets of Mineralogy to the Claimant, the only member of Mineralogy, by a simple resolution at any time of the Claimants choosing.[98]

112. Under the Mineralogy Constitution the Claimant had the absolute right to appoint or remove any director at any time and to make any conditions it sought on a director's appointment prior to making the appointment of a director or change Mineralogy's Constitution. The only reason that profits and/or returns were retained in Mineralogy as set out in the 2019 Accounts and the 2020 Accounts were because the Claimant required them to be retained by Mineralogy for further use and investment by Mineralogy in Australia[99].

g. Accrual Accounting and Document Inspection

113. Mr Palmer confirms that the Claimant has always, since it became the holding company of Mineralogy in 2019, been able to inspect any document in the control or possession of Mineralogy. He also confirmed that Mineralogy does and is required by Australian Law to keep accrual accounts.[100] These matters are set out in the expert report of Peter Dunning KC.

[98] Sixth Palmer WS at para 47; Constitution of Mineralogy dated 16 May 2014, (**Exh. C-563**), p 25-26.
[99] Sixth Palmer WS at para 48.
[100] Sixth Palmer WS at para 49.

h. The Respondent's Reply

114. In relation to the Respondent's Reply, at paragraphs 89 to 97, Mr Palmer says as follows:

a. "The Constitution which Mineralogy adopted in 2002 (**Exh. C-553**) is not the Mineralogy Constitution in force at the time of the 2019 Accounts or the 2020 Accounts.[101] The Respondent's expert Professor Lys has used the 2002 Constitution, as a consequence, nothing contained with the Reply alleged by the Respondent in the Reply in respect of the Constitution of Mineralogy is relevant or has any force. Notwithstanding, all the provisions of the Mineralogy Constitution referred to in this statement above (**Exh. C-563**) were contained within the terms of the historical 2002 Constitution of Mineralogy."

b. "…[I]t is a nonsense to suggest as the Respondent does in paragraph 94 of its Reply that a company, contrary to Australian Law, with a turnover of many hundreds of millions of dollars should operate on cash accounting which the Respondent's own laws bars a company with many hundreds of millions of dollars turnover doing so.[102] Mr Palmer considers that the Respondent's and Professor Lys quoted view are a nonsense in respect of cash.[103] Likewise, as clause 31.11 of the Mineralogy Constitution confirms, dividends may be paid wholly or partly by the distribution of specific assets, including paid up shares, or in debentures

[101] Sixth Palmer WS at para 50(a).
[102] Sixth Palmer WS at para 49, 50(b); Supplementary BDO Report at paras 2.7-2.8.
[103] Sixth Palmer WS at para 49, 50(b).

of, any other corporation and there is no requirement for it to be fully or partly paid in cash".[104]

115. The failure to detail the actual provisions of any constitution of Mineralogy by the Respondent is telling and calls into it question the Respondent's Expert's competence.[105]

i. Claimant's Ongoing Contribution to Mineralogy's Operations

116. Five of the Claimant's directors are involved in the operations of Mineralogy and make a real and material contribution to the operations of Mineralogy.[106] Clause 22.3 of the Mineralogy Constitution recognises that even directors of Mineralogy may act in the interest of its holding company (the Claimant) even when it may be contrary to the interests of Mineralogy.[107] Since the time that the Claimant became the holding company of Mineralogy, the directors of the Claimant has provided direction and determined the priority to all the operations of Mineralogy,[108] all directors of the Claimant hold the paramount position within the group,[109] no employee of Mineralogy can direct them in respect of any matter.[110]

117. The five Claimant directors make daily contributions to Mineralogy operations as directors of the Claimant and each of them is responsible to the board of the Claimant for their commercial activities within the group,[111] and that it is not a question of the tail

[104] Sixth Palmer WS at para 44-45.
[105] Sixth Palmer WS at para 51.
[106] Sixth Palmer WS at para 52.
[107] Constitution of Mineralogy dated 16 May 2014, (**Exh. C-563**), p 20.
[108] Sixth Palmer WS at para 52.
[109] Sixth Palmer WS at para 52.
[110] Sixth Palmer WS at para 52.
[111] Sixth Palmer WS at para 53.

wagging the dog as they do not report to the board of Mineralogy.[112] The Board of Mineralogy acts at all times in accordance with the wishes of its holding company (the Claimant).[113]

118. Since each of the five directors of the Claimant were appointed as directors of the Claimant, their roles and contribution to Mineralogy and its operations have changed and expanded by virtue of their directorships of the Claimant and the authority that goes with that position,[114] and their primary obligation under law is to the Claimant and it is from that position they each provide a contribution to Mineralogy.[115]

119. Commercial experience in industry worldwide, shows that it is common for directors of the holding Company of a Group to be employed or involved in the activities of subsidiary companies.[116] The contributions happen in real time, where a person's duties or roles in the past do not impinge on their status or contributions which may vary even daily according to their experiences,[117] and likewise, the experience and knowledge once experienced or known cannot be separated from their knowledge applied in all tasks.[118] Mineralogy has and continues to benefit from the experience and increasing knowledge of all the Claimant's directors involved in Mineralogy operations[119].

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[112] Sixth Palmer WS at para 53.
[113] Sixth Palmer WS at para 53.
[114] Sixth Palmer WS at para 54.
[115] Sixth Palmer WS at para 54.
[116] Sixth Palmer WS at para 55.
[117] Sixth Palmer WS at para 55.
[118] Sixth Palmer WS at para 55.
[119] Sixth Palmer WS at para 55.

j. Claimant's Directors Assisting and Contributing to the Operations of Mineralogy

120. The matters set out below in respect of the Claimant's Directors contributing to Mineralogy operations are confirmed in the Sixth Palmer WS at paragraphs 56 to 62 (inclusive)[120].

Emily Palmer

121. Emily Palmer was appointed a director of the Claimant on 28 February 2019.[121] She has remained a director of the Claimant since her appointment.[122] Prior to her appointment as a director of the Claimant, she was already involved in Mineralogy's operations as Mineralogy's Administration Manager but resigned to pursue other business opportunities with the Claimant in mid-2021.[123] Because she was a director of the Claimant, she joined Mineralogy and served as a director of Mineralogy from 13 May 2021 to 23 August 2021 and Administration Manager thereafter but has not received any compensation from Mineralogy since August 2021.[124] "**Exh. C-585**" records the shareholders meeting whereby the Claimant appointed Emily Palmer as a director of Mineralogy. In her role as a director of Mineralogy she made a substantial contribution to board decisions and policy and she had and has executive responsibility to ensure the board of Mineralogy acted in the best interests of the Claimant in accordance with clause 22.3

[120] See also the Seventh Palmer WS at paras 8 to 10.
[121] ACRA Business profile of Zeph Investments Pte Ltd**, (Exh. C-77**).
[122] Sixth Palmer WS at para 56.
[123] Sixth Palmer WS at para 56.
[124] Sixth Palmer WS at para 56.

of the Mineralogy Constitution which contributed to the successful operations of Mineralogy and the Claimant's group.[125]

122. Following Emily Palmer being appointed as a director of the Claimant [redacted].[126] [redacted], she has supervised and checked all outgoing transactions and assisted in managing the Claimant's investments by actively managing Mineralogy cash flow.[127] [redacted]

Account	Date
[redacted]	13 July 2020
[redacted]	2 July 2020
[redacted]	19 January 2024

See exhibit "**Exh. C-586**".

123. She continues to supervise the Claimant's investment in Mineralogy [redacted] and Mineralogy and the Claimant continues to benefit from her judgement and professionalism and her knowledge of the Claimant's priorities and operations.[128]

Declan Sheridan

124. Declan Sheridan was promoted and appointed a director of the Claimant on 28 February 2019 and his appointment remains current.[129] His promotion was an important consideration in his

[125] Sixth Palmer WS at para 56.
[126] Sixth Palmer WS at para 57.
[127] Sixth Palmer WS at para 57 and Seventh Palmer WS at para 8.
[128] Sixth Palmer WS at para 58.
[129] ACRA Business profile of Zeph Investments Pte Ltd, (**Exh. C-77**).

retention for the group so he could continue to carry out his role and responsibilities for Mineralogy and his responsibilities at that time until the present were to act as a catalyst in utilising his experience and the business contacts that the Claimant's businesses had in Singapore for the benefit of Mineralogy and its coal projects.[130] Mr Sheridan has not received any compensation from Mineralogy since August 2021 but has continued to carry out his responsibilities and roles for Mineralogy and that he most recently he carried out inspections of Mineralogy projects in Western Australia in July 2024.[131] As a director of the Claimant, he is responsible to the board of the Claimant on his activities he carries out for Mineralogy and its subsidiary Waratah Coal projects.[132] Mr Sheridan reports to and advises the Mineralogy board on the Claimant's policy and contributes to the management of Mineralogy and the Claimant's investment and his prime legal responsibility as a director of the Claimant is to act in its interests under Singapore Law.[133] The Claimant's interest and Mineralogy's interest is to ensure the proper operations of Mineralogy.

Baljeet Singh

125. 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).[134] She was appointed a director of the Claimant on 22

[130] Sixth Palmer WS at para 59.
[131] Sixth Palmer WS at para 59.
[132] Sixth Palmer WS at para 59.
[133] Sixth Palmer WS at para 59.
[134] Sixth Palmer WS at para 60; Current & Historical Extract for Mineralogy Pty Ltd, 14 February 2024 (**Exh. C-479**).

October 2021.[135] Ms Singh is a person assisting the Claimant's representative in the arbitration. As a director of the Claimant, and a person assisting in the arbitration, Ms Singh provides specialist knowledge of the arbitration and its impacts on Mineralogy and its employees to Mineralogy from time to time as Mineralogy needs to be fully informed of the progress of the arbitration as the arbitration is in the public domain and press enquiries are frequent.[136] Ms Singh is also company secretary of Mineralogy and attends to normal company secretarial duties for Mineralogy and interfaces with the Claimant on these matters and has established systems of corporate governance for Mineralogy after her appointment as a director.[137]

Clive Palmer

126. Mr Palmer has held various roles (including as a director) in Mineralogy since the 1980s and is now 70 years old.[138] He initially retired as a director of Mineralogy on 8 of October 2018 at the age of 64.[139] Mr Palmer became a director of the Claimant on 23 January 2019,[140] and after being appointed as a director of the Claimant, the Claimant appointed him as a director of Mineralogy on 27 February 2019.[141] Mr Palmer was appointed by the Claimant as a director of Mineralogy inter alia for the express purpose of

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[135] ACRA Business profile of Zeph Investments Pte Ltd**, (Exh. C-77**).

[136] Sixth Palmer WS at para 60.

[137] Sixth Palmer WS at para 60.

[138] Sixth Palmer WS at para 61; Seventh Palmer WS at paras 1, 10.

[139] Sixth Palmer WS at para 61; Current & Historical Extract for Mineralogy Pty Ltd, 14 February 2024, (**Exh. C-479**).

[140] ACRA, Register of Directors of Zeph Investments Pte Ltd, (**Exh. C-478**); Sixth Palmer WS at para 61; Seventh Palmer WS at para 10.

[141] Minutes of General Meeting of Members of Mineralogy Pty Ltd (**Exh. C-584**); Sixth Palmer WS at para 61; Seventh Palmer WS at para 10.

contributing his experience and knowledge to Mineralogy's operations and to manage the Claimants investment in Australia. Paragraph 61 of his sixth witness statement confirms following his appointment by the Claimant to Mineralogy Board of directors he has always acted in the best interest of the Claimant in carrying out his roles at Mineralogy.[142] Mr Palmer would not have continued to act as a director of Mineralogy but for the for the existence of clause 22.3 in the Mineralogy Constitution which allows him to always act in the interest of the Claimant and Mineralogy whose interests are aligned,[143] and he contributes to Mineralogy operations which he oversees all management operations of the Claimant's investment in Mineralogy.[144] Mr Palmer is the Claimant's representative in this Arbitration. All staff at Mineralogy and all chief executive functions at Mineralogy and decisions are carried out by him and he does not receive a salary from Mineralogy.[145]

Bernard Wong

127. Mr. Wong is a director of the Claimant, is the Claimant's Chief Investment Officer and carries out the functions of managing Mineralogy's accounting staff.[146] Mr Wong:

(i) is "actively involved in the day-to-day operations" of Mineralogy as a director and chief Investment officer of the Claimant;[147]

[142] Sixth Palmer WS at para 61.
[143] Sixth Palmer WS at para 61.
[144] Sixth Palmer WS at para 61.
[145] Sixth Palmer WS at para 61.
[146] Sixth Palmer WS at para 62.
[147] Sixth Palmer WS, para 62.

(ii) is responsible for overseeing the group's audited consolidated accounts and utilising the skills and experience he has obtained as director of the Claimant in supervising the production of Mineralogy Accounts and entries for inclusion in the Group accounts;[148] and

(iii) also manages the day today accounting staff and management accounts and banking for both the Claimant and Mineralogy[149].

k. Agreed Facts

128. The following facts are not disputed:

a. The Claimant is a company validly incorporated under the laws of Singapore.

b. The Claimant owns all the shares in Mineralogy which it validly and lawfully acquired through a Share Swap on 29 January 2019.[150]

c. Mineralogy has been, and remains, a wholly owned subsidiary of the Claimant since that date.

d. The Claimant's parent is Mineralogy International Limited ("**MIL**"), a company duly incorporated and operating in New Zealand.[151]

e. The "Mineralogy group" is ultimately owned by Mr Clive Palmer.

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[148] Sixth Palmer WS, para 62.
[149] Sixth Palmer WS, para 62.
[150] ROPO, para 64.
[151] SODPO, para 230.

f. In the financial year ending 30 June 2019 ("**FY2019**"), Mineralogy reported profits of A$35.55 million.[152] It paid no dividend to the Claimant.[153]

g. In the financial year ending 30 June 2020 ("**FY2020**"), Mineralogy reported profits of $207.17 million. It paid dividends of $8.115 million (total) to the Claimant.[154]

129. The following legal concepts are also accepted:

a. A Share Swap is a lawful and effective method of transferring ownership of the Mineralogy shares to the Claimant.[155] The Claimant's submission is that it must constitute an investment.

b. There is nothing inherently problematic about acquiring an investment through an internal corporate restructuring.[156]

c. A cashless transaction may constitute an investment.[157]

d. There is no dispute regarding the "adequacy" of consideration.[158]

e. The origin of capital is not relevant to this case.[159]

f. Both Parties agree that definitions in the Treaty should be interpreted in accordance with the principles set out in the

[152] Fifth Palmer WS, para 43(a); Financial Reports of Mineralogy Pty Ltd for the year ended 30 June 2019, (**Exh. C-476**).
[153] Fifth Palmer WS, paras 43(b), 122(c); Mineralogy's Audited Financial Reports for the FYE 20 June 2019, (**Exh. C-476**).
[154] Mineralogy's Audited Financial Reports for the FYE 20 June 2020, (**Exh. C-477**).
[155] ROPO, paras 64 and 71.
[156] ROPO, para 72.
[157] ROPO, para 68.
[158] ROPO, para 61(a).
[159] ROPO, para 61(b).

VCLT; namely, in good faith in accordance with their ordinary meaning, interpreted in the light of the context and the object and purpose of the Treaty.

g. Both Parties also rely on the decisions of previous investment treaty tribunals which have interpreted similar phrases in other treaties. These cases provide helpful guidance to the Tribunal.

I. Definition of Investor

130. Under the AANZFTA, in addition to submissions made above and/or in the alternative, an investor is a person "that seeks to make, is making, or has made an investment in the territory of another Party" (Article 2(d)).

131. As the Claimant noted in the SODPO, and the Respondent does not dispute, this definition mirrors the US Model BIT 2004 which formed the basis for Chapter 11 of the AANZFTA.[160]

132. Respected (Australian) international law academic, Tania Voon, states:[161]

> "*The United States has tended to prefer a broad definition of investor, now followed by several other States. For example, the 2012 US Model BIT defines an investor of a party as 'a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an*

[160] SODPO, para 274 relying on A Kawharu and L Nottage, "Models For Investment Treaties In The Asia-Pacific Region: An Underview" 34 (2017) Arizona Journal of International & Comparative Law, 461, at 502, (**Exh. CLA-183**).

[161] Tania Voon and Dean Merriman "Incoming: How International Investment Law Constrains Foreign Investment Screening" *The Journal of World Investment & Trade* 24 (2003) 75 at 89 (**CLA-241**).

investment in the territory of the other Party' (subject to a qualification for dual nationals). This kind of broad language provides scope for screening of an investment that has not yet been established in a host State to be caught by an IIA (with respect to an obligation applicable to investors), depending on the definition of investment (since the prospective investor must be attempting to make an investment) and the language used in substantive obligations."

133. While this comment does not focus on the meaning of "make", it is clear that Ms Voon is using the US Model BIT (on which the AANZFTA is based) as an example of a "broad" definition of investor, which she contrasts in the article with other narrower definitions. Had the US Model BIT in fact adopted a more restrictive definition than most treaties through the use of the verb "make" – as proposed by the Respondent – Ms Voon would surely not have chosen the US Model definition as an example of an archetypal broad definition of "investor".

134. Indeed, the very fact that the US definition of investor – in contrast to many others – includes those "*seeking to make*" an investment, thereby broadening the pool of potential investors under the treaty, shows the intent to have a broad application. This is also true of the broad definition of investment in the US Model BIT, also adopted in the AANZFTA. The State Parties to the AANZFTA chose the broad definitions of the US Model BIT over other more restrictive definitions that were available to them. This Tribunal should respect the State Parties' choice and not limit the definitions in the highly unusual way now proposed by the Respondent.

135. As indicated by Ms Voon, there is no special magic to the words "*made an investment*" aside from denoting a broad definition of investor. There is certainly no indication that the State Parties to the AANZFTA were attempting to fashion a definition that required something unusual, different or distinct from other investment treaties. There is no indication that the State Parties were seeking to impose a requirement on each new owner of an existing investment to contribute further resources to the underlying investment in order to become "an investor of a Party". Indeed, the fact that the State Parties adopted the US Model BIT formulation suggests the opposite – that they were seeking a standard, broad definition.

136. In the English language, the verb "*to make*" does not have a fixed meaning but takes its meaning from the noun with which it is associated.[162] For this reason, one cannot simply quote a dictionary definition of the verb "*to make*", as its meaning changes depending on the noun and context. In the present case, the noun that gives "to make" its meaning is "investment". The Tribunal cannot, therefore, interpret the phrase "*to make an investment*" without reference to the meaning of investment as defined in the Treaty.

137. Investment is defined in the AANZFTA as (relevantly) shares *owned or controlled* by an investor (Article 2(c)). The natural and contextual meaning of "*to make an investment*" is, therefore, to bring about the state of owning or controlling the shares. To the

[162] See SODPO, para 262. "To make" is a delexical verb meaning that the "*the important part of the meaning is taken out of the verb and put into the noun*". Similarly, "*to make*" is a transitive verb which gains its meaning from its object.

extent that this requires an action, it is the action of gaining or acquiring ownership or control of the shares that is required.

138. This interpretation of the definition of investor is consistent with the definition of "*covered investment*" in Article 2(a) of Chapter 11, which also forms part of a contextual interpretation. A covered investment is an investment that is in existence at the date of the Treaty's entry into force or is "*established, acquired or expanded*" thereafter. The fact that an investment may be acquired *"or"* expanded demonstrates squarely that an investor is not required to actively commit additional resources to the investment (i.e., to expand the investment). The State Parties have expressly agreed that a covered investment is not required to be both acquired "*and*" expanded – acquisition alone is sufficient. It would be nonsensical to read into the definition of "*investor*" a requirement to actively contribute to (and thereby expand) the investment when the definition of "*covered investment*" clearly permits investments to be acquired or expanded.

139. In other words, the definition contended for by the Respondent runs directly contrary to the definition of "*investment*" and "*covered investment*". It would require the Tribunal to ignore (indeed override) these definitions in the Treaty and imply additional requirements into the definition of investor. Such an approach is not consistent with a contextual reading of the Treaty or the principles of the VCLT.[163]

140. Moreover, as explained in the SODPO, the primary purpose of the phase "*is seeking to make, makes or has made*" is actually to

[163] Vienna Convention on the Law of Treaties (**Exh. CLA-17**).

convey the required temporal state of the investment.[164] This is important as some treaties do not permit those seeking to make an investment to access Treaty protection. In keeping with the broad definitions of investment and covered investment in the AANZFTA, the State Parties agreed that even those who had not yet made an investment could be an "*investor of a Party*". The adoption of a broad definition that includes prospective investors speaks against the restrictive definition now proposed by the Respondent.

141. Finally, the Tribunal must take account of the footnote added by the AANZFTA State Parties to clarify that an investor seeking to make an investment must have taken active steps towards this goal.[165] This is not a clarification included in the Model BIT. It shows that the State Parties turned their minds to the need for active steps, and specifically required active steps in the context of an investor seeking to make an investment. Had the State Parties intended to impose a condition that an investor must actively contribute resources to an existing investment (in addition to acquiring it), they would surely have included a footnote or reference to this requirement. This is especially so as it would run contrary to the definition of investment and covered investment as discussed above.

142. The Respondent attempts to sweep aside the ordinary meaning of the terms "investment", "covered investment" and "investor" by simply saying that "to make" is not the same as to "own" or to "hold" and must mean something different.[166] Yet at paragraph 64 of the

[164] SODPO, para 264.
[165] See SODPO, para 274.
[166] ROPO, paras 53-54

Reply the Respondent admits that the Claimants ownership of the Mineralogy Shares was "*legal and effective*". AANZFTA in Chapter 11, Article 2(c), inter alia states:

> "*Investment means every kind of asset **owned** or controlled by an investor, including but not limited to the following:…..*"

143. Yet the Respondent disputes that the Claimant has made an investment despite the admission that the Share Swap was legal and effective in bestowing ownership of the shares on the Claimant. It does so notwithstanding that, as is evident from the above, the Claimant's definition does not equate the verb "make" with the verb "own" or "hold". The Claimant's position is that making an investment is the act of acquiring ownership of the shares – i.e., taking the steps required to effect a state of ownership or acquisition which AANZFTA acknowledges is an investment in Article 2. This is a perfectly consistent and contextual approach to interpretation, in contrast to that advocated by the Respondent.

144. As explained in the SODPO,[167]and elsewhere in this Rejoinder the meaning of investor proposed by the Claimant is entirely consistent with the purposes of the Treaty as set out in the preamble, as follows:[168]

> *REINFORCING the longstanding ties of friendship and cooperation among them;*

[167] SODPO, para 277.

[168] *Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area,* Chapter 11, (**Exh. CLA-001**), pp. 1-2.

RECALLING the Framework for the AFTA-CER Closer Economic Partnership endorsed by Ministers in Ha Noi, Viet Nam on 16 September 2001;

DESIRING to minimise barriers and deepen and widen economic linkages among the Parties; lower business costs; increase trade and investment; enhance economic efficiency; create a larger market with more opportunities and greater economies of scale for business;

CONFIDENT that this Agreement establishing an ASEAN-Australia-New Zealand Free Trade Area will strengthen economic partnerships, serve as an important building block towards regional economic integration and support sustainable economic development;

RECOGNISING the important role and contribution of business in enhancing trade and investment among the Parties and the need to further promote and facilitate cooperation and utilisation of the greater business opportunities provided by this Agreement;

CONSIDERING the different levels of development among ASEAN Member States and between ASEAN Member States, Australia and New Zealand and the need for flexibility, including special and differential treatment, especially for the newer ASEAN Member States; as well as the need to facilitate the increasing participation of newer ASEAN Member States in this Agreement and the expansion of their exports, including, inter alia, through strengthening of their domestic capacity, efficiency and competitiveness;

REAFFIRMING the respective rights and obligations and undertakings of the Parties under the World Trade Organization Agreement and other existing international agreements and arrangements;

RECOGNISING the positive momentum that regional trade agreements and arrangements can have in accelerating regional and global trade liberalisation, and their role as building blocks for the multilateral trading system.

145. As stated in the SODPO,[169] the goals of deepening economic ties and linkages in the region, strengthening economic integration, promoting cooperation and business opportunity and facilitating participation are all consistent with the Claimant's definition of investor, investment and covered investment. These are broad goals that encourage a broad reading of the definitions. [170] Nothing in the preamble or the Treaty itself requires the definition of investor to be read in a restrictive manner that limits the definition to those engaged in "*some form of active investment, whether by way of a contribution of capital or otherwise*" over and above the original investment.[171] Indeed, reading the definition of "*investor*" in the narrow and restrictive fashion advocated by the Respondent would appear to go against the broad goals of the Treaty to strengthen, deepen and promote regional economic integration.

146. In the present case, the links created between Australia, Singapore and New Zealand promote the goals of the AANZFTA. MIL is now exploring for lithium in New Zealand as well as operating its long-

[169] SODPO, paras, 185, 277, 278.
[170] See *Addiko v Montenegro*, (**Exh. RLA-52**) para 357.
[171] ROPO, para 47.

standing Singapore business. Had the coal project not been stifled by the Amendment Act in 2020 the services of the Singapore financial sector would have been assisted in bringing this investment to fruition.[172] This would certainly have facilitated considerable economic linkages. Moreover, as Mr Palmer himself notes, he may still move to Singapore once his children have grown up.[173] This is precisely the type of integration envisioned in the AANZFTA.

m. The Claimant's Definition is Consistent with Investment Treaty Jurisprudence - There is no Requirement for an Additional Contribution by an Investor

147. Notwithstanding the major contribution the Claimant has made to Mineralogy, the Respondent avers that an investor must make an active contribution by way of capital or otherwise.[174] The Respondent states that the Claimant did not do so as it has contributed nothing to Mineralogy.[175] It is unclear if the Respondent's position is that the alleged "contribution" must be made to the investment itself (i.e., Mineralogy), or whether purchasing an investment (from MIL) is sufficient.[176]

148. The confusion that pervades the Respondent's position is symptomatic of its falsity. On the one hand, the Respondent takes issue with the value of the Consideration Shares that were

[172] Fifth Palmer WS, paras 53-58; Martino WS, paras 18-19, 24-27, 29, 31, 33, 36 and 38.
[173] Sixth Palmer WS, para 88.
[174] ROPO, para 47.
[175] ROPO, para 48.
[176] See ROPO, paras 48 and 61(a).

exchanged in the Share Swap.[177] On the other hand, the Respondent suggests no investment exists because there was no contribution to Mineralogy.[178]

149. If the Respondent is simply saying that "contribution" means payment for the shares that were acquired (i.e., a payment to MIL and not a contribution to Mineralogy), then the answer is, that this has clearly been satisfied through the Share Swap, as discussed below. There is no requirement, as the Respondent accepts, that the payment for the investment is adequate or of a specific value.[179] It is incorrect to say that the shares had no value, but even if they did, it would not be fatal to the existence of an investment as demonstrated by *Levy v Peru* and *MNSS B.V. v Montenegro*.[180] This is a point that pertains to the adequacy of the consideration paid to MIL in the transaction to acquire the shares.[181] It is clearly different to a requirement to make an active contribution to Mineralogy, by way of capital or otherwise.[182] Contribution and purchase price are different concepts that appear to have been conflated by the Respondent.

150. If the Respondent's position is that the Claimant has failed to make an additional contribution to the investment, it is not only factually

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[177] The respondent states that the shares exchanged with MIL by the Claimant were of "*no value*" (ROPO, paras 48 and 61(a)).

[178] ROPO, para 66.

[179] SODPO, paras 330-334.

[180] *Levy v Peru*, ICSID Case No ARB/10/17, Award, 26 February 2014, para 148, (**Exh. CLA-188**); *MNSS B.V. v Montenegro,* ICSID Case No ARB(AF)/12/8, Award, 4 May 2016, para 126-127, (**Exh. CLA-194**); SODPO, para 326-327.

[181] While the Respondent suggests its objection does not relate to adequacy (para 61(a)), the contention appears to be that a party that provides consideration that has no value (i.e., is inadequate) has not made an investment. The Claimant addresses this point at SODPO, paras 330-334.

[182] The Respondent complains that the Claimant "*contributed nothing to Mineralogy*" (ROPO, para 48; see also para 61(a)).

incorrect (as discussed above) but ignores the long line of authority that clearly states that any requirement for a "contribution" to an investment is satisfied by the original contribution.[183] Therefore, to the extent that any contribution is found to be required, the original contribution suffices (the Respondent acknowledges that the origin of investment is not relevant)[184].

151. If it were not so, every party that purchases an existing investment from a third party would be required to make an additional investment of capital, over and above the purchase price paid to the third party (which is clearly not a contribution to the investment). It is grasping at straws to suggest that the use of the term "*make*" an investment in the AANZFTA is sufficient to override this well-established principle of law.

152. As confirmed by the English Court in the *Tatneft v Ukraine*, a requirement to make a contribution to the investment would mean that:[185]

> "*[I]f an investor from one Contracting State acquired what would in ordinary language be described as an investment which is located in the territory of the other Contracting State from someone other than a natural or legal person operating within the host state, then the new investor would have no "investment" in the host state for the purposes of the BIT. That would undermine the aim of the BIT which, as with other*

[183] This jurisprudence is set out in the SODPO, from para 322.

[184] ROPO, para 61(b).

[185] *PAO Tatneft v Ukraine* [2018] EWHC 1797 (**Exh. RLA-51**), para 69. See also *Gold Reserve Inc v Venezuela*, ICSID Case No ARB(AF)/09/1, Award, 22 September 2014, (**Exh. CLA-32**), para 261; *Flemingo v Poland,* UNCITRAL, Award, 12 August 2016, (**Exh. RLA-48**), para 315.

bilateral and multilateral investment treaties, is to create and maintain favourable conditions for mutual investments."

153. Consequently, the Court further confirmed that the phrase "are invested by" does not import a requirement that the investor must actively invest or contribute resources: [186]

> "*In my judgment the phrase "are invested by" does not import a requirement that, in order to be an investment, there should have been an active process of the commitment of resources by the investor therein. The purpose of the words "are invested by" is to permit, within the definition of "investment", a link between the specification of the types of assets which are comprised within the term and the person who owns or is otherwise interested in those assets (who must be an investor of the other Contracting State) and also with the requirement that that investor must have acquired those assets in accordance with the legislation of the home state. They do not mean that even though the asset would ordinarily and naturally be described as an investment of an investor of the other Contracting State, nevertheless they will not qualify as such because the investor has not actually made an active contribution of resources to the host state*."

154. The argument that an additional contribution is required was flatly rejected by the Swiss Federal Tribunal in *Clorox v Venezuela* when it overturned the arbitral tribunal's finding that a requirement "*to invest*" necessitated that an active contribution be made by the investor. The Court held that the tribunal had wrongly implied into

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

the relevant treaty additional requirements that simply did not exist on the plain language of the treaty.[187] Implying additional requirements into the AANZFTA based on the words "*made an investment*" is equally impermissible.

155. Similarly, the tribunal in *Sea Search-Armada v Colombia* noted:[188]

> "*[T]he argument that the phrase "invested by investors" limits treaty protections only to "active" investors was made (and rejected) in a number of other cases. For instance, in Vladislav Kim et al. v. Republic of Uzbekistan the tribunal held that the applicable treaty contained no distinction between active and passive investors, despite the inclusion of the phrase "invested by investors" in the definition of "investment". In Addiko Bank AG v. Montenegro, the tribunal similarly concluded that "the words 'assets invested by an investor' does not mean […] that the investment must have been an 'active investment' that was made 'through the contribution of resources to Montenegro or an exchange of resources to acquire an asset.*"
>
> *In the light of all of the above, the Tribunal is unable to conclude at this juncture that there is a requirement under the TPA for an "active" and "personal" investment by the purported investor, whether express or by necessary implication. Even if, for the sake of argument, such a requirement were actually*

[187] *Clorox I*, (**Exh. RLA-144**), para 3.4.2.4

[188] *Sea Search-Armada, LLC v. Republic of Colombia,* PCA Case No. 2023-37, (**Exh. CLA-242**), paras 177-178 (footnotes omitted).

expressed or implied by the TPA, the Tribunal would nonetheless remain unconvinced by Respondent's argument."

156. The decision of the Swiss Federal Tribunal in *Clorox* is consistent with the great weight of authority that has similarly rejected the arguments the Respondent now makes. These cases have been discussed in detail in the SODPO and the Claimant does not repeat them here.[189] The case authorities invariably find that once a tribunal has concluded there is a valid "investment", that investment is "*made*" as soon as the assets are purchased.[190] The Respondent's rebuttal is set out below and does not change the clear and consistent jurisprudence that is fatal to the Respondent's position.

157. In particular, the Respondent's overly semantic criticism that the Claimant relies on cases that interpret the meaning of the words "*invested by*" (i.e., the verb "*to invest*") rather than "*made an investment*" (i.e., the verb "*to make*") does not bear scrutiny. Not only are there obvious similarities in meaning between the two phases (recalling that "to make" must take its meaning from the noun "investment"), but investment tribunals regularly cite and rely on the jurisprudence for both phrases interchangeably.[191] Moreover, the arguments and rationales advanced by the respondents in each of these cases are almost identical to those

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[189] SODPO, paras 308-329; see also case analysis at SODPO, paras 293-296.

[190] *Abaclat v Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction, 4 August 2011, (**Exh. CLA-192**), para 412; *See also Orascom TMT Investments Sarl v People's Democratic Republic of Algeria*, ICSID Case No ARB/12/35, Award, 31 May 2017, (**Exh. CLA-193**), para 382.

[191] For example, the tribunal in *Montauk v Colombia* (interpreting to make and investment") refers to the reasoning in *Clorox v Venezuela* (interpreting "invested by"). *Montauk Metals v Republic of Colombia* (ICSID Case No. ARB/18/13, Award, 7 June 2024), (**Exh. RLA-147**), para 414.

now advanced by the Respondent. The reasoning of the various tribunals in rejecting these arguments is obviously relevant.

An Investor Must Participate in the Transaction to Acquire the Investment

158. "*Making*" differs from "*owning*" or "*holding*".[192]

159. This is consistent with the tribunal's findings in *Addiko v Montenegro*:[193]

> "*The Tribunal is of the view that the ordinary meaning of the verb "making" includes an act of acquiring an investment which can be defined as gaining possession or control of, or getting or obtaining something. The emphasis is not on the exchange of monetary value for title or possession, but on the act of obtaining title or possession. Thus, "making" an investment includes instances in which title or possession is obtained over an asset that qualifies as an investment. In this case, Claimant acquired (i.e., obtained title to, gained control over) the shares of the Bank on 26 March 2014, when the transfer was registered with the CDA. Claimant thereafter acquired the remaining 140 shares of the Bank through the Shares Transfer Agreement dated 9 July 2014*."

160. The tribunal in *Addiko* considered that this position was also consistent with the reasoning of the tribunal in *Clorox v Venezuela*:[194]

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[192] See ROPO, para 46(a).
[193] *Addiko v Montenegro*, (**Exh. RLA-52**) para 352.
[194] *Addiko v Montenegro*, (**Exh. RLA-52**) para 359.

> "*The Clorox tribunal, in interpreting the terms "assets invested by investors", did not state that the investor had to have an active role in order to have an investment that is protected, but only that the claimant has to make a showing of an "investment action", i.e., that claimant did something that could be deemed investing".*

161. However, the activity required is not a contribution by way of capital or otherwise to the investment. The activity required, as stated in the case authorities, is that the investor participates in the transaction which brings about the ownership or control of the investment.

162. This is clearly stated by Teare J in the English High Court decision of *Gold Reserve v Venezuela*.[195] The issue identified by the Court in that case was that the putative investor had not played any role in the share swap through which it acquired the investment. The share swap was undertaken by the investor's shareholder, not by the putative investor itself. This is clearly distinguishable from the present case. The Claimant participated directly in the acquisition of the Mineralogy shares by being the party that undertook the Share Swap. This is the only action required to make an investment on the plain meaning of the definition. A requirement for further action would constitute an impermissible addition to the plain words of the treaty. Something that has been rejected time and again by tribunals and courts.[196]

163. The present case accords with the findings in *Gramercy v Peru* where the tribunal found that the investor "*purchased the*

[195] *Gold Reserve v Venezuela* [2016] EWHC 153 (**Exh. RLA-44**).
[196] For example, *Clorox v Venezuela I*, (**Exh. RLA-144**).

[investment] *with its own funds, acting on its own behalf, and thus became the legal and beneficial owner of the* [investment]".[197] Here, the Claimant also purchased the investment with its own funds (the fully paid shares it issued) and was acting on its own behalf. It became the legal and beneficial owner of the Mineralogy shares as a result of this transaction in which it directly participated.

164. Similarly, in *AMF Aircraft Leasing v Czech Republic*, the tribunal held that the investor had to "*engage in the action of making the investment*."[198] In the present case, the Claimant did exactly that. The Claimant engaged in the action of the investment by issuing the paid-up Consideration Shares and transferring them to MIL. The present case is entirely consistent with the tribunal's conclusions in *AMF Aircraft*.

165. It is this action of participating directly in the transaction through which the investment is acquired that satisfies the requirement to have "*made an investment*". It is also this action of participating in the relevant transaction to acquire the shares that distinguishes the term "*made*" from terms like "*held*" or "*owned*".

166. Nothing further is required or implied by the use of the phrase "*made an investment*". This is consistent with the cases cited by the Claimant in the SODPO, and also with the vast majority of the cases cited by the Respondent in its Reply.[199] In general, the cases

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[197] *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), (**Exh. CLA-86**), para 606.

[198] *AMF Aircraft/easing Meier & Fischer GmbH & Co. KG v The Czech Republic* (PCA Case No. 2017-15, Final Award), (**Exh. RLA-49**), para 422.

[199] ROPO, para 55.

require nothing more than participation in the relevant transaction to acquire the investment.

n. The Claimant Has Made an Investment

Acquisition Of Shares

167. As accepted by the Respondent, the Share Swap in the present case was valid and effective and an investment can be made through a share swap.[200]

168. The Respondent is incorrect, however, to say that the shares lacked value.[201] The Claimant's share capital prior to the share a value under Singapore law of A$6,002,896.[202] The shares in Mineralogy historically had the same value, being 6,002,896 shares issued at A$1 each.[203] The intention was that the Restructure would be effective through the swapping shares of equivalent value at settlement. There is nothing unusual about this transaction. It is a standard way to implement a corporate restructure. Corporate restructures have long been recognised as capable of creating an investment by an investor.[204]

169. The entire transaction was properly and lawfully undertaken by the Claimant, as acknowledged by the Respondent in paragraph 64 of its Reply.[205] Yet contrary to this acknowledgement and admission the Respondent makes the unparticularised allegation that the

[200] ROPO, paras 64, 68 and 71.
[201] ROPO, para 61(a).
[202] Sixth Palmer WS, para 21.
[203] Sixth Palmer WS, paras 21 and 24.
[204] See SODPO, para 286.
[205] ROPO, para 64.

transaction was a sham. The Respondent acknowledges at paragraph 170 of the Reply:

> "*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.*"

170. It is scandalous for the Respondent to accuse (without providing any particulars) a well-respected Singaporean firm, Allen & Gledhill, as being involved in a 'sham' transaction.

171. The transaction was structured (*by the legal and financial professionals who documented it*) to ensure that the shares that were swapped at settlement had equivalent value to each other. To say that the Claimant paid nothing,[206] is quite simply, wrong as a matter of law. And if that were so and no consideration was paid for the Share Swap it could not be, as the Respondent acknowledges, "*lawful and effective*".[207]

172. MIL now owns shares in the Claimant that have significant value due to the Claimant's own assets both in Singapore and in Australia. The Claimant's shares are an item of value – were MIL to sell those shares now (or immediately after the Share Swap), it would have been and would be able to do so for considerable value.

[206] ROPO, para 61(a).
[207] ROPO, para 64.

Further Investment of "Returns"

173. As set out in the SODPO, the Claimant has also made additional investments in Mineralogy through the retained profits made available for Mineralogy to reinvest in its business.[208]

174. The definition of "investment" in Article 2(c) of the AANZFTA states that "*returns that are invested shall be treated as investments*."

175. A "*return*" is defined in Article 2(j) as:

> "***[A]n amount yielded by*** *or derived from an investment,* ***including profits****, dividends, interest, capital gains, royalties and all other lawful income.*" (**Emphasis added**)

176. According to this definition profits yielded by an investment are Returns. Returns that are invested constitute a new investment.

177. As set out in the SODPO, Mineralogy made current-year profits of $35.5 million in FY 2019 and $207.17 million in FY 2020.[209] As explained in Supplementary BDO Report these profits are properly calculated using the required accrual accounting methodology and were available to be paid out in dividends, had that been desired.[210] The profits are confirmed in Mineralogy's audited accounts.[211] These profits **yielded** by the investment are deemed to be "**Returns**" under the AANZFTA. There is no requirement that the profits be paid out as dividends in order to constitute returns.

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[208] SODPO paras. 238-243.

[209] SODPO, para 242.

[210] SODPO, para 242; 247, 304; BDO Report, paras 6.2, 6.6; Supplementary BDO Report, paras 2.7-2.8; Fifth Palmer WS, para 43(a); Financial Reports of Mineralogy Pty Ltd for the year ended 30 June 2019, (**Exh. C-476**); Mineralogy's Audited Financial Reports for the FYE 20 June 2020, (**Exh. C-477**).

[211] Financial Reports of Mineralogy Pty Ltd for the year ended 30 June 2019, (**Exh. C-476**); Financial Reports of Mineralogy Pty Ltd for the year ended 30 June 2020, (**Exh. C-477**).

178. It is clear that these profits were "invested" in accordance with the definition of investment in Article 2(c). The profits (whether in cash, cash equivalents or otherwise) were not paid out to the Claimant by way of dividends but were retained in Mineralogy for its continued use. The fact that the yielded profits were actually reinvested is demonstrated by the table in Mr Lys' Second Report in Figure 3 (para 84) which shows the cash balances decreasing over time. The profits retained in the business were used by Mineralogy in furtherance of its activities in Australia. This is clearly an investment under the AANZFTA.

179. The Claimant's position is supported by the findings of the tribunal in *OI European Group v Venezuela*. In that case, the tribunal confirmed that returns included profits that had been retained in the business:[212]

> "*Indeed, during fiscal years 2006-2009 OIEG has provided cash to the companies, when it did not withdraw part of the profits generated, and allowed them to be kept as reserves. The total amount retained (excluding the dividends paid to shareholders) amounts to almost USD 100 million, of which USD 73 million correspond to OIEG. When a shareholder decides not to collect profits in full, but to leave them-in whole or in part-with the company, it is waiving a right and making a contribution of cash to the company, which is enriched to the extent of the amount that the shareholder relinquished.*"

180. Like OIEG, the Claimant chose not to collect the profit in full (which it could have done as described below), but instead chose to leave

[212] *OI European Group v Venezuela*, ICSID Case No ARB/11/25, Award, 10 March 2015, paras. 241, (**Exh. CLA-189**).

that money in Mineralogy, there by enriching Mineralogy to the extent of the profits retained.

181. The Respondent often points to the "economic reality" of the underlying facts.[213] The economic reality of these facts is that the Claimant has foregone a dividend in FY 2019 and FY 2020 (aside from a small dividend of A$8.115 million) in favour of reinvesting those profits into Mineralogy's business. Even if Mr Ly's incorrect position on available "cash" (or equivalent) were accepted, the amount of reinvested by the Claimant would be around A$117 million.[214] This is a clear (and real) contribution.

182. Again, economic reality is important when addressing the Respondent's formalistic interpretation of the potential for a dividend to be paid. As explained by Mr Palmer in his Sixth Witness Statement,[215] the economic reality is that had the Claimant wanted to receive a dividend in any given year, that dividend would have been paid.

183. Indeed, the dividends that were issued in FY2020 amounted to a small part of the profit.

184. The Mineralogy Constitution (as it was in 2019)[216] facilitates this, as explained by Mr Palmer:[217]

[213] For example, ROPO, para 117.
[214] Second Lys WS, para 84.
[215] Sixth Palmer WS, paras 41-48.
[216] Constitution of Mineralogy dated 16 May 2014, (**Exh. C-563**); Note that the Respondent relies on an incorrect version of the Constitution.
[217] Sixth Palmer WS, paras 31-48.

a. The Constitution permits the directors of Mineralogy to recommend a dividend to the Shareholder (being the Claimant) (cl 31.1).

b. The Constitution permits the directors to act in the best interests of the Claimant (cl 22.3).

c. The Governing Director, if appointed, has the power to recommend dividends be paid to the Claimant and the power to act in the best interests of the Claimant (cl 29(h)).

d. Any dividend must be approved by the Claimant (cl 32.1).

185. During the relevant period, Mr Palmer was Mineralogy's sole director and/or its "Governing Director" under the Constitution. He was also a director of the Claimant.[218]

186. The reality of these clauses is that, had the Claimant wanted a dividend to be paid, Mr Palmer would have recommended such a dividend in the accounts for the Claimant to approve. In determining to reinvest the funds rather than pay a dividend, he was acting in the best interests of the Claimant.[219]

187. The economic reality of a single shareholder company is described by Mr Palmer in his witness statement:[220]

> "*As the Claimant was the only shareholder of Mineralogy, it always had the power to ensure profits were retained and*

[218] Sixth Palmer WS, para 33; ASIC, Current and Historical Extract for Mineralogy Pty Ltd, 14 February 2024, (**Exh.C-479**); Minutes of Meeting of General Members of Mineralogy Pty Ltd, 9 February 2021, (**Exh.C-564**).

[219] Sixth Palmer WS, paras 47-48.

[220] Sixth Palmer WS, para 41.

reinvested in Mineralogy's business to enhance the Claimant's investment in Mineralogy shares and business."

188. The Claimant has the power to appoint Mineralogy's directors. The Claimant has the power to remove them and has the power to appoint new directors. The Claimant as the 100% shareholder of Mineralogy has the power to change the Constitution of Mineralogy.

189. The Claimant has made investments by permitting the profits yielded by Mineralogy to be reinvested into its business activities.

190. The Claimant is an "investor" under the AANZFTA and the jurisdiction objection must be dismissed.

The Claimant Actively Manages its investments

191. As earlier acknowledged, the Claimant maintains that it actively manages its investments in Mineralogy.

192. The fact that five of the Claimant's directors also have roles in Mineralogy is illustrative of this active management. Ms Emily Palmer was a director of the Claimant first and was then appointed by the Claimant as a director of Mineralogy.[221] This is part of the active management of its investment.

193. There is a close relationship between the Claimant and Mineralogy. The Claimant's directors are acutely aware of all activities of Mineralogy and are actively involved in them. The evidence clearly shows that the Claimant appoints Mineralogy's directors,[222]

[221] Sixth Palmer WS, para 56; Seventh Palmer WS, para 8; Minutes of General Meeting of Members of Mineralogy Pty Ltd (**Exh.C-585**).

[222] Including Ms Palmer and Ms Singh (Sixth Palmer WS, paras 56-62); Seventh Palmer WS, paras 8 and 10.

approves Mineralogy's accounts,[223] has representatives on Mineralogy's board, and has a Chief Investment Officer to manage its investments and oversee the group's audited consolidated accounts.[224] These are all proper activities of an active holding company.

The Claimant Owns an "Investment"

194. The Claimant repeats its submission in paragraphs 350-364 of the SODPO.

195. If the Tribunal decides that the term "*investment*" has inherent characteristics akin to those usually found to exist in ICSID cases, it is clear that the Claimant's shares in Mineralogy meet these criteria. This really is a non-point and appears to be nothing but a waste of the Tribunal's time.

196. To reiterate briefly the submissions in the SODPO, if the Tribunal considers that the characteristics of contribution, risk and duration are required for an investment:

    a. Contribution is clearly met by the original contribution to the investment, alongside the reinvested profits and active management contribution made by the Claimant. Regardless of these additional contributions made by the Claimant, it is well-established that an investor who acquires an existing investment is not required to make an additional contribution over and above the contribution of the original

[223] Constitution of Mineralogy dated 16 May 2014 (**Exh C-563**), cl 32.1; Sixth Palmer WS, para 62.
[224] Sixth Palmer WS, para 62.

investor.[225] It is also uncontroversial that the purchase price paid for the investment is immaterial in this context.[226]

b. Risk is inherent in the shares purchased by the Claimant. This is even more so in a situation where Mineralogy was engaged in a major dispute with CITIC at the time of purchase and had not yet received the second arbitral award in the BSIOP Dispute which confirmed its entitlement to damages. As the Respondent rightly acknowledges, these are all "sources of uncertainty".[227] Yet, the Respondent tries to distinguish these considerable uncertainties from "risk". The value of the Claimant's shares at settlement and the profits reinvested in Mineralogy completely undermine this argument.

c. Duration is obvious. The Claimant owned the shares for around 20 months before the Amendment Act was passed and has continued to own the shares ever since. On any view, the duration requirement is met.

III. OBJECTION TWO: DENIAL OF BENEFITS

197. The Respondent's admissions detailed above demonstrated that the Claimant has on 13 August 2020 had, a substantive business in Singapore. The Claimant is not a shell company. The undeniable facts demonstrate beyond doubt that the Claimant has a

[225] SODPO, paras 322-329.
[226] The Respondent accepts adequacy of consideration is not the issue as clearly established by the cases discussed in the SODPO, paras 330-334.
[227] ROPO, para 117.

substantive business in Singapore and that the Respondent's denial of benefits objection must be dismissed.

198. The following facts are not disputed by the Parties:

a. the relevant date for assessing whether the Claimant had a substantive business in Singapore is 13 August 2020;[228]

b. the Claimant has seven directors, two of whom are resident in Singapore;[229]

c. the Claimant purchased three engineering companies in January 2019 for just over S$3.6 million;[230]

d. the Claimant entered into a Joint Venture with two minority Joint Venture Partners on 4 January 2020;[231]

e. around February 2020, 146 employees were transferred from the minority Joint Venture Partners to the Claimant;[232]

f. the Joint Venture continues to operate today under the trading name "Kleenmatic Services". Kleenmatic Services provides real services in Singapore;[233]

g. Kleenmatic Services operates out of the Claimant's registered office in Singapore;[234]

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[228] ROPO, para 132.

[229] ROPO, para 397.

[230] SODPO 89(d)(iv) and 385; ROPO, para 146.

[231] Joint Venture Agreement between Claimant, One Kleenmatic Pte Ltd and Kleen Venture Pte Ltd, (**Exh. C-469**).

[232] ROPO, para 168; Contracts at **Exhs. R-618** to **R-763**.

[233] SODPO, para 407; Fifth Palmer WS at paras 91 and 97; Audited Financial Statements of Zeph Investments Pte Ltd for the Financial Year Ending 30 June 2024, (**Exh. C-579**) at pages 11, 22 and 27; Seventh Palmer WS at para 6.

[234] SODPO para 408; First Palmer WS at paras 36-37; Audited Financial Statements of Zeph Investments Pte Ltd for the Financial Year Ending 30 June 2024, (**Exh. C-579**) at page 11; Seventh Palmer WS at para 6.

h. the Singapore Government has paid the Claimant more than S$2 million in subsidiaries since the beginning of 2020, due to the pandemic.[235] It has been granted the required licences to operate its business by the Singapore Government;[236] and

i. in FY 2020, the Claimant's Singapore business generated an income of S$5,680,594.[237] In FY 2021, the Claimant's Singapore business generated an income of S$5,347,107.[238]

199. In relation to the legal principles, it is agreed that the key issue for determination by this Tribunal is whether the Claimant has a substantive business in Singapore.[239]

200. In essence, the Respondent's denial of benefits objection is based on the fact that the Claimant purchased existing businesses in Singapore and has continued to operate those businesses in the same manner as previously operated despite the fact that the Respondent acknowledges the cleaning business was conducted as a joint venture. As discussed further in Section Two of this Rejoinder, the Respondent has come nowhere close to discharging its burden on denial of benefits. This is particularly concerning given the very serious (and unfortunate) allegation that the Claimant's business in Singapore is a "*sham*".[240] Such an

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[235] SODPO, para 392; ROPO, para 170.
[236] ROPO, para 170.
[237] Audited Financial Statements of Zeph Investments Pte Ltd for the financial year ended 30 June 2020, (**Exh. C-81**).
[238] Audited Financial Statements of Zeph Investments Pte Ltd for the financial year ended 30 June 2021, (**Exh. C-83**).
[239] ROPO, para 125.
[240] ROPO, para 125.

allegation should never have been made in light of the plain facts of this case. The Claimant's Singapore business is real and profitable. There is no basis on which to deny benefits.

a. <u>The Claimant has a Significant and Genuine Presence in Singapore</u>

201. The Claimant's current business in Singapore operates under the name "Kleenmatic". As the Respondent acknowledges the Claimant acquired a 90% interest in the Joint Venture through which it operates Kleenmatic on 4 January 2020.[241]

202. On 9 November 2020, the Claimant contributed S$700,000 as required by the JV Agreement.[242] This was an arm's length transaction with companies not previously associated with Claimant.

203. Since it acquired the engineering businesses just after incorporation, the Claimant has consistently employed between 58 and 300 people (approximately) in Singapore.[243] The Claimant has set out in the SODPO the details of its business activities. To recall these details briefly:

    a. The Claimant has a physical office space where its Singapore directors work on a daily basis.[244]

[241] SODPO, para 387; First Palmer WS, para 64; Joint Venture Agreement between Claimant, One Kleenmatic Pte Ltd and Kleen Venture Pte Ltd, (**Exh.C-469**).
[242] Joint Venture Payment, (**Exh. C-578**); Seventh Palmer WS at para 13.
[243] First Palmer WS, paras. 66 – 79; Zeph Staff Report, (**Exh.C-88**); Fifth Palmer WS, para 144.
[244] SODPO, paras 381-384.

b. The Claimant pays PAYE and superannuation (CPF) contributions for its employees, as detailed in the SODPO.[245]

c. The Claimant engages professional services firms in Singapore and holds the required licenses to operate from the Singapore government.[246]

d. Two of the Claimant's directors are based in Singapore and manage its Singapore activities on a daily basis.[247]

e. The Claimant also operates as a holding company. Its investments included foreign investments in Australia, but also (previously) local investments through the holding of the shares in the Engineering companies and more recently as parent to the minority Joint Venture partners.

f. The Claimant received over $2 million in grants from the Singapore government during the COVID-19 pandemic.[248]

g. The Claimant has a Chief Investment Officer and several directors who are Australia-based and are involved in the day-to-day management of Mineralogy.[249]

h. One of Singapore's largest and most respected law firms, [redacted], undertook the transactions for the Claimant.[250] Two of its lawyers are currently company secretaries for the Claimant and were on 13 August 2020.

[245] SODPO, para 416.
[246] SODPO, paras 399, 417, 423.
[247] SODPO, para 397.
[248] SODPO, paras 419-20.
[249] SODPO, paras 74, 81, 82, 248, 249; Fifth Palmer WS, para 36.
[250] SODPO, paras 235, 395, 423, 596.

Yet the Respondent scandalously says the Share Swap was a sham and in doing so, impinges the professional ethics and reputation of one of Singapore's most respected law firms.

i. The Claimant holds annual events for its staff, including an annual Chinese New Year Party.[251]

The Joint Venture evidences the operations of the Claimant. As noted above, the Claimant now also owns its original minority Joint Venture Partners.

204. The Claimant has recently expanded its Singapore investments.[252] While this additional investment was not in place in 2020, it shows the Claimant's commitment to Singapore as it continues to expand its activities there. So too does the Claimant's continued growth in revenue from its Singapore business. In FY 2024, the Singapore business earned income of S$12,003,851.[253] There is nothing artificial or "sham" about the Claimant's business.

205. There is nothing sham about the acquisition of the Kleenmatic business. The Claimant operates the business and employs the majority of the staff. The Claimant employs 298 people[254].

206. Mr Quek and Mr Loh, based in Singapore, are directors of the Claimant in every formal and proper sense. They have duties under the Companies Act 1967 (Sing) to act in the best interests of the

[251] See SODPO, para 447.
[252] Audited Financial Statements of Zeph Investments Pte Ltd for the Financial Year Ending 30 June 2024, (**Exh. C-579**); Seventh Palmer WS at para 6.
[253] Audited Financial Statements of Zeph Investments Pte Ltd for the Financial Year Ending 30 June 2024, (**Exh. C-579**) at page 7; Seventh Palmer WS at para 6.
[254] Zeph Investments Pte Ltd Employee List as at 31 July 2024, (**Exh. C-583**); Seventh Palmer WS at para 7.

Claimant and are liable for the actions of the Claimant under Singapore law. These directors are heavily involved in the Claimant's operations. The Claimant also has two company secretaries who are resident in Singapore and who are both lawyers at [redacted]. There is nothing "sham" about this structure, all of which was properly implemented and functions in a manner consistent with all obligations under Singapore law.

207. As explained in the SODPO, the Claimant also initially invested in three marine engineering businesses. As explained by Mr Palmer in his Seventh Witness Statement,[255] this was a sector that the Claimant was interested in exploring in Singapore (given Singapore's well-known reputation in the shipping industry and the natural synergies with Mineralogy's other business investments). Ultimately, these businesses have not been successful. Unfortunately, the COVID-19 pandemic had a devastating effect on the shipping industry in Singapore.[256] At the date of the breach on 13 August 2020, the engineering businesses were still operational. The engineering businesses failed substantially due to the COVID-19 pandemic. The huge impact of the pandemic on the global shipping industry in particular was widely publicised. In any case, whether or not these engineering businesses were profitable prior to the Claimant's investment is irrelevant – they were legitimate investments.

[255] Seventh Palmer WS, para 5.

[256] The Impact of the Covid-19 Pandemic on Shipping, The Maritime Executive (**Exh. C-580**); Seventh Palmer WS at para 14.

b. The Test for Determining what is "Substantive"

208. Article 11(1) refers *to "substantive business operations"* and a question arises as to the meaning of the word *"substantive"*. No specific meaning is ascribed to that word by the AANZFTA and the word should therefore be given its ordinary meaning. Dictionary definitions of the word *"substantive"* indicate that it means nothing more than *"having substance"*. Some dictionary definitions treat the term *"substantive"* as being synonymous with *"substantial"*.

209. Assuming however, that the term *"substantive"* is the same or similar in meaning to the term *"substantial"*, however, there are authorities on the meaning of *"substantial"* in this context which provide at least some guidance.

210. It has been held that:[257]

> "*A business activity may not be cursory, fleeting or incidental, but must be of sufficient extent and meaning as to constitute a genuine connection by the company to its home state. That genuine connection is necessary to ensure that the company is one that the home State has an interest to protect, and which the host State would consider it appropriate for the home State to protect. The connection between the company and its home State cannot be merely a sham, with no business reality whatsoever, other than an objective of maintaining its own corporate existence*".

[257] *Gran Colombia Gold Corp. v Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020, (**Exh. RLA-80**) para 137.

211. It has further been said that:[258]

> *"[A]lthough there has not been a significant jurisprudence on the question of 'substantial business activities', the tribunals that have found such activities to exist have been prepared to do so on the basis of a relatively small number of activities both in terms of quantity and quality".*

212. It is plain from the evidence in this case that the business operations of the Claimant in Singapore are *"substantive business operations"* within the meaning of Article 11(1) of Chapter 11 of the AANZFTA.

The Ordinary Meaning of the words

213. The Respondent begins its own analysis by baldly asserting that the AANZFTA – in choosing "*substantive*" instead of "*substantial*", and "*operations*" rather than "*activities*" – "*can be seen to specify a more demanding standard*".[259] However, that is (with respect) a wholly self-serving submission that is divorced from the ordinary meaning of the words (contrary to Article 31 of the Vienna Convention and the Respondent's own stance in respect of the construction of Article 11(1)(b)[260]) and is an unsustainable construction:

a. Although "*substantive*" may connote "*authenticity and genuineness*",[261] in line with its plain meaning (i.e., having

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[258] *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019, (**Exh. RLA-74**), para 260.

[259] SOPO, para 222.

[260] SOPO, para 214.

[261] SOPO, para 222.

substance; being real as opposed to apparent), it does not impose a higher threshold.

b. "*Substantial*", too, can be defined as being real and not illusory; but it also means considerable in quantity, or significantly great. As such, if anything, "*substantive*" is less exacting: whilst a business' operations or activities might very well be "*substantive*" without being "*substantial*", it is difficult to conceive how they may properly be "*substantial*" but not "*substantive*".

c. As to "*operations*" and "*activities*", the former does not imply a "*more significant form of continuous physical presence*".[262] In this context, "*operations*" should be treated as referring to the fact of functioning, or being in effect (i.e., is a business 'operational' in a particular territory?), whereas "*activities*" suggests a more positive set of commercial actions.

214. Accordingly, the Claimant's primary position – in view of the natural meaning of the language used – is that the threshold for "*substantive business operations*" is materially lower, from Claimant's perspective, than "*substantial business activities*". Its alternative position is that the applicable standard, in relation to both formulations, is essentially the same – but either way there can be no possibility of the Respondent's construction being treated as correct.

[262] SOPO, para 222.

c. Evidence of the Claimant's Substantive Business in Singapore

215. The Claimant was incorporated in Singapore on 21 January 2019.[263] Since its incorporation in 2019, the Claimant has had a substantive business in Singapore.

216. The Claimant's current primary activities are:

a. holding and managing its investments in Australia - the Claimant is the 100% parent company of Mineralogy in Australia;

b. managing its business operations in Singapore under a Joint Venture Agreement dated 24 January 2020 (discussed below), under which the Claimant directly holds a 90% share in the Joint Venture business;[264] and

c. having, as at 13 August 2020, an investment in its Engineering businesses. The Respondent attacks the Engineering businesses profitability. The Respondent neglects to consider that a decision to invest in a segment of operations is not solely made on profitability but in this case was made out of the potential of the sector to develop. It is common knowledge that at that time the COVID-19 pandemic had taken a serious blow to many industries and this is especially so for the shipping industry. As at 13 August 2020, the engineering business was still operational[265].

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[263] ACRA, Certificate of Incorporation for Zeph Investments Pte Ltd, 21 January 2019, (**Exh.C-70**).
[264] Fifth Palmer WS, para 80; Joint Venture Agreement dated 24 January 2020, (**Exh. C-489**).
[265] First Palmer WS, para 57; Fifth Palmer WS, para 88.

The Claimant's Compliance with Singapore Companies Act 1967

217. The Claimant is required, in accordance with the Singapore Companies Act 1967,[266] to:

a. have a registered address in Singapore;

b. have directors resident in Singapore;

c. appoint Singapore auditors;

d. produce audited accounts; and

e. carries on its business and operations according to Singapore Law.

218. As outlined below, the Claimant has at all times complied with the requirements of the Singapore Companies Act 1967.[267]

The Claimant's Registered Office

219. As set out in the SODPO, the Claimant has had a physical presence in Singapore since the year of its incorporation, and it continues to have such a presence today. During the 2019 calendar year, the Claimant conducted its business operations from [redacted][268]

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

a. [redacted]; and

b. [redacted].[269]

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[266] Companies Act 1967 (Singapore), (**Exh. CLA-162**).
[267] *Companies Act 1967*(Sing), (**Exh. CLA-162**).
[268] First Palmer WS, para 36; SODPO, para 382.
[269] First Palmer WS, para 37.

221. The Claimant has continued to operate its business out of the [redacted] address, which is open for business five days a week during normal working hours in Singapore. [270]

The Claimant's Directors

222. As explained in the SODPO, the Claimant currently has seven directors, as follows:[271]

a. Clive Frederick Palmer, appointed on 23 January 2019 (Australia resident);

b. Emily Susan Moraig Palmer, appointed on 28 February 2019 (Australia resident);

c. Declan Jack Zournazi Sheridan, appointed on 28 February 2019 (Australia resident);

d. Loh Wai Chan, appointed on 4 February 2020 (Singapore resident);

e. Quek Ser Wah Victor, Director, appointed on 22 June 2020 (Singapore resident);

f. Bernard Tze Loong Wong, appointed on 22 October 2021 (Australia resident); and

g. Baljeet Singh, appointed on 22 October 2021 (Australia resident).

223. In the past, the following people have served as directors of the Claimant:

[270] First Palmer WS, para 38.

[271] ACRA Business profile of Zeph Investments Pte Ltd dated 1 February 2023, (**Exh. C-77**); ACRA Register of Directors for Zeph Investments Pte Ltd, 2 February 2023 (**Exh. C-73**).

a. Mr Mashayanyika, appointed on 21 January 2019 and ceased on 12 February 2021 (Australia resident);[272] and

b. Tan Cher Wee, appointed on 21 January 2019 and ceased on 29 June 2020 (Singapore resident).[273]

224. The company secretaries (Yee Koon Daphne ANG and Zhe Lei TAN) are resident in Singapore.[274]

225. The two directors who are resident in Singapore and are primarily responsible for the day-to-day business operations in Singapore. It should be noted that the company secretaries are full time employees of [redacted]. The Singapore-based directors are also the [redacted].[275] The five remaining directors are Australia-based and are responsible for actively managing the Claimant's Australian investments.

The Claimant's Auditor and Audited Accounts

226. The Claimant produces annual audited financial statements. For the Financial year ending 2019, the Claimant engaged [redacted]

[272] ACRA, *Business Profile for Zeph Investments Pte Ltd* (21 September 2022), Claimant's Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 2, (**Exh.C-63**), p. 53-57; ACRA, *Register of Directors of Zeph Investments Pte Ltd* (2 February 2023), (**Exh.C-73**). ACRA (of Singapore) Register of Directors of Zeph Investments Pte Ltd as at 14 February 2024, (**Exh. C-478**).

[273] ACRA, *Business Profile for Zeph Investments Pte Ltd* (21 September 2022), Claimant's Notice of Intention to Submit Dispute to Arbitration, Annexure A, Exhibit 2, (**Exh.C-63**), p. 53-57; ACRA, *Register of Directors of Zeph Investments Pte Ltd* (2 February 2023), (**Exh.C-73**). ACRA (of Singapore) Register of Directors of Zeph Investments Pte Ltd as at 14 February 2024, (**Exh. C-478**).

[274] Business Profile, Singapore Accounting and Corporate Regulatory Authority, 1 February 2023, (**Exh. C-77**).

[275] First Palmer WS, para 40.

[redacted], Singapore to audit its financial accounts.[276] Since 2020, the Claimant's auditors have been [redacted].[277]

227. The Claimant has lodged, in compliance with the Singapore Companies Act 1967, audited financial statements since its incorporation.[278]

The Claimant's Business Operations in Singapore from January 2019

GCS Engineering, Visco Engineering and Visco Offshore Engineering.

228. Mr Palmer explains in his First Witness Statement, [279] that on or around 31 January 2019, shortly after its incorporation, the Claimant acquired three subsidiary engineering companies in Singapore, namely GCS Engineering Services Pte Limited ("**GCS**"), Visco Engineering Pte Limited ("**VEPL**"), and Visco Offshore Engineering Pte Limited ("**VOPL**") (together, the "**Singaporean Engineering Subsidiaries**").[280]

229. At that time, GCS's principal activities included marine works and various other engineering activities and processes, whilst VEPL

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[276] First Palmer WS, para 41; Audited Financial Statements for the reporting period from 21 January 2019 to 30 June 2019 (**Exh. C-79**).

[277] See Bundle of Engagement Letters, pp.13-16 (**Exh. C-96**); First Palmer WS, para 47; Fifth Palmer WS, para 82.

[278] Fifth Palmer WS, para 123; Claimant's Audited Financial Statements FY2019, (**Exh. C-79**); Email from ACRA Financial Statements 30 June 2019, (**Exh. C-511);** Claimant's Audited Financial Statements FY2020, (**Exh. C-81**); Email from ACRA Financial Statements 30 June 2020, (**Exh. C-512)**; Claimant's Audited Financial Statements FY2021, (**Exh. C-83**); Email from ACRA Financial Statements 30 June 2021, (**Exh. C-513**); Claimant's Audited Financial Statements FY2022 (**Exh. C-85**)**;** Email from ACRA Financial Statements 30 June 2022, (**Exh. C-514**)**;** Claimant's Audited Financial Statements FY2023 (**Exh. C-515**); Email from ACRA Financial Statements 30 June 2023, (**Exh. C-517**).

[279] First Palmer WS, para 46.

[280] First Palmer WS, para 46; Share Purchase Agreement dated 31 January 2019 between Chin Bay Goh and the Claimant, (**Exh. C-507**).

and VOPL's principal activities included the repairing of ships, tankers, and other ocean-going vessels.[281]

230. The 2019 Audited Consolidated Financial Statements for the 2019 financial year state that the Claimant "*operates in building and repairing ships, tankers, other ocean going vessels by manpower contracting. The [Zeph] Group is currently in the process of increasing the number of employees to more than 100 for the 2020 financial year.*"[282]

231. During 2019 and 2020, the Engineering Companies made payments to the Central Provident Fund (**CPF**) Board of Singapore,[283] a mandatory social security savings scheme funded by contributions from employers and employees.[284] By way of example, CPF contribution rates by employer, as a percentage of the employees' wage, currently ranges from 7.5% to 17%.[285]

232. These subsidiaries had a number of employees. They paid salaries and contributions to the Singapore Government's CFP for these employees.[286] For example, the records show:

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[281] First Palmer WS, para 45; Fifth Palmer WS, para 86.

[282] Consolidated Financial Reports for the year ended 30 June 2019, p. 2, (**Exh. C-80**).

[283] Fifth Palmer WS, para 87; Records of Payment for GCS Engineering (**Exh. C-89**); Records of Payment for Visco Engineering (**Exh. C-90**); Records of Payment for Zeph Investments Pte Ltd, One Kleenmatic Pte Ltd, Kleen Venture Pte Ltd, GCS Engineering Service Pte Ltd, and Visco Engineering Pte Ltd (**Exh. C-91**).

[284] The Singapore Government Ministry of Manpower website, page titled "What is the Central Provident Fund (CPF)", accessed on 8 February 2024 (**Exh. C-508**).

[285]The Singapore Government Central Provident Fund website, page titled "How much CPF contributions to pay", accessed on 9 February 2024, (**Exh. C-509**).

[286] First Palmer WS, para 68.

a. Between July 2019 and January 2020, GCS Engineering Services paid $17,628 to the CPF on behalf of 13 employees;[287] and

b. Between May and July 2019 and January 2020, Visco Offshore Engineering paid $27,090 to the CPF on behalf of 24 employees (in addition to agency fees for 34 foreign workers also employed during that period).[288]

233. In addition, during the period from 21 January to 30 June 2019, the Claimant paid CPF contributions of S$13,135.[289]

234. For the year ended 30 June 2019, the Claimant's Engineering Companies had total revenue and other income in Singapore as follows:

a. GCS Engineering Service Pte. Ltd.: SG$1,365,105;[290]

b. Visco Engineering Pte. Ltd.: SG$2,119,803;[291] and

c. Visco Offshore Engineering Pte. Ltd.: SG$1,062,668.[292]

235. During the COVID-19 pandemic there was an unexpected slowdown in demand, however they were still trading on 13 August 2020. The Engineering Companies were placed into voluntary

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[287] CPF Record of Payment for GCS Engineering Services, (**Exh. C-89**).

[288] CPF Record of Payment for Visco Offshore Engineering, (**Exh. C-90**) (It is noted that some employees were shared by Visco Offshore Engineering and GCS Engineering Services, but each company contributed separately for the employee).

[289] Audited Financial Statements for the reporting period from 21 January 2019 to 30 June 2019, p. 17, (**Exh C-79**).

[290] GCS Engineering Services Pte Ltd Audited Financial Statements for the Reporting Period from 1 January 2019 to 30 June 2019, p. 7, (**Exh. C-542**).

[291] Visco Engineering Pte Ltd Audited Financial Statements for the Reporting Period from 1 September 2018 to 30 June 2019, p. 7, (**Exh. C-543**).

[292] Visco Offshore Engineering Pte Ltd Audited Financial Statements for the Reporting Period from 1 January 2019 to 30 June 2019, p 7, (**Exh. C-544**).

liquidation in October 2020.[293] All creditors were paid and the Engineering Companies being finally wound up in 2022.[294]

Joint Venture between the Claimant, Kleen Venture and One Kleenmatic.

236. On 4 January 2020, the Claimant entered into a joint venture arrangement with two companies incorporated in Singapore, Kleen Venture Pte Limited ("**KVPL**") and One Kleenmatic Pte Limited ("**OKPL**") (the "**Joint Venture**").[295]

237. The Claimant and its directors had no prior involvement with KVPL or OKPL prior to the Claimant's entry into the Joint Venture, it was an arm's length commercial transaction. [296]

238. As part of the Joint Venture, the Claimant began offering corporate cleaning services in Singapore.[297] The Claimant is the controlling party of the Joint Venture, with a 90 per cent interest therein; the remaining 10 per cent interest is split 50/50 between KVPL and OKPL.[298]

239. After entering the JV Agreement, the Claimant took over the day-to-day operations of the Joint Venture business, in accordance with its obligations under the Agreement.[299] The Claimant's two

[293] First Palmer WS, para 57.
[294] Fifth Palmer WS, para 86 and 88.
[295] First Palmer WS, para 64; Joint Venture Agreement between Claimant, One Kleenmatic Pte Ltd and Kleen Venture Pte Ltd, (**Exh. C-469**).
[296] First Palmer WS, para 64; Joint Venture Agreement between Claimant, One Kleenmatic Pte Ltd and Kleen Venture Pte Ltd, (**Exh. C-469**).
[297] First Palmer WS, para 65.
[298] First Palmer WS, para 73.
[299] Fifth Palmer WS, para 97.

Singapore-based directors actively managed the business there, and the Claimant employed the staff engaged in that business.[300]

240. Given the goodwill and brand recognition of Kleenmatic in Singapore, the Claimant decided to retain the Kleenmatic name.[301] The Claimant now owns the entire business, having acquired the shares in the minority JV Partners on 4 August 2022.[302] . Notwithstanding the acquisition of the minority JV Partners by the Claimant, the business still operates as a joint venture, meaning that the Claimant has actively conducted the Joint Venture business since January 2020.

The Claimant has Since 2019 Employed a Significant Number of Employees

241. The Claimant has employed a large number of people in Singapore since its incorporation. Set out below are the employees of the Claimant in each year since 2019.

242. In the 2019 calendar year, the Claimant and its Singaporean subsidiaries employed a total of 58 employees throughout the year.[303] This number is made up of:

a. 13 employees of GCS Engineering Service Pte Ltd in the period from June to December 2019;

b. 24 employees of Visco Offshore Engineering Pte Ltd;

c. 21 employees of Visco Engineering Pte Ltd; and

[300] Fifth Palmer WS, para 91.
[301] Fifth Palmer WS, para 91.
[302] Fifth Palmer WS, para 91.
[303] Zeph Staff Report (**Exh. C-88**); First Palmer WS, para 68.

d. 34 foreign employees of the Claimant (via a labour-hire firm).

243. In the 2020 calendar year, the Claimant and its Singaporean subsidiaries employed a total of 249 employees from February to November 2020.[304] This number is made up of:

a. 146 employees of the Claimant;

b. 51 employees of Kleenmatic Management;

c. 46 employees of Kleenmatic Services; and

d. 6 employees of GCS Engineering Service Pte Ltd.

244. In the 2021 calendar year, the Claimant and its Singaporean subsidiaries employed a total of 262 employees throughout the year.[305] This number is made up of:

a. 135 direct employees of the Claimant;

b. 43 employees of Kleenmatic Management; and

c. 93 employees of Kleenmatic Services.

245. In the 2022 calendar year, the Claimant and its Singaporean subsidiaries employed a total of 278 employees throughout the year.[306] This number is made up of:

a. 113 direct employees of Claimant;

b. 33 employees of Kleenmatic Management; and

c. 132 employees of Kleenmatic Services.

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[304] Zeph Staff Report (**Exh. C-88**); First Palmer WS, para 72; Sixth Palmer W, para 67; **Exh. R-618** to **Exh. R-763**(inclusive).
[305] Zeph Staff Report (**Exh. C-88**); First Palmer WS, para 73.
[306] Zeph Staff Report (**Exh. C-88**); First Palmer WS, para 78.

246. As at 30 June 2023, the Claimant employed a total of 248 employees, comprised of:[307]

a. 170 direct employees of the Claimant;

b. 21 employees of Kleenmatic Management; and

c. 57 employees of Kleenmatic Services.

247. As at 31 January 2024, the Claimant directly employed a total of 265 employees in its Singapore business. The Claimant's subsidiaries, Kleenmatic Management and Kleenmatic Services, each employed one employee.[308]

248. The Transfer of 146 Employees to the Claimant occurred pursuant to the Joint Venture Agreement.[309]

249. As stated in paragraph 89 of the Fifth Palmer WS, since January 2020, the Claimant has operated the Joint Venture business in Singapore pursuant to a Joint Venture Agreement dated 24 January 2020 (the JV Agreement) which is **Exh. C-469**[310].

250. In the JV Agreement, the term:

a. "First Party" means the Claimant,

b. "Second Party" means One Kleenmatic Pte Ltd (OK), and

c. "Third Party" means Kleen Venture Pte Ltd (KV),

(See, page 3 of the JV Agreement, **Exh. C-469**).[311]

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[307] Zeph Staff Report (**Exh. C-498**); Fifth Palmer WS, para 141.

[308] Zeph Staff Report (**Exh. C-510**); Fifth Palmer WS, para 142.

[309] **Exh. R-618** to **Exh. R-763** (inclusive).

[310] Joint Venture Agreement between Claimant, One Kleenmatic Pte Ltd and Kleen Venture Pte Ltd, 24 January 2020 (**Exh. C-469**).

[311] Joint Venture Agreement between Claimant, One Kleenmatic Pte Ltd and Kleen Venture Pte Ltd, 24 January 2020 (**Exh. C-469**).

251. In the definitions section of the JV Agreement, the term "Manager" means the "First Party" which is the Claimant (see page 3 of **Exh. C-469**).[312]

252. A stated in clause 24 of the JV Agreement:

> "*The Second Party shall transfer, as directed by Manager, its employees to the First Party for their employment to be by the First Party within 29 business days, as part of this Joint Venture and paid out of the Joint Venture Account. Public Holidays do not count as business days. All receipts for activities carried out under the Joint Venture shall be paid into the Joint Venture Account and dispersed as the Manager may require from time to time. The Third Party shall transfer, as directed by Manager, its employees to a party that the Manager may nominate within 29 Business days of such nomination, provided always parties so nominated by the Manager may provide such employees to the Joint Venture under a Labor hire agreement which may be agreed with the Manager.*"[313]

253. On 1 February 2020, in accordance with paragraph 24 of the JV Agreement, the Claimant as Manager directed the transfer of employees to the Claimant. Evidence of the transfer of employment of 146 employees to the Claimant on 1 February 2020 is exhibited at **Exh. R-618** to **Exh. R-763** (inclusive).

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[312] Joint Venture Agreement between Claimant, One Kleenmatic Pte Ltd and Kleen Venture Pte Ltd, 24 January 2020 (**Exh. C-469**).

[313] Joint Venture Agreement between Claimant, One Kleenmatic Pte Ltd and Kleen Venture Pte Ltd, 24 January 2020 (**Exh. C-469**), cl 24, p 11.

The Claimant's Contributions to the Singapore Central Provident Fund

254. The Claimant has consistently paid contributions to the Singapore Government's Central Provident Fund (**CPF**) for all of its Singapore employees. As noted above, the CPF is the Singapore Government Authority that administers the compulsory retirement savings and pension plan for working Singaporeans into which all Singapore business enterprises are required to pay contributions in respect of each of their employees. The following contributions have been made by the Claimant in accordance with the Laws of Singapore:

a. in FY2020, the Claimant paid total staff contributions to the CPF of S$262,548 (excluding CPF contributions for directors);[314]

b. in FY2021, the Claimant paid total staff contributions to the CPF of S$536,912 (excluding CPF contributions for directors);[315]

c. in FY2022, the Claimant paid total staff contributions to the CPF of S$365,354 (excluding CPF contributions for directors);[316] and

[314] Audited Financial Statements for the financial year ended 30 June 2020, p.37 (**Exh. C-81**); see also Claimant's Record of Payment to the CPF for February to June 2020, pp. 1-16 (**Exh. C-91**).
[315] Audited Financial Statements for the financial year ended 30 June 2021, p.36 (**Exh. C-83**).
[316] Audited Financial Statements for the financial year ended 30 June 2022, p.32 (**Exh. C-85**); see also, CPF Record of Payment, (**Exh. C-93**).

d. In FY2023, the Claimant paid total staff contributions to the CPF of S$310,720 (excluding CPF contributions for directors).[317]

The Claimant has Engaged a Number of Third Party Contractors to Conduct its Business

255. A number of external consultants have been engaged by the Claimant since it was incorporated in January 2019 to carry out a variety of services. A sample of those consultants are listed below:[318]

a. [redacted] – Tax services (signed 28 June 2019 and still acting for the Claimant for specialist tax advice);

b. [redacted] – Audit services (signed 14 May 2020 and still currently acting as auditors for the Claimant);

c. [redacted] – Company Secretarial and related services (signed 23 January 2019 and still acting as the Company Secretary for the Claimant);

d. [redacted] – Tax services (signed 18 August 2020 and still acting as the Tax Agent for the Claimant);

e. [redacted] – Legal services (engaged 5 December 2022 to perform legal work for the Claimant); and

f. [redacted] – Notary Public Services (engaged via the Claimant's tax agents Amabel & Associates on 6 October 2022).

[317] Audited Financial Statements for the financial year ended 30 June 2023, p. 32 (**Exh. C-515**)
[318] Bundle of Engagement Letters, (**Exh. C-96**).

Insurance Policies Held by the Claimant to Conduct its Business

256. The Claimant holds the following insurance policies in Singapore required to operate its business in Singapore: [319]

a. Workers' Compensation Insurance:

i. 20 March 2020 to 19 March 2021, with [redacted] for 156 employees;[320] and

ii. 20 March 2021 to 19 March 2023 and thereafter with [redacted] for 138 employees.[321]

b. Public liability:

i. 20 March 2021 to 19 March 2023 and thereafter with [redacted].[322]

c. Business insurance:

i. 20 March 2020 to 19 March 2023, with [redacted].[323]

257. These insurance policies are a significant and genuine cost to the Claimant, required to operate its substantive business.

Licenses Issued by the Singapore Government to the Claimant to Conduct its Business

258. The Claimant, to conduct its business, has obtained licenses from the Singaporean National Environment Agency since the

[319] Bundle of Insurance Policies, (**Exh. C-95**).
[320] Bundle of Insurance Policies, pp. 5-8, (**Exh. C-95**).
[321] Bundle of Insurance Policies, pp. 10-29, (**Exh. C-95**).
[322] Bundle of Insurance Policies, pp. 30-47, (**Exh. C-95**).
[323] Bundle of Insurance Policies, pp. 1-4, (**Exh. C-95**).

Claimant's entry into the Joint Venture Agreement.[324] In March 2020, the Agency issued a one-year licence to the Claimant to carry on a cleaning business. It has renewed that licence to the Claimant in each subsequent year.[325] This licence has been granted to the Claimant since 10 March 2020.

COVID-19 Government Subsidies

259. The 2020 and 2021 financial years were impacted by the global COVID-19 pandemic. The Singapore Government offered businesses operating in Singapore certain grants and relief during the COVID-19 pandemic. The Claimant received the following payments from the Singapore Government during the pandemic to assist it in operating its business during that time:

a. In the year to 30 June 2020, the Claimant received S$536,026 in Government grants on account of the pandemic;[326]

b. In the year to 30 June 2021, the Claimant received S$1,053,544 in Government grants on account of the pandemic;[327] and

c. In the year to 30 June 2022, the Claimant received S$614,037 in Government grants on account of the pandemic.[328]

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[324] First Palmer WS, para 80; Licences issued to Zeph Investments Pte Ltd, (**Exh.C-94**).
[325] Licences issued to Zeph Investments Pte Ltd (**Exh. C-94**).
[326] Audited Financial Statements for the financial year ended 30 June 2020, p. 36, (**Exh. C-81**).
[327] Audited Financial Statements for the financial year ended 30 June 2021, p. 35, (**Exh. C-83**).
[328] Audited Financial Statements for the financial year ended 30 June 2022, p. 31, (**Exh. C-85**).

d. In the year to 30 June 2023, the Claimant received S$190,966 in Government grants on accounts of the pandemic.[329]

260. These payments evidence the Claimant's ongoing and significant business activities in Singapore. The Claimant would not have been eligible for such substantial payments, had it not been operating a genuine and substantive business in Singapore.

The Claimant's Audited Financial Statements Demonstrate that it has a Substantive Business in Singapore

261. In compliance with the requirements of the Singapore corporate regulator, ACRA, the Claimant has lodged Audited Financial Statements with ACRA for each financial year since 21 January 2019.[330]

Financial Year 2019

262. The Claimant's Audited Financial Statements for the financial year ending 30 June 2019 demonstrate that the Claimant's total assets on a standalone basis were valued at over S$8,200,000.[331] The Claimant's standalone Audited Financial Statements record that the Claimant incurred expenses in the financial year of

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[329] Audited Financial Statements for the financial year ended 30 June 2023, p. 32, (**Exh. C-515).**

[330] Fifth Palmer WS, para 123; Claimant's Audited Financial Statements FY2019, (**Exh. C-79**); Email from ACRA Financial Statements 30 June 2019, (**Exh. C-511**); Claimant's Audited Financial Statements FY2020, (**Exh. C-81**); Email from ACRA Financial Statements 30 June 2020, (**Exh. C-512)**; Claimant's Audited Financial Statements FY2021, (**Exh. C-83**); Email from ACRA Financial Statements 30 June 2021, (**Exh. C-513**); Claimant's Audited Financial Statements FY2022 (**Exh. C-85**)**;** Email from ACRA Financial Statements 30 June 2022, (**Exh. C-514**)**;** Claimant's Audited Financial Statements FY2023 (**Exh. C-515**); Email from ACRA Financial Statements 30 June 2023, (**Exh. C-517**).

[331] Audited Financial Statements for the reporting period from 21 January 2019 to 30 June 2019, p. 7, (**Exh. C-79**).

$2,029,233,[332] resulting in a loss, although much of that loss was incurred due to writing off a loan to one of its subsidiaries in the amount of $1,975,670.[333]

263. The Claimant's Consolidated Audited Accounts for the financial year ending 30 June 2019 record that the consolidated group total income for operations in Australia, Singapore and New Zealand during this financial year was approximately A$300 million.[334]

264. In addition, after accounting for the Singapore and Australian subsidiaries, the Claimant's Consolidated Audited Accounts for the financial year ending 30 June 2019 record that the total assets of the Claimant's consolidated group in that financial year were approximately A$613,435,345.[335]

Financial Year 2020

265. The Claimant's Audited Accounts for the financial year to 30 June 2020 record that the Claimant generated income in Singapore (excluding dividends) of S$5,680,594.[336] This included grants received from the Singaporean Government on account of the COVID-19 pandemic in the amount of S$536,026.[337] In the same period, the Claimant incurred expenses of S$3,797,307.[338] The

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[332] Audited Financial Statements for the reporting period from 21 January 2019 to 30 June 2019, pp. 8, 22, (**Exh. C-79**).
[333] Audited Financial Statements for the reporting period from 21 January 2019 to 30 June 2019, pp. 10, 18, (**Exh. C-79**).
[334] Consolidated financial reports for the year ended 30 June 2019, p. 4, (**Exh. C-80**).
[335] Consolidated financial reports for the year ended 30 June 2019, p. 5, (**Exh. C-80**).
[336] Audited Financial Statements for the financial year ended 30 June 2020, p. 36, (**Exh. C-81**).
[337] Audited Financial Statements for the financial year ended 30 June 2020, p. 36, (**Exh. C-81**).
[338] Audited Financial Statements for the financial year ended 30 June 2020, p. 8, (**Exh. C-81**).

Claimant's total assets on a standalone basis were valued at over S$19.1 million for the 2020 financial year.[339]

266. These accounts evidence the Claimant's substantive business in Singapore a few months prior to the passing of the *Amendment Act* on 13 August 2020.

267. In addition, the Claimant's Consolidated Audited Accounts for FY20 record that the consolidated group income for operations in Australia, Singapore and New Zealand during this financial year was approximately A$349,500,000.[340] After accounting for the Singapore and Australian subsidiaries, the total assets of the Claimant's consolidated group were valued at just under A$806 million.[341]

268. As stated above, GCS Engineering Services Pte Ltd, Visco Engineering Pte Ltd and Visco Offshore Engineering Pte Ltd were placed into voluntary liquidation in October 2020, in large part, because of the trading conditions experienced by these companies during the COVID-19 pandemic. The shipping industry was hit particularly hard.

269. The Claimant had taken the risk its investment in the Engineering Companies referred to above and as such had lost the companies due to the COVID-19 pandemic in 2020.

Financial Year 2021

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[339] Audited Financial Statements for the financial year ended 30 June 2020, p. 7, (**Exh. C-81**).
[340] Consolidated Financial Reports for the year ended 30 June 2020, p. 3, (**Exh. C-82**).
[341] Consolidated Financial Reports for the year ended 30 June 2020, p. 4, (**Exh. C-82**).

270. The Claimant's 2021 financial year ran from 1 July 2020 to 30 June 2021. The *Amendment Act* was passed during this period.

271. The Claimant's Singapore business continued to operate during the 2021 financial year. The Claimant's assets were worth approximately S$13,100,000 during this financial year and the Claimant's income (excluding dividends) was S$5,347,107.[342] This included revenue from services, as well as from Government grants to account for the impact of the COVID pandemic. The Claimant incurred expenses of S$4,588,507[343] and employed around 135 people.[344]

272. As at 30 June 2021, the total assets of the Claimant's Consolidated group were valued at over A$1,051,166,879 as at 30 June 2021[345]. The Claimant also received income on a consolidated basis of A$545,503,344 and incurred expenses of A$230,998,876.[346]

Claimant's Chinese New Year Party

273. Each year, the Claimant hosts a Chinese New Year party for its staff, directors and their families.

274. The 2024 Chinese New Year Party took place at Marina Bay Sands in Singapore on 17 February 2024.[347] Below is a photo taken at that party which was attended by local staff and the Singapore directors Quek Ser Wah Victor and Loh Wai Chan and their families

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[342] Audited Financial Statements for the financial year ended 30 June 2021, pp. 6 and 35, (**Exh. C-83**).
[343] Audited Financial Statements for the financial year ended 30 June 2021, p. 7, (**Exh. C-83**).
[344] First Palmer WS, para 76(a).
[345] Consolidated Financial Reports for the year ended 30 June 2021, pp. 4, (**Exh. C-84**).
[346] Consolidated Financial Reports for the year ended 30 June 2021, pp. 3-4, (**Exh. C-84**).
[347] Fifth Palmer WS, para 135.

and other directors of the Claimant including Mr Bernard Wong (Chief Investment Officer and director of the Claimant, and Chief Financial Officer of Mineralogy) as well as Mr Declan Sheridan (director of the Claimant and Head of Finance and Financial Relationships at Mineralogy):

275. Below is a link to a video of the Claimant's 2024 Chinese New Year Party attended by the Claimant's employees in Singapore as well as four of the Claimant's seven directors:

[redacted]

d. <u>The Law</u>

276. As set out in the SODPO, the purpose of the denial of benefits clause is to prevent an investor from establishing a "*mailbox*" or "*shell*" company for treaty protection. The test for "*substantial*

business activities" is one of substance over form.[348] The business activities must be more than "*merely a sham, with no business reality…other than an objective of maintaining its own corporate existence*."[349] There is no law that requires heightened scrutiny of business activities where the ultimate owner of the corporate group shares nationality with the Host State.

277. As always, the Tribunal is required to interpret the plain meaning of the denial of benefits clause, when read in context. The Claimant's position on plain meaning has not altered from that set out in SODPO.[350] The plain and ordinary meaning of substantive is "*of substance*" not form. This is consistent with well-established jurisprudence that the purpose of this denial of benefits test is to prevent treaty protection from being gained through a "shell" company.[351]

278. Helpfully, there is also a significant body of jurisprudence that has been built up over the years as to the requirements for a substantial or substantive business in relation to a denial of benefits provision in an investment treaty. While fewer treaties use the term "substantive", it is submitted that the terms are often used interchangeably and, if anything, "substantial" suggests a greater emphasis on size or quantity and therefore a higher threshold. The Claimant sets out the details of the relevant case authorities at paragraph 463 of the SODPO and does not repeat that here.

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[348] SODPO, para 463; See *AMTO* (**Exh. RLA-72**), para 69; *Big Sky* (**Exh. RLA-85**), paras 275- 286; *Mercuria* (**Exh. CLA-203**), para 570; *Littop* (**Exh. RLA-85**), para 616-618.
[349] *Aris Mining* (**Exh. RLA-80**), para 137.
[350] SODPO, para 458.
[351] The Respondent appears to agree this point (see ROPO, para 125 and 135).

279. For the purpose of denial of benefits, there is no prohibition on purchasing and operating an existing business in the home State. There is also no prohibition on using a trade name (including an existing one) when operating in the home State. Indeed, using established trade names for businesses operating through a joint venture is standard practice. This does not make a business less "substantive". Moreover, the policy rationale for the denial of benefits clauses (to prevent the use of shell companies with no economic connection to the home State[352]), does not require that a business trades under its own name or establishes a new business in the jurisdiction.

Cases where Substantive or Substantial Businesses have been found

280. In the SODPO, the Claimant set out examples of characterises identified by investment tribunals business as establishing a business to be substantive and/or substantial by. As a reminder, such characteristics include:

a. the existence of a physical office, employees, local bank accounts, or local shareholdings are common indicators of substantial business activities;[353]

b. operations that reflect the usual activities of a "typical capital holding company";[354]

[352] *Venezuela v Clorox* (Judgment 4A_398/2021 of the Swiss Federal Tribunal dated 20 May 2022) (**Exh. RLA-142**), para 3.4.2.6.
[353] *Aris Mining,* (**Exh. RLA-80**) para 139; *Pac Rim* (**Exh. RLA-33**), para 4.72.
[354] *Mercuria Energy Group Ltd v. Poland*, SCC Case No. 2019/126, Award, 29 December 2022, (**Exh. CLA-203**), para 570.

c. a small but permanent staff in the home State;[355]

d. the existence of local directors;[356]

e. whether "work is being done for the company" in the territory in question;[357] and

f. leased office space, paid taxes, and held meetings there.[358]

281. The Claimant satisfies all of these elements. Indeed, the Claimant has a far more substantive business in Singapore than most of the examples given in paragraph 463 of the SODPO where businesses were found to be substantive/substantial. In one case, a substantial business was found to exist even where the claimant lacked a physical address or permanent staff in the home State because it had other activities which, taken cumulatively, were sufficient to constitute a substantial business.[359]

282. These cases show that "substantive" is not to be judged by the size of a company's commercial activities in the home State, but by whether a company has done more than simply maintain a registration in the home State (i.e., whether the company is a "shell" company).

283. By any measure, the Claimant satisfies this test. There can be no doubt that the Claimant has a substantive business in Singapore

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[355] *Limited Liability Company AMTO v. Ukraine* SCC Case No. 080/2005, Final Award, 26 March 2008, (**Exh. RLA-72**).

[356] *Masdar Solar & Wind Cooperatief UA v. Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, (**Exh. RLA-81**), paras 253-254.

[357] *NextEra v. Spain*, (**Exh. RLA-74**), para 257.

[358] *9REN Holding SARL v. Spain*, ICSID Case No. ARB 15/15, Award, 21 May 2019 (**Exh. RLA-82**), paras 180-182.

[359] *Big Sky*, (**Exh. RLA-85**) paras 285-286.

and the Respondent's denial of benefits objection must be dismissed.

The Business Does Not Need to be in the Same Industry as the Investment

284. As confirmed in *Aris Mining Corporation v. Colombia*, a company need not conduct its substantive business in a similar sector to that of the investments. The activities of the home State are to be examined on their own merits and not by reference to activities conducted in other jurisdictions.[360]

285. The fact that the Claimant's business in Singapore offers cleaning services does not mean it is a sham or is not a substantive business. There is no requirement in law for the Claimant's employees to be engaged in the mining sector or investment activities (although some of them are, such as the Chief Investment Officer).

e. Conclusion to Substantial Business

286. The Claimant has invested in the JV and operates it. It has done so since January 2020 and continues to do so today. It is a thriving business that has grown under the Claimant's ownership.

287. There is no proper basis on which the deny the benefits of the Treaty to the Claimant. The Respondent is, and has always been, aware that the Claimant operates a substantive business in Singapore. The denial of benefits objection is hopeless and should be dismissed.

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[360] *Aris Mining Corporation v. Colombia*, (**Exh. RLA-80**), para 138; SODPO, para 463(f)(ii).

IV. OBJECTION THREE: ABUSE OF PROCESS

Key Issues

288. Before addressing the respondent's third objection, the Claimant sets out to describe, with accuracy, the three separate disputes that have been raised by the Respondent in the context of this objection.

a. BSIOP or State Agreement Dispute

289. The BSIOP Dispute was a dispute where the relevant date of breach was in 2012 between Mineralogy and the Western Australian Government that was subject to ongoing domestic arbitration. All claims in respect of that dispute were terminated by the Respondent's Western Australian Parliament pursuant to clause 10 of the Amendment Act on 13 August 2020[361]. Clause 10 says as follows:

> ***"10. Relevant arbitrations and awards***
>
> *(1) Any relevant arbitration that is in progress, or otherwise not completed, immediately before commencement is terminated.*
>
> *(2) Any relevant arbitration arrangement, and any relevant mediation arrangement, connected with a relevant arbitration terminated under subsection (1) are terminated.*

[361] *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA), (**Exh. CLA-3**).

(3) The following provisions of the Commercial Arbitration Act 2012 continue to apply in relation to a relevant arbitration terminated under subsection (1) —

(a) sections 27E and 27F;

(b) section 27G in relation to any order made under that section before commencement.

(c) sections 27H and 27I.

(4) The arbitral award made in a relevant arbitration and dated 20 May 2014 is of no effect and is taken never to have had any effect.

(5) The arbitration agreement applicable to that relevant arbitration, and under which that arbitral award is made, is not valid, and is taken never to have been valid, to the extent that, apart from this subsection, the arbitration agreement would underpin, confer jurisdiction to make, authorise or otherwise allow the making of that arbitral award.

(6) The arbitral award made in a relevant arbitration and dated 11 October 2019 is of no effect and is taken never to have had any effect.

(7) The arbitration agreement applicable to that relevant arbitration, and under which that arbitral award is made, is not valid, and is taken never to have been valid, to the extent that, apart from this subsection, the arbitration agreement would underpin, confer jurisdiction to make, authorise or otherwise allow the making of that arbitral award."

290. On 14 August 2020, the termination of the BISOP arbitration by the Amendment Act was confirmed by the Western Australia Government to Mineralogy[362].

The CITIC Matter

291. The CITIC Dispute the Respondent refers to in its Reply was a Western Australian Supreme Court action between CITIC and Mineralogy which was finally determined in Mineralogy's favour by a final judgment of the Western Australian Supreme Court on 7 March 2023.[363]

292. It was a commercial dispute between Mineralogy and the CITIC parties about the interpretation of rights and obligations under the contracts between them. Western Australia was not a party to this dispute. Western Australia had nothing to do with Mineralogy's contractual rights with CITIC and did not intervene in the CITIC Dispute nor did it threaten a measure equivalent to the Amendment Act.

293. The fact that Western Australia did not seek to intervene in the CITIC Dispute was consistent with the precedent set by prior governments, as no state agreement had ever been amended without consent in the 70-year history of state agreements in Western Australia. As explained by former Western Australian Premier, Colin Barnett, that is because the essential feature of a state agreement – and the basis of its value to the counterparty –

[362] Letter from State Solicitor's Office to Mr McHugh dated 14 August 2020 (**Exh. C-430**).
[363] *Sino Iron Pty Ltd v Mineralogy Pty Ltd [No 15]* [2023] WASC 56 (**Exh. CLA-170**).

is the certainty that no amendment will be made without mutual consent:[364]

> *"Whereas other statutes are able to be changed at will,* ***the provisions of State Agreements are only able to be changed by mutual agreement in writing between the parties to each State Agreement. State Agreements therefore provide certainty that ground rules for the life of each agreement project cannot be changed unilaterally.*** *Although State Agreement provisions are not capable of being changed unilaterally, State Agreements do not fetter the power of Parliament to repeal the ratifying Acts.* ***It is testimony to the importance of State Agreements that no Parliament has even attempted such unilateral repeal action."*** (**Emphasis added**)

Amendment Act Dispute

294. The Amendment Act Dispute commenced with the enactment of the Amendment Act and is subject to this arbitration between the Claimant and the Respondent. The details of the Amendment Act Dispute are set out in Section III, paragraph 212 to paragraph 242 of the Claimant's Response.[365]

295. This dispute arises out of the Amendment Act, and the Amendment Act alone. This arbitration would have never commenced had the Amendment Act not been passed.

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[364] Hon Colin Barnett, "State Agreements" [1996] *Australian Mining and Petroleum Law Association Yearbook* 314-323, at 317, (**Exh. C-104)**. At the time of writing, Mr Barnett was the Western Australia Minister for Resources Development.

[365] See also, Claimant's Notice of Intent, 20 October 2022, L305 to L445 (**Exh. C-63**); See generally, *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) Part 3, (**CLA-003**).

296. In this arbitration, the Tribunal is requested to determine whether the Amendment Act breaches Articles 6 and 9 of the Treaty and, if so, what damage has been caused to the Claimant by the Amendment Act. The Notice of Arbitration sets this out clearly in the section entitled "The 2020 Amendment Act Breaches the AANZFTA". [366]

297. Specifically, the Claimant seeks damages for:

a. the denial of justice and discriminatory treatment perpetrated by the Amendment Act through the wrongful termination of the Arbitration Agreement; and

b. the expropriation of the Claimant's rights and property including the loss of opportunity, and future projects as a result of the sovereign risk created by the Amendment Act, making the development of the tenements by the Claimant's subsidiaries impossible.

298. The claimed breaches by the Claimant in this arbitration are based solely on the Amendment Act. As discussed further below, it is the specific dispute before this Tribunal that must be foreseeable for an abuse of process objection to be successful. It is incontestable that the specific dispute before this Tribunal is whether the Amendment Act breaches the Respondent's obligations under the AANZFTA.

[366] See Notice of Arbitration (as amended on 30 September 2023), paras 32-38.

Admission by the Respondent

299. The Respondent has admitted in paragraph 241 of its Reply that the Amendment Act was not foreseeable at the time the Claimant made its investment.[367]

300. The President of the Tribunal in this Arbitration stated at paragraph 37 of Procedural Order No. 4 (**PO4**) (**Exh. CLA-261**)[368] as follows:

> "*However, the Tribunal understands that the Respondent acknowledges that the fact of the passing of the Amendment Act per se was not foreseeable to the Claimant at the time of the January 2019 Restructure.[46] Indeed, referring to evidence already in the record and in part furnished by the Claimant, the Respondent concedes that the Amendment Act was not conceptualized before March-May 2020;[47] that the draft bill that would become the Amendment Act was not approved before July 2020;[48] and that the draft bills were not only kept secret,[49] but were accessible only to a handful of high-level public officials [50]*"

301. The footnotes referred to by the Tribunal in paragraph 3 of PO4 (quoted above) are as follows (using the Tribunal's footnote numbering):

> Footnote 46: *The Tribunal's understanding should not be construed as prejudging the APO, and is subject to change in view of the Parties' further briefing on the matter.*

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[367] ROPO para 241; see also *Zeph Investments Pte Ltd v Australia* (PCA Case No 2023-40, Procedural Order No. 4, 24 May 2024), (**Exh. CLA-261**), Annex A, p. 8.

[368] *Zeph Investments Pte Ltd v Australia* (PCA Case No 2023-40, Procedural Order No. 4, 24 May 2024), (**Exh. CLA-261**).

Footnote 47: *See inter alia Annex A, Respondent's Objections to the Claimant's Request No. 1 ("The Claimant seeks documents evidencing "the date on which the concept of the draft legislation which became the Amendment Act was first conceived or proposed". The Federal Court of Australia has found that Mr Mark McGowan and Mr John Quigley discussed the prospect of legislation as a means of dealing with Mr Palmer's damages claim from about March 2020 (Palmer v McGowan (No 5) [2022] FCA 893 at para. 27, Exh. R-166.").*

Paragraph 27 of the judgement referred to by the Respondent reads as follows: "Mr McGowan said that from about March 2020, he and Mr Quigley were discussing the prospect of legislation as a means of dealing with the problem represented by Mr Palmer's damages claim: T463.21–464.1. In late May Mr Quigley and Mr McGowan had an SMS exchange in the following terms […]" (R-166, ¶ 27, emphasis added). The Claimant has furnished the "late May […] SMS exchange" between Messrs. McGowan and Mr. Quigley referred to by the Federal Court of Australia as C-432, and on that basis argues that it could not have foreseen the passing of the Amendment Act (see inter alia, SOPO Response, ¶ 35). See inter alia SOPO Response, ¶ 35 quoting C-432, Text messages between Mr Quigley and Mr McGowan, May 2023.

Footnote 48: *See inter alia Annex A, Respondent's Objections to the Claimant's Request No. 1 ("In relation to the 'date on which work first commenced on the drafting of the draft legislation which became the Amendment Act', the evidence on the record establishes that, in July 2020, Mr McGowan and*

Mr Quigley approved the drafting of the bill that would become the Amendment Act (Affidavit of Mr McGowan dated 26 March 2021 Exh. C-135; p. 136 at para 78).").

Footnote 49: *See inter alia Annex A, Respondent's Objections to the Claimant's Request No. 1 ("In relation to the Claimant's position that 'the extent to which any such drafts of the Amendment Act were circulated internally at the Respondent is also relevant to the secrecy maintained during the preparation of the Amendment Act', 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 (text messages between Mr Quigley and Mr McGowan on 23 May 2020, extracted in Palmer v McGowan (No 5) [2022] FCA 893 at Annexure A, Exh. R-166; ABC Radio interview transcript, Exh. C-127; Affidavit of Mr Quigley dated 25 March 2021, Exh. C-135, p. 115 at paras. 7-9; Affidavit of Mr McGowan dated 26 March 2021, Exh. C-135; p. 136 at para 78)). On that basis, the Claimant is not entitled to the production of the documents sought.").*

Footnote 50: *See inter alia Annex A, Respondent's Objections to the Claimant's Request No. 3 ("Insofar as the Claimant seeks these documents to prove that 'the Amendment Act was prepared in secret', the fact that the Amendment Act was prepared in confidence is already proven by the evidence on the record, and is not contested by the Respondent. The Respondent repeats its objection in relation to Request No. 1. Insofar as the Claimant seeks these documents to prove '[t]he extent to which the WA Cabinet was (or was not briefed) about*

the Amendment Act', that is also a fact that is already proven by the evidence on the record, or otherwise not contested by the Respondent. Other than Mr Mark McGowan and Mr John Quigley, and potentially one or two other Ministers, no member of Cabinet was aware of the existence of the draft legislation until a Cabinet meeting at 4.15pm on 11 August 2020 (45 minutes before the Bill was introduced into Parliament) (Palmer v McGowan (No 5) [2022] FCA 893 at para. 30, Exh. R-166).")

302. The Respondent has, therefore, admitted that the Amendment Act was not foreseeable yet maintains on unarguable grounds contrary to law its abuse of process argument.[369]

The Respondent's case does not accord with the Law

303. The Respondent's case is that the restructuring of the Mineralogy Group was carried out in late 2018 in the face of an ill-defined general but foreseeable risk that Western Australia would unilaterally amend the State Agreement in some way adverse to the interests of the Claimant and its subsidiaries at some stage, and that this is sufficient to constitute an abuse of right. The Respondent remarkably adopts that position despite its conduct during the material period which indicated, incontrovertibly and emphatically, that it was engaging in the then ongoing arbitration in good faith with no indication of any alternative approach.

304. As discussed below, under international law the orthodox and established position is that an abuse of right occurs where a

[369] ROPO para 241; see also *Zeph Investments Pte Ltd v Australia* (PCA Case No 2023-40, Procedural Order No. 4, 24 May 2024), (**Exh. CLA-261**), Annex A, p. 8.

specific measure which gives rise to a specific treaty claim is objectively foreseeable to an investor and is likely "*to a very high degree"*[370] or "*reasonably foreseeable*" to occur at the time of the relevant corporate restructuring.[371] Critically in the circumstances of the present case:

a. a degree of specificity regarding the treaty claim is required to ensure that the test for abuse strikes a fair balance between the need to safeguard an investor's right to invoke the protection of an investment treaty in the context of a legitimate corporate restructuring, and the need to deny protection to abusive conduct;[372] and

b. a mere *"possibility"* that a dispute might occur will not be sufficient,[373] because it is a perfectly legitimate act of corporate planning to restructure an investment to obtain treaty protection against the general risk of future disputes with a host state.[374]

305. The Respondent's objection on "abuse of process" is not arguable in accordance with international law.

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[370] *Venezuela v Clorox II*, paragraph 5.3 (**Exh. RLA-142**). See also, for example, *Pac Rim Cayman LLC v The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, (**Exh. RLA-33**) paragraph 2.99 (*" … the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy"*).

[371] *Clorox v Venezuela* (PCA Case No 2015-30, Award dated 17 June 2021) (**Exh. CLA-239**), para 249.

[372] *Levy v Peru* (ICSID Case No ARB/11/17, Award of 9 January 2015) (**Exh. CLA-188**), para 185.

[373] *Venezuela v Clorox* (Judgment 4A_398/2021 of the Swiss Federal Tribunal dated 20 May 2022) (**Exh. RLA-142**), para 5.6.

[374] *Tidewater v Venezuela* (ICSID Case No ARB/10/5, Decision on Jurisdiction of 8 February 2013) (**Exh. RLA-93**), para 184; *Levy v Peru* (ICSID Case No ARB/11/17, Award of 9 January 2015) (**Exh. CLA-188**), para 184; *Philip Morris Asia v Australia* (PCA Case No 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015) (**Exh. RLA-95**), para 540.

306. The “abuse of process” objection cannot succeed as it is common ground that the Amendment Act was not foreseeable and the only relevant date is 13 August 2020, the date the Amendment Act was enacted.[375]

307. The Respondent’s “abuse of process” objection is, therefore, an abuse itself (see paragraphs 146 to 161 of the Claimant’s Response). The only claims under the Treaty brought by the Claimant are claims which arise directly out of the Amendment Act and which did not exist prior to the enactment of that Act.

b. Abuse of Process Objection by the Respondent

308. The Respondent’s objection to jurisdiction is based on the principle of abuse of process.[376] The Respondent contends that the interposition of the Claimant into the ownership structure of Mineralogy and International Minerals on or about 21 January 2019 (the **Restructuring**) was an impermissible manoeuvre to gain protection of the Treaty in circumstances where the dispute before the Tribunal was objectively foreseeable to a reasonable commercial actor in the Claimant’s shoes.

309. The parties have fundamentally different views about the nature of the dispute before this Tribunal, and whether it was objectively foreseeable to a reasonable investor at the time of the Restructuring.

310. Despite the earlier admissions that the relevant dispute is the Amendment Act Dispute, the Respondent’s position for the purposes of this objection is that the passage of the Amendment

[375] ROPO, para 131.
[376] SOPO, paras 16, 264; ROPO, paras 5, 269.

Act did not give rise to a new dispute, but was merely the *"playing out of a pre-existing domestic dispute"* between Western Australia and Mineralogy.[377] According to the Respondent, the Claimant's treaty claim is *"the latest chapter in this longstanding dispute"*, which it defines broadly to include not only the BSIOP Dispute between Mineralogy and Western Australia, but also the role of Western Australia in the CITIC Dispute between Mineralogy and the CITIC Parties.[378]

311. The Respondent casts an erroneously broad net regarding the foreseeability of the dispute. It contends that the question is not whether the passage of Amendment Act itself was reasonably foreseeable, but rather, whether those associated with the Claimant ought reasonably to have foreseen that Western Australia might adopt any *"measures that unilaterally impacted Mineralogy's rights under the State Agreement, being measures which might give rise to a treaty claim"*.[379] Effectively, the Respondent's case is that the Restructuring was carried out in the face of an ill-defined general but foreseeable risk that Western Australia would unilaterally amend the State Agreement in some way adverse to the interests of the Claimant and its subsidiaries at some stage, and that this is sufficient to constitute an abuse of right.

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[377] SOPO, para 352; ROPO, para 5: *"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".*

[378] SOPO, para 285: *"The dispute between the parties about the Western Australia Government's conduct in relation to Mineralogy's rights under the State Agreement subsequently broadened, including in view of the legality of any unilateral amendment of the State Agreement by Western Australia to address disputes that had arisen between Mineralogy and the CITIC Parties."* See also Respondent's ROPO at [242]: *"The dispute before this tribunal…is a dispute concerning the WA Government's conduct in relation to the BSIOP Proposal…which crystallised through the unilateral adoption…of a measure of the type envisaged and contested by the parties in relation to the CITIC Dispute."*

[379] SOPO, para 316; ROPO, para 243.

The Legal Test for Abuse of Process

312. That approach to foreseeability and abuse of right is misguided.[380]

313. The Claimant sets out below the orthodox and established law on abuse of process. This law has been deliberately obfuscated by the Respondent in its submissions because the Respondent knows it cannot succeed in its abuse of process claim on the law as it currently stands. The Respondent's incorrect legal theory is addressed below.

314. The correct position is that an abuse of right occurs where a specific measure which gives rise to a specific treaty claim is objectively foreseeable to an investor and is likely "*to a very high degree"*[381] or was "*reasonably foreseeable*" to occur at the time of the relevant corporate restructuring.[382] Critically in the circumstances of the present case:

    a. a degree of specificity regarding the treaty claim is required to ensure that the test for abuse strikes a fair balance between the need to safeguard an investor's right to invoke the protection of an investment treaty in the context of a

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[380] *Tidewater v Venezuela* (ICSID Case No ARB/10/5, Decision on Jurisdiction of 8 February 2013) (**Exh. RLA-93**), para 184; *Levy v Peru* (ICSID Case No ARB/11/17, Award of 9 January 2015) (**Exh. CLA-188**), para 184; *Philip Morris Asia v Australia* (PCA Case No 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015) (**Exh. RLA-95**), para 540.

[381] *Venezuela v Clorox II*, paragraph 5.3 (**Exh. RLA-142**). See also, for example, *Pac Rim Cayman LLC v The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, (**Exh. RLA-33**) paragraph 2.99 (*" … the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy"*).

[382] *Clorox v Venezuela* (PCA Case No 2015-30, Award dated 17 June 2021) (**Exh. RLA-142**), para 249.

legitimate corporate restructuring, and the need to deny protection to abusive conduct;[383] and

b. a mere *"possibility"* that a dispute might occur will not be sufficient,[384] because it is a perfectly legitimate act of corporate planning to restructure an investment to obtain treaty protection against the general risk of future disputes with a host state.

315. Abuse of right is a well-recognised concept in investment treaty jurisprudence. The heart of the principle is that it is an abuse of process for an investor to restructure its investment to obtain treaty protection at a time when a specific dispute is objectively foreseeable to a reasonable investor. The other side of the coin, equally recognised by investment treaty tribunals, is that it is a perfectly legitimate act of corporate planning to restructure an investment to obtain treaty protection against the general risk of future disputes with a host state.[385]

316. It is trite to note at the outset that it is for the party alleging abuse to establish the facts upon which it bases that claim[386] and the threshold for a finding an abusive initiation of an investment claim is high.[387] There can be no presumption of abuse and a Tribunal

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[383] *Levy v Peru* (ICSID Case No ARB/11/17, Award of 9 January 2015) (**Exh. CLA-188**), para 185.

[384] *Venezuela v Clorox* (Judgment 4A_398/2021 of the Swiss Federal Tribunal dated 20 May 2022) (**Exh. RLA-142**), para 5.6.

[385] *Tidewater v Venezuela*, (**Exh. RLA-93**), para 184; *Levy v Peru*, (**Exh. CLA-188**), para 184; *Philip Morris v Australia*, (**Exh. RLA-95**), para 540; *Venezuela v Clorox*, (**Exh. RLA-142**), para 5.2.3.

[386] *Alverley v Romania* (ICSID Case No ARB/18/30, Excerpts of Award of 16 March 2022) (**Exh. RLA-71**), para 364; *Pac Rim v El Salvador* (ICSID Case No ARB/09/12, Decision on Jurisdiction of 1 June 2012) (**Exh. RLA-33**), para 2.15.

[387] *Philip Morris*, (**Exh. C-95**), para 539.

will affirm an abuse only in *"very exceptional circumstances"*.[388] Satisfying the burden of proof for an abuse of this nature requires "*more persuasive evidence*" than usually required.[389] The "*threshold for finding treaty abuse is high, which is why it should not be accepted too readily.*"[390]

Abuse of Process: *Clorox v Venezuela*

317. In the context of this case (seated in Geneva), two of the most pertinent decisions on abuse of process are those of the arbitral tribunal in *Clorox v Venezuela* and the subsequent challenge to that decision in the Swiss Federal Court.[391]

318. This was a case that arose out of a law implemented by the Venezuelan government that changed the price regulation regime and thereby impacted the claimant's business. At issue in the case was a restructure that took place in April 2011, whereby a Spanish company was inserted into the corporate chain by way of a share swap. The claimant in the arbitration was the Spanish holding company which claimed protection under the Spain-Venezuela BIT. A few months before the restructure, in January 2011, the Venezuelan government had announced that it was undertaking preparations of a law to regulate prices and that would create an authority in charge of setting prices. After the restructure had been

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[388] *Levy v Peru*, (**Exh. CLA-188**) para, 186; *Alverley*, (**Exh. RLA-71**), para 366; *Venezuela v Clorox II*, (**Exh. RLA-142**), para 5.2.3; Decision of the Swiss Supreme Court (*Clorox*), 4A_398/2021, 20 May 2022 (**Exh. RLA-142**), para 5.2.4; Decision of the Swiss Supreme Court (*Natland*), 4A_80/2018, 7 February 2020, (**Exh. CLA-235**), para 4.8; Decision of the Swiss Supreme Court (*Yukos*), 4A_492/2021, 24 August 2022, (**CLA-238**) para 8.1.

[389] SODPO, para 649; *Alverley Investments Ltd v. Romania* (**Exh. RLA-71**), para 366.

[390] Decision of the Swiss Supreme Court, 4A_398/2021, 20 May 2022 (**Exh. RLA-142**), para 5.2.3 (citing *Gremcitel v. Peru* (**Exh. RLA-96**), para 186; *ConocoPhillips v. Venezuela* (**RLA-94**), para 275; *Philip Morris Asia Ltd. v. Australia*, (**RLA-95**) para 539); SODPO, paras 647-657.

[391] Decision of the Swiss Supreme Court, 4A_398/2021, 20 May 2022 (**Exh. RLA-142**).

completed, Venezuela enacted the law on price regulation which had the effect of setting prices below production costs for 73% of its goods. This was the subject of the dispute in the arbitration.

319. The majority of the arbitral tribunal and the Swiss Federal Court confirmed that while the State's announcement in January 2011 raised the possibility that a dispute may arise between the parties, a reasonable investor, placed in the same circumstances, would not have inferred from the speech that a specific dispute was foreseeable. The Court agreed that, while the restructure was likely the result of the government's announcement which caused the investor to fear the adoption of measures that could potentially affect the profitability of the investment, the restructuring was not abusive because a specific dispute was not foreseeable at the time it took place.

320. In the arbitration, the distinguished tribunal (presided over by Professor Bernard Hanotiau) dismissed the abuse of process objection and set out the following conclusions on the legal test for abuse:

a. When determining whether an abuse occurred, a tribunal may take account of the first steps taken towards restructuring, not just the date on which the restructuring occurred.[392]

b. If "*the dispute submitted to the Tribunal*" was not foreseeable at the time of the restructure, any abuse of process can be excluded.[393]

[392] *Clorox v Venezuela* Award, (**Exh. C-239**), paras 427-429.
[393] *Clorox v Venezuela* Award, (**Exh. C-239**), para 428.

c. It is only if the dispute was foreseeable at the time of the restructure, that the question of whether or not the restructuring operation was carried out with a view to this foreseeable dispute could be considered.[394]

d. The foreseeability requirement for an abuse of process must relate to "*the specific dispute as it is shaped in the arbitration proceedings*"[395] and the "*object of foreseeability must be a specific dispute*".[396]

e. It is important to identify "*the first measure or practice constituting the alleged breach of the Treaty*" and to determine whether its adoption or implementation was foreseeable at the critical date.

f. Concurring with *Tidewater v. Venezuela,* the Tribunal confirmed that it is perfectly legitimate for an investor to seek the protection of a treaty to protect itself from the general risk of litigation with the host State.[397]

321. The tribunal found:[398]

> *[447]* ***The object of foreseeability must be a specific dispute****. As the Tribunal in the case of Tidewater v. Venezuela stated, it is perfectly legitimate for an investor to seek the protection of a treaty to protect itself from the general risk of litigation with the host State. In order to offer this protection to*

[394] *Clorox v Venezuela* Award, (**Exh. C-239**), para 428.
[395] *Clorox v Venezuela*, (**Exh. C-239**), para 441.
[396] *Clorox v Venezuela*, (**Exh. C-239**), para 447.
[397] *Clorox v Venezuela*, (**Exh. C-239**), para 447.
[398] *Clorox v Venezuela*, (**Exh. CLA-239**), paras 448-450.

their investors, States sign investment protection treaties with arbitration clauses.

[448] it is the foreseeability of a specific dispute that must be assessed [and the Parties agree that] [a] ***foreseeable dispute is more than a possible dispute****: the simple possibility that a dispute may arise between an investor and a State of another nationality is not enough to constitute an abuse of process … foreseeability must refer to a specific type of dispute, namely, not to any dispute in general, but to a* ***specific type of dispute that, eventually, proves to be the one challenged by the restructured investor****.*

[450] it is important to identify ***the first measure or practice constituting the alleged breach of the Treaty*** *and to determine whether its adoption or implementation was foreseeable at the critical date.* (Emphasis added.)

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

323. The Swiss Federal Court agreed with the arbitral tribunal's conclusions that the facts did not establish an abuse of process. It held that "*a restructuring must have been carried out with a view to a specific dispute at a time when its occurrence was foreseeable*."[399] It also stated that foreseeability was an objective

[399] Decision of the Swiss Supreme Court, 4A_398/2021, 20 May 2022 (**Exh. RLA-142**), para 5.2.4.

test and that it is "*appropriate to ask whether a specific dispute would have been foreseeable for a reasonable investor placed in the same situation as the investor concerned at the time the investment was restructured*."[400]

324. The Court noted the exceptional nature of the remedy and stated that "*the criterion of foreseeability of the dispute must be assessed restrictively.*"[401] It also confirmed that restructuring an investment for treaty protection is not abusive unless it is carried out at a time when a "*specific future dispute*" with the host state is foreseeable.[402]

325. Importantly, the Court espoused a two-step approach to abuse of process:

> *[1] It is up to the party claiming the existence of an abuse of rights to allege and prove the facts establishing the foreseeability of the dispute when the investment was restructured …*
>
> *[2] If this is proven, the reorganization of the investment structure will be presumed to have been carried out with a view to the aforementioned dispute and will therefore be considered abusive. The investor concerned may, however, rebut this presumption by demonstrating that the restructuring, carried out at a time when the dispute was foreseeable, was in fact undertaken primarily for*

[400] Decision of the Swiss Supreme Court, 4A_398/2021, 20 May 2022 (**Exh. RLA-142**), para 5.2.4.
[401] Decision of the Swiss Supreme Court, 4A_398/2021, 20 May 2022 (**Exh. RLA-142**), para 5.2.4.
[402] Decision of the Swiss Supreme Court, 4A_398/2021, 20 May 2022 (**Exh. RLA-142**), para. 5.2.3.

reasons other than that of benefiting from the protection offered by an investment treaty.[403]

326. The timing issue – by which the time a specific dispute becomes objectively foreseeable is assessed as against the timing of the relevant corporate structuring – is the primary test. If the specific dispute in this case was not objectively foreseeable at the time of the Restructuring, then there can be no abuse of right, regardless of whether or not there were commercial reasons for the restructure other than investment treaty protection. In this scenario, the Restructuring is permissible in that it seeks to protect against a general risk of adverse state action, not a specific foreseeable risk.

327. The Claimant's case is that the Respondent's objection does not pass the timing test, so there can be no abuse of right. But in any event, if it is necessary to address them at all, there were *bona fide* commercial reasons for the Restructuring. (Those commercial reasons are addressed in the First Palmer WS and the witness statements of Domenic Martino and Nui Harris. The Respondent has not filed any factual evidence which takes issue with these matters.)

328. As explained in the introduction to this section of the Rejoinder, the central issue in this case is the definition of the foreseeable dispute (the object of foreseeability) and the level of probability of that dispute arising. The Claimant submits that what must be objectively foreseen (the object of foreseeability) is the measure which ultimately gives rise to the treaty claim – not simply a general risk of adverse state measures - and the measure must be a real

[403] Decision of the Swiss Supreme Court, 4A_398/2021, 20 May 2022 (**Exh. RLA-142**), para 5.2.4

prospect, which is probably to a very high degree, and not simply a possible but unlikely one.

329. On examining the facts, the Swiss Federal Tribunal in *Clorox* decided:[404]

> "*The presidential speech in question certainly raised the possibility that the measures announced might eventually give rise to a dispute between investors and Venezuela. It's a long way from concluding that a reasonable investor in the same circumstances would have been able to infer from such a statement that a specific future dispute was foreseeable on that basis alone. In this respect, it must first be stressed that the terms chosen by the former Head of State could well have been a mere announcement designed to galvanize his supporters. It is therefore not possible to infer from the words spoken by the former President of the State concerned that they would predictably result in the adoption of concrete measures. Secondly, despite the appellant's claims to the contrary, the vague outlines of this short extract from a lengthy presidential speech delivered on January 15, 2011 in no way made it possible to predict whether the products marketed by an investor would actually be affected by the planned state measures. Nor did they make it possible to foresee that they would be on such a scale as to lead to litigation.*"

330. It is evident from these remarks that the Court placed emphasis on the certainty of the type of measure and its impact – vague statements will not be sufficient to make a specific dispute

[404] Decision of the Swiss Supreme Court, 4A_398/2021, 20 May 2022 (**Exh. RLA-142**), para. 5.6.

foreseeable. This is also the reason that the Federal Tribunal distinguished *Philip Morris v Australia.* The Court said that in *Philip Morris*, in contrast to the *Clorox* facts, there was no uncertainty about the Australian government's intention to introduce tobacco plain packaging legislation in the latter case. Philip Morris had also informed the Australian government prior to the restructure (as early as 2009) that the plain packaging measures would infringe its intellectual property rights.[405]

Application of the *Clorox* Test to the Present Case

331. The Respondent's case on abuse of process is hopeless when the law as established by the Swiss Court (upholding the arbitral tribunal's decision) in *Clorox v Venezuela* is applied.

332. The law is clear that the specific dispute (being the first measure or practice that constitutes the alleged breach of the treaty) must have been foreseeable. In the present case, the measure or practice is the Amendment Act (and the substantive measures it put in place). No other measure is alleged to have breached the Treaty in this case, nor has the Tribunal been asked to determine any dispute other than liability arising from the Amendment Act.

333. In particular, the Tribunal has not been asked to determine whether Mr Barnett's decision to reject the BSIOP proposal was lawful under the State Agreement Act. This dispute has already been determined by the Hon. Michael McHugh AC KC.

334. The Tribunal has certainly not been asked to make any findings regarding the contractual dispute or the dispute over land between

[405] Decision of the Swiss Supreme Court, 4A_398/2021, 20 May 2022 (**Exh. RLA-142**), para. 6.

Mineralogy and CITIC. Neither Mineralogy nor CITIC are parties to this Arbitration and both of those disputes were resolved in Mineralogy's favour by the Western Australian Courts[406].

The Claimant's Position is Consistent with Other Decisions of the Swiss Court

335. The Swiss Court's decision in *Clorox v Venezuela* is consistent with its previous decision in *Natland v Czech Republic*.[407] This decision is pertinent as the arguments raised by the Czech Republic in the *Natland* case bear many similarities to those of the Respondent in this case.

336. In *Natland*, the Czech Republic argued that the claimant was not entitled to treaty protection as the investments were ultimately owned by Czech nationals and had been internationalised through two restructurings (in Cyprus and the Netherlands) only once the solar reform legislation at issue in the case was imminent and foreseeable.[408]

337. The Court rejected this argument even though the Czech government had announced its intention to abolish the solar incentive scheme a few months before the restructurings took place and the Czech government was already in dispute with two other investors in the sector at the time of the restructurings. The Court noted that, having announced its intentions regarding the legislation, the government then made another announcement (following industry pressure) that the reductions would only apply

[406] *Sino Iron Pty Ltd v Mineralogy Pty Ltd [No 15]* [2023] WASC 56 (**Exh. CLA-170**).
[407] Decision of the Swiss Supreme Court, 4A_80/2018, 7 February 2020, (**Exh. CLA-235**).
[408] Decision of the Swiss Supreme Court, 4A_80/2018, 7 February 2020, (**Exh. CLA-235**) para 4.2.

to those who connected to the grid after a certain date. This second announcement took place after the first restructuring but before the second one. There was also due to be an election the following year. A year later, the Czech Republic enacted a different measure (a solar levy) to achieve the same result as the repeal of the incentive scheme. It was this measure that was at issue in the arbitration.

338. The Court found that, at the time of the restructurings, there was no indication that the Czech Republic would enact the solar levy for all industry participants, which was a different measure to the incentive reduction that had previously been announced. Thus, the Federal Tribunal distinguished between the pre-existing general dispute which arose from the announcement of a future amendment to the incentive scheme, and the specific dispute that gave rise to the arbitration (i.e., the enactment of the solar levy).

339. The Swiss Tribunal's reasoning in *Clorox v Venezuela* and *Natland v Czech Republic* was reaffirmed in its most recent decision on abuse of process, *Yukos Capital v Russia*.[409] In the *Yukos* case, the Court held that, to find abuse of process it was "*necessary to consider whether a specific dispute would have been foreseeable for a reasonable investor placed in the same situation as the investor concerned at the time of the restructuring of the investment in the light of all of the particular circumstances of each case.*"[410] The Court confirmed that the specific dispute was not

[409] Decision of the Swiss Supreme Court, 4A_492/2021, 24 August 2022, (**Exh. CLA-238**).
[410] Decision of the Swiss Supreme Court, 4A_492/2021, 24 August 2022, (**Exh. CLA-238**), para 8.1 (emphasis added).

foreseeable to a reasonable investor, based on the facts established in the award.

The Claimant's Position is Consistent with other Relevant Jurisprudence

340. Aside from the Swiss law decisions, the most relevant authority for present purposes is *Philip Morris v Australia*. The tribunal in that case undertook a thorough analysis of the authorities on abuse of process and it is widely cited as a key case on abuse of process.

341. In *Philip Morris v Australia*, the Tribunal carefully examined the law on abuse of process (or abuse of rights). It concurred with the well-established principle that restructuring an investment to gain treaty protection is not itself an abuse.[411] The key is the timing of the restructure and whether the dispute at issue was foreseeable when the restructure occurred. The tribunal considered that "*a dispute is foreseeable when there is a reasonable prospect, as stated by the Tidewater tribunal, that a measure which may give rise to a treaty claim will materialise*."[412]

342. The tribunal's conclusions are consistent with a raft of other authorities:[413]

    a. *Lao Holdings v Laos* confirmed that it was an abuse to restructure after the claimant is fully aware of "*the legal dispute*" at issue.[414]

[411] (**Exh. RLA-95**), The case law on this point is examined by the Tribunal at paras 540-544.
[412] *Philip Morris v Australia*, (**Exh. RLA-95**), para 554.
[413] For further references, see SODPO, para 665.
[414] *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014, (**Exh. CLA-150**), para 70.

b. The *Pac Rim* tribunal confirmed that it may be an abuse of process to restructure when a party can "*foresee a specific future dispute as a very high probability and not merely as a possible controversy.*"[415]

c. In *Tidewater v Venezuela*, the Tribunal said that it was "*a question of fact as to the nature of the dispute between the parties and a question of timing as to when the dispute that is the subject of the present proceedings arose or could reasonably have been foreseen*."[416] the Tribunal focussed on "the dispute that is the subject of the present proceedings".[417]

d. *Levy v Peru* and *Pac Rim v El Salvador* both utilise a test of a specific future dispute with a very high probability.[418]

e. Similarly, the *Alverley* case cited by the Respondent in its Reply[419] emphasises the "critical date" with reference to foreseeability of the measure that is alleged to breach the treaty as a reasonable prospect:

> *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*

[415] *Pac Rim*, Decision on the Respondent's Jurisdictional Objections, (**Exh. RLA-33**), para 2.99.
[416] *Tidewater,* Decision on Jurisdiction, (**Exh. RLA-93**), paras 145–146 and 184.
[417] *Tidewater v Venezuela*, (**Exh. RLA-93**), para 145.
[418] *Levy v Peru*, (**Exh. CLA-188**), para 187; *Pac Rim*, (**Exh. RLA-33**), para 2.10 and 2.99.
[419] *Alverley*, (**Exh. RLA-71**), para 386, cited in ROPO at para 249.

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****.* (Emphasis added)

f. In *Ipek v Turkey*, the Tribunal emphasised that the object of foreseeability must be a specific dispute, which is to be determined by reference to the essence of the claimant's claim:[420]

As a matter of law, a distinction is to be drawn between the restructuring of an investment at a time:

a. when the investor seeks to protect itself from the general risk of future disputes with a host state, which is a legitimate goal and no abuse of an investment protection treaty; and,

b. when a ***specific dispute was foreseeable****, namely, when there is a reasonable prospect…that* ***a measure which may give rise to a treaty claim*** *will materialise.*

[…]

In the context of this case, the Tribunal proceeds on the basis that ***what must be reasonably foreseeable -***

[420] *Ipek v Turkey* (ICSID Case No ARB/18/18, Award of 8 December 2022) (**Exh. RLA-99**) paras 320 and 325.

that is: foreseeable to a reasonable person in the position of the investor*.* (Emphasis added.)

343. In the Claimant's submission, the measure giving rise to the relevant treaty claim must be well-defined and apparent, even in circumstances where there are existing disputes or circumstances of general enmity between an investor and a host state. Usually, to be foreseeable in the requisite sense, a specific measure is announced or in some other way communicated by the government to the claimant or the wider commercial world. It is not enough to establish an abuse to say that a claimant should have anticipated or imagined an adverse measure. Governments are free to act as they see fit and it is always possible for an investor to imagine any number of adverse measures which a government could conceivably adopt in respect of a claimant's investment.

344. In addition, the law is clear that a state of heightened tension, hostility, or dispute between the investor and the host state does not mean that the investor ought to foresee that the state might take an adverse measure against it. In *Tidewater*, the claimant brought proceedings against Venezuela in respect of a law which expropriated the assets of its Venezuelan subsidiary (**SEMARCA**).[421] At the time the treaty claim was filed, SEMARCA was already engaged in an existing commercial dispute with the Venezuelan state-owned oil company (**PDVSA**) over arrears payable by PDVSA to SEMARCA, and whether SEMARCA would renew its contract with PDVSA.[422] Venezuela alleged that the

[421] *Tidewater Inc. v the Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5) (Decision on Jurisdiction) 8 February 2013, (**Exh. RLA-93**).

[422] *Tidewater*, (**Exh. RLA-93**), para 145.

treaty claim was merely an extension of the pre-existing dispute between SEMARCA and PDVSA, and that the claimant had been incorporated to access investment treaty jurisdiction for a dispute which was already in existence.[423]

345. The *Tidewater* Tribunal dismissed that argument.[424] The expropriation law which was the subject of the treaty claim was plainly new and distinct from the *"ordinary commercial dispute"* between PDVSA and SEMARCA.[425] The existence of that commercial dispute did not mean that Venezuela's later expropriatory actions should have been expected: the Tribunal held that the expropriation was not reasonably foreseeable at the time of the restructuring.[426] It was relevant to the Tribunal's assessment of foreseeability that despite the dispute with SEMARCA, PDVSA's actions at the time of the restructuring were *"consistent with a continuing will to trade"*, and its language *"consistent with a negotiated contractual solution and not with expropriation."* [427] That conduct pointed against a reasonably foreseeable expropriation of the claimant's investment.

346. Similarly, *Mobil v Venezuela* concerned a corporate restructure designed to gain treaty protection at a time where there were existing disputes with the host state.[428] The Dutch claimant (**Mobil BV**) was inserted into the ownership chain of the Venezuelan

[423] *Ibid*, para 50, 144.
[424] *Ibid,* para 192.
[425] *Ibid,* para 191.
[426] *Tidewater*, (**Exh. RLA-93**), para 197.
[427] *Ibid,* para 195.
[428] *Mobil v Venezuela* (ICSID Case No ARB/07/27, Decision on Jurisdiction of 10 June 2010) (**Exh. RLA-92**).

investments (**Mobil Venezuela**) in 2006.[429] At the time of the restructuring, it was acknowledged that there were disputes between the parties concerning the enactment of higher royalty and income tax rates.[430] It was also accepted that the sole purpose of the restructuring was to obtain treaty protection.[431]

347. In January 2007, Venezuela announced measures to nationalise certain oil projects, including those of Mobil Venezuela.[432] By June 2007, Mobil's investment had been fully expropriated.[433] Mobil BV brought a claim under the Netherlands-Venezuela BIT in respect of the expropriation of its investment.[434] Venezuela argued that the claim constituted an abuse of right, because the restructuring was effected at a time when the dispute was foreseeable.[435]

348. The *Mobil* Tribunal was careful to distinguish between different disputes in its assessment of foreseeability: in respect of the pre-existing tax and royalty disputes (for which the claimant did not invoke the protection of the treaty), it was clear that the Tribunal did not have jurisdiction.[436] However, the existence of those pre-existing disputes did not disqualify the Tribunal's jurisdiction in respect of the nationalisation law, which was enacted after the restructuring.[437] It is implicit in the Tribunal's reasoning that the

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[429] *Ibid*, para 203.
[430] *Ibid,* para 19, 202.
[431] *Ibid,* para 190, 204.
[432] *Mobil v Venezuela* (ICSID Case No ARB/07/27, Decision on Jurisdiction of 10 June 2010) (**Exh. RLA-92**).
[433] *Ibid,* para 31.
[434] *Mobil v Venezuela* (ICSID Case No ARB/07/27, Decision on Jurisdiction of 10 June 2010) (**Exh. RLA-92**).
[435] *Ibid,* para 188.
[436] *Ibid,* para 205.
[437] *Mobil v Venezuela* (ICSID Case No ARB/07/27, Decision on Jurisdiction of 10 June 2010) (**Exh. RLA-92**).

adverse tax and royalty measures which Venezuela had already imposed upon Mobil were not sufficient to put it on notice that Venezuela might foreseeably take further adverse measures against its interests.[438]

349. Another pertinent example is *Aguas del Tunari v Bolivia*.[439] In that case, the claimant (**Aguas**) was a Bolivian company ultimately owned by Bechtel, a US company.[440] Aguas had been granted a 40 year concession to operate the water and sewerage services for a Bolivian city. Between November and December 1999, two Dutch companies were inserted into the corporate ownership chain of Aguas.[441] The concession had faced strong popular opposition from the outset.[442] At time of the restructure, citizen groups and civil society organisations had expressed strong concerns about the concession, and had in some cases called for its annulment.[443] Following a sharp increase in water rates in early 2000, protests against the concession turned violent.[444] Violence spread across the country and the Bolivian president declared a state of siege.[445]

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[438] *Mobil v Venezuela* (ICSID Case No ARB/07/27, Decision on Jurisdiction of 10 June 2010) (**Exh. RLA-92**).

[439] *Aguas del Tunari v Bolivia* (ICSID Case No ARB/02/3 Decision on Respondent's Objections to Jurisdiction, 21 October 2005), (**Exh. CLA-185**).

[440] *Aguas del Tunari v Bolivia* (ICSID Case No ARB/02/3 Decision on Respondent's Objections to Jurisdiction, 21 October 2005), (**Exh. CLA-185**).

[441] *Aguas del Tunari v Bolivia* (ICSID Case No ARB/02/3 Decision on Respondent's Objections to Jurisdiction, 21 October 2005), (**Exh. CLA-185**).

[442] *Aguas del Tunari v Bolivia* (ICSID Case No ARB/02/3 Decision on Respondent's Objections to Jurisdiction, 21 October 2005), (**Exh. CLA-185**).

[443] *Aguas del Tunari*, (**Exh. CLA-185**), paras 65, 329.

[444] *Aguas del Tunari v Bolivia* (ICSID Case No ARB/02/3 Decision on Respondent's Objections to Jurisdiction, 21 October 2005), (**Exh. CLA-185**).

[445] *Aguas del Tunari v Bolivia* (ICSID Case No ARB/02/3 Decision on Respondent's Objections to Jurisdiction, 21 October 2005), (**Exh. CLA-185**).

As a consequence, the Bolivian authorities terminated the concession in April 2000.[446]

350. When Aguas brought proceedings under the Netherlands-Boliva BIT, Bolivia protested that the restructure was effected *"in anticipation of the events to follow in the Spring of 2000"*.[447] The Tribunal disagreed.[448] The general public unpopularity and calls from interest groups in 1999 for the concession to be annulled made it imaginable that the concession would be cancelled but did not raise a foreseeable prospect that the government would in fact act to terminate Aguas' concession.[449] That measure was not foreseeable in the relevant sense until riots broke out on a larger scale in the following year, after the restructuring had occurred.[450]

351. The Respondent's Statement on Preliminary Objections departs from the established position that it is a *"specific dispute"* which must be objectively foreseeable and reasonably likely to occur.[451] The Respondent posits a broader test for what must have been reasonably foreseeable at the time of the Restructuring. It says that it was not necessary for the Amendment Act itself to have been reasonably foreseeable; rather, the test for abuse is whether those associated with the Claimant ought reasonably to have foreseen that Western Australia might have adopted any measure of any

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[446] *Ibid,* para 73.
[447] *Ibid,* para 329.
[448] *Aguas del Tunari v Bolivia* (ICSID Case No ARB/02/3 Decision on Respondent's Objections to Jurisdiction, 21 October 2005), (**Exh. CLA-185**).
[449] *Aguas del Tunari v Bolivia* (ICSID Case No ARB/02/3 Decision on Respondent's Objections to Jurisdiction, 21 October 2005), (**Exh. CLA-185**).
[450] *Ibid,* paras 329, 331.
[451] *Aguas del Tunari v Bolivia* (ICSID Case No ARB/02/3 Decision on Respondent's Objections to Jurisdiction, 21 October 2005), (**Exh. CLA-185**).

nature to *"unilaterally impac[t] Mineralogy's rights under the State Agreement"*.[452]

352. The Respondent relies upon *Cascade v Turkey*[453]. Those observations exist in a vacuum because the *Cascade* award is heavily redacted.[454] The facts of the case are not accessible.[455] As a result, it is impossible to put the Tribunal's comments about foreseeability in the all-important factual context of the case.

353. In the Claimant's submission, the Respondent has stretched the words of the cited passage of *Cascade* well beyond their intended application. *Cascade* stands for the proposition that it is not necessary for an investor to have reasonably foreseen the *precise measure* which results in the investment treaty dispute. But the *specific dispute itself*, whether it is brought about by measure X or measure Y, must still be objectively reasonably foreseeable as a reasonable or likely prospect.

354. The Respondent appears to regard *Cascade* as authority for the proposition that an abuse occurs whenever it is reasonably foreseeable that a state will take *any measure* which will result in *any type* of investment treaty dispute.[456] That interpretation cannot be correct. It would label as abuse any restructuring which aims to obtain protection against a *"general risk of future disputes"*, when

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[452] SOPO, para 316.

[453] C*ascade Investments v Turkey* (ICSID Case No. ARB/18/4, Award of 20 September 2021) (**Exh. RLA-98**), para 350-351; See ROPO, para 268 and 269.

[454] C*ascade Investments v Turkey* (ICSID Case No. ARB/18/4, Award of 20 September 2021) (**Exh. RLA-98**).

[455] C*ascade Investments v Turkey* (ICSID Case No. ARB/18/4, Award of 20 September 2021) (**Exh. RLA-98**).

[456] SOPO, para 279, 306, 308, 312; ROPO para 269.

in fact numerous Tribunals have held that to do so is a perfectly legitimate act of corporate planning.[457]

355. Whether a specific dispute is objectively foreseeable will always depend on the particular context. It cannot be the case, and *Cascade* does not mean, that as soon as any disagreement or enmity exists between investor and host state that all *imaginable* adverse measures are objectively foreseeable.

356. To conclude otherwise would be to suggest, incorrectly, that cases such as *Clorox,*[458] *Tidewater,*[459] *Mobil*[460] and *Aguas del Tunari*[461] were all wrongly decided. In each of these cases there was antagonism between the state and the investor about the terms on which they continued to do business in that state. The state imposed or announced new taxes and royalties or disputed the life of contracts or concessions and payments due to the investor. Despite these disagreements, the Tribunals in these cases held that the ultimate expropriation measure on which the claims were based were not foreseeable. Expropriation (or measures akin to it) must have been foreseeable to the claimants as a risk which was probable to a very high degree – the claimants in all these cases were companies freshly interposed in the investment structure to gain protection from, inter alia, expropriation. But the context in

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[457] For example, *Tidewater*, (**Exh. RLA-93**), para 184; *Alapli v Turkey* (ICSID Case No. ARB/08/13, Dissenting Opinion of Marc Lalonde of 12 July 2012), (**Exh. R-46**), para 58; *Venezuela v Clorox II*, (**Exh. RLA-142**), para 5.2.3.

[458] *Clorox v Venezuela* (PCA Case No 2015-30, Award dated 17 June 2021) (**Exh. CLA-239**)

[459] *Tidewater v Venezuela* (ICSID Case No ARB/10/5, Decision on Jurisdiction of 8 February 2013) (**Exh. RLA-93**).

[460] *Mobil v Venezuela* (ICSID Case No ARB/07/27, Decision on Jurisdiction of 10 June 2010) (**Exh. RLA-92**)

[461] *Aguas del Tunari v Bolivia* (ICSID Case No ARB/02/3 Decision on Respondent's Objections to Jurisdiction, 21 October 2005) (**Exh. CLA-185**).

each case showed that at the time of the restructure expropriation (or other treaty breach by the host state) was not foreseeable.[462]

357. In summary, the object of foreseeability entails specificity regarding the measure that constitutes the alleged treaty breach. That measure must be "*probable to a very high degree"*[463] or "*reasonably foreseeable"*, and not merely possible. Otherwise, the test for abuse fails to strike a fair balance between the need to safeguard an investor's right to invoke protection of an investment treaty in the context of a legitimate corporate restructuring, and the need to deny protection to abusive conduct.[464]

358. While these tests vary slightly in formulation, the one point they all have in common is that the dispute at issue in the arbitration must have been foreseeable – not just some vague controversy or disagreement between the parties. The idea that a dispute of some sort might arise in the future is not sufficient. This is fatal to the Respondent's position in the present case.

359. As discussed above, the *Philip Morris* tribunal emphasised the requirement for the specific dispute to be foreseeable. The tribunal stated that "the key question [was] whether a dispute about plain packaging was reasonably foreseeable before the

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[462] *Clorox v Venezuela* (PCA Case No 2015-30, Award dated 17 June 2021) (**Exh. CLA-239)**, *Tidewater v Venezuela* (ICSID Case No ARB/10/5, Decision on Jurisdiction of 8 February 2013) (**Exh. RLA-93**), *Mobil v Venezuela* (ICSID Case No ARB/07/27, Decision on Jurisdiction of 10 June 2010) (**Exh. RLA-92**), *Aguas del Tunari v Bolivia* (ICSID Case No ARB/02/3 Decision on Respondent's Objections to Jurisdiction, 21 October 2005) (**Exh. CLA-185**).

[463] *Venezuela v Clorox II*, paragraph 5.3 (**Exh. RLA-142**). See also, for example, *Pac Rim Cayman LLC v The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, (**Exh. RLA-33**) paragraph 2.99 (*" … the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy"*).

[464] *Levy v Peru*, (**Exh. CLA-188**), para 185.

restructuring."[465] Moreover, to even be a "dispute" the issue between the parties, it had to involve rights, not just a general disagreement.

360. *Philip Morris v Australia* supports the Claimant's position in this case. The specific dispute in *Philip Morris* was foreseeable because the policy had been publicly announced (in detail) and was highly likely to be implemented. This stands in stark contrast to the present case.

361. In Philip Morris:

a. The Australian Prime Minister and Minister for Health had unequivocally announced the Australian Government's intention to adopt plain tobacco packaging and published a timetable for the implementation of the legislation.[466] On the basis of such information, the Arbitral Tribunal considered that a specific dispute could reasonably have been envisaged at the time of the restructuring, since there was no uncertainty as to the Australian Government's intention to introduce plain packaging and it was at least a reasonable prospect that legislation equivalent to the Plain Packaging Measures would be eventually enacted.[467]

b. The government never withdrew from the position announced, even though the political leaders changed.[468]

c. Internal documents showed that Philip Morris had taken legal advice before the restructure on a potential dispute

[465] *Philip Morris v Australia* (**Exh. RLA-95**), para 566.
[466] *Philip Morris v Australia*, (**Exh. RLA-95**), para 566.
[467] *Philip Morris v Australia*, (**Exh. RLA-95**), para 566.
[468] *Philip Morris v Australia*, (**Exh. RLA-95**), para 568.

with the government over its plain packaging legislation. There are no documents of a similar nature in the present case.[469]

362. When the test in *Philip Morris* is applied to the facts in this Arbitration (as set out above), it is evident that no abuse of process can be found:

a. There was no equivalent announcement by the Western Australian government of the intention to implement the measures in the Amendment Act (quite the opposite, there was a deliberate effort to keep the Act secret).

b. Mr Quigley stated that the Amendment Act was deliberately introduced into Parliament after 5 pm to prevent Mineralogy from accessing the Australian courts to seek an urgent injunction against the Act.[470]

c. Western Australia gave every indication that it would continue with the domestic arbitrations in good faith, including by signing the Arbitration Agreement in July 2020.

d. The Western Australian government never gave any indication it was considering amending the Statement Agreement in relation to the domestic arbitrations.

e. The Western Australian government never pursued any attempt to amend the State Agreement or interfere in the dispute between Mineralogy and CITIC. That dispute was

[469] *Philip Morris v Australia*, **(Exh. RLA-95**), para 147.
[470] Transcript of Mr Quigley's interview with ABC Radio, 13 August 2020, p.1 (**Exh. C-127**).

determined by the Western Australian Courts in Mineralogy's favour.

f. Indeed, there is no indication at all that the Western Australian government even seriously considered this option. The only evidence cited by the Respondent is (i) a newspaper report in which Mr McGowan allegedly said he was "considering options" regarding the dispute between Mineralogy and CITIC;[471] and (ii) a comment by Mr McGowan during a Parliamentary debate that there was support to sustain CITIC's Sino Iron project, including altering the state agreement.[472] A state agreement can be altered by consent of the parties, which history has shown has been the normal process. Such vague and generalised comments about an entirely separate issue fall far short of the policy announcement on plain packaging in *Philip Morris* (or even the government announcement on price regulation in the *Clorox* case).

363. According to the Respondent, gone would be the "*high threshold*" required for this "*exceptional remedy*". The test in its place would result in finding that an investor should foresee or anticipate any and all disputes arising from legislative change, if it has any form of disagreement with a State.

364. In essence, the Respondent's argument is that the Claimant should have foreseen the present dispute as it must have realised there was a real prospect that the Respondent would breach its own

[471] Ben Harvey, 'State set to protect Sino Iron' The West Australian (3 November 2018), (**Exh. R-130**),
[472] WA, Parliamentary Debates, Legislative Assembly (29 November 2019), (**Exh. R-158**), p. 3.

public policy and unilaterally amend the State Agreement to abolish the domestic arbitrations, despite having shown no prior indication that it intended to do so. The Claimant should have somehow foreseen that the Respondent would destroy a legitimate legal process that it had up to that point, and for two years thereafter, engaged in with no suggestion that it would not continue to do so.

365. This position is absurd. The Respondent simply cannot show the dispute before this Tribunal was foreseeable in January 2019, 20 months before the Respondent and the Claimant and Mr McHugh had entered into the Arbitration Agreement in July 2020.[473]

The Parties Agree that the Amendment Act was not Foreseeable

366. As previously stated above, the Amendment Act Dispute commenced with the Amendment Act and is subject to this Arbitration between the Claimant and the Respondent. The details of the Amendment Act Dispute are set out in Section III, paragraph 212 to paragraph 242 of the Claimant's Response.

367. As referred to above, the Respondent has admitted in paragraph 241 of its Reply that the Amendment Act was not foreseeable at the time the Claimant made its investment.[474]

368. The Respondent during the document production phase of this Arbitration made the following admissions:

a. "*The Federal Court of Australia has found that Mr Mark McGowan and Mr John Quigley discussed the prospect of*

[473] Executed counterparts of the Arbitration Agreement, 17 July 2020, (**Exh. C-242**).

[474] ROPO para 241; see also *Zeph Investments Pte Ltd v Australia* (PCA Case No 2023-40, Procedural Order No. 4, 24 May 2024), (**Exh. CLA-261**), Annex A, p. 8.

legislation as a means of dealing with Mr Palmer's damages claim from about March 2020."[475]

b. "[T]*he evidence on the record establishes that, in July 2020, Mr McGowan and Mr Quigley approved the drafting of the bill that would become the Amendment Act*."[476] (Affidavit of Mr McGowan dated 26 March 2021 **Exh. C-135**; p. 136 at para 78

c. "[T]*he secrecy maintained in connection with the preparation of the Amendment Act is a fact that is already proven by the evidence on the record.*"[477]

d. "[T]*he fact that the Amendment Act was prepared in confidence is already proven by the evidence on the record, and is not contested by the Respondent.*"[478]

e. "*Other than Mr Mark McGowan and Mr John Quigley, and potentially one or two other Ministers, no member of Cabinet was aware of the existence of the draft legislation until a Cabinet meeting at 4.15pm on 11 August 2020.*"[479]

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[475] *Zeph Investments Pte Ltd v Australia* (PCA Case No 2023-40, Procedural Order No. 4, 24 May 2024), (**Exh. CLA-261**), Annex A, p. 8; *Palmer v McGowan* (No 5) [2022] FCA 893 at para. 27, (**Exh. R-166**).

[476] *Zeph Investments Pte Ltd v Australia* (PCA Case No 2023-40, Procedural Order No. 4, 24 May 2024), (**Exh. CLA-261**), Annex A, p. 8; Affidavit of Mr McGowan dated 26 March 2021 (**Exh. C-135**), p. 136 at para 78.

[477] *Zeph Investments Pte Ltd v Australia* (PCA Case No 2023-40, Procedural Order No. 4, 24 May 2024), (**Exh. CLA-261**), Annex A, p. 8; Text messages between Mr Quigley and Mr McGowan, 23 May 2020, extracted in *Palmer v McGowan* (No 5) [2022] FCA 893 at Annexure A, (**Exh. R-166**); ABC Radio interview transcript, (**Exh. C-127**); Affidavit of Mr Quigley dated 25 March 2021, (**Exh. C-135**), p. 115 at paras. 7-9; Affidavit of Mr McGowan dated 26 March 2021 (**Exh. C-135**); p. 136 at para 78)).

[478] PO 4, Annex A, Respondent's Objections to the Claimant's Request No. 3.

[479] PO 4, Annex A, Respondent's Objections to the Claimant's Request No. 3; *Palmer v McGowan* (No 5) [2022] FCA 893 at para. 30 (**Exh. R-166**).

369. However, as stated above, the Respondent casts an erroneously broad net regarding the foreseeability of the dispute. It contends that the question is not whether the passage of Amendment Act itself was reasonably foreseeable, but rather, whether those associated with the Claimant ought reasonably to have foreseen that Western Australia might adopt any *"measures that unilaterally impacted Mineralogy's rights under the State Agreement, being measures which might give rise to a treaty claim"*.[480]

370. The specific legislative measure of the Amendment Act and the associated dispute about the breach of the Treaty was neither (objectively) reasonably foreseeable (as admitted by the Respondent), nor likely to occur at the time of the Restructuring. It is incontrovertible that:

a. At the time of the Restructuring, Mineralogy and Western Australia were engaged in the second phase of the BSIOP arbitration to determine whether Mineralogy would be permitted to press its claim for damages for Western Australia's breach of the State Agreement with regard to the BSIOP. The Second BSIOP Award, which confirmed Mineralogy's right to pursue those damages, was not delivered until 11 October 2019. An unsuccessful appeal by Western Australia followed. Therefore, at the time of the Restructure, Mineralogy did not, and could not, know whether it would even be permitted to press its claim for damages under the BSIOP Dispute. It is not tenable for the Respondent to maintain that those associated with the Claimant could reasonably have foreseen that Western

[480] SOPO, para 316; ROPO, para 243.

Australia would legislate to avoid liability for a damages award in the BSIOP Dispute before the ability to claim those damages had been decided.

b. Significantly, the purpose of state agreements was to signal state support for the counterparties to the agreements and to give commercial investors in mining projects in Western Australia certainty that the rules would not be changed without their consent. **No state agreement had ever been changed unilaterally by Western Australia in 70 years of the existence of such agreements.**[481] This context gave every indication that Western Australia would not take the unprecedented step of unilateral amendment of the State Agreement.

c. At all times prior to the passage of the Amendment Act, Western Australia's conduct was designed to indicate its continued compliance with and acceptance of the ongoing arbitral process to determine the BSIOP Dispute in accordance with the State Agreement. Western Australia had previously abided by this process since it was initiated in 2012. It agreed to the appointment of retired High Court Justice McHugh and the timetable for the damages phase of the 2020 Arbitration. It executed the Arbitration Agreement and the Mediation Agreement. Its conduct was exactly what would be expected of a western democratic government with an obligation to be a model litigant with

[481] AMPLA Yearbook 1996, *"State Agreements",* the Hon Colin Barnett, Minister for Resources Development, Western Australia (**Exh. C-104**, p. 317).

respect for the rule of law.[482] Western Australia's conduct was entirely inconsistent with the Respondent's position that the termination of the BSIOP arbitration process was reasonably foreseeable at the time of the Restructuring or indeed at any time until the introduction of the Bill for the Amendment Act on 11 August 2020.

d. Indeed, the Respondent has admitted that Western Australia did not conceive of the prospect of termination of the BSIOP Dispute until May 2020, and having done so, went to extraordinary lengths to keep termination by legislation a secret, even from members of the Western Australian government. The Respondent has acknowledged that *"the Amendment Act was formulated in secret and hence could not have been foreseeable."*[483] To suppose now that those associated with the Claimant, objectively speaking, nevertheless ought to have foreseen unilateral action to terminate the BSIOP arbitration (not to mention all of the other extraordinary and unprecedented measures imposed by the Amendment Act), as a reasonable prospect, 16 months before Western Australia even conceived of it, is absurd.

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[482] In Australia, the common law principle of the state as model litigant can be traced back as far as M*elbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 (**Exh. CLA-159**) per Griffith CJ, who described the standard as *"the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects"*. In 2004, the Supreme Court of Western Australia observed that this standard *"applies as much to State agencies as it does to those of the Commonwealth"*: *Re MacTiernan, Ex parte Aberdeen Nominees Pty Ltd* [2004] Western Australia SCA 262 (**Exh. CLA-240**), para 73.

[483] Respondent's ROPO, para 241.

371. The Respondent's maintenance of its abuse of process objection despite these admissions is based on it misguided understanding of the law.

372. It is common ground that the abuse of process objection cannot succeed as the Amendment Act was not foreseeable and the only relevant date is 13 August 2020, the date the Amendment Act was proclaimed[484].

373. The treaty claim before this Tribunal arises from the Amendment Act passed into law by Western Australia on 13 August 2020. This legislation eviscerated the arbitral process set out in the State Agreement the Arbitration Agreement, and via any other legal avenue, for the resolution of the BSIOP Dispute. It is not about the decision of then Western Australian Premier Barnett to refuse to consider the BSIOP in 2012 which was central to the domestic BSIOP Dispute. The consequences of that decision are at most tangentially relevant to how damages must be assessed in this arbitration, but it is not even the measure that has given rise to the treaty breaches pleaded by the Claimant. Neither is the Amendment Act related in any sense to the CITIC Dispute, a commercial dispute between Mineralogy and Chinese entities, to which Western Australia was not a party. This is not the internationalisation of a domestic dispute; the Amendment Act gave rise to an entirely different and distinct claim on the international plane that did not exist until the passage of the Amendment Act.

[484] ROPO, para 131.

374. The question inter alia the Tribunal must be respectfully asked to determine in the Respondent's abuse objection is whether, at the time of the Restructuring, it was foreseeable as a real prospect that Western Australia would terminate the Arbitration Agreement and its process by the Amendment Act and deprive the Claimant's subsidiaries of any prospect of domestic recourse to damages for Western Australia's breach of the State Agreement relating to the BSIOP Dispute. No fine line analysis of the historical knowledge (objectively appraised) is required to answer this question. For the reasons summarised above, the prospect that Western Australia might terminate the Arbitration Agreement by means of such extraordinary and unprecedented legislation as the Amendment Act cannot conceivably have been within the reasonable contemplation of those associated with the Claimant or Mineralogy at the time of the Restructuring as at that time the Arbitration Agreement did not exist.

375. To articulate the Claimant's argument further, the above sections of these submissions set out in detail:

a. the legal test for abuse of right, and in particular the authorities which establish: (i) that a state of tension or existing dispute between an investor and the host state does not mean that the investor ought to foresee that the state might take an adverse measure against it on an unrelated matter; and (ii) that it is a *"specific dispute"*,[485] being a measure giving rise to a particular treaty claim, rather than a generalised risk of state action, which must be

[485] see, for e.g.: *Philip Morris v Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2014, (**Exh. RLA-65**), para 554.

foreseeable "*to a very high degree*"[486] in order for abusive conduct to be found;

b. the relevant background context, including:

   i. the procedural history of the BSIOP Dispute between Mineralogy and Western Australia and the arbitration process commenced in 2012 and followed by those parties up until the passage of the Amendment Act in August 2020;

   ii. the basis of the CITIC Dispute, a domestic contractual dispute between Mineralogy and Chinese entities to which Western Australia was not a party;

   iii. the circumstances and reasons for the insertion of the Claimant into the ownership chain of Mineralogy in January 2019, and the genesis and development of the Amendment Act over a year later in the period between May and August 2020; and

c. the application of those principles to the facts of this case, which reveals that the specific dispute before this tribunal – arising from the termination of the Arbitration Agreement by the Amendment Act legislation – was not objectively foreseeable as a reasonable prospect as at the time of the Restructuring, nor at any time until the Amendment Act was introduced on 11 August 2020, some 20 months after the

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[486] *Venezuela v Clorox II*, paragraph 5.3 (**Exh. RLA-142**). See also, for example, *Pac Rim Cayman LLC v The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, (**Exh. RLA-33**) paragraph 2.99 (*" … the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy"*).

Restructuring. It should be noted that the Arbitration Agreement was signed in July 2020 and the Mediation Agreement was signed in August 2020 which likewise were some 20 months after the Restructuring and that their termination was, inter alia, one of the major purposes of the Amendment Act.

376. Accordingly, the abuse argument fails.

Relevance of Rationale for Restructuring

377. In Clorox v Venezuela, the Swiss Tribunal held that the test for abuse of process, "the temporal factor plays a decisive role in drawing the line between legitimate planning to acquire nationality and abuse of the treaty."[487] To be clear (and contrary to the Respondent's submissions), it is the timing of the restructure (and whether the dispute was foreseeable at the time) that is decisive, not the rationale for the restructuring. Rationale becomes important only if the temporal factor suggests abuse. This was confirmed by the Swiss Federal Tribunal, holding that if a State proves that the specific dispute was objectively foreseeable at the time of the restructure, an abuse will be presumed unless the investor "rebut[s] this presumption by demonstrating that the restructuring, carried out at a time when the dispute was foreseeable, was in fact undertaken primarily for reasons other than that of benefiting from the protection offered by an investment treaty."[488]

[487] Decision of the Swiss Supreme Court, 4A_398/2021, 20 May 2022 (**Exh. RLA-142**), para 5.2.4.
[488] Decision of the Swiss Supreme Court, 4A_398/2021, 20 May 2022 (**Exh. RLA-142**), para 5.2.4.

378. This is consistent with the position taken in *Philip Morris* where the Tribunal stated, "[h]*aving held that the dispute was foreseeable prior to the restructuring, the Tribunal now turns to the Claimant's reasons for restructuring*."[489]

379. On the Claimant's case, there is no reason for the Tribunal in this Arbitration to even address the Claimant's rationale for Restructuring. However, the Claimant has addressed this issue in its SODPO and does so again in this Rejoinder, in response to the Respondent's legal case theory. The Respondent's grounds and arguments are abuse of process themselves.

380. If, however, the specific dispute was foreseeable at the time of the corporate restructuring, there is an opportunity for the Claimant to illustrate that the restructure was not an abuse because treaty coverage to that specific dispute was an ancillary purpose of the restructuring.

381. The Claimant was incorporated as a Singaporean company on 21 January 2019 under the name Mineralogy International Pte Ltd.[490] On 29 January 2019, the Claimant was inserted into the Mineralogy ownership structure via a Share Swap whereby the Claimant acquired from MIL 100% of the shares in Mineralogy, and as consideration, issued an identical number of shares to MIL, such that MIL became the 100% shareholder of the Claimant.

382. The Restructuring was effected to achieve genuine business advantages, inter alia including

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[489] *Philip Morris v Australia*, (**Exh. RLA-95**), para 370.

[490] Mineralogy International Pte Ltd would subsequently change its name to Zeph Investments Pte Ltd in December 2019.

a. to assist with securing new investment / financing in Singapore, particularly for coal projects in Queensland such as the Waratah Coal Project;

b. to provide Mr Palmer with the option of tax and investment advantages; and

c. other investment and diversification reasons.

383. As Messrs Palmer, Martino and Harris explain, these commercial rationales were the primary reasons for the Restructuring.[491] Investment treaty coverage was ancillary. The Respondent has not filed any factual evidence which takes issue with these matters. This matter is addressed further below.

384. As explained above, the commercial rationale for the Restructuring is irrelevant to the abuse of process analysis as the specific measure at issue in this Arbitration was not foreseeable, as it is common ground that the specific measure was not foreseeable.

385. The claims in this Arbitration are claims emanating from the Amendment Act and inter alia include claims for the termination of the Arbitration Agreement.

The Amendment Act

386. On 13 August 2020, the Amendment Act was enacted by the Western Australian Parliament. The object of the Amendment Act was to eviscerate inter alia Mineralogy's rights by terminating the Arbitration Agreement and the Mediation Agreement and the Claimant's rights to pursue a claim for Western Australia's breach of the State Agreement in relation to the BSIOP Proposal. The

[491] First Palmer WS, paras 113 - 139; Martino WS, paras 10 - 37; Harris WS, paras 8 – 11.

Amendment Act terminated the Arbitration Agreement and the Mediation Agreement. The Amendment Act terminated the BSIOP Dispute and it absolved by legislation all liability of the state in relation to the BSIOP Proposal or consequent upon the passage of the Amendment Act itself. To recall, the Amendment Act provided, *inter alia*, that: [492]

a. the BSIOP Proposal has no contractual or other legal effect (clause 9);

b. the Arbitration Agreement is terminated, and Existing Awards (including the First and Second Awards) are of no effect and taken never to have had any effect (clause 10);

c. the State (including the Crown, the Western Australia Government, and any Western Australia State Authority) has no liability, and cannot have any liability, to any person connected in any way with the BSIOP Proposal or the passage of the Amendment Act (clauses 11 and 19);

d. there can be no appeal, review or, or any other challenge to, the State's conduct concerning the BSIOP Proposal or the passage of the Amendment Act;

e. the rules of natural justice including any duty of procedural fairness do not apply in respect of the BSIOP Dispute or the passage of the Amendment Act (clauses 12, 20);

f. no conduct of the State related to the BSIOP Proposal or the passage of the Amendment Act can give rise to

[492] The effect of the Amendment Act is explained in further detail in the Claimant's Response to the Respondent's SOPO dated 14 March 2024 at paras 222(a)-(q); see also, Claimant's Notice of Intent, 20 October 2022, L305 to L445 (**Exh. C-63**); see generally, *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) Part 3, (**CLA-003**).

commission of a civil wrong or criminal offence (clauses 18-20); and

g. Mineralogy, IM, and Clive Palmer must indemnify the State against any loss, cost or liability connected with the BSIOP Proposal, including those arising under international treaties or international law, and for any loss or cost or liability relating to the BSIOP Proposal or the passage of the Amendment Act (clauses 14, 15, 22 and 23).

387. The Amendment Act also created massive sovereign risk.[493]

388. The Respondent supposes that because it acknowledges that the promulgation and passage of the Amendment Act was not foreseeable, the subterfuge and fraud on the part of Western Australia needs no further dissection or discussion; that the means by which the legislation at issue in this arbitration came into being are not relevant beyond that bald concession.[494]

389. But that cannot be so: the extraordinary details of the origin, development and urgent passage of, and motivations and justifications for, the Amendment Act, highlight how and why the dispute in these international proceedings is of a distinct factual and legal nature from any earlier confrontations between the Claimant's subsidiaries and Western Australia. The Arbitration Agreement was only executed in July 2020.[495] It is a nonsense to

[493] See for e.g., *Mineralogy Pty Ltd & Anor v State of Western Australia* [2021] HCA 30, para 97 per Edelman J (**Exh. C-009**): "The decision to enact the [ss 9(1), 9(2) and 10(4) to 10(7)] may reverberate with sovereign risk consequences".

[494] ROPO, para 241.

[495] Executed counterparts of the Arbitration Agreement, 17 July 2020, (**Exh. C-242**).

suggest that its termination forms part of an earlier unrelated dispute.

390. First, the devious efforts made by Western Australia to conceal the idea of terminating the Arbitration Agreement and the means by which it chose to do so, undermine the Respondent's contention that the Amendment Act was somehow a foreseeable and unexceptional development of a pre-existing dispute. On the contrary, Western Australia's course of conduct illustrates that it knew and intended this unilateral amendment of the State Agreement to be a bolt from the blue; a "*Trojan horse*"[496]; a "*poison* pill"[497]; something entirely new and unexpected to the Claimant and the Claimant's subsidiaries. The huge effort toward secrecy makes the suggestion that it was foreseeable all along an entirely incongruous position for the Respondent to take.

391. Secondly, Western Australia's motivations and justifications for the need for the Amendment Act are telling in that they reveal Western Australia's clear appreciation as to how unusual, extreme, and frankly unlikely this measure was, even at the time that it was passed into law, let alone as at the time of the Restructuring some 20 months earlier.

392. It will be recalled that the Amendment Act was first conceived by the then Western Australia Attorney-General, John Quigley, in May 2020. An early morning text exchange between Quigley and Premier McGowan records that the purpose of the Act was to terminate by fiat an agreed arbitration and mediation process with

[496] Texts between Quigley and McGowan on 23 May 2020 (**Exh. C-432**) (extracted in para 392, below).
[497] Texts between Quigley and McGowan on 23 May 2020 (**Exh. C-432**) (extracted in para 392, below).

the Australian Companies because Western Australia feared an adverse outcome of the Third BSIOP Arbitration:[498]

> *[Quigley]: I must be a bit OCD! I have been awake since 4.15 thinking of ways to beat big fat Clive and his arbitration claim for 23.5 billion in damages remembering the turd has pulled off 2 big wins in arbitration before former High Court justice Michael McHugh. The solution is to be found in an amendment to legislation obstensibly [sic] to protect us Re [the possibility of an unrelated dispute] … which amendment for that purpose is merely a Trojan horse as within the very small legislative amendment will be a poison pill for the fat man. Can't wait for full day light when I can discuss with our brainiac SG to check I am not having a mid nite [sic] fantasy. It's such a neat solution obstentially [sic] to solve one almost non existent problem but the side wind could drop the fat man on his big fat arse! Can't wait to speak with Josh. We lawyers get off on the strangest things Eh?…Hey are you glad me single again… not making love in sweet hours before dawn instead worrying how to defeat Clive!* 😂😂😂🤣
>
> *[McGowan]: Let's discuss the $23 billion claim. We need to really sort out what to do. I don't want to let Parker know or any journo before we r ready*
>
> *[Quigley]: Absolutely secrecy of essence …* 😂😂😂*…*

393. Over six weeks in June-August 2020, during which time the Australian Companies continued to prepare in good faith for the

[498] Texts between Quigley and McGowan on 23 May 2020 (**Exh. C-432**).

Arbitration Agreement Arbitration hearing timetabled for November 2020,[499] a small number of state officials led by Attorney-General Quigley drafted the Amendment Act in utmost secrecy. Quigley later revealed to the Western Australia Parliament the extreme lengths taken to keep the existence of the Act a secret.[500]

> "*Such was the level of secrecy—if I can say that—or security that even the State Solicitor vacated his office and worked on this at home, so that the office would not generally know what was happening. Senior Parliamentary Counsel, Mr Lawn, was brought into the loop, and the Premier and I. Even the Treasurer, who is one of my closest friends, did not know any of this at all. It was kept absolutely tight until Friday night, when a small group of ministers knew so that we could plan the coming week, but not cabinet generally. Cabinet then held an emergency cabinet meeting at 4.00 pm yesterday, and at about 4.10 pm it was informed of the situation. The State Solicitor was in the cabinet meeting to brief the cabinet.*"

394. Quigley provided further insight into the efforts taken by Western Australia and its lawyers to keep the Act a secret in an interview given on 13 August 2020 to ABC Radio Perth:[501]

> *This legislation has been drafted over the last six weeks in secret by the best legal minds in this city. The Solicitor-General of Western Australia, Mr Joshua Thomson SC, our incredible State Solicitor Mr Nick Egan and his legal team at*

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[499] See, Minute of Direction, 26 June 2020, (**Exh.C-384**).

[500] Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 August 2020, 4811b-4836a (John Quigley, Attorney-General) (**Exh. C-429**).

[501] Transcript of ABC Radio Perth interview with John Quigley, 8:35am, 13 August 2020, (**Exh. C-127**).

the State Solicitor's office. Mr Egan even left the office and worked at home to keep it…to keep the job secret so that people in… in his own office wouldn't know.

395. The Amendment Act was introduced to Western Australia's lower house Legislative Assembly without any notice to the Assembly at just after 5 pm on 11 August 2020. The timing was, again as explained to the Western Australia Parliament by the Attorney-General, specifically designed to defeat Mineralogy's rights before the domestic courts:[502]

I can disclose to members why we brought this bill in at 5.00 pm last night. We brought this bill in when we knew that every courthouse and every registry in the country was closed and the doors locked, and there was no chance [for Mineralogy/Palmer] to make an application to the court on that day.

396. The Amendment Act passed under urgency through the Western Australia Legislative Assembly on 12 August 2020, and through the upper house Legislative Council on 13 August 2020 and received Royal Assent within approximately 19 hours, by-passing all the usual parliamentary committee processes.

397. The Western Australia government's plan to terminate the BSIOP Dispute and rationale for it was further explained in a media conference held by Quigley and McGowan on 12 August 2020 (**12**

[502] Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 August 2020, 4811b-4836a (John Quigley, Attorney-General), (**Exh. C-429**).

August 2020 media conference).[503] The comments in this media conference made it clear that Western Australia:

a. only conceived of and embarked upon the process of drafting the Amendment Act after the issue of the Second BSIOP Award and the unsuccessful appeal against that Award;

b. was legislating to protect itself as a last resort from what it saw as a prospect of a disastrous damages award; and

c. had no intention of complying with the Arbitration or Mediation Agreements in good faith, or of paying Mineralogy any sum which may have been agreed or awarded by those processes.

398. McGowan and Quigley's clandestine efforts to ambush the Claimant and the Australian Companies with the Amendment Act were successful. The secretive methods of the drafters and politicians involved rendered the passage of the Amendment Act, which now forms the subject matter of the dispute before this Tribunal (**Amendment Act Dispute**), completely unforeseeable to the Claimant and the Australian Companies as it would be to any reasonable investor in their shoes.

c. <u>The Claimant's Claim is not an Abuse because the Measure from which the Treaty Claim has Materialised was not Foreseeable at the Time of the Restructuring</u>

399. The Claimant apprehends that the Respondent's submission is effectively that the termination of the Arbitration Agreement

[503] Transcript of Press Conference, 12 August 2020 (**Exh. C-465**),

arbitration by the Amendment Act was a part of the existing BSIOP Dispute,[504] and/or should have been foreseen by the Claimant as a likely development of the BSIOP Dispute given that some form of amendment of the State Agreement was raised as a possibility by Western Australia in relation to the CITIC Dispute between Mineralogy and the CITIC Parties. The Respondent makes these allegations despite the fact that the Arbitration Agreement was not signed by the parties until late July 2020 and terminated by the Amendment Act just a few weeks later. To suggest such matters were foreseeable is a nonsense.

400. The Respondent says that the Claimant foresaw that Western Australia could alter the State Agreement unilaterally in some way adverse to the rights of the Claimant's Subsidiaries that could give rise to a treaty claim.[505] On this theory, the Respondent claims that an alteration or termination of rights under the State Agreement in any way adverse to the Claimant, including the termination of the Arbitration Agreement, was possible and foreseeable prior to the Restructuring.[506] The argument appears to be that Western Australia might somehow seek to amend the State Agreement to override Mineralogy's contractual rights in relation to the CITIC

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[504] SOPO, paras 304 (*"…the [Restructuring] was an attempt to obtain investment protection in relation to a domestic dispute that had already crystallised"*) and 352 (*"The…Amendment Act was the playing out of a pre-existing domestic dispute"*); also see ROPO, para 5 (*"[The Restructuring'] was made for the objective purpose of securing treaty protection in respect of inter-related disputes that were already in existence"*).

[505] ROPO, paras 242(b) and 243.

[506] ROPO, paras 242-243: *"The dispute before this tribunal…is a dispute concerning the WA Government's conduct in relation to the BSIOP Proposal…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…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".*

Dispute, Mineralogy ought to have foreseen that Western Australia might pass legislation to bring in measures such as the Amendment Act.

401. The problem with the Respondent's argument is that the Respondent's characterisation of the relevant dispute is misconceived. To pitch the object of foreseeability at a level which deems objectively foreseeable any adverse legislation, is to say that it is an abuse for an investor to seek treaty protection if it can imagine any kind of adverse legislative measure against its interests. That approach to the foreseeable dispute is far too broad and general. First, as explained by the Tribunal in *Clorox,* the reason that abuse of process requires the restructured investor to foresee the probability of a *"specific future dispute"* rather than merely the *"probability of a State measure"* is because *"the constituent elements of a dispute are not limited to the adoption of measures of general scope but also include their practical application and their consequences."*[507]

402. Secondly, a risk of legislative measures adverse to commercial interests or contractual rights always exists because governments are sovereign and can generally legislate as they see fit. That general risk is why investment treaties exist. That formulation of a foreseeable dispute does not comply with the Swiss Federal Tribunal's reminder in *Clorox* that the criterion of foreseeability of the dispute must be assessed restrictively because abuse of rights is an exceptional remedy.[508] The Respondent's approach renders abusive exactly what investment treaty tribunals have declared not

[507] *Clorox v Venezuela*, (**Exh. CLA-239**), para 459.
[508] *Clorox v Venezuela*, (**Exh. CLA-239**), para 5.2.4.

to be abusive: restructuring for treaty protection to guard against general future risk of adverse and unfair legislative change.

403. It was theoretically possible, at any time after the State Agreement was executed, that Western Australia could legislate to affect Mineralogy's interests under the State Agreement in some way. There are an infinite number of ways in which it could choose to do so. But the fact that it had the general ability or power to legislate in a manner affecting the interests of the Australian Companies is nowhere near enough to give rise to foreseeability of a specific dispute in the sense articulated in the authorities set out in this submission.

404. A general risk of an unspecific adverse measure does not meet that test. What is required in the Claimant's submission is an objective appreciation of a real prospect of a measure under the Arbitration Agreement, such as to give rise to this treaty claim. It is just not possible in January 2019 that the Claimant would foresee that it would even enter into an Arbitration Agreement with two independent parties being Western Australia and Mr McHugh (the State Agreement Arbitrator) into the future and that Western Australia would terminate that Arbitration Agreement by legislation less than 3 weeks after signing it.

405. It is not valid for the Respondent to say that, because there was a theoretical prospect of amendment of the State Agreement (as there is with any law)[509], such adverse amendment of the State Agreement could be foreseen in respect of the other disputes

[509] Noting: Barnett, "State Agreements" [1996] *Australian Mining and Petroleum Law Association Yearbook* 314-323, at 317, (**Exh. C-104)**: "*State Agreements do not fetter the power of Parliament to repeal the ratifying Act. It is a testimony to the importance of State Agreements that no Parliament has event attempted such unilateral repeal action".*

between Mineralogy and Western Australia forever more. The possibility of amendment of the State Agreement was always an abstract possibility because a state can generally legislate as it sees fit. As noted above, a sovereign government can generally act against the interests of any investor at any time if it wishes to do so and that is the reason for the investment treaties. The *mechanism* of adverse action is well known – legislation. But that does not mean that an adverse legislative amendment was always a real or objectively foreseeable or is reasonably likely to occur.

406. In addition, given the history (highlighted by former Premier Barnett) that no state agreement had been unilaterally amended since state agreements were first introduced 70 years ago,[510] it would be a sensible conclusion that Western Australia understood the sovereign risk consequences of unilateral amendment of state agreements and would not, when push came to shove, unilaterally amend the State Agreement with Mineralogy.

407. In summary, the substance of the BSIOP Dispute was the decision of then Premier Barnett in 2012 unlawfully refusing to treat the BSIOP as a proposal under the State Agreement.[511] The substance of the CITIC Dispute was a disagreement between Mineralogy and the CITIC Parties arising from the desire of the CITIC Parties to expand the area of the Sino Iron and Korean Steel Projects.[512] The

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[510] Barnett, "State Agreements" [1996] *Australian Mining and Petroleum Law Association Yearbook* 314-323, at 317, (**Exh. C-104)**.

[511] See, *Mineralogy Pty Ltd v the State of Western Australia,* Award of the Hon. Michael McHugh AC, 20 May 2014, (**Exh. C-442**), paras 1, 66.

[512] See, *Sino Iron Pty Ltd v Mineralogy Pty Ltd* [No 15] [2023] WASC 56 (**CLA-070**), **para 3**: "*This 'battle' in a seemingly never-ending civil litigation war is fought between the proponents of the project conducted on certain of Mineralogy's many mining tenements located in the Pilbara of Western Australia and out of the local port of Cape Preston ('Sino Iron Project')*, **para 7**: "*The trial sees three corporate plaintiffs … move this Court to issue (amongst other relief) final, mandatory compulsive conduct injunctions directed at the first defendant*

substance of the dispute before this Tribunal is inter alia expropriation and the denial of justice afforded by a legislative measure (the Amendment Act) giving rise to a treaty claim for a breach of the Treaty obligation of fair and equitable treatment and/or an uncompensated expropriation. All three matters are distinct in time, content and parties.

408. Neither the BSIOP Dispute, nor the CITIC matter can properly be described, per the *Clorox* Tribunal definition,[513] as the specific dispute or type of dispute that proves to be the "one challenged by the restructured investor", or in another formulation used in the same Award, "the first measure or practice constituting the alleged breach of the Treaty." The BSIOP Dispute and the CITIC matter are not, as the *Philip Morris* Tribunal described, the specific measure giving rise to reasonable prospect of a treaty claim.[514] In this case, inter alia, that measure is the termination of the Arbitration Agreement and the Arbitration Agreement process by means of the Amendment Act.

409. Accordingly, the question central to this objection of treaty abuse is whether termination of the Arbitration Agreement was objectively foreseeable as a reasonable prospect at the time of the Restructuring. It was still 20 months before the Arbitration Agreement was even executed. It is plainly apparent that it was not foreseeable at the time of the Restructuring, nor in fact at any time

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('Mineralogy') – primarily grounded on Mineralogy's alleged breaches of contract(s) that relate to the Sino Iron Project on the Pilbara of Western Australia". **Para 17**: *"Because its interests are or may be affected by the relief sought, the State of Western Australia … is the third defendant … albeit no relief is sought against the State.*".

[513] *Clorox v Venezuela*, (**Exh. CLA-239**), paras 448-450; see above, paras 317 - 326.

[514] *Philip Morris v Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2014, (**Exh. RLA-65**), para 554.

until the Amendment Act was introduced to the Western Australian Parliament at 5pm on 11 August 2020 - approximately 20 months after the point at which the Claimant came to own Mineralogy.

410. At the time of the Restructuring in this case (29 January 2019), there was no suggestion that Western Australia would legislate to end an arbitral process that had been in train for 7 years at that point. The Second McHugh Award had not even been issued. To that point, the Australian Companies did not know whether they would be permitted to press their claim for damages for Western Australia's breach of the State Agreement with regard to the BSIOP, let alone foresee that Western Australia might legislate to remove that prospect entirely.

411. Once the Second Award was issued on 11 October 2019,[515] and the Australian Companies were permitted to proceed to seek damages, Western Australia gave no indication that it would pre-emptively legislate its way out of potential liability in that arbitration. To the contrary, there was every indication that Western Australia intended to proceed with the existing dispute resolution processes: Western Australia appealed,[516] and having lost that appeal, entered into reasonable and proper arrangements for the damages phase of the arbitration before Mr McHugh. No witness for the Respondent gives any reason to contest this view of Western Australia's actions.

412. The string of losses suffered by Western Australia in the First and Second BSIOP Awards and the appeal to the Western Australia

[515] See, *Mineralogy Pty Ltd v the State of Western Australia,* Award of the Hon. Michael McHugh AC, 11 October 2019, (**Exh. C-443**).
[516] *State of Western Australia v Mineralogy Pty Ltd* [2020] WASC 58, (**Exh. CLA-8**).

Supreme Court, plainly rattled Western Australia.[517] Attorney-General Quigley's crude and puerile text to the Western Australia Premier on 23 May 2020 surmised: "*I have been awake since 4.15 thinking of ways to beat big fat Clive and his arbitration claim for 23.5 billion in damages remembering the turd has pulled off 2 big wins in arbitration before former High Court justice Michael McHugh*". And the answer according to Quigley: "*The solution is to be found in an amendment to legislation …* ".[518] That amendment to legislation became the Amendment Act.

413. At the 12 August 2020 media conference, Quigley confirmed that it was necessary in his view for Western Australia to act after "*three hits that we didn't expect in front of the Arbitrator*" and being "*sent by the Supreme Court back now for a damages hearing*.**"**[519]

414. Quigley's text to the Premier was sent on 23 May 2020. It dates precisely Western Australia's first formulation of the possibility of terminating the BSIOP arbitration process by legislative fiat. Plainly, 23 May 2020 is some 16 months after the Restructuring. As recognised by this Tribunal and acknowledged by the Respondent, *"the Amendment Act was not conceptualized before March-May 2020…the draft bill that would become the Amendment Act was not approved before July 2020; and…the draft bills were*

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[517] Transcripts of press conference, 12 August 2020, (**Exh.C-465**), lines 429 – 512: *"The thing with this arbitration … we didn't expect to lose the first time concerning 2012. We didn't expect to lose the second time concerning the 2014 … and the Arbitrator rules against us again, and said, … I'll proceed to hear the damages … so then we appealed to the Supreme Court of Western Australia. And the Supreme Court of Western Australia said, "… I dismiss your appeal" … how would any of the public feel in these circumstances where they've taken three hits in front of the Arbitrator, three hits that we didn't expect from the Arbitrator.*"

[518] Texts between Quigley and McGowan on 23 May 2020 (**Exh. C-432**).

[519] Transcript of media conference held by Western Australia Premier Mark McGowan and Western Australia Attorney-General John Quigley, 12 August 2020 (**Exh. C-465**).

not only kept secret, but were accessible only to a handful of high-level public officials."[520] In that situation it is absurd to suggest that in January 2019, the Australian Companies or those associated with them could reasonably have foreseen a measure which was first conceived of by Western Australian officials well over a year later.

415. The next critical point is to consider Western Australia's conduct in 2020 and ask what that conduct may seriously have suggested to an investor regarding the possibility of legislative amendment of the State Agreement that interfered with the BSIOP arbitration process. As in the *Tidewater* case, the state's conduct towards the investor at the time of the relevant restructuring and thereafter may indicate whether the investor ought to anticipate the eventual treaty dispute.[521] In the present case, as set out below, Western Australia's conduct would have led any investor to conclude that Western Australia would abide by its obligations to arbitrate disputes under the State Agreement, not that Western Australia would (as it in fact did) legislate to extinguish those obligations as though they never existed.

416. As the Respondent points out, the BSIOP arbitration had run since 2012. Western Australia had cooperated and participated in it and had done so, to all outward appearances, in good faith. It had not sought to avoid the dispute by unilateral amendment of the State Agreement. In the same vein, in the aftermath of the Western Australia Supreme Court's decision dismissing Western Australia's

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[520] *Zeph Investments Pte Ltd v Australia* (PCA Case No 2023-40, Procedural Order No. 4, 24 May 2024), para 37 (footnotes omitted) (**Exh. CLA-261**).

[521] *Tidewater*, (**Exh. RLA-93**), para 195.

application to appeal against the Second BSIOP Award, the parties agreed to re-engage Mr McHugh to determine the quantum of damages to be awarded to Mineralogy.

417. Rather than avoiding this process, Western Australia gave every indication that it intended to continue to comply with it. First, Western Australia participated in a procedural conference before Mr McHugh on 26 June 2020 that determined dates for a hearing, delivery of evidence for each party, and delivery of an Award by Mr McHugh. Secondly, Western Australia executed a fresh Arbitration Agreement with Mineralogy and Mr McHugh. That agreement set out the terms on which the Third BSIOP Arbitration to determine damages for breach of the State Agreement would be conducted. Thirdly, in accordance with a direction at the procedural conference, Western Australia signed the Mediation Agreement with Mineralogy and appointed a retired Western Australian Supreme Court Chief Justice to explore settlement once evidence was exchanged and before the arbitral hearing. Fourthly, it accepted service of Mineralogy's evidence as to damages in the period March 2020 to May 2020.

418. Western Australia's conduct was designed (and would be perceived by any objective observer) to indicate its compliance and acceptance of the ongoing arbitral process to determine the damages issue in accordance with the State Agreement. This was not surprising: Western Australia had abided by this process since it was initiated in 2012. Its conduct was exactly what would be

expected of a western democratic government with an obligation to be a model litigant with respect for the rule of law.[522]

419. The State Solicitor's Office of Western Australia (**SSO**) represented Western Australia in relation to the 2020 arbitration and mediation[523].

420. The maintenance of the rule of law and separation of powers in a liberal parliamentary democracy depends on the Crown, particularly the State and Commonwealth governments, observing a standard of fair play in disputes with its subjects[524].

421. The SSO has specifically publicly acknowledged that Western Australia is subject to the obligations of a model litigant[525].

422. Quigley, in sworn evidence given by him in the Federal Court of Australia, accepted the following propositions:

    a. As the Attorney-General and first law officer of Western Australia, his responsibilities included to ensure that he, and Western Australia, *"meet the highest ethical standards in conjunction with any legal proceedings with which the State is connected"*.[526]

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[522] In Australia, the common law principle of the state as model litigant can be traced back as far as M*elbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, (**Exh. CLA-159**) per Griffith CJ, who described the standard as *"the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects"*. In 2004, the Supreme Court of Western Australia observed that this standard *"applies as much to State agencies as it does to those of the Commonwealth"*: *Re MacTiernan, Ex parte Aberdeen Nominees Pty Ltd* [2004] WASC 262, (**Exh. CLA-240**), para 73.

[523] Exh. C-135, p.13.

[524] *LVR (WA) Pty Ltd v AAT* [2012] FCAFC 90[524] (**Exh. CLA-258**) at 42 and *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 333[524] (**Exh. CLA-159**) at 342 per Griffiths CJ.

[525] SSO Guidelines at **Exh. C-135**, p 42.

[526] Transcript of proceedings, *Palmer v McGowan*, Federal Court of Australia, New South Wales Registry, No. NSD 912 of 2020, 9 March 2022 (**Exh. C-581**), P. 501, lines 39-43.

b. Those high ethical standards *"include honesty and fairness and the absence of deceit"*.[527]

c. Those obligations *"apply to proceedings, not just before courts but before other tribunals such as arbitrators"*.[528]

d. Western Australia has written model litigant guidelines representing how it operates.[529]

e. Those model litigant guidelines make the following statement with which Quigley agrees:

> *"There is an old-fashioned, traditional and almost instinctive standard of fair play to be observed by the Crown in dealing with subjects"*.[530]

423. A copy of Western Australia's model litigant guidelines is located at pages 13 -46 of "**Exh. C-135**".

424. The Australian Companies were therefore entitled to expect that Western Australia would continue to act in accordance with these fundamental tenets of state conduct. The criticism and protest by bodies such as the Western Australia Law Society and the Western Australia Bar Association[531] in the wake of the Amendment Act

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[527] **Exh. C-581,** P-502, lines 1-2.

[528] **Exh. C-581**, P-502, lines 4-5.

[529] **Exh. C-581**, P-502, line 7; P-503, lines 13-14.

[530] Transcript of Federal Court of Australia Proceeding No. NSD212/2020, (**Exh. C-581**), P-504, lines 5-13.

[531] Law Society of Western Australia, "Media Statement on the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act", 19 August 2020: https://lawsocietywa.asn.au/articles/media-statement-on-the-iron-ore-processing-mineralogy-agreement-act (**Exh. C-129**); Western Australian Bar Association, Response to the Attorney-General's justification for the Iron Ore Processing (Mineralogy Pty Ltd) Amendment Act 2020, December 2020, (**Exh. C-130**); "Equality before the law swept under the carpet by both sides",13 August 2020, (**Exh, C-137**); ""WA MPs showing ignorance over Clive Palmer", 19 August 2020 (**Exh. C-139**); "The tyranny that strikes a friendless Clive Palmer could hurt any of us", 22 August 2020 (**Exh. C-141**); "You don't need to like Clive Palmer to dislike his arbitrary treatment"., 27 August 2020 (**Exh. C-142**).

illustrates that serious professional legal bodies were surprised by and critical of Western Australia's disregard of such norms.

425. The only reasonable conclusion that any objective commercial observer would reach as a result of the arrangements for the Arbitration Agreement was that Western Australia would continue to abide by and participate in that arbitration process (including a mediation). Besides the obligations in the State Agreement itself, that is what Western Australia had re-committed to by virtue of the Arbitration Agreement and the Mediation Agreement, parties to which included eminent former Australian judicial officers. There was no indication at all that, instead of proceeding in accordance with these agreements, Western Australia would unilaterally amend the State Agreement to end the Arbitration Agreement arbitral process under it altogether.

426. How is it then, that the Respondent can now contend that those associated with the Claimant could reasonably have foreseen or apprehended that Western Australia would do otherwise than comply with what it had readily agreed to do? It cannot. It is trite to say that sovereign governments can generally legislate as they see fit. But it does not follow that an investor must then be taken to anticipate or foresee the possibility of any type of legislation adverse to its investment regardless of government assurances to the contrary. If that were the case, investments could never procure investment treaty coverage.

427. What is now revealed but was not known (and could not have been known) to the Claimant or its subsidiaries at the time of the Arbitration Agreement, is that Western Australia's ostensible good faith Arbitration Agreement was in fact a sham. Western Australia

went to great pains to ensure that the Claimant and the Australian Companies were led to believe Western Australia was abiding and cooperating with the ordinary processes, even though it had no real intention of doing so. Like Venezuela's demonstration of a *"continuing will to trade"* at the time of the restructuring in *Tidewater*, Western Australia's ostensible willingness to proceed along ordinary agreed dispute resolution channels in 2019 and up until 11 August 2020 is inconsistent with the Respondent's position that the termination of that process or the Arbitration Agreement was foreseeable at the time of the Restructuring.

428. The 23 May 2020 text exchange between Quigley and McGowan concluded with the agreement that "*absolutely secrecy*" was of the essence for a "*very small legislative amendment [that] will be a poison pill for the fat man [Mr Palmer] …*".[532] As set out above, The Amendment Act was passed in extreme urgency through the Western Australian legislature between 5pm 11 August 2020 and 13 August 2020 devoid of the usual committee processes.

429. The Claimant and the Australian Companies did not know about Quigley's idea of legislative intervention texted to Premier McGowan on 23 May 2020. the Claimant and the Australian Companies did not know that the idea had been developed and that through June, July and August 2020 a select group of Western Australian officials were secretly promulgating the Amendment Act.

430. Having had the idea of the Amendment Act in May 2020, Western Australia was thereafter merely pretending to engage with the arbitral process, while at the same time going to extreme lengths

[532] Texts between Quigley and McGowan on 23 May 2020 (**Exh. C-432**).

to maintain the secrecy of its real agenda: the promulgation and passage of the Amendment Act to terminate that very process. The Respondent's Statement on Preliminary Objections does not mention this two-faced subterfuge at all. Indeed, the Respondent entirely avoids the early morning genesis of the Amendment Act as set out in Quigley's crude text to the Premier, the extraordinary rationalisation for Western Australia's duplicity articulated by the Attorney General and the Premier to the Western Australia legislature and at the 12 August 2020 media conference, or the dichotomy of Western Australia's conduct in terms of the secret promulgation and urgent passage of the Amendment Act on the one hand and its pretence of engagement with the obligations under the State Agreement and/or the Arbitration Agreement on the other.

431. The Respondent has not put forward any evidence from Quigley or McGowan or any other Western Australia government official to otherwise explain Western Australia's actions in this May – August 2020 period (or at any other time). In those circumstances, the Claimant submits, it must be inferred that Western Australia knew that the measure giving rise to this treaty claim was unforeseeable and took deliberate steps to ensure that it remained so.

432. The Respondent effectively submits in its Reply that the way in which the Amendment Act came about and the parallel deceptive conduct of Western Australia in respect of the Arbitration Agreement are somehow irrelevant to this issue of treaty abuse. But it is difficult to see how that can be so: Western Australia deliberately led the Claimant and the Australian Companies down one path while secretly plotting to terminate the very same

processes. The Respondent's conduct in this regard is directly relevant to whether the measure at issue in this treaty claim was objectively foreseeable from the point of Restructuring in January 2019 until 11 August 2020.

433. Having successfully pulled off this "*Trojan horse*"[533] manoeuvre (as per Quigley's text) to pass what Quigley and McGowan acknowledged at the 12 August 2020 media conference to be an "*extraordinary measure*",[534] the Respondent cannot then be heard to say that those associated with the Claimant should have seen the Amendment Act measure coming all along. Western Australia's plea of bad faith and abuse of process by the Claimant is uttered from an ashen mouth when Western Australia's own duplicity to concoct the situation and deceive the Claimant and its subsidiaries is considered. In other words, Western Australia went to considerable lengths to keep the prospect of any amendment to the State Agreement adverse to the Australian subsidiaries and/or the abolition of the Arbitration Agreement a secret, and yet the Respondent now maintains that the Claimant/its subsidiaries should have expected it was likely that such extraordinary legislation would be passed. The Respondent's position is incongruous and unsupportable.

d. <u>The Respondent's Behaviour did not Foreshadow the Present Dispute</u>

434. Until the moment the Amendment Act was introduced into the Western Australian Parliament, all of the Respondent's actions

[533] Texts between Quigley and McGowan on 23 May 2020 (**Exh. C-432**).
[534] Transcript of Press Conference, 12 August 2020 (**Exh. C-465**),

(i.e., those of the Western Australian government) indicated that it would continue to participate in the domestic arbitrations in the usual way.

435. Western Australia had:

a. participated fully in both the first and second domestic arbitrations;

b. challenged the award in the second domestic arbitration in the Western Australian Courts in accordance with its rights under the relevant arbitral legislation;[535]

c. accepted the Court's dismissal of that challenge;

d. participated in the third domestic arbitration for around nine months;

e. attended a directions hearing in June 2020 and agreed to file evidence and submissions in accordance with the procedural timetable;

f. signed the Arbitration Agreement setting out the scope of the third domestic arbitration and confirming the appointment of the Hon Michael McHugh in July 2020;[536] and

g. signed the Mediation Agreement in August 2020, agreeing to attempt to settle the dispute through mediation.[537]

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[535] *State of Western Australia v Mineralogy Pty Ltd* [2020] WASC 58, (**Exh. CLA-8**).
[536] Executed counterparts of the Arbitration Agreement, 17 July 2020, (**Exh. C-242**).
[537] Executed counterparts of the Mediation Agreement, 5-6 August 2020 (**Exh. C-266, Exh. C-269, Exh.C-272**).

436. Nothing in the Respondent's behaviour to 11 August 2020 hinted at or foreshadowed the measures that would be imposed through the Amendment Act. No threat had ever been made to interfere with the domestic arbitrations through legislation. No threat had ever been made to withdraw from the domestic arbitration proceedings. The Amendment Act literally came out of the blue. It was a separate and distinct action that involves a separate and distinct dispute.

Conclusion

437. The Claimant's claims are not an abuse of right. First, the Claimant's inclusion in the ownership structure of the Australian Companies was for genuine commercial reasons, of which treaty protection was merely ancillary. Mr Palmer, Mr Martino, Mr Harris and Mr Migliucci have all deposed to these matters and instead the Respondent has sought to attack the evidence through opinion evidence – but that does not address the threshold point or the evidence submitted by the Claimant's factual witnesses in good faith, none of which is properly susceptible to challenge – not least given that it is the honest evidence of three individuals with no, or no proper, basis on which to challenge their credibility. As events transpired, treaty protection became relatively more important to the Claimant, but at the time of the Restructuring the primary purpose of the Claimant's incorporation was for financing, investment and tax reasons, all of which have been explained in detail in the Claimant's evidence.

438. This Section of the Claimant's Rejoinder has highlighted, however, that regardless of purpose, the Restructuring was not abusive because the termination of the Arbitration Agreement and its

processes by legislation was not objectively foreseeable as at the time of the Restructuring, nor at any time until the Amendment Act was introduced as a bill late in the afternoon of 11 August 2020 – some 20 months after the Restructuring.

439. Western Australia led the Claimant subsidiaries to believe it would continue to comply with the BSIOP Arbitration that had been in place since 2012. Western Australia did not threaten or announce that it would terminate the BSIOP Arbitration. Instead, Western Australia worked assiduously to keep its plans in that respect a secret. Given also the historical context that no state agreement had ever been unilaterally amended or terminated, it beggars belief now that the Respondent alleges that the those associated with the Claimant and its Subsidiaries ought to have foreseen termination of inter alia the Arbitration Agreement as a realistic prospect at the time of the Restructuring (some 20 months earlier when the Arbitration Agreement did not exist) or indeed at any time up until the introduction of the Amendment Act on 11 August 2020.

e. Additional Summary Responses to the Respondent's "Abuse of Process" Objection

440. This section contains further answers to which the Respondent's unfounded allegation that the Claimant's claim is *"an abuse of process"*. Its purpose is to respond, at a somewhat greater level of granularity, to the detail of specific arguments and issues raised in the ROPO.

441. For the reasons set out in this section, the corporate restructure which involved the incorporation of the Claimant in Singapore was not undertaken for the *"determinative or principal purpose of*

bringing a treaty claim … in relation to an existing or foreseeable dispute".[538]

442. For convenience, the Claimant generally adopts the headings and sub-headings used in this part of the ROPO, except where they are unduly tendentious.

A. THE PURPOSE OF THE RESTRUCTURE

443. In paragraph 176 of the ROPO, the Respondent asserts that the Claimant *"does not dispute the necessity of assessing whether it had a bona fide purpose for the January 2019 restructure"*. This misrepresents the actual position of the Claimant, which is explained below.

444. The cited paragraphs of the Claimant's SODPO do not support the Respondent's assertion at all. They do nothing more than state, as a matter of fact, that the restructure was a *bona fide* process conducted for genuine commercial purposes. It does not follow that it is necessary for such *bona fide* purposes to be found by the Tribunal to have existed in this case.

445. Indeed, that issue is entirely immaterial in this case given that the relevant dispute was not in any way foreseeable at the time of the restructure.

446. Also, as explained below, the fact that the Respondent and its coterie of "desktop" experts now seek to quibble with the Claimant's commercial rationale for the restructure is equally irrelevant.

447. As will be seen, there are a great many such attempts in the ROPO to misrepresent the position of the Claimant and misstate the facts

[538] Contrary to what is stated in the ROPO, para 175.

and evidence. These attempts, presumably borne of desperation, cast considerable doubt on the *bona fides* of the Respondent's preliminary objections as a whole.

448. Despite the Respondent's attempted misrepresentation, the Claimant's position was and remains perfectly clear. As the Claimant said in the SODPO:[539]

> "*The Claimant's position in response to this allegation is straightforward. First, the Restructuring was effected for a genuine commercial purpose, which was to provide the Mineralogy group and Mr Palmer with significant potential financing, investment and tax advantages …..*
>
> *Secondly … there is no abuse of right regardless of the purpose of the Restructuring because at the time of the restructuring the specific dispute before this Tribunal was not in existence, nor was it objectively foreseeable as a reasonable prospect. In the absence of a foreseeable and likely dispute the Restructure was a legitimate act of corporate planning*". [Emphasis added]

449. In any event, and without prejudice to its position that the commercial rationale for the restructure in January 2019 is irrelevant (given that the relevant specific dispute could not have been foreseen at that time), the Claimant reiterates that the restructure was a *bona fide* process conducted for genuine commercial purposes and responds below to paragraphs 177 to 239 of the ROPO.

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[539] SODPO, para's 489 to 490.

450. The Respondent asserts, incorrectly, that the Claimant's account of the precise advantages to be gained from the restructure *"has shifted … over the course of this arbitration"*.[540] In particular, the Respondent asserts that what it calls the "*Alleged Lithium Rationale"* and the *"Alleged Risk and Exposure Rationale"* have "been abandoned by [the Claimant]".[541]

451. The Claimant emphasises, again, that the precise advantages to be gained from the restructure, a process undertaken more than 18 months before the current dispute was foreseeable, are not relevant and that the Tribunal does not need to make any finding in relation to that issue.

452. Nevertheless, it is wrong to say that the Claimant has "abandoned" any of the matters it has put forward in its Statement of Claim and in the evidence previously filed. It has not abandoned anything. On the contrary, the Claimant continues to rely upon all of the material it has previously filed. This includes all of the material filed by the Claimant demonstrating that the corporate restructure in January 2019 was a bona fide process undertaken for genuine commercial reasons.[542]

453. The Respondent's approach in the Reply is to put forward one canard after another, the next one being that the Claimant *"has not refuted*" the Respondent's so-called *"evidence of the true purpose behind [the Claimant's] incorporation and acquisition of Mineralogy*

[540] ROPO, para 178.
[541] ROPO, para 178, 211.
[542] SODPO, para's 21(c), 45, 145, 552, 574(b) and (x), 646, 681; Fifth Palmer WS, para's 48, 66, 69, 109, 139.

shares". This is another misrepresentation of the Claimant's true position.

454. The Claimant's position is that the Respondent has not adduced, and is not in any position to adduce, any evidence at all of the true purpose behind the restructure.

455. Rather, the Respondent has assembled a team of essentially academic "desktop" experts to advance a series of ill-conceived criticisms of the transaction and its perceived potential benefits. For the reasons mentioned later in this document, those opinions, given years after the event by persons who lack relevant expertise and have no personal knowledge of the relevant facts, are entirely irrelevant.

456. It is hardly surprising that the Claimant would not seek to refute irrelevant opinion evidence of this kind by adducing equally irrelevant opinion evidence of its own. Rather, the Claimant has adduced direct evidence of fact from those actually involved in the transaction, including the primary decision maker, Mr Palmer. The Claimant's evidence amply demonstrates the true purposes behind the restructure and the *bona fides* of that transaction.

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

a. The September 2008 meeting

457. In paragraphs 181 to 191 of the ROPO, the Respondent seeks to make much of the existence and contents of a single document, described as the "Prospectus meeting agenda".

458. The Respondent's submissions about the "Prospectus meeting agenda" should be rejected for a number of reasons.

459. *First*, the Respondent says that the Claimant's relevant evidence was that the possibility of "restructuring through Singapore" was first contemplated during 2008. The Respondent then raises Cain about an alleged "paucity of documents" to corroborate that.[543] Yet the Claimant's evidence was not to the effect that a "restructuring through Singapore" was first contemplated during 2008; rather, the evidence shows that incorporation of a company in Singapore was first contemplated during 2008. The relevant evidence about this is identified below.

460. Further, there is no reason to suppose that the initial contemplation of an event will give rise to the creation of a multitude of documents or, indeed, any documents at all. The Respondent's startlingly strident submissions on this topic[544] thus proceed upon a fundamental misconception.

461. *Secondly*, the Respondent's submission to the effect that the Prospectus meeting agenda *"does not support the inferences [the Claimant] asks the Tribunal to draw"*[545] also proceeds upon a misconception.

462. The Respondent fundamentally ignores the relevant evidence on this topic. The evidence is that, when the possibility of restructuring through Singapore was contemplated by Mr Palmer during the first week of June 2018,[546] he cast his mind back to the September

[543] See, in particular, ROPO, para's 181 and 182.
[544] ROPO, para 182.
[545] ROPO, para 183.
[546] Palmer Fifth WS, para 48.

2008 meeting, because the possibility (and indeed desirability) of incorporation in Singapore for the purposes of finance raising (rather than a restructuring of the kind which occurred in January 2019) was initially considered and discussed during that meeting.[547]

463. Once the true nature of that evidence is understood, the Respondent's submissions on this issue[548] are exposed as irrelevant. Those submissions proceed upon a fundamental misapprehension, namely that the Claimant is asking to draw "inferences" from the contents of the "Prospectus meeting agenda". This is not so for the following reasons:

a. The Prospectus meeting agenda was not produced because the Claimant asks the Tribunal to draw any "inferences" from its contents.

b. The Prospectus meeting agenda was produced in response to a document production request.

c. The only forensic relevance of the Prospectus meeting agenda is that it corroborates the fact that the meeting mentioned in Mr Palmer's evidence took place.

d. The suggestion that the Claimant is asking the Tribunal to draw "inferences" from the contents of the "Prospectus meeting agenda" is merely an invention of the Respondent. In circumstances where the Tribunal has evidence from Mr Palmer about the fact of the September 2008 meeting taking place, there is no need for the Tribunal to draw any inference

[547] Palmer Fifth WS, para 49 and 50.
[548] ROPO, para's 181 to 189.

about that fact and the Claimant does not ask that any inferences be drawn.

e. The contents of the document itself are not relevant. They could only be relevant if they contradicted Mr Palmer's recollection of what was discussed at the meeting, which they do not. There is nothing in the document which is inconsistent with Mr Palmer's recollection of the discussion at the meeting.

f. The Respondent attempts to ignore Mr Palmer's direct evidence about what was discussed at the meeting and substitute purported "expert evidence" from persons who did not attend the meeting. This is truly extraordinary. Essentially, the Respondent's witnesses seek to give their opinion as to what was or was not discussed at the September 2008 meeting. That, of course, is a question of fact, not opinion. Direct evidence of the facts has been given by Mr Palmer, who attended the meeting and has first-hand knowledge of what was discussed. The Respondent's evidence on this topic is therefore entirely irrelevant.

g. It is not the proper function of an independent expert witness to engage in an exercise of speculation about what might have been discussed at a meeting many years ago, which that witness did not attend and about which the witness has no personal knowledge. The Respondent's evidence on this topic should therefore be treated as inadmissible.

h. The Respondent's evidence is also illogical because an agenda for a meeting is not a transcript or recording of the

discussion at the meeting. Indeed, given that an agenda for a meeting is prepared in advance of the meeting, that would be impossible.

i. The 2008 Singapore meeting was not (despite the Respondent's seemingly obtuse suggestion to the contrary) held for the purpose of discussing incorporation of a company in Singapore. The Singapore incorporation issue merely arose in passing in the context of the (IPO related) discussion at that meeting. This is established by Mr Palmer's evidence.

464. The Respondent's submissions concerning the Prospectus meeting agenda are, unfortunately, indicative of much of the Respondent's case strategy. That strategy involves:

a. seeking to ignore direct evidence of fact from witnesses with personal knowledge of and involvement in the relevant events;

b. seeking to meet that evidence with irrelevant, speculative opinion evidence from persons with no knowledge of or involvement in the relevant events;

c. seeking to mischaracterise the Claimant's position, evidence and submissions; and

d. making serious but baseless allegations against the Claimant and its witnesses, including by insinuating that the Claimant's witnesses are not to be believed.

465. The Respondent's conduct in these respects is deplorable scurrilous, misconceived and ill-founded and should, respectfully, be rejected.

466. The Respondent then seeks to springboard from its own mischaracterisation of the Claimant's evidence in order to assert that it *"must be common ground"* that, at the time of the September 2008 Singapore meeting, *"Mineralogy did not yet even own Waratah Coal"* and *"Mineralogy did not own the Queensland coal properties"*.[549]

467. None of this, of course, has any relevance whatsoever. As previously mentioned, the relevance of the 2008 Singapore meeting is that the desirability of incorporation of a company in Singapore for the purposes of finance raising was contemplated during 2008 (and is something to which Mr Palmer cast his mind back in early June 2018). In typical fashion, the Respondent avoids addressing that cogent direct factual evidence and instead sets up a "straw man" argument concerning the time of acquisition of the Queensland coal properties.[550] The Respondent then proceeds to beat its own "straw man" to death. This does nothing to advance the Respondent's case; indeed, it merely damages the Respondent's credibility.

468. Throughout this section of the ROPO, the Respondent sets out one "straw man" argument after another. The next one is to opine, through Mr Rogers, that *"had there been an intention to discuss project finance at that meeting"*, he would have expected *"specialist*

[549] ROPO, para 186.
[550] Ibid.

mining project financiers" to have been present.[551] However, nothing in the Claimant's evidence or submissions suggested that there was ever *"an intention to discuss project finance at that meeting"*. As mentioned above, the Claimant's evidence is that the Singapore incorporation issue merely arose in passing in the context of the (IPO related) discussion at the meeting; it was not part of the formal agenda for the meeting and no intention of that kind was formed in advance of the meeting. The proposition that one would expect a team of "specialist mining project financiers" to have been invited to attend the meeting, in order to discuss an issue which only arose in passing during the meeting, is self-evidently absurd. Again, the Respondent is attacking an irrelevant proposition which is based on a hypothetical factual scenario of its own invention.

469. Precisely the same comments apply to the Respondent's next "straw man" argument, which is to the effect that, *"had there been an intention to discuss project finance at that meeting"*, there would have been *"agenda items which related to debt"*.[552]

470. Ironically, the Respondent, having set fire to a series of these "straw men", then proceeds to set fire to the whole of its argument by conceding that the effect of the Claimant's evidence is in fact that *"the possibility of restructuring through Singapore"* was first considered in 2018.[553] That is precisely the point made above, namely that there is no inconsistency between:

[551] ROPO, para 187.
[552] Ibid.
[553] First Palmer WS at para 115.

a. the evidence that the possibility of restructuring through Singapore, in the manner which was ultimately done in early 2019, was first considered in 2018; and

b. the evidence that the possibility of incorporation in Singapore for the purposes of finance raising was first considered in 2008.

471. As a result, the Respondent has simply led the Tribunal on "a wild goose chase" in relation to this issue, ignoring in the process direct evidence of fact (from the Claimant's witnesses who have personal knowledge of and involvement in the relevant events), to mischaracterise the Claimant's position and to make scurrilous, unfounded allegations against the Claimant and its witnesses. This is inconsistent with the obligation on the Respondent to conduct these proceedings in good faith. The ROPO is replete with many other examples of such conduct by the Respondent, further examples of which are given below.

b. The stated urgency of the restructure

472. The Respondent seeks to make something of a reference to urgency in registering a company in Singapore "to capitalise on an investment opportunity", states that documentary record "discloses no pursuit of any such opportunity" and argues that the statement was "false" because no such opportunity was pursued.[554] This is another unfounded and scurrilous attack on the Claimant's factual witnesses, which the Tribunal should reject. In fact:

[554] ROPO, para's 192 to 194.

a. Although Mr Palmer did not perceive any specific, time-bound, considerations of urgency in the restructure at that time,[555] in circumstances where his decision to restructure had been reached in June 2018, he was nevertheless keen, by November 2018, to get on with things. Therefore, his representative's reference, in the relevant email relied on by the Respondent,[556] to "*looking to move very quickly*" was, and is, readily understandable, particularly in view of the fact that it was sent to one of the largest law firms in Singapore, [redacted].

b. The Respondent's suggestion that no investment opportunity was pursued in Singapore is unsustainable. As Mr Palmer explains,[557] one of the goals of the corporate restructuring was that it would lead to additional investment opportunities, including the establishing of new business in Singapore, thereby improving cashflow and enabling him to invest more funds in the Mineralogy Group via the Claimant. As the evidence shows, shortly after its incorporation the Claimant acquired the Singaporean Engineering Subsidiaries and established the Joint Venture in Singapore.

473. Accordingly, there is no merit in the Respondent's attempts to link the purported "*urgency*" for incorporating MIL and the Claimant, in late 2018/early 2019, to what it asserts was a "*major deterioration in relations between Mineralogy and the WA Government*" and Mr

[555] SODPO, para 601; Fifth Palmer WS, para 115.
[556] ROPO, para 192; Emails between [redacted] 30 November 2018 (**Exh. C-502**).
[557] Fifth Palmer WS, para 48, 60, 67 to 68, 71.

Palmer's alleged "*desire to secure treaty protection*" in respect of the same.[558]

c. The true rationale for the incorporation of MIL

474. In the face of direct, cogent evidence of fact concerning the commercial rationale for the incorporation of MIL, the Respondent seeks to construct its own highly tenuous, speculative theory concerning that rationale.[559] Once again, the Respondent's theory lacks any factual foundation. Indeed, it amounts to nothing more than an entreaty to the Tribunal to draw a series of inferences, all of which are contrary to the only available evidence of fact (adduced by the Claimant).

475. The Respondent's submissions on this topic should be rejected forthwith – not least because they consistently seek to mischaracterise the Claimant's position.

476. The foundation for the Respondent's submissions on this issue is without foundation. It invites the Tribunal to draw inferences based on a small bundle of press clippings from 2019. Not only are the contents of the press clippings obviously hearsay, which should be given no weight at all (not least as unreliable press commentary), but their subject matter is entirely irrelevant for the reasons mentioned below.

477. The Respondent submits that the Claimant *"has not contested or responded to"* the Respondent's so-called evidence about press clippings and related correspondence and such so-called evidence *"therefore stands unchallenged"*. These assertions are wrong. The

[558] ROPO, para 197.
[559] ROPO, para's 197 to 201.

relevant evidence was summarised in the Claimant's SODPO,[560] including as follows:

> "*The Respondent raises the CITIC letters in its Objections but, the CITIC letters merely evince Mr Palmer's knowledge of the existence of investor-State agreements and nothing more. As Mr Palmer confirms in his Fifth WS at paragraphs 139 to 140[561], the CITIC matter was a matter between Mineralogy and CITIC not the Respondent (including the Respondent's State of Western Australia). It was a proceeding in the Supreme Court of Western Australia and it has since been determined by the Supreme Court of Western Australia in favour of Mineralogy[562]. The CITIC matter is not addressed or referenced at all in the Amendment Act. The Respondent's attempt to elide the CITIC controversy with the current dispute has no basis in fact. The CITIC controversy was a controversy between the Claimant and CITIC whereas the CITIC controversy was subject to proceedings in the Supreme Court of Western Australia. The CITIC Parties were seeking to acquire land from Mineralogy without making any payment. The Supreme Court of Western Australia dismissed the proceeding.*
>
> *As Mr Palmer also confirms, there has never been an arbitration in respect of the CITIC matter and no arbitration in*

[560] SODPO, para's 523 to 527. See also SODPO, para's 630 to 634.
[561] Fifth Palmer WS, para 139 to 140.
[562] *Sino Iron Pty Ltd v Mineralogy Pty Ltd* [2023] WASC 56, (**Exh. CLA-70**).

respect of such matter was ever threatened commenced or held.[563]

Mr Palmer notes in his Fifth WS at paragraph 28[564] *that the State Agreement had always provided that it could be amended by consent and that no proposal had ever been sought to do so by the Respondent at any time since 2008 and, notes the 1996 paper of former Western Australian Premier Mr Colin Barnett, extracts from which are set out later in this Response, and which inter alia states as follows:*

> *"Unlike other statutes of Western Australia that can be changed by Parliament, State Agreement provisions can only be amended by mutual agreement by the parties thereto".*[565]
>
> *[Emphasis added]*

In January 2019, Mr Barnett's position was the orthodox position accepted at that time by Mineralogy and indeed the community of Western Australia.

The CITIC matter was a matter wholly unrelated to any arbitration and not in any way related to the Dispute before this honourable Tribunal".

478. The fanciful suggestions made by the Respondent concerning the rationale for the incorporation of MIL should be dismissed. The Tribunal should accept the direct evidence on this issue which has

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[563] Fifth Palmer WS at para 140.
[564] Fifth Palmer WS at para 28.
[565] The Hon. Colin Barnett, *State Agreements*, AMPLA Yearbook 1996, pp. 314-327, (**Exh. C-104**)

been given by the Claimant's witnesses, who have knowledge of all the relevant facts.

479. The Respondent states that the Claimant's SODPO *"is entirely silent as to its purposes for incorporating MIL in December 2018"*.[566] The Respondent is well aware that the SODPO does not constitute the entirety of the Claimant's case on this issue and, in fact, Mr Palmer and Mr Martino have both provided direct factual evidence relevant to this issue.[567]

480. The Respondent also asserts that the "Alleged Lithium Rationale" is *"the only rationale for the incorporation of MIL that Zeph has advanced"*. For the reasons set out below, that is another incorrect statement.

481. *First*, it is necessary to look at what the factual evidence actually is, namely that:

a. Following his decision in June 2018 to implement a restructure in Singapore, Mr Palmer received additional advice from Mr Martino in early August 2018 regarding the appropriate structure, which involved a holding company in New Zealand.[568]

b. Mr Palmer's initial view was that two structures should be established, one involving a company in Singapore owned by Mr Palmer directly and the other involving a New Zealand company which would own the Singapore company.[569]

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[566] ROPO, para 200.
[567] See, for example, Fifth Palmer WS, para 110 and 113; First Martino WS, para 24, 31 to 33 and 36.
[568] Fifth Palmer WS, para 110.
[569] Ibid.

c. Mr Palmer's initial view was that the New Zealand company should operate a lithium business.[570]

d. The evidence is very clear that these structures were envisaged, and ultimately established, in order to comply with advice which Mr Palmer had received from Mr Martino and to have "one group covering all business operations in New Zealand, Singapore and Australia".[571]

e. The evidence is equally clear about the commercial rationale for the incorporation of MIL, and the reason why that step needed to be taken first, namely that this offered significant taxation advantages. In particular, both Mr Palmer and Mr Martino have given evidence as to why MIL was incorporated in New Zealand in December 2018.[572]

482. Further, and in contrast to what is said in the ROPO,[573] the Claimant does join issue with the Respondent on its submissions and expert "evidence" concerning the "Alleged Lithium Rationale":

a. The Respondent's case, in this regard, is grounded solely on a report by a barrister from New Zealand, Mr Kalderimis (**Kalderimis Report**), and its conclusions that a New Zealand company would not have enjoyed meaningful regulatory advantages over, or been treated more favourably than, an Australian firm in relation to lithium exploration.[574]

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[570] Ibid.
[571] Ibid.
[572] Fifth Palmer WS, para 110, 113, 116, 121; First Martino WS, para 24, 31 to 33, 36.
[573] ROPO, para 201.
[574] SOPO, para 329 to 332; Kalderimis Report, para 34 to 36.

b. By Mr Kalderimis' own admission, though, he is a commercial dispute resolution lawyer and not a regulatory specialist (or even a corporate lawyer).[575] With respect, then, he lacks expertise in the very area on which he purports to opine.

c. In addition, the Kalderimis Report – like the rest of the Respondent's expert 'evidence' in support of its Preliminary Objections – is nothing more than a second-hand opinion, produced long after-the-event by an unconnected third party, that is flatly contradicted by the testimony of not only Mr Palmer but Mr Martino – both of whom were directly involved in MIL's incorporation in New Zealand.

d. Contrary to the Respondent's plea, therefore, it has not "*already demonstrated that the alleged reason for incorporating MIL in New Zealand… is not credible*";[576] or come close to doing so.

e. Rather, and as set out in the Claimant's SODPO,[577] the Tribunal should give the Kalderimis Report no weight (given the candid admission by the maker of the report that he lacks expertise in the very area on which he purports to opine), and the evidence of Mr Palmer and Mr Martino should clearly be preferred.

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[575] Kalderimis Report, para 2 and 14.

[576] ROPO, para 200.

[577] SODPO, para 621(e). As the Tribunal will observe, the Respondent is also wrong to claim, as it does in its ROPO, at [200], that the Claimant's submission in respect of the Kalderimis Report was made "*with no plausible basis or supporting reasoning*"; the Claimant explicitly identified in its SODPO the grounds on which it invites the Tribunal to accord no weight to Mr Kalderimis' "evidence".

483. The rationale for the incorporation of MIL has therefore been explained by the Claimant's evidence and the Respondent's submissions on this topic should be rejected.

d. The true rationale for the incorporation of the Claimant

484. The Respondent's submissions concerning the rationale for the incorporation of the Claimant[578] should also be rejected. Again, these submissions amount to nothing more than an entreaty to the Tribunal to draw a series of inferences, contrary to the only available evidence of fact (adduced by the Claimant).

485. These submissions also misrepresent the documentary evidence. For example, the Respondent asserts that a chain of emails states that the Claimant *"was created for the purposes of 'acquiring established businesses in Singapore'"*.[579] This is blatantly misleading. The relevant email[580] merely noted that the new entity *"will be acquiring established businesses in Singapore"*. That does not mean that Zeph was created for that *purpose*. The Respondent's attempts to misrepresent the Claimant's position, evidence and submissions are relentless. The Tribunal should be vigilant to reject those attempts.

486. The Respondent also complains about what it calls a "*paucity*" of documentation from the Claimant explaining the purposes behind its incorporation.[581] That complaint is, however, unfounded because:

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[578] ROPO, para 202 to 210.
[579] ROPO, para 208.
[580] See ROPO, para 204(e).
[581] ROPO, para 203.

(a) As the Respondent itself acknowledges,[582] the Claimant has disclosed such documents, including for example correspondence between Mr Palmer's representative and [redacted]; the Claimant's Certificate of Incorporation; and further correspondence between the Mineralogy Group, [redacted], and PwC.

(b) The Respondent's contention also ignores the important evidence about the independent financial reports produced by a pre-eminent British economist, [redacted], in September 2018, at Mr Palmer's request, in respect of seeking funding in Singapore ([redacted] **Reports**).[583] Indeed, the Respondent makes no mention at all of the [redacted] Reports in its SOPO or ROPO.

(c) It appears that the Respondent's complaint really relates not so much to the volume but to the type of material produced, e.g., the fact that no board minutes or correspondence from Mr Palmer himself have been disclosed. But this does not begin to substantiate its allegation that it was a need for "*a company incorporated in a different jurisdiction that was also party to investment treaties with Australia*"[584] that prompted the Claimant's incorporation in Singapore and ignores Mr Palmer's approach to running his own business (by contrast with the type of material one might expect if

[582] ROPO, para 204 and 205.
[583] Analysis of China First Coal Project - Option 1, Report, (September 2018) (**Exh. C-472**); Analysis of China First Coal Project - Option 2, Report, (September 2018) (**Exh. C-474**).
[584] ROPO, para 202.

Zeph were a public company, as opposed to a closely held proprietary company).

(d) In any event, the fact that there are not more documents does not assist the Respondent, given that Mr Palmer, Mr Martino, and Mr Harris all address the commercial reasons for incorporating the Claimant in Singapore in their evidence.

487. The Respondent argues, also, that the documents disclosed do not support the Claimant's rationales.[585] This argument too is without foundation:

a. This argument is premised, once more, on the Respondent's erroneous insistence that the Claimant relies only on the Coal Funding Rationale and the Tax Rationale.[586] As set out above, that is not the case.

b. As Mr Palmer explains,[587] one of the other objectives of the restructuring was that it would create further investment opportunities, including the forming of new business in Singapore. Consistent with this, the email chain cited by the Respondent in its ROPO[588] expressly referred to the Claimant "*acquiring established businesses in Singapore*" (which subsequently it did).

c. The Respondent again conveniently overlooks the [redacted] Reports, which explicitly related to the Coal Funding

[585] ROPO, para 208.
[586] ROPO, para 208.
[587] Fifth Palmer WS, para 48, 60, 67 and 68, 71.
[588] ROPO, para 208; **Exh. R-771**.

Rationale (which, even on the Respondent's own case, the Claimant relies on).[589]

488. Another striking feature of the ROPO is the Respondent's attempt, through its team of "desktop" opinion experts, to second-guess the commercial decision-making processes of Mr Palmer and the Mineralogy Group, including by asserting that they should be expected to have obtained further *"tax advice, legal advice, corporate and business advice, or strategic advice"*.[590] Subjective opinions held by the Respondent or its witnesses, concerning the extent to which Mr Palmer or Mineralogy could or should have obtained additional professional advice, are simply not relevant.

489. Further, the evidence establishes that the Mineralogy Group is a closely held group of companies. The benefits of keeping a business closely held are not limited to maintaining control of a majority of the shares. Those benefits also include greater control, in the sense that a closely held company allows the ultimate beneficial owners to have a huge influence over the strategic direction of the company. This provides the freedom to make business-changing decisions, even where those decisions involve potential risk, and to take such decisions rapidly whenever circumstances suggest that it is desirable to move quickly. Indeed, many successful business people believe that it is invariably desirable to move quickly. As Andrew Carnegie once said, for example: *"The first man gets the oyster, the second man gets the*

[589] Analysis of China First Coal Project - Option 1, Report, (September 2018) (**Exh. C-472**); Analysis of China First Coal Project - Option 2, Report, (September 2018) (**Exh. C-474**).
[590] ROPO, para 210.

shell". In similar vein, Mr Palmer states his view that he is *"not in business to tread water"*.[591]

490. The Respondent's submissions also overlook the long experience and success of Mr Palmer as an *entrepreneur*. The hallmarks of a successful entrepreneur include confidence in one's own judgment, the ability to identify opportunities missed by others, the ability to act quickly and decisively, and a willingness to take risks in order to achieve success. By contrast, it is often said that one of the greatest mistakes an entrepreneur can make is to take advice from too many different people.

491. Indeed, it is these very qualities which led to Mr Palmer being recognised in Australia's *Government* magazine as an "Entrepreneur of the Decade"[592] and becoming the fifth wealthiest Australian.[593] These same qualities enabled Mr Palmer, having arranged for Mineralogy to acquire certain mining tenements in the Pilbara district of Western Australia in the mid-1980s, to turn the iron ore deposits that existed on the tenements into something extraordinary for Australia. This culminated in the Sino Iron Project, which involves the largest investment made by China in a single iron ore project.

492. Mr Palmer has now been involved in business for more than 40 years. Projects which he has initiated or controlled during that time have contributed to the direct or indirect creation of more than

[591] Sixth Palmer WS at para 86.
[592] First Palmer WS at para 9.
[593] Sixth Palmer WS at para 73; Australian Financial Reviews 2023 Rich List, (**Exh. C-481**).

40,000 jobs in Australia and more than $10 billion of investment in the Australian economy.[594]

493. Mr Palmer and Mineralogy did not achieve these extraordinary successes by allowing themselves to become captive to an army of lugubrious, grey-suited advisers. As the evidence shows, they seek and obtain professional advice, such as taxation advice, when they identify a need for it, but not otherwise.

494. Nevertheless, as the evidence shows, advice was in fact obtained in relation to the corporate restructure. As shown by Mr Palmer's evidence,[595] such advice was obtained from (*inter alios*) representatives of [redacted] and [redacted] Mr Martino's own advice was also instrumental, as both he himself[596] and Mr Palmer[597] confirm. And, as Mr Harris explains,[598] advice was taken, too, from [redacted], in the form of the [redacted] Reports.

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

495. The Respondent commences this section by asserting, again that the Claimant "now appears to maintain only two of its rationales" for the corporate restructure, namely the Alleged Coal Funding Rationale and the Alleged Tax Rationale.[599]

496. This effectively repeats the Respondent's previously debunked assertion that what it calls the "*Alleged Lithium Rationale"* and the

[594] First Palmer WS at para 17.
[595] Fifth Palmer WS, para 49 and 50.
[596] First Martino WS, para 16 to 37.
[597] Fifth Palmer WS, para 51, 110, 116, 118.
[598] First Harris WS, para 11 to 15.
[599] ROPO, para 211.

"Alleged Risk and Exposure Rationale" have "been abandoned by [the Claimant]".[600] Again, the Claimant continues to rely upon all of the material it has previous filed, including witness statements in which both Mr Palmer and Mr Martino address the Alleged Lithium Rationale.[601]

497. The Claimant emphasises, again, that the precise advantages to be gained from the restructure, a process undertaken more than 18 months before the current dispute was foreseeable, are not relevant and that the Tribunal does not need to make any finding in relation to that issue.

498. Nevertheless, as previously mentioned, it is wrong to say that the Claimant has "abandoned" any of the matters it has put forward in its Statement of Claim and in the evidence previously filed. On the contrary, as previously mentioned, the Claimant continues to rely upon <u>all</u> of the material it has previously filed.

a. <u>Zeph's Coal Funding Rationale</u>

499. Turning to the Coal Funding Rationale and Tax Rationale, specifically, the Respondent baldly asserts that the Claimant has not produced "*sufficient*" (whatever that means) documentary, witness, or expert evidence to show the purposes of the restructure.[602] At the risk of repetition, the Claimant observes as follows:

    a. The burden is on <u>the Respondent</u> to put forward coherent material that points to an abuse of process.

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[600] ROPO, para 178, 211.
[601] Fifth Palmer WS, para 110, 113; First Martino WS, para 24, 31 to 33, 36.
[602] ROPO, para 212.

b. It is only if the Respondent has done so that the onus falls on the Claimant to adduce evidence to explain its actions.

c. As noted above, the Respondent has not produced such coherent material. Rather, it has come up with a series of complaints about the Claimant's document production, coupled with an array of *ex post* and/or inadmissible opinions from third-party experts (in respect of what is essentially a matter of fact).[603]

d. Strictly speaking, then, the Claimant is not even under any evidential obligation in respect of the Abuse of Process Objection.

e. Nonetheless, the Claimant has provided evidence to explain why it did what it did, when it took steps, including from those "on the ground" at the relevant time, together with contemporaneous documentation (where available, in line with the Tribunal's order) and expert testimony (where appropriate).

f. Instead of properly engaging with that material in its ROPO, the Respondent instead falls back on its expert "evidence" – as well as resorting to unjustified ad hominem attacks on the Claimant's witness, especially Mr Palmer (as referred to above).

500. The submissions in the ROPO in relation to the Coal Funding Rationale are illustrative of this approach on the Respondent:

[603] The Respondent recognises that this is the Claimant's position and does not appear to dispute that it is correct: ROPO, para 212.

a. They commence with repetitive assertions that there is no "*documentary evidence*" to support this motivation (which in fact there is, including the [redacted] Reports);[604] and that the Coal Funding Rationale would not have explained the "*apparent urgency*" for the Claimant's incorporation[605] (as already dealt with above).

b. The Respondent asserts, too, the fact that the Claimant did not subsequently take steps that are consistent with the rationale and instead acquired unrelated businesses – the Singaporean Engineering Subsidiaries.[606] This does not serve to prove, though, that the Coal Funding Rationale was not one of the reasons for incorporating the Claimant in late 2018/2019. In fact, it only demonstrates that (contrary to the Respondent's case) there were a number of commercial purposes in play, including (as Mr Palmer sets out)[607] exploring new investment opportunities in Singapore.

c. The Respondent also seeks to criticise the Claimant for failing meaningfully to engage with the reports of Professor Lys and Mr Rogers.[608] However:

   i In both its SODPO and this Rejoinder, the Claimant has highlighted the shortcomings, generally, in the Respondent's expert "evidence", which is directly contradicted by the material adduced by the Claimant

[604] ROPO, para 213.
[605] Ibid.
[606] Ibid.
[607] Fifth Palmer WS, para 8, 60, 67 to 68, 71.
[608] ROPO, para 214 to 217.

(chiefly, testimony from the key players at the relevant time).

ii The reports of Professor Lys – like the Kalderimis Report – are flawed in that he does not have experience of mining deals in Singapore,[609] such that, with respect, he lacks expertise in the very field on which he purports to opine.

iii Professor Lys' "evidence", in this regard, stands in stark contrast to that of Mr Palmer himself, who brings to the table not only vast experience but a track record of success in this area.

iv For the avoidance of doubt, the fact that the Claimant did not respond, in SODPO, to Mr Rogers' "*conclusion 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*" does not mean that it "*stands unchallenged*".[610] Again, that conclusion runs directly contrary to the evidence of the individuals who were actually involved in the restructure at the material time.

v Mr Rogers sees fit to call into question, too, Mr Palmer's testimony as to the advice that he personally received during the meeting in Singapore in September 2008[611] – a meeting which, again, neither Mr Rogers nor any of

[609] SODPO, para 621(b).
[610] ROPO, para 216.
[611] ROPO, para 217; Rogers Supplementary Report, paras 4.5.1, 4.6.1 and 4.6.3.

the Respondent's other witnesses attended, and of which he has no firsthand knowledge.

vi It will be for the Tribunal to decide whether to accept the Claimant's evidence on these issues, or to prefer the *ex post facto* desktop commentary of the Respondent's witnesses. The Claimant submits that the choice for the Tribunal, in the premises, is obvious and the Respondent's evidence should be rejected.

501. There are additional reasons why the subjective and idiosyncratic opinions of Professor Lys[612] cannot possibly assist the Tribunal. Indeed, the Tribunal should reject his evidence in toto. It is no part of the function of an expert witness to draw inferences and arrive at factual conclusions (e.g. about whether or not certain matters are *"supported by the evidence"*) as Professor Lys purports to do. That is a function of the Tribunal, which cannot be usurped by a witness. The making of such statements also casts serious doubts upon the objectivity and independence of Professor Lys and suggests that his evidence should be rejected or, at least, that no weight should be given to his evidence.

502. Similar comments apply to the evidence of Mr Rogers.[613] It is absurd for the Respondent to adduce opinion evidence to the effect that there is "no serious basis" on which to conclude that Mineralogy held the view that the restructuring would increase the likelihood of attracting coal financing for Mineralogy projects, in circumstances where witnesses for the Claimant have given evidence of the holding of that view. Whether Mr Rogers agrees

[612] See ROPO, para 214 and 215.
[613] See ROPO, para 216 and 217.

with that view or not (which is irrelevant), it is entirely improper for him to suggest, in effect, that those witnesses are lying.

503. Similar comments apply to Mr Rogers' "opinion" that no specialist project financier would give the evidence which was, in fact, given to Mr Palmer.[614] This is an improper insinuation to the effect that Mr Palmer is not telling the truth. In this regard, Mr Rogers is conducting himself like an advocate, not as an independent expert witness.

504. Again, it is no part of the function of an expert witness to draw inferences and arrive at factual conclusions (e.g. about whether or not certain views were in fact held) as Mr Rogers purports to do. That is a function of the Tribunal, which cannot be usurped by a witness. The making of such statements also casts serious doubts upon the objectivity and independence of Mr Rogers and suggests that his evidence should be rejected or, at least, that no weight should be given to his evidence

505. It should also be observed that, despite admitting that the corporate restructure was *"both lawful and effective"*[615] the Respondent tosses around, like so much confetti, allegations to the effect that the transaction was "a sham" and "a paper façade". In doing so, the Respondent has made a scurrilous and unfounded attack on the Claimant's factual witnesses and this is conduct which the Claimant submits should be rejected by the Tribunal in the firmest of terms.

[614] ROPO, para 217.
[615] See ROPO, para 64.

506. As for the opinion of Mr Rogers to the effect that *"the project would not have been financed"*, that opinion is simply not relevant. All that matters is the view which was in fact taken by the relevant Mineralogy Group personnel at the time.

b. Zeph's Tax Rationale

507. This somewhat lengthy section of the ROPO[616] seeks to dispute that *"any tax benefits could flow to the Mineralogy Group (or, indeed, to Mr Palmer) as a result of the restructure"*. This proposition must be rejected, for the following reasons.

508. First, the Respondent's assertion that the Claimant has "repeatedly failed to clarify the precise tax advantages that it claims could have accrued from the restructuring in January 2019" is demonstrably incorrect. The Claimant's material identifies those tax advantages in considerable detail.

509. *Secondly*, the Respondent queries why a dividend paid out in 2022 was not dealt with in accordance with the structure recommended by Mr Martino and approved by Mr Palmer. Mr Palmer explains that in his witness statements.[617]

510. *Thirdly*, and most importantly, the Respondent's evidence actually confirms that the structure which was put in place to secure the perceived tax advantages is a valid and effective structure, subject to some basic steps being taken. For example, Professor Phua stated in paragraph 48 of his report:[618]

[616] ROPO, para 218 to 239.
[617] First Palmer WS; Sixth Palmer WS, paras 86 and 88.
[618] ROPO, para 226.

"*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 … be exempt from income tax in Singapore if he satisfies IRAS that granting him such an exemption is beneficial to him.*"

511. And Mr Cooper states in paragraph 59 of his report as follows:

> *"But so far as Australian income tax is concerned, <u>what saves Mr Palmer $90m of Australian tax on a future dividend</u> is ceasing to be a resident before the dividend is paid."*

512. The validity and effectiveness of the structure which was implemented in January 2019, *inter alia* to obtain the tax advantages identified by the Claimant, is thus common ground.[619]

513. All the Respondent seeks to do is throw up a series of irrelevant hypothetical scenarios, none of which may ever come to pass. All that matters is that the structure (which even the Respondent's expert witnesses accept is valid and effective for its intended purpose) has been out in place. That being the case, any issues concerning *activation* of the structure for the purpose of obtaining tax advantages would need to be identified and addressed <u>at the time of activation</u>. No doubt professional advice would be obtained at that time but the Claimant cannot be criticised for not having

[619] BDO Services Report at para 1, p.1.

obtained extensive advice (or generated extensive documentation) about a process which has not yet been activated.

514. Accordingly, the issues raised by the Respondent's experts are necessarily hypothetical, especially given that tax laws (as a former American President once said) *"undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow"*. As such, any potential advantages or disadvantages, or other issues, would need to be considered and addressed at the time of activation, having regard to the state of the relevant tax laws in Singapore (and Australia) at the relevant time and professional advice in connection therewith.

515. It also bears repeating, of course, that a difference of opinion regarding the extent of the tax advantages which might be available at a given point in time, as a result of the restructure, is entirely irrelevant to the decision making process which resulted in the restructure implemented in January 2019, based on the advice which was sought and obtained at that time.

B. FORESEEABILITY OR OTHERWISE OF THE DISPUTE

516. The Respondent asserts that the Claimant "has elected not to address [the Respondent's] argument as to the foreseeability of the dispute on the terms in which it has been put".

517. As demonstrated by the authorities referred to below:

a. the Respondent's argument is entirely misconceived because it has nothing to do with foreseeability of the specific dispute which is now before this Tribunal; and

b. applying the relevant legal principles, the Respondent's admission to the effect that the Amendment Act could not have been foreseen at the time of the restructure in January 2019 (or indeed at any time prior to the Bill for the Amendment Act being introduced on 11 August 2020)[620] is fatal to the Respondent's "abuse of process" objection.

(iii) The "specific factual matrix of the Balmoral dispute"

518. The Respondent contends that the Claimant "seeks to have the Tribunal ignore" the "factual matrix" of what it calls the "Balmoral Dispute".[621] The answer to that contention is obvious. What the Respondent is seeking to do is as follows:

a. first, it seeks to redefine the dispute before this Tribunal on its own absurdly broad terms; and

b. secondly, in reliance in this artificial edifice of its own invention, it seeks to suggest (despite admitting that the Amendment Act itself was entirely unforeseeable[622]) that it is sufficient to show that some kind of *"conduct in relation to the BSIOP Proposal"*[623] was reasonably foreseeable.

519. The Respondent complains that the Claimant has not engaged with what it variously describes as "the Balmoral Dispute"[624] and "the BSIOP Dispute".[625] The Claimant is not prepared to entertain, and

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[620] See , *Zeph Investments Pte Ltd v Australia* (PCA Case No 2023-40, Procedural Order No. 4, 24 May 2024), (**Exh. CLA-261**), para 37.
[621] ROPO, para 241 to 244.
[622] See *Zeph Investments Pte Ltd v Australia* (PCA Case No 2023-40, Procedural Order No. 4, 24 May 2024), (**Exh. CLA-261**), para 37.
[623] ROPO, para 242.
[624] E.g., ROPO, para 241, 242.
[625] E.g., ROPO para 244, 253, 262.

submits that the Tribunal should not entertain, the disingenuous game which the Respondent is playing here. It involves defining the dispute before this Tribunal as "the Balmoral Dispute" and then seeking to suggest, in effect, that this is the same thing as "the BSIOP Dispute", notwithstanding that the latter term is defined in the Respondent's own document as the "*Dispute between Mineralogy and the WA Government concerning the BSIOP Proposal, pre-dating this arbitration"*.[626]

520. In seeking to elide the difference between these two very different things, the Respondent quite incredibly asserts that the Amendment Act was *"a measure of the type contested by the parties in relation to the CITIC Dispute"*. This is self-evidently absurd, for the following reasons.

521. *First*, as the Claimant has already pointed out:[627]

> *"As a preliminary point, it is important to take into account the fact that the Respondent's Objections are made in the context of the Amendment Act: an unprecedented and extraordinary piece of legislation when viewed in the context of Australian history. It is also unique when viewed in the broader parameters of the approach to rule of law and proper conduct of Governments in western democracies going back at least to the Second World War. In short, there has never been a measure like it in any Western democracy anywhere in the world for at least the last 80 years – a fact which underscores*

[626] ROPO, p. iv.
[627] SODPO, para 15.

the inherent and fundamental flaws in the Respondent's arguments about foreseeability and abuse of process."

522. *Secondly*, to illustrate the absurdity of the Respondent's argument, it is worth reiterating the following points previously made by the Claimant:

"The main purpose of the Amendment Act was to terminate the Arbitration Agreement entered on 8 July 2020 and the State Agreement Arbitration and to achieve the following objectives and outcome" which includes the termination of the Arbitration Agreement and includes*:*

i. *"Any relevant arbitration and arbitration agreement (including the State Agreement Arbitration and the Arbitration Agreement) between the Respondent's State of Western Australia and the Claimant's subsidiaries that is in progress or otherwise not completed immediately before commencement of the Amendment Act is terminated with immediate effect (section 10);*[628]

ii. *The First and Second Awards in favour of the Claimant's subsidiaries in the State Agreement arbitration are of no effect and are taken never to have had any effect (section 10);*[629]

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

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

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

Iron Ore Proposal (and any such liability existing before commencement is extinguished) (section 11);[630]

iv. *On and after commencement of the Amendment Act, no proceedings can be brought to establish, quantify or enforce any such liability (section 11);*[631]

v. *There can be no appeal against or review of any of Western Australia's conduct concerning the Balmoral South Iron Ore Proposal and the rules of natural justice, including any duty of procedural fairness, shall not apply (section 12);*[632]

vi. *The Balmoral South Iron Ore Proposal (which was the subject of the First Award) is to have no contractual or other legal effect under the State Agreement or otherwise (section 9);*[633]

vii. *The Claimant's subsidiaries and their relevant director (as defined) must indemnify, and keep indemnified, Western Australia against any loss or liability connected with the Balmoral South Iron Ore Proposal, including those arising under international law or international treaties (section 14);*[634]

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[630] Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 11, (**Exh. C-1**).
[631] Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 11, (**Exh. C-1**).
[632] Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 12, (**Exh. C-1**).
[633] Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 9, (**Exh. C-1**).
[634] Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 14, (**Exh. C-1**).

viii. *The Claimant's subsidiaries and their relevant director must indemnify, and keep indemnified, Western Australia against any legal costs and any liability to pay any legal costs of any other person in connection with legal proceedings connected with the Balmoral South Iron Ore Proposal, as well as any loss connected with a stated intention or threat to bring such proceedings (section 14);*[635]

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

x. *No conduct of Western Australia connected with the consideration of courses of action for resolving disputes about the Balmoral South Iron Ore Proposal, including anything in connection with the Amendment Act itself and any communications and statements made in connection therewith, has or has ever had the effect of causing or giving rise to the commission of a civil wrong by Western Australia (section 18);*[636]

xi. *No such conduct of Western Australia has or has ever had the effect of placing Western Australia in breach of or of frustrating the State Agreement, any related arbitration agreement, any related mediation agreement, or any other agreement or understanding, nor of giving rise to*

[635] Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 14, (**Exh. C-1**).
[636] Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 18, (**Exh. C-1**).

any right or remedy against Western Australia (section 18);[637]

xii. *No document, other thing or oral testimony connected with such conduct is admissible in evidence or can otherwise be relied upon or used in any proceedings in any way that is against the interests of Western Australia (section 18);*[638]

xiii. *Western Australia has and can have no liability to any person that is in any way connected with such conduct and any such liability that Western Australia had before commencement of the Amendment Act is extinguished (section 19);*[639]

xiv. *No such conduct of Western Australia can be appealed against, challenged, quashed or called into question on any basis and the rules of natural justice, including any duty of procedural fairness, shall not apply (section 20);*[640]

xv. *Any proceedings in which such conduct is appealed against, challenged, quashed or called into question on any basis that are not completed before commencement of the Amendment Act are terminated (section 20);*[641]

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[637] Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 18, (**Exh. C-1**).
[638] Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 18, (**Exh. C-1**).
[639] Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 19, (**Exh. C-1**).
[640] Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 20, (**Exh. C-1**).
[641] Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 20, (**Exh. C-1**).

xvi. Any proceedings in which such conduct is appealed against, challenged, quashed or called into question on any basis have been completed before commencement of the Amendment Act, any remedy, ruling or other outcome unfavourable to Western Australia or that requires Western Australia to do or not do anything are extinguished (section 20);[642] *and*

xvii. Any such conduct of Western Australia before, on or after commencement of the Amendment Act does not constitute and is taken never to have constituted an offence (section 20).[643]*"*

523. Accordingly, it is not merely the Amendment Act which was not foreseeable. The enactment of any measure remotely like the Amendment Act (a measure not seen in any Western democracy anywhere in the world for at least the last 80 years) was not foreseeable either. The radical and extreme nature of that measure, its shocking assault on rule of law norms, and the complete secrecy surrounding the preparation of the legislation introduced at 5.00 p.m. on 11 August 2020 are such that the dispute which is the subject of this arbitral proceeding could never have been foreseeable prior to that date and time.

524. In any event, as the relevant authorities (referred to in this Rejoinder) show, there is a significant distinction between the possibility or probability of the adoption of some kind of state measure and the occurrence of a specific dispute and this requires,

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[642] Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 20, (**Exh. C-1**).

[643] Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020, section 20, (**Exh. C-1**).

inter alia, an analysis of *"the extent of state intervention"* which, in the case of the Amendment Act, was not reasonably foreseeable at any time prior to 11 August 2020 when the shocking and unprecedented nature of the relevant measure was first announced.

(iv) The law relevant to foreseeability for abuse of process objections

525. The Respondent argues that a dispute may be foreseeable "even if the precise measure that crystallises that dispute is unforeseen" and that identification of a dispute "focusses on substance and not form".[644]

526. These arguments take the Respondent nowhere because it is plain, having regard to the form and the substance of the Amendment Act, the Respondent's admission that the Amendment Act was not foreseeable,[645] and the applicable legal principles referred to below, the dispute before this Tribunal was not foreseeable at the time of the restructure in January 2019 or, indeed, at any time prior to 11 August 2020 (when the Bill for the Amendment Act was introduced).

527. The Claimant relies on the following relevant authorities, not addressed by the Respondent, which confirm that the Respondent's "abuse of process" objection is misconceived and doomed to fail.

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[644] ROPO, para 245 and 246.

[645] See *Zeph Investments Pte Ltd v Australia* (PCA Case No 2023-40, Procedural Order No. 4, 24 May 2024), (**Exh. CLA-261**), para 37.

528. The Claimant relies on the following statement of principle in *Philip Morris v Australia*:[646]

> *"[T]he initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when* ***a specific dispute*** *was foreseeable*." [Emphasis added]

529. The Claimant's position is also supported as the Claimant has referred above by the *Clorox* line of decisions, which include decisions of the Swiss Federal Tribunal.[647] The Respondent is aware of those decisions, and indeed relies on parts of them in other contexts,[648] but tellingly makes no reference to the passages set out later in this section. This suggests that the Respondent appreciates that it has no answer to the points made below but has nevertheless maintained its "abuse of process" objection in bad faith.

530. In the decision of the First Court of Civil Law of the Swiss Federal Tribunal dated 25 March 2020,[649] the Court noted that *"the temporal aspect is decisive"* and that it is necessary to examine the time at which a challenged *"acquisition of nationality"* was *"carried*

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[646] PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, (**RLA-65**) at para 554**.**

[647] *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***); and *Clorox Spain SL v Venezuela (II)*, Decision of the Swiss Federal Tribunal, 148 III 330 (4A_398/2021), 20 May 2022 (***Clorox v Venezuela II***).

[648] See ROPO at [59](a); [59](c), n. 138; [61](c), n. 169; [71](b); [259], [266], [267].

[649] *Clorox v Venezuela I*, supra.

out in relation to a specific dispute opposing the investor to one of the contracting states".[650]

531. That Court in that decision referred interchangeably to the concepts of "a specific dispute",[651] "a specific future dispute"[652] and "the dispute giving rise to the arbitration proceedings".[653]

532. The references to *"a specific dispute"* and *"a specific future dispute"* are very significant. In this context, it can only mean the specific dispute articulated in the Claimant's Notice of Arbitration (also treated as Statement of Claim) arising out of the enactment of the *Amendment Act* in 2020 and its destruction of valuable rights, particularly the contractual right to have damages assessed in accordance with the Arbitration Agreement. That specific dispute was not foreseeable at any time prior to 5.00 p.m. on 11 August 2020 when the Western Australian Attorney-General, John Quigley, rose to his feet in the Western Australian Parliament to introduce the Bill for the *Amendment Act*.[654] Indeed, Mr Quigley and others in the government of Western Australia had gone to great lengths to ensure that it would be impossible for anyone associated with the Claimant or its subsidiaries to foresee the measure imposed by

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[650] *Clorox v Venezuela I*, paragraph 3.4.2.8.

[651] Ibid.

[652] Ibid.

[653] Ibid.

[654] Western Australia Parliamentary Hansard, 11 August 2020, p. 4, (**Exh. C-429**); Extracts from Court Book in Federal Court of Australia defamation proceeding between Mr Clive F Palmer and Mr Mark McGowan (Premier of Western Australia), Affidavit of Mark McGowan sworn 26 March 2021, pp. 134 & 136, (**Exh. C-135**); Extracts from Court Book in Federal Court of Australia defamation proceeding between Mr Clive F Palmer and Mr Mark McGowan (Premier of Western Australia), Affidavit of J Quigley sworn 25 March 2021, p. 115, (**Exh. C-135**); Transcript of press conference interview 12 August 2020, pp. 1, 7 & 9, (**Exh. C-465**); NSD912/2020 Transcript, XXN of J Quigley, 9 March 2022 and 8 April 2022, pp. 16, 21-23, 25 and 27, (**Exh. C-136**); NSD912/2020 Transcript, XXN of M McGowan, 9 March 2022, pp. 8-12, (**Exh. C-136**); Transcript of press conference interview, 12 August 2020,p. 9, (**Exh. C-465**).

the *Amendment Act*. This was achieved by a deliberate and elaborate process of secrecy and deception. Even the Respondent has now admitted that the secrecy was such that the enactment of the Amendment Act could not have been foreseen at any time prior to 11 August 2020, more than 18 months after the restructure implemented in January 2019.[655]

533. In this case of course, *"the dispute giving rise to the arbitration"* is not what the Respondent describes as "the Balmoral Dispute", what it describes as "the BSIOP Dispute" or what it describes as "the CITIC Dispute". None of the Respondent's descriptions corresponds to the dispute giving rise to this arbitration, which arose out of the enactment of the Amendment Act on 13 August 2020, something which (by the Respondent's own admission[656]) could not have been foreseen at any time prior to 11 August 2020.

534. Further, the disputes described by the Respondent are different disputes involving different subject-matter and different parties. They are not the *"specific dispute opposing the investor to one of the contracting states"*, which is the dispute brought before this Tribunal by the Claimant.

535. In the decision of the First Court of Civil Law of the Swiss Federal Tribunal dated 20 May 2022,[657] the Court noted that:

> *"Several arbitral tribunals and numerous authors have rightly recognized that it is not in itself abusive for an investor to (re)structure its investment in order to meet the conditions set*

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[655] See *Zeph Investments Pte Ltd v Australia* (PCA Case No 2023-40, Procedural Order No. 4, 24 May 2024), (**Exh. CLA-261**), para 37.

[656] Ibid.

[657] *Clorox v Venezuela II*, supra.

out in an investment treaty and thus obtain the benefits of the treaty, including to protect itself from future disputes with the host state".[658]

536. The Court went on to say, however, that:

> *"If the restructuring is carried out with a view to a specific future dispute at a time when the latter is foreseeable, the objection based on abuse of the treaty may apply"*.[659] [Emphasis added]

537. After noting that "the threshold for finding treaty abuse is high, which is why it should not be accepted too readily",[660] the Court said:[661]

> *"The Court of Appeal has already made it clear that the temporal factor plays a decisive role in drawing the line between legitimate planning to acquire nationality and abuse of the treaty …. Thus, in principle, the protection of an investment treaty must be refused to an investor when he carries out a nationality acquisition transaction at a time when 'the dispute giving rise to the arbitration proceedings was foreseeable and this transaction must be considered,*

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[658] *Clorox v Venezuela II*, paragraph 5.2.3.

[659] Ibid.

[660] Ibid. See also, in this regard, *Philip Morris Asia Limited v The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, [539]; *Renée Rose Levy and Gremcitel S.A. v Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, [186]; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, [143] (*"In this context, it has further to be noted that in all legal systems, the doctrines of abuse of rights, estoppel and waiver are subject to a high threshold. Any right leads normally and automatically to a claim for its holder. It is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim. The high threshold also results from the seriousness of a charge of bad faith amounting to abuse of process"*).

[661] *Clorox v Venezuela II*, paragraph 5.2.4.

according to the rules of good faith, as having been carried out with a view to this dispute' …. It follows that a restructuring must have been carried out with a view to a specific dispute at a time when its occurrence was foreseeable". [Emphasis added]

538. The Court noted that the Arbitral Tribunal, the decision of which it upheld, considered that *"treaty abuse presupposes that a specific future dispute appears probable to a very high degree"*[662] and that:

> *"[A] distinction should be made between the probability of the adoption of a state measure and that of the occurrence of a specific dispute, the degree of probability being necessarily higher in the second case, since the constituent elements of a dispute are not limited to the adoption of measures of general scope, but also encompass their practical implementation and consequences …. In the arbitral tribunal's view, an abuse of the treaty can only be found where the investor was aware of all the elements that made it possible to foresee the specific dispute in respect of which it is suing the host state for breach of the BIT. This involves asking whether the specific dispute dividing the parties was foreseeable for the claimant when she became aware of the speech made by the former President of the host State …. On the basis of the short extract from this speech … the Panel considers that the only thing an investor could foresee was the future adoption of a law regulating*

[662] *Clorox v Venezuela II*, paragraph 5.3. See also, for example, *Pac Rim Cayman LLC v The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, paragraph 2.99 (*" … the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy"*).

prices and the creation of a state authority responsible for setting said prices. Nothing more. An investor could determine neither the products targeted nor the extent of state intervention … The announcement of a new price control law could not, in itself, anticipate the specific dispute submitted to the Arbitral Tribunal, given that a price control regime has existed for over 70 years in the State concerned …. The Arbitral Tribunal therefore concludes that the dispute was not foreseeable at the time of the restructuring … and the claimant has therefore not committed any abuse of rights". [Emphasis added]

539. There is an obvious analogy between the speech made by the President in the *Clorox* case and the statements made by Mr McGowan in the present case. As the Claimant previously noted:

> *"While bluster and bluffing are part of everyday commercial negotiation and political theatre, no person could have foreseen measures remotely resembling those imposed by the Amendment Act, or measures with anything like that nature or effect, involving, inter alia, unilateral repudiation of the Claimant's rights by an extraordinary and unprecedented Act of Parliament being enacted in breach of the rule of law by a Western Democracy"*.[663]

540. The *Clorox* decisions thus confirm the correctness of the Claimant's submissions on this issue.

541. Accordingly, nothing said or done prior to January 2019 (or, indeed, prior to 11 August 2020) was sufficient to make foreseeable the

[663] SODPO, para 633.

occurrence of the specific dispute which the Claimant has brought before this Tribunal. In no way could the Claimant have foreseen the *"practical implementation and consequences"* of the measure planned and prepared in secret by the Respondent's State of Western Australia in 2020, *"all the elements"* of that extraordinary and unprecedented measure and *"the extent of state intervention"* by the Amendment Act in an arbitral process which had been on foot for some eight years.

542. This reasoning of the arbitral tribunal, which the Court accepted in *Clorox*, is fatal to the Respondent's "abuse of process" objection. The statements just quoted are directly applicable to the circumstances of the present case.

543. Indeed, the reasoning set out above applies a fortiori in this case. In the Clorox case, the arbitral tribunal made the point that "the announcement of a new price control law could not, in itself, anticipate the specific dispute submitted to the Arbitral Tribunal, given that a price control regime has existed for over 70 years in the State concerned". In the present case, however, the position is much starker because the evidence shows that, prior to the Amendment Act, there was a 70 year history of State Agreements in the Respondent's State of Western Australia in which that State had <u>never</u> sought unilaterally to amend a State Agreement and, indeed, such a thing was considered unthinkable.[664]

544. The Court in *Clorox* went on to say:

> *"The presidential speech in question certainly raised the possibility that the measures announced might eventually give*

[664] See the SODPO, para 525 and 526, 630 to 632; Fifth Palmer WS at para 28.

rise to a dispute between investors and Venezuela. It is not possible to conclude that a reasonable investor, placed in the same circumstances, could have inferred from such a speech that a specific future dispute was foreseeable from that fact alone. In this respect, it must first be stressed that the terms chosen by the former Head of State could well have been a mere announcement designed to galvanize his supporters. It is therefore not possible to infer from the words spoken by the former President of the State concerned that they would predictably result in the adoption of concrete measures. Secondly, despite the appellant's claims to the contrary, the vague outlines of this short extract from a lengthy presidential speech … in no way made it possible to predict whether the products marketed by an investor would actually be affected by the planned state measures. Nor did they make it possible to foresee that they would be on such a scale as to lead to litigation. On this point, it should also be pointed out that Venezuela has had a price-control regime for almost 70 years, but this has not deterred the respondent and the group of companies to which it belongs from making investments there. It is certainly likely that this group saw the President's announcement as a warning signal of possible measures that could affect the sustainability and profitability of its investments, which is why it probably wanted to secure its assets as much as possible by restructuring. However, such an approach cannot be described as abusive since, on the basis of the facts found by the Arbitral Tribunal, it is not possible to conclude that a specific future dispute was

foreseeable when the investment was restructured …".[665] [Emphasis added]

545. The Court concluded as follows:

> *"In the final analysis, the objection that the respondent was guilty of an abuse of the treaty must be dismissed, since the appellant has failed to provide the necessary evidence to show that the disputed restructuring was carried out with a view to a specific dispute at a time when such a dispute was foreseeable."*[666]

546. In this case, of course, the Respondent has accepted in terms that the specific dispute was not foreseeable at the time of the restructure.[667]

547. For all these reasons, the Respondent's "abuse of process" arguments are illogical, misconceived, contrary to the evidence and contrary to authority and its "abuse of process" objection must be dismissed.

(v) The role to be played by foreseeability

548. For the reasons set out above, the additional arguments set out in paragraphs 261 to 264 of the ROPO are also misconceived as a matter of law.

C. ZEPH'S CLAIM DOES NOT INVOLVE AN ABUSE OF PROCESS

[665] *Clorox v Venezuela II*, paragraph 5.6.
[666] Ibid.
[667] See *Zeph Investments Pte Ltd v Australia* (PCA Case No 2023-40, Procedural Order No. 4, 24 May 2024), (**Exh. CLA-261**), para 37.

549. For the reasons set out above, the Respondent's "abuse of process" objection is entirely misconceived as a matter of law[668] and must be dismissed.

SECTION TWO: FURTHER RESPONSES TO THE REPLY

550. In this Section Two the Claimant outlines its further responses to the Reply.

V. ADMISSION AND ESTOPPEL

a. Introduction

551. In its Reply, the Respondent has:

a. mischaracterised the Claimant's submissions that the Respondent has made admissions in respect of investor and investment which bind it, as an estoppel argument. The Respondent has not denied that admissions have been made by it;

b. failed to respond at all in relation to the Claimant's submissions that the Respondent's objections in respect of investor and investment are an abuse of process; and

c. incorrectly treated the Claimant's Response as being based on the 'broad'[669] view of estoppel whereas the Claimant's

[668] See *Clorox v Venezuela II*, paragraph 5.6; ROPO, [259].
[669] Bowett, D., *Estoppel before International Tribunals and Its Relation to Acquiescence*, 33 British Yearbook of International Law (BYIL), 1958, 176, (**Exh. RLA-104**), p. 202.

Response posits the 'broad' view as being the preferred approach in the circumstances of this case but in any event proceeds to prove estoppel on both the broad and strict views (i.e. including reliance and detriment).

552. Each of these defects in the Respondent's Reply will be dealt with in turn.

b. Mischaracterisation of Claimant's Response in Respect of the Respondent's Admissions

The 'Admissions Submission' and the Good Faith Submissions

553. The Claimant's Response could not have been clearer that the Respondent's objections to jurisdiction must fail because the objections are in direct conflict with its own previous determinations and conduct[670], that the Respondent has accepted the Claimant is a foreign Singaporean investor and meets the jurisdictional requirements of the AANZFTA. This argument is then developed at paragraphs 50 – 143 of the Claimant's Response (the "**Admissions Submission**").

554. What then follows at paragraphs 144 – 211 of the Claimant's Response are separate arguments arising out of the good faith doctrine including the Respondent's abuse of process, estoppel and acquiescence (the "Good Faith" Submissions).

[670] See for example para 48: *The Respondent's Objections are contrary to previous determinations, acceptances, approvals and admission to the Respondent's jurisdiction made to the Claimant and its investments by the Respondent since early 2019. As set out in Section II and IV below, the Respondent has formally admitted the Claimant and the Claimant's investments to the jurisdiction of the Respondent on 29 March 2019.*

555. Despite this, the Respondent at paragraph 10 of the Reply has mischaracterised the entirety of the Admissions Submission as an estoppel argument.

556. What then follows in the Reply is an attempted attack on the Admissions Submissions - by applying estoppel principles. The argument therefore fails before it even starts. The Respondent fails, even remotely, to engage with the Admissions Submission, yet alone contest it, and the Claimant's position should therefore be accepted. That is, the Respondent is bound by its admissions that the Claimant is an investor of Singapore which has made investments in Australia.

The Respondent's Admissions

557. It is worth briefly re-stating the matters which constitute admissions by the Respondent most of which are prior to the Reply and which are set out at paragraphs 50 to 143 of the Response and now include admissions that the relevant date is 13 August 2020[671] and an admission in paragraph 64 of the Reply that the Share Swap is "legal and effective"[672] and the Claimant is an owner of the shares and therefore an investor under AANZFTA. In light of those submissions, it is a nonsense to suggest, as the Respondent does, that any dispute earlier is relevant in any way.

558. First, the Respondent has acknowledged that the Claimant is an investor which has made an investment in Australia. The acknowledgments (i.e. 'admissions') made by the Respondent are:

[671] ROPO, para 131
[672] ROPO, para 64.

a. The Respondent's notification to the Claimant and the Government of Singapore of its exercise of the purported right to deny the benefits of Chapter 11 of AANZFTA to the Claimant and its investments by way of letters dated 22 December 2020[673] and 24 June 2021,[674] was made on the implicit basis that the Claimant is an investor of Singapore and has investments in Australia;[675]

b. ASIC, the Respondent's corporate and financial regulator, has accepted that the Claimant is a foreign corporation which made investments in Australia in March 2019;[676]

c. The Respondent's agency responsible for administering foreign investment into Australia in respect of Australian real estate, the Australian Foreign Investment Review Board ("**FIRB**"), has previously accepted (indeed, itself determined) that the Claimant is an investor of Singapore making an investment in Australia;[677]

d. The Respondent's States of Western Australia and Queensland have each separately determined that the 29 January 2019 restructure which saw the Claimant acquire 100% of the shares in Mineralogy meant that Claimant "made an acquisition" in Mineralogy and that the value of the landholdings component of the share transactions was

[673] Letter from the Office of International Law of the Attorney-General's Department of Australia to Volterra Fietta, 22 December 2020 (**Exh. C-153**).
[674] Letter from the Office of International Law of the Attorney-General's Department of Australia to Volterra Fietta, 24 June 2021 (**Exh. C-155**).
[675] Response, para 122 –126.
[676] Response, paras 61 – 97.
[677] Response, paras 98 – 109.

$3,901,429 in Queensland and $189,000,000 in Western Australia;[678]

e. Although the Respondent purported to deny the benefits of AANZFTA on 24 June 2021, the Respondent subsequently in its financial years 2022, 2023 and 2024 Budget Papers expressly acknowledged the Claimant's claims as a "contingent liability";[679] and

f. The matters set out in paragraphs 32 to 36 of this Rejoinder

559. Second, the Respondent has alleged in its Response that Mr Palmer (an investor of Australia) indirectly owns or controls Mineralogy. However, the Respondent's State of Western Australia has determined (i.e. 'admitted') that Mineralogy is a foreign corporation because it is owned or controlled by the Claimant[680].

Admissions, Meaning and Effect – Legal Principles

560. An 'admission' is a previous statement or representation by one of the parties to a proceeding that is adverse to their interests in the outcome of the proceeding. This definition covers both express admissions and implied admissions by conduct. [681] The Claimant submits that evidence may be received, and acted upon by the tribunal as decisive as an admission or acknowledgement of the state of a parties' rights and obligations *vis a vis* the other party. As

[678] Response, paras 110 – 121.
[679] Response, paras 127 – 135.
[680] Response, paras 136 - 143.
[681] See for example: Evidence Act 1995 (Cth) Dictionary, Pt 1; Evidence Act 1995 (NSW) Dictionary, Pt 1; Evidence Act 2001 (Tas) s 3(1); Evidence Act 2004 (NI) Dictionary, Pt 1.

Bowett explained,[682] the relevance of admissions is that even though they may not peremptorily preclude the party from the averring the truth of a proposition, they nevertheless serve as admissions against interest that will have probative value or analytical utility when adjudicating on the relevant points of fact or law.

561. Such a meaning of admission is consistent with the meaning given by this Tribunal in Procedural Order No. 4 at paragraph 37.[683] The Tribunal concluded that as a result of the Respondent's acknowledgement and concession, the fact (passing of the Amendment Act) was not controversial (hence was not in issue and disclosure was not required).

562. The Claimant's Response devotes some 93 paragraphs[684] to an exposition of what the statements and conduct were and how they constitute admissions by the Respondent. In reply, none of the Respondent's analysis in relation to estoppel is apposite to whether the statements and conduct of the Respondent constitutes an admission or what the effect of the admission is. The Respondent's Reply leaves the Claimant's arguments in relation to the admissions unchallenged and the Claimant's submissions should therefore be accepted.

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[682] W Bowett, "Estoppel before International Tribunals in Relation to Acquiescence" (1957) *British Yearbook of International Law* 176, 195, (**Exh. RLA-104**).

[683] *However, the Tribunal understands that the Respondent acknowledges that the fact of the passing of the Amendment Act per se was not foreseeable to the Claimant at the time of the January 2019 Restructure. Indeed, referring to evidence already in the record and in part furnished by the Claimant, the Respondent concedes that the Amendment Act was not conceptualized before March-May 2020;47 that the draft bill that would become the Amendment Act was not approved before July 2020; and that the draft bills were not only kept secret, but were accessible only to a handful of high-level public officials. [Emphasis added]*

[684] Response, para 50-143.

563. The effect and meaning of an admission requires an objective interpretation of the statement or conduct. In the case of each of the admissions set out above, the statements and conduct are clear and unequivocal and should be objectively construed as an admission by the Respondent for the purposes of AANZFTA, including that the Claimant is an investor of Singapore with investments in Australia, as explained below. This is particularly the case in respect of the 'denial of benefits' admission which is dealt with separately below where the admission was made specifically in the context of and in accordance with AANZFTA.

Further Applicable Principles of Customary International Law

564. Further or in the alternative, the binding nature of the Respondent's statements and conduct upon an admission may also find legal expression under customary international law in the form of the principles of 'unilateral act', 'good faith' and "approbation or reprobation". That is, the Respondent may be found by the Tribunal to be bound by its statements (defined above as the "Respondent's Admissions") under the customary international law principles of 'unilateral act', 'good faith' or 'approbation and reprobation'. Irrespective of the principle applied, the outcome is the same, namely that the Respondent is bound by its previous statements and cannot now aver inconsistent or contrary positions.

Unilateral Acts and Good Faith

565. The consent of the Respondent to arbitration in Article 21 of AANZFTA is incontrovertibly a unilateral declaration by the Respondent. It's inclusion in the treaty is determinative that it was intended that under AANZFTA, customary international law

principles in respect of *unilateral acts* would apply in the context of the investor state treaty obligations.

566. Further, the principle of good faith grants legal force to unilateral acts of States and requires nothing else for the existence of an international obligation than the intention of the state.[685]

567. A unilateral act is an expression of will from the Respondent which produces legal effects in conformity with international law, in particular, that the State is bound by its acts. In respect of the "Respondent's Admissions", those statements may be regarded as unilateral acts which bind the Respondent.

Doctrine of Approbation and Reprobation

568. The following cases address the principle of law of general application that it is not possible for a party to approbate and reprobate:

a. Volpi v Volpi and Delanson[686]:

> *"[244] The abuse of process point is supported by reference to the observation of Sir Nicolas Browne-Wilkinson V.C. (later Lord Browne-Wilkinson) in Express Newspapers plc v. News (UK) Ltd. (1990) 1 WLR 1320, where he said:*

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[685] *Nuclear Tests* (*Australia* v. *France*) (Jurisdiction and Admissibility) [1974] ICJ Rep 253, (**Exh. CLA-246**), para. 43; ILC, 'Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations', Yearbook of the ILC 2006, Vol 2, Part 2, A/CN.4/SER.A/2006/Add.l (Part 2) 369, 370, (**Exh. CLA-247**). *Nuclear Tests* (**Exh. CLA-246**) fn(2), para. 43 ('[N]othing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect […]').

[686] *Volpi v Volpi*, Ad hoc Arbitration, Ruling of the Supreme Court of the Bahamas, Consolidated Appeals 2020APPsts00013, 2020APPsts00018, 28 December 2023, at para 244, (**Exh. CLA-262**).

"There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them, and having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance." "

b. Arius v WPIL:[687]

"Arius is indeed attempting to hedge its position by saying that the arbitral proceedings, which Arius itself commenced, will be withdrawn, but only upon dismissal of the present application. That is an entirely impermissible course which seems to approbate and reprobate and blow hot and cold at the same time. It is plain to me that the Statutory Demand was served for the improper purpose of exerting pressure on WPIL to pay an alleged debt that is hotly disputed. This Court will not countenance such an approach."

c. V Goel v S Goel and Others[688]:

"The plaintiff cannot be allowed to approbate and reprobate. If the Arbitration proceedings commenced even against the plaintiff by the said notice, surely the present suit is not maintainable and the parties are to

[687] *Arius v WPIL*, DIAC Case No. 23-0065, Judgment of the High Court of Justice of the British Virgin Islands, 27 March 2024, at para 47, (**Exh. CLA-263**).
[688] *V Goel v S Goel and Others*, Judgment of the Delhi High Court 2023_DHC_5565, 8 August 2023, at para 43, (**Exh. CLA-264**).

be referred to arbitration. If the arbitration proceedings did not commence with the above notice, as it was not addressed to the plaintiff herein, the present suit and the application being filed after the coming into force of the Amending Act, the Amending Act will apply."

d. *CLX v CLY and others*[689]:

"The Court of Appeal, in BWG v BWF [2020] 1 SLR 1296 ("BWG") (at [102]) set out the law on approbation and reprobation as follows:

102 The foundation of the doctrine of approbation and reprobation is that the person against whom it is applied has accepted a benefit from the matter he reprobates (Evans v Bartlam [1937] AC 473 per Lord Russell of Killowen at 483). The doctrine of approbation and reprobation has also been referred to as a principle of equity that a person 'who accepts a benefit under an instrument must adopt it in its entirety giving full effect to its provisions and, if necessary, renouncing any other rights which are inconsistent with it' (Piers Feltham, Daniel Hochberg & Tom Leech, Spencer Bower: Estoppel by Representation (LexisNexis UK, 4th Ed, 2004) ('Estoppel by Representation') at para XIII.1.10). We endorse Belinda Ang Saw Ean J's description of the doctrine in Treasure Valley Group Ltd v Saputra Teddy and another (Ultramarine Holdings

[689] *CLX v CLY and others* [2022] SGHC 17 at para 41, (**Exh. CLA-265**).

Ltd, Intervener) [2006] 1 SLR(R) 358 ('Treasure Valley') at [31]:

The doctrine of approbation and reprobation precludes a person who has exercised a right from exercising another right which is alternative to and inconsistent with the right he has exercised. It entails, for instance, that a person 'having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit' : see Evans v Bartlam [1937] AC 473 at 483 and Halsbury's Laws of Australia vol 12 (Butterworths, 1995) at para 190-35 where the doctrine of approbation and reprobation is conveniently summarised as follows:

A person may not 'approbate and reprobate', meaning that a person, having a choice between two inconsistent courses of conduct and having chosen one, is treated as having made an election from which he or she cannot resile once he or she has taken some benefit from the chosen course."

e. *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan,* at paragraph 558:[690]

"According to the principle of national and international law known as approbate and reprobate,[639] Pakistan may not at the same time both rely on the Supreme

[690] *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/13/1, (**Exh. CLA-266**).

Court decision and seek to have it recalled or modified. (As far as the Tribunal has been informed, the procedure in Pakistan's Civil Review Petition has not been concluded.)"

For completeness, footnote 639 was as follows: *"See, for example, in the law of Pakistan, Secretary Economic Affairs Div, Islamabad v. Ahmed and others, Supreme Court of Pakistan 31 July 2013, §23 : "Even as a rule of evidence or pleading a party should not be allowed to and " [sic: approbate and reprobate?]. In the context of international law, Sir Ian Sinclair interpreted the reasoning of the International Court of Justice in the Aegean Continental Shelf case as "a specific application of the principle of intertemporal law, tempered by the equitable doctrine of approbation and reprobation": Sinclair, The Vienna Convention on the Law of Treaties, 2nd edition, Manchester 1984, p. 126 (emphasis added). See also Karkey's Post Hearing Brief, ¶¶ 77, 79 and 86 on estoppel."*

Application of Principles of Unilateral Acts, Good Faith and Approbation and Reprobation

569. Whilst in the following paragraphs, the statements and conduct of the Respondent is dealt with under the legal principle of 'admissions', for the sake of brevity, each statement or conduct should also be treated as if the customary international law principles of 'unilateral act', 'good faith' and 'approbate and reprobate' were applied. Accordingly, each of the "Respondent's Admissions" should be found to be binding on the Respondent

under each of the legal principles. In each case, the meaning and effect of the Respondent's Admissions should be construed on the same basis as set out below in respect of the application of the legal principles for admissions. In each case, the Respondent should be found to be bound by its statement of prevented from averring an alternative or inconsistent position.

The Meaning and Effect of the Admissions made by ASIC, ATO, FIRB, Qld and WA OSR

570. With regards to ASIC, as evidenced by the Claimant's Response at paragraphs 61 to 97, the Respondent (through its agency ASIC) has explicitly recognised:

a. the Claimant as a foreign corporation carrying on business in Australia;

b. the Claimant had made an investment in Mineralogy;

c. the Claimant actively managed its investments in Australia[691]; and

d. the audited Financial Statements accepted by ASIC disclose that the Claimant has made an investment in Mineralogy.[692]

571. ASIC was exercising its responsibilities under the ASIC Act and ensuring compliance with the Corporations Act and the maintenance of its registers subject to its power to require

[691] Response, paras 73 – 83.
[692] Response, paras 84 – 90.

correction of any document which is false or misleading or contrary to law or contains errors. ASIC did not exercise such powers.[693]

572. However, the Respondent says, "*that 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*." [694]

573. With regards to FIRB and the ATO, the Respondent asserts *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.*[695] And *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.*[696]

574. The same argument is applied in respect of the Queensland Revenue Office and the Western Australian office which determined that the Claimant made an acquisition in Mineralogy when the 29 January 2019 share transaction occurred. The Respondent again contends that the decisions were made in the context of their administration of the relevant domestic legislation

[693] Response, paras 61 - 63, 94 – 95.
[694] ROPO, para 24.
[695] ROPO, para 28b.
[696] ROPO, para 28c.

and have no application to the meaning of investor or investment in the context of AANZFTA. [697]

575. Thus, it can be seen that there is no ambiguity or uncertainty in the statements of the Respondent, *per se*. It can be seen that the Respondent has accepted that under its domestic law, the Claimant is a foreign investor of Singapore which has made investments in Australia. However, the Respondent contends that its statements that the Respondent is a 'foreign person', an 'investor' or has made an 'investment' under domestic law have no application under international treaty[698].

576. However, that is not the test for an 'admission'. The question for an admission is: in all the circumstances of the case, objectively construed, what did the Respondent's statement or conduct mean, when made?

What are the Facts and Circumstances in which the Admission is to be Construed?

577. These are the circumstances in which the Respondent's admissions are to be construed.

578. First, States must ensure their domestic laws permits them to meet their treaty obligations. Article 27 of the Vienna Convention, in part, provides that *A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.* Accordingly, it is recognised that statutes or particular sections of statutes should be administered in accordance with Australia's international

[697] ROPO, para 29.
[698] e.g, ROPO, para 28b.

obligations[699]. This applies particularly to the relevant statutory provisions administered by ASIC, ATO, FIRB, and OSR offices of WA and Qld, because they specifically deal with investment in Australia by foreign persons.

579. Second, in Australia, there is a presumption that Parliament, in enacting legislation, intends to act consistently with Australia's obligations under international law. It follows that, as a matter of statutory interpretation, domestic statutes will be construed where the language permits, so that the statute conforms to Australia's obligations under international law.[700] The very statutory provisions pursuant to which the Respondent made the statements[701]are exclusively about foreign investment and are of the very type where it is to be expected that the Respondent would ensure the specific legislative provisions conform to the Respondent's international law obligations.

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

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[699] *Minister for Immigration and Ethnic Affairs v Teoh* (2003) 195 ALR 502, (**Exh. CLA-248**), para 100.

[700] Dawson J in *Dietrich v R* (1992) 177 CLR 292, (**Exh. CLA-249**).

[701] Duties Act 2001 (Qld) (**Exh. CLA-167**), Duties Act 2008 (WA) (**Exh. CLA-168**), Foreign Acquisitions and Takeovers Act 1975 (Cth) (**Exh. CLA-166**), Corporations Act (**Exh. CLA-161**), ASIC Act (**Exh. CLA-163**).

promoting investment in its territory of Australia, which was to be undertaken in accordance with the Respondent's own domestic laws regarding such investment.

581. Fourth, as a major trade dependent nation, the Respondent's own domestic formulations of the meaning of 'investor' and 'investment', which are intended to apply to foreign persons making investments in Australia subject to investment treaty protections, should be seen as a statement by the Respondent as to its interpretation of those terms.

582. In light of the above, the statements by the Respondent to the Claimant should be objectively construed to have a meaning, which:

a. meets and is consistent with the Respondent's international law obligations;

b. conforms to the Respondent's obligations under international law in accordance with the presumption laid down by the Respondent's High Court; and

c. is understood in the context of the AANZFTA and its explicit objective of enhancing trade and promoting investment in accordance with the Respondent's domestic laws.

583. For these reasons, the Respondent's Admissions that the Claimant was (i) an investor of Singapore, (ii) the Claimant made an investment in Australia; and (iii) Mineralogy was controlled by the Claimant and not Mr Palmer should be objectively construed as admissions by the Respondent as to these matters for the purposes of AANZFTA.

584. The Respondent's admissions that the relevant date is 13 August 2020[702] and in paragraph 64 of the Reply that the share swap is "legal and effective" were made in this proceeding and are therefore clearly admissions in the context of AANZFTA.

585. Further or in the alternative, the Respondent should be bound to the Respondent's Admissions as a unilateral act or as matters upon which it cannot be permitted to approbate and reprobate.

The Admissions made by Department of Foreign Affairs and Trade ('DFAT') in the Denial of Benefits Letter

586. The admissions made by DFAT, the agency conducting this proceeding for the Respondent warrant special mention. At paragraphs 39 – 41 of the Reply, the Respondent addresses the Claimants' submission that the Respondent's invocation of denial of benefits constitutes an admission that the Claimant is an investor of Singapore. The Respondent seeks to dismiss the submission as *barely developed and absurd.*[703]

587. The Respondent does not engage with, yet alone contradict, the central proposition of this submission – that is, the terms of Article 2(d) of Chapter 11 of AANZFTA necessarily involves acceptance by the denying Party that the Claimant is an investor of Singapore and has made an investment in Australia. (The basis for this is self-evident from a reading of the article and is explained in the Reply.)[704] Whilst asserting the proposition is not developed, the Respondent implicitly accepts that it understands the proposition

[702] ROPO, para 131.
[703] ROPO, paras 39-40.
[704] Nonetheless, the argument is made good at Response paragraphs 122 – 124.

by saying that in the SOPO, it has argued in the alternative that Claimant is not an investor of Singapore and has not made an investment in Australia.

588. Rather, the submission is challenged on 2 specious grounds:

a. first, the "everybody does it" defence[705] (without citing authority), and

b. secondly, that the propositions that the Claimant is an investor of Singapore with investments within the meaning of Article 2(c) of Chapter 11 of AANZFTA are expressly denied in the same document in which the denial of benefits objection is developed i.e. the SOPO.[706]

589. Both of these statements are incorrect.

590. Dealing first with the second ground, the Respondent misleadingly asserts that the propositions are expressly denied in the same document in which the denial of benefits objection is developed. Where the denial of benefits objection is developed is not to the point. It is when the admissions were first made which is relevant and the purpose of the Respondent's obfuscation is obvious. The denial of benefits (and its concomitant implicit admissions) was first made by the Respondent on 22 December 2020[707] (expressed as am intention to deny) and then after correspondence between the

[705] "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." ROPO, para 40.

[706] ROPO, para 39-40.

[707] Letter from the Office of International Law of the Attorney-General's Department of Australia to Volterra Fietta, 22 December 2020 (**Exh. C-153**).

parties, was formally denied on 24 June 2021.[708] This was well before the arbitral processes had commenced [709] and the SOPO was prepared. In December 2020 when the denial was made, there was no alternative argument that the premise upon which the denial of benefits was made was *expressly denied.* That the argument was developed some 3 years later when the SOPO was prepared is of no consequence.

591. As to the first ground, there is no disagreement with the Respondent's contention that arguments may be presented in the alternative during proceedings. Plainly however, (i) the denial of benefits letter dated 22 December 2020 was not an 'argument' and (ii) it was not presented in the proceedings.

592. The denial of benefits letter was a statement of position by the Respondent. It is a matter of fact, not an argument. The statement forms part of the factual matrix for these proceedings. It was made on an open basis. It is not an argument or submission made in the course of proceedings but an unqualified statement of the Respondents position under the terms of the treaty[710] pursuant to the provisions of an express article (11) of AANZFTA dealing with the issue. The Respondent's claim that the Claimant was not an investor of Singapore with investments in Australia was only made for the first time when the SOPO was issued on 22 January 2024

[708] See **Exh. C-154** in which the Respondent asserted that it had made 'extensive investigations' regarding the Claimant and its investments.

[709] The notice of arbitration which commenced proceedings was not to issue for another 2 1/2 years on 28 March 2023.

[710] Letter from Volterra Fietta to the Office of International Law of the Attorney-General's Department of Australia, 21 January 2021 (**Exh. C-154**) "*consistent with Article 11.1 of Chapter 11 of AANZFTA, Australia denies the benefits of Chapter 11…".*

– just over 3 years since the admission was made in December 2020.

593. The doctrine of approbation and reprobation are particularly apt in respect of the consequences of the Respondent's decision to formally purport to deny benefits. As stated in *Evans v Bartlam*[711]: "*The doctrine of approbation and reprobation precludes a person who has exercised a right from exercising another right which is alternative to and inconsistent with the right he has exercised."* The Respondent would have it, that years prior to the commencement of this arbitration, in June 2021, it could seek to exercise a right to deny benefits (which is expressly based on the Claimant being an investor in Singapore with investments in Australia) and then seek to exercise a right to challenge jurisdiction on the basis which is alternative to and inconsistent with the right exercised (that Claimant *is not* an investor in Singapore and *does not have* investments in Australia). The Respondent cannot reprobate on this matter.

594. As to the Respondent's contention that States frequently make multiple preliminary objections in the alternative, so much may be admitted. As above, it is perfectly legitimate to do so as part of submissions in a proceeding. But that is not the case here. The Respondent's objection on the basis that the Claimant is not an investor of Singapore with investments in Australia is in direct conflict with its admission made prior to the commencement of the arbitral proceedings. The Respondent may well make arguments

[711] Supra 413(d)

in the alternative but those which are contrary to its earlier express admissions cannot be made and must be rejected.

595. Finally, the conduct of the Respondent in issuing its formal notice of denial must be viewed as a formal statement made expressly pursuant to a specific treaty provision. As with the Respondent's unilateral act of consenting to the arbitration under Article 21, its denial of benefits under article 11 must be viewed with similar effect where the issues of intent and authority are beyond question.

596. The Respondent's snipey Reply on these matters *(barely developed, absurd)* may be readily understood as DFAT's reaction to recognising that it, as the agency responsible for advancing the Respondent's interests, had admitted, that the Claimant was an investor of Singapore with investments in Australia.

c. Good Faith

Preliminary

597. As noted above, the Claimant's submissions in Part II of the Response dealt with (i) the Respondent's Admissions and (ii) Good Faith matters (including abuse of process by the Respondent, estoppel and acquiescence.

598. The Claimant now turns to the Respondent's reply in respect of these Good Faith Matters.

Respondent's Abuse of Process

599. It is to be noted that the Respondent has not engaged with or responded, at all, with the Claimant's submissions at paragraphs 144 to 177 in respect of the Respondent's abuse of process. The

Claimant contended that it is an abuse of process for the Respondent to now advance its 'investor' and 'investment' objections when it has previously accepted the Claimant is an investor which has made an investment, did not raise the objection for over 3 years when it had a positive duty to do so and continued to regulate the Claimant's investments in Australia and charge it taxes and duties to do so. It is an abuse of process for the Respondent to now advance its investor and investment arguments in such circumstances.

Estoppel

600. At paragraph 193 of the Response, the Respondent misconstrues the Claimant's statement[712] that it is not necessary to establish any form of prejudice or detriment on the part of the Claimant order to establish such an estoppel.

601. The Claimant's submission is that both the 'broader' view and the 'stricter' view in relation to estoppel are applicable and in the circumstances of this case, the requirements are established for both views. The Claimant's submission is that the 'broader' view should be applied in this matter[713] but if not, the Claimant satisfies the requirements of the 'stricter' view of estoppel.

602. In relation to the first requirement (clear, consistent, unequivocal and/or unambiguous statements or conduct), the Claimant repeats and relies upon the submissions made above at paragraphs 30 to 80 above in respect of the meaning of the 'Admissions' made by the Respondent.

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[712] ROPO, paras 10-12.
[713] Response, paras 190 – 195.

603. The admission set out in Section C1 of the Response (*The admissions made by ASIC, ATO, FIRB, Qld and WA OSR*) are statements which are clear, unambiguous and unequivocal. Each of the statements in its own terms is clear and unambiguous that the Claimant is an investor of Singapore with investments in Australia.

604. Contrary to the matters stated at paragraphs 20 to 29 of the Reply, in every case, the statements and conduct of the Respondent did convey to the Claimant the Respondent's position in a clear and unambiguous manner. Indeed, the thrust of the Respondent's argument is not that the determinations and decisions of its agencies and States were unclear, but that they were not made in the context of, or a consideration of, AANZFTA[714].

605. The letter denying benefits is a useful example. It is addressed to the Claimant, signed by the Respondent's agency conducting these very proceedings and is patently issued on the premise that the Claimant is an investor of Singapore with investments in Australia. The implicit premise of the letter denying benefits is clear.

606. Further, in every case, it is clear the second limb to the test for estoppel (statements or conduct were made or performed voluntarily, unconditionally and under authority) is satisfied.

607. As to reliance and detriment, the Claimant informed the Respondent in February 2019,[715] that it was an investor of Singapore, had made investments in the territory of Australia and that it considered its investments had the protection of AANZFTA.

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[714] *Supra,* paras 14 – 19.

[715] Response, para 152; Letter from MIL to Western Australia dated 4 February 2019, (**Exh. R-141**).

Thereafter, by its denial of benefits in December 2020 (acknowledging the Claimant was an investor of Singapore with investments in Australia), by the recognition by ASIC that it was a foreign company carrying on business in Australia and by the other statements, decisions and conduct referred to, the Claimant was led to believe that the Respondent continued to accept that the Claimant was an investor of Singapore with investments in Australia.

608. It is obvious that in these circumstances, where the Claimant had stated directly to the Respondent that the Claimant considered itself to be an investor of Singapore making investments in Australia that the Claimant would rely on the ongoing statements and conduct of the Respondent which affirmed the belief and understanding of the Claimant's position. And the Claimant did rely on the Respondent's statements including by, for example, maintaining and continuing its registration as a foreign corporation carrying on business in Australia, continuing to prepare and lodge financial accounts with ASIC on the basis the Claimant was a foreign corporation with investments in Australia, maintaining and continuing its investment in Australia and being actively engaged in the management of the business of its investment.

609. Finally, it is unequivocally the case that in relying on the statements or conduct, the Claimant suffered a detriment and / or that benefit was produced for Australia, including for example:

a. the Respondent has derived significant revenue benefits from the Claimants transactions in Australia,[716] and the

[716] Response, paras 110 – 121.

Claimant has paid significant amounts in respect of those transactions. They have not been refunded to the Claimant by the Respondent;

b. the Claimant has paid annual fees to ASIC in respect of its registrations with ASIC;

c. the Claimant has incurred very substantial costs in providing its management team for the management of its investments in Australia which has also provided benefits to Australia in the form of taxes; and

d. consistent with the precise purpose for which the *Foreign Acquisitions and Takeovers Act 1975* was enacted, the Respondent is empowered to regulate (including prohibiting) the actions of foreign entities to acquire interests in securities, assets or Australian land,[717] the Respondent does not enjoy this regulatory benefit over non-foreign entities.

610. These arguments are further developed below.

d. Timing of Denial of Benefits, Acquiescence and Estoppel

Overview

611. In respect of the timing of denial of benefits, the Respondent's case is that "recent practice" of investment tribunals "confirms that a respondent State is permitted to deny the benefit 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

[717] See for e.g. *Foreign Acquisitions and Takeovers Act 1975* (Cth), (**Exh. CLA-166**), s 67.

proceedings [718] (the timing issue). That is only a selective account of recent doctrine. The Claimant's case is that there are a number of persuasive tribunal decisions that have found the denial of benefits can only have prospective effect. In the present case that approach best accounts for the text, objects and purpose of the AANFTA and means that any effective denial of benefits had to come at least prior to any dispute. In the present case the notification came only after the dispute had arisen because it can have only prospective effect, the tribunal can dismiss the denial of benefits argument entirely.

612. As to questions of principles in respect of acquiescence and estoppel. The Reply puts in issue as a matter of principle whether detrimental reliance is an essential element of a case in estoppel or acquiescence. The Claimant's position is that in respect of acquiescence no such reliance is required. As for estoppel, there is a debate as to whether estoppel will operate to prevent a State adopting inconsistent positions (ie the broad view), or whether some detrimental reliance or benefit to the State is essential (ie the narrow view). But in any event, the Respondent's case is that it has demonstrated both detrimental reliance or a benefit gained by the Respondent (eg tax revenues) that the Respondent is not entitled to resile from its acceptance of the Claimant as a foreign investor in Australian.

613. As to other two elements of estoppel. The Respondent argues that the relevant government entity (the only one expressly called out is ASIC) did not have authority to bind the Respondent in respect

[718] See eg ROPO, para 38(b).

of questions arising under the AANZFTA (**authority issue**);[719] or were not *specifically* directed to the Claimant's status as an investor under Ch 11 of the AANZFTA (**specificity issue**). [720] Neither of those arguments ought to be accepted. In the short the authority point would undercut ordinary principles of State responsibility in international law. And the Respondent's insistence on specificity applies the principle too narrowly. On the Respondent's case, an investor could only ever adopt a course of action based on a representation by a host-State if such a state established a body with specific responsibility for investment *under each treaty* (and not even foreign investment generally). Were that the case estoppel would never operate in favour of investors.

e. <u>Timing Issue – The Denial of Benefits Can Only Be Prospective</u>

Summary of Argument

614. Before the tribunal comes to consideration of the requirements of the denial of benefits provision, and even before it considers the Claimant's arguments in respect of acquiescence or estoppel, the Tribunal must first resolve the question of when must a host state notify an investor of the intention to deny benefits under the AANZFTA.

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[719] See eg ROPO, para 22 "*ASIC has no responsibility for matters under Chapter 11 of the AANZFTA"*; para 24 "*Not only did ASIC have no authority…"*.

[720] See eg ROPO, para 24 re ASIC: "*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;"* para 27 re FIRB and ATO: *"Zeph's reliance on the conduct of [FIRB and ATO] is equally unavailing"*; para 28; para 29 re QRO and Revenue WA: "*The relevant tests in these Acts* [with respect to the QRO and Revenue WA] have no overlap with the definition of "investment" in Chapter 11.

615. The Respondent's case is that "*recent practice"* of investment tribunals "*confirms that a respondent State is permitted to deny the benefit of the relevant treaty to the investor up until the time at which the respondent State is require to identify its preliminary objections in arbitration proceedings."* [721] But that is a selective account of the decisions. In truth there are numerous decisions pointing in each direction. The real issue is whether a State can after taking benefits of an investor deny that investor the benefits of a treaty such as AANZFTA.

616. The Claimant submits that the better view both reflecting the objects and purpose of the AANZFTA and in principle as supported by the reasoning of numerous investment tribunals, is that a denial of benefits can only operate prospectively from the date it is given, and in that it must be notified at least before the dispute arose and before a State takes benefits from an investor or else it would allow for self-serving denials to thwart any dispute.

617. On the facts of the present case the denial of benefits was only given by way of letters on either 22 December 2020,[722] or 24 June 2021,[723] after the Claimant had invoked the dispute resolution procedures on 14 October 2020.[724] It follows that the Respondent's denial of benefits is too late to have an effect on the present proceeding as it comes after the dispute had arisen, and

[721] See eg ROPO, para 38(b).

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

[723] Letter from Australia to Volterra Fietta dated 24 June 2021, (**Exh. C-155)**.

[724] Written Request for Consultations on 14 October 2020, Letter from Volterra Fietta, on behalf of Zeph, to the Australian Minister for Foreign Affairs and Trade dated 14 October 2020 (raising a dispute under AANZFTA), (**Exh. C-148**).

after the Respondent takes benefits from an investor and in these circumstances have prospective effect.

618. There is a dispute in the authorities as to whether a more stringent requirement for the denial of benefits requires notification before the any actual investment (and not simply before a dispute about the investment). The Claimant's case is that as a matter of principle it makes coherent sense for the denial to be required to be given in advance of any investment. But that particular question need not be resolved in the present case. The Respondent's denial of benefits can be rejected on the basis that it only has prospective effect and was issued in the present case after the dispute arose after the Respondent has enjoyed the benefits the investor has provided.[725]

619. It is necessary to explain the context of the tribunal decisions relied upon by the Respondent at Reply 38(b), and to demonstrate that Claimant's argument is supported by the text of the Treaty, and general principles of investment law that seek to give effect to the object of the treaty in promoting investment, and by numerous arbitral decisions. The Respondent cannot take a benefit as it has in this case,[726] and then seek to deny a benefit. The saying "you cannot have your cake and eat it" comes to mind when one considers the actions of the Respondent.

Text, Objects and Purpose, and Relevant Tribunal Decisions

620. The Denial of Benefits clause in Art 11(1) of Chapter 11 is in the following form:

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[725] Foreign Transfer Duty, Statement of Grounds, WA, (**Exh. C-63**, Annexure A, Exhibit 28).
[726] Foreign Transfer Duty, Statement of Grounds, WA, (**Exh. C-63**, Annexure A, Exhibit 28).

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

(a) to an investor of another Party that is a juridical person of such other Party and to investments of that investor if an investor of a non-Party owns or controls the juridical person and the juridical person has no substantive business operations in the territory of the other Party;

(b) to an investor of another Party that is a juridical person of such other Party and to investments of that investor if an investor of the denying Party owns or controls the juridical person and the juridical person has no substantive business operations in the territory of any Party, other than the denying Party"

621. Notably, the denial of benefits clause has an express requirement for the Respondent State to take a positive step in giving "*notification"*. That is not uniformly the case in each of the clauses considered in the authorities referred to by the Respondent. The denial is in respect of the Chapter including the substantive standards of protection on investment.

622. In the present case the denial of benefits clause provides no express guidance on the *timing* of the notification of a denial. That in itself reveals a drafting choice by the States parties. By contrast the drafters of the Canada-China FIPPA in Art 16(1) stated that the notification could be given "at any time" including after the institution of proceedings:

A Contracting Party may, ***at any time including after the institution of arbitration proceedings*** *in accordance with*

Part C, deny the benefits of this Agreement to an investor of the other Contracting Party.[727]

[**Emphasis added**]

623. The absence of such express language in the AANZFTA is consistent with the Claimant's case that the notification of the denial must be given at least before the dispute arose.

624. That interpretation is further supported by recourse to the objects and purpose of the AANZFTA, consistently with Article 31 VCLT.

625. The Preamble to the AANZFTA contains the following recitations:

…

DESIRING to minimise barriers and deepen and widen economic linkages among the Parties; lower business costs; ***increase trade and investment;*** *enhance economic efficiency; create a larger market with more opportunities and greater economies of scale for business;*

…

RECOGNISING the important role and ***contribution of business in enhancing trade and investment among the Parties*** *and the need to further promote and facilitate co-operation and utilisation of the greater business opportunities provided by this Agreement*

[**Emphasis Added**]

[727] See also Art 16(2), and 16(3) Agreement between the Government of Canada and the Government of the People's Republic of China for the promotion and reciprocal protection of investments, 1 October 2014, accessed: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/china-chine/fipa-apie/index.aspx?lang=eng.

626. The Objectives of the AANZFTA are contained in Chapter 1, Article 1. The objectives of the AANZFTA are to:

> *a.1 progressively liberalise and facilitate trade in goods among the Parties through, inter alia, progressive elimination of tariff and non-tariff barriers in substantially all trade in goods among the Parties;*
>
> *a.2 progressively liberalise trade in services among the Parties, with substantial sectoral coverage;*
>
> ***a.3 facilitate, promote and enhance investment opportunities among the Parties through further development of favourable investment environments;***
>
> *a.4 establish a co-operative framework for s**trengthening, diversifying and enhancing trade, investment** and economic links among the Parties; and*
>
> *a.5 provide special and differential treatment to ASEAN Member States, especially to the newer ASEAN Member States, to facilitate their more effective economic integration.*
>
> [**Emphasis added**]

627. Each of those Preambular recitations and Objectives indicates that the terms of the Treaty need to be read in a manner that would be favourable to investment (ie "facilitate, promote and enhance investment", "favourable investment environments", "framework for strengthening… investment". The fact that the Respondent identified the Claimant and its subsidiary Mineralogy as a foreign person notwithstanding that it was incorporated in Australia because of its ownership by the Claimant as a foreign investor

imposing over $400,000 in tax in respect of the Claimant's ownership of property in Western Australia means that the Respondent received a substantial financial benefit from the Claimant's subsidiary on the basis that the Claimant and its subsidiary were foreign entities. In the case of the Claimant a denial of benefits must be given prior to the State taking a substantial benefit from the Claimant or its subsidiary and/or its investment in the Respondent.

628. Those objectives of the States Parties can only be realised by recognising some limitations on the ability of a State to deny benefits, lest it would undermine the very objective of the AANZFTA in creating "*favourable investment environments of investment*" for putative investors.

629. So much was accepted in *Khan Resources*, where the Tribunal held that the right conferred by Art 17(1) of the ECT to deny the benefits of its substantive standards of treatment cannot be "*effectively exercised toward a particular investor after the investor in question commences international arbitration against the host state*".[728]

630. The Tribunal in *Khan* Resources observed that the text of the denial of benefits clause, (which is not relevantly distinguishable from Art 11(1) of the AANZFTA),[729] was not determinative and so recourse was necessary to the object and purpose of the Treaty:

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[728] PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012 (**Exh. CLA-250**), para 424.

[729] Art 17(1) of the ECT provides: "*Each Contracting Party reserves the right to deny the advantages of this Part to: (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised*".

In the Tribunal's view, this question of interpretation is not solved by reference to the terms of Article 17(1). It is therefore necessary to investigate with particular attention the "object and purpose" of the Treaty. [730]

631. The analysis of the objects and purpose was as follows:

> "*The Treaty seeks to create a predictable legal framework for investments in the energy field. This predictability materializes only if investors can know in advance whether they are entitled to the protections of the Treaty. If an investor such as Khan Netherlands, who falls within the definition of 'Investor' at Article 1(7) of the Treaty and is therefore entitled to the Treaty's protections in principle, could be denied the benefit of the Treaty at any moment after it has invested in the host country, it would find itself in a highly unpredictable situation. This lack of certainty would impede the investor's ability to evaluate whether or not to make an investment in any particular state. This would be contrary to the Treaty's object and purpose.*
>
> *In contrast, an obligation for contracting parties to exercise their Article 17 right in time to give adequate notice to investors would be consistent with the obligation of host states under Article 10(1) of the Treaty to create 'transparent conditions' for investments*." [731]

[730] PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012, (**Exh. CLA-250**), para 425.
[731] PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012, (**Exh. CLA-250**), paras 426-427.

632. The Tribunal in *Khan* Resources then referred with approval[732] to *Plama Consortium Limited v. Republic of Bulgaria*,[733] where the Tribunal in that matter observed:

> "*The covered investor enjoys the advantages of Part III [the substantive standards of treatment] unless the host state exercises its right under Article 17(1) ECT; and a putative covered investor has legitimate expectations of such advantages until that right's exercise. A putative investor therefore requires reasonable notice before making any investment in the host state whether or not that host state has exercised its right under Article 17(1) ECT. At that stage, the putative investor can so plan its business affairs to come within or without the criteria there specified, as it chooses. It can also plan not to make any investment at all or to make it elsewhere. After an investment is made in the host state, the "hostage factor" is introduced; the covered investor's choices are accordingly more limited; and the investor is correspondingly more vulnerable to the host state's exercise of its right under Article 17(1) ECT. At this time, therefore, the covered investor needs at least the same protection as it enjoyed as a putative investor able to plan its investment. The ECT's express "purpose" under Article 2 ECT is the establishment of " ... a legal framework in order to promote <u>long-term</u> co-operation in the energy field... in accordance with the objectives and principles of the Charter " (emphasis supplied).*

[732] PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012, (**Exh. CLA-250**), para 428.
[733] ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, (**Exh. RLA-73**), para 161.

It is not easy to see how any retrospective effect is consistent with this 'long-term' purpose."

633. The Tribunal in *Khan* Resources then said:

> "*It is difficult to imagine that any Contracting Party, whatever its general policy regarding mailbox companies, would refrain from exercising its right to deny the substantive protections of the ECT to an investor who has already commenced arbitration and is claiming a substantial sum of money. A good faith interpretation does not permit the Tribunal to choose a construction of Article 17 that would allow host states to lure investors by ostensibly extending to them the protections of the ECT, to then deny these protections when the investor attempts to invoke them in international arbitration ".* [734]

634. Accordingly, the Tribunal concluded that Mongolia could not rely on Art 17(1) of the ECT to bar the investor.[735]

635. The Claimant submits there is no relevant purposive distinction between the ECT and AANZFTA. The reasoning of the Tribunal in *Khan Resources* should, therefore, be applicable with respect to Art 11(1) of the AANZFTA.

636. The Claimant submits that only a prospective invocation of a denial of benefits is effective: i.e., one prior to the making of the investment by the investor, or at least prior to a dispute arising.

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[734] PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012, (**Exh. CLA-250**), para 429.

[735] PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012, (**Exh. CLA-250**), para 431.

637. Such an approach is also consistent with other cases under Art 17 of the ECT:

a. *Stati v* Kazakhstan where the Tribunal said "*Art. 17 ECT would only apply if a state invoked that provision to deny benefits to an investor before a dispute arose and Respondent did not exercise this right*";[736]

b. *Yukos Universal Ltd. (Isle of Man) v. Russian Federation* said:

> "[...] *an exercise of the reserved right of denial* [...] *can only be prospective in effect from the date of that Memorial. To treat denial as retrospective would, in the light of the ECT's 'Purpose,' as set out in Article 2 of the Treaty [...] be incompatible "with the objectives and principles of the Charter." Paramount among those objectives and principles is "Promotion, Protection and Treatment of Investments" as specified by the terms of Article 10 of the Treaty. Retrospective application of a denial of rights would be inconsistent with such promotion and protection and constitute treatment at odds with those terms*." [737]

c. *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, the Tribunal said:

> "*Accepting the option of a retroactive notification would not be compatible with the object and purpose of the*

[736] *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan (I)*, SCC Case No. 116/2010, Award, 19 December 2013 (**Exh. CLA-251**), para 745.

[737] PCA Case No. AA227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, (**Exh. CLA-252**), para 458.

ECT, which the Tribunal has to take into account according to Article 31(1) of the VCLT, and which the ECT, in its Article 2, expressly identifies as "to promote long-term co-operation in the energy field."[738]

638. None of those cases were referred to by the Respondent. The cases that were referred to by the Respondent at Reply[38(b)] have reached a different conclusion. They are each considered in turn.

639. *Empresa Eléctrica del Ecuador v Ecuador* (Award of 2 June 2009),[739] was in respect of the US-Ecuador BIT. The reasoning of the tribunal on this point was both *obiter*, and fleeting. It consists of one declaratory sentence without textual analysis: "*Ecuador announced the denial of benefits to EMELEC at the proper stage of the proceedings, ie upon raising its objection on jurisdiction*".[740] The finding was clearly obiter because of the four jurisdictional objections raised (see para 73 in *Empresa*), the case was dismissed on the first ground being the absence of representative capacity, and "*therefore the other objections do not require an examination or decision on the part of the Tribunal."*[741] Accordingly, little if any weight should be given to the decision.

640. *Ulysseas v Ecuador* (Interim Award of 28 September 2010)[742] was also concerned with the US-Ecuador BIT. Although that BIT has no express requirement of "notification" (a difference from the

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[738] ICSID Case No. ARB/07/14, Excerpts from Award, 22 June 2010, (**Exh. CLA-253**), para 225.

[739] *Empresa Eléctrica del Ecuador, Inc. v Republic of Ecuador* (ICSID Case No. ARB/ 05/0, Award of 2 June 2009), (**Exh. RLA-84**), para. 71.

[740] *EMELEC,* (**Exh. RLA-84**)**,** para 71,

[741] *EMELEC,* (**Exh. RLA-84**), para 136.

[742] *Ulysseas, Inc v Republic of Ecuador* (Interim Award of 28 September 2010), (**Exh. RLA-87**), para 172.

AANZFTA) it seems to have been (rightly) accepted,[743] that some form of positive step was required by Ecuador arising impliedly from the language of "reserve the right to deny". Ecuador sought to eschew the relevance of cases concerned with Art 17 of the ECT on the basis that (i) neither the USA nor Ecuador were parties,[744] and (ii) that Art 17 was limited to a denial of the substantive benefits of the treaty rather than the whole of the treaty. [745]

641. The tribunal in *Ulysseas* reasoning had a number of steps. First, it reasoned that issue concerned one of jurisdiction. That is, because the denial of benefits included the "*advantages of BIT arbitration, a valid exercise of the right would have the effect of depriving the Tribunal of jurisdiction under the BIT"*.[746] Second, it reasoned (erroneously) that the UNCITRAL Rules provided a relevant source of law of answering the question of treaty interpretation, and held that the Respondent had "*complied with the time limit prescribed by the UNCITRAL Rules*".[747] Third, it reasoned that there was no contrary textual indication that would "*exclude[] the right to deny advantages at the time such advantages are sought by the investor through a request for arbitration*."[748] Fourth, the tribunal saw "no valid reason" to insist on prospective application of the denial of benefits, and rejected an argument based on uncertainties in legal relations under the BIT, because the

[743] *Ulysseas,* (**Exh. RLA-87**), para 124.
[744] To the extent relevant in the present case the Claimant notes that Australia was a party to the ECT but Singapore is not.
[745] *Ulysseas,* (**Exh. RLA-87**), para 124.
[746] *Ulysseas,* (**Exh. RLA-87**), para 172.
[747] *Ulysseas,* (**Exh. RLA-87**), para 172.
[748] *Ulysseas,* (**Exh. RLA-87**), para 172.

"possibility" for the host to deny is known from the time the investor makes the investment.[749]

642. As to the first step in the reasoning of the *Ulysseas* tribunal and the emphasis on jurisdiction. It is not clear how denial of benefits in respect of jurisdiction as a means of distinguishing the Art 17 ECT cases explains why retrospective denials would be permitted. It is certainly no answer to the purposive reasoning in *Khan Resources*. A denial that is notified before the investment or before the invocation of the dispute resolution proceedings with prospective effect will be effective to deny the jurisdiction of the tribunal, and the substantive protections while duly respecting the objects and purpose of creating a stable environment for investment. But in every case a retrospective denial is likely to run counter to a good faith interpretation of the objects of investment treaties. This is especially so in this case where the Respondent has taken substantial benefits from the Claimant prior to allegedly denying the Claimant the benefits of the treaty.

643. As to the second step, the tribunal was in error to subordinate the treaty analysis to a consideration of the arbitral rules that were invoked by the parties in that proceeding. As in the present case, the UNCITRAL Rules were merely one of the sets of rules that could be invoked (see Art VI (3) of the US-Ecuador BIT), but more substantively, the question was one that needed to be answered as a question of treaty interpretation not by reference to procedural rules. While the rules relevant to the conduct or jurisdictional determinations were relevant to the *manner* in which such *arguments* could be raised, they could not inform the proper

[749] *Ulysseas,* (**Exh. RLA-87**), para 173.

interpretation of the treaty provision as to whether a host-State will be permitted to retrospectively undermine the investment by denying benefits.

644. As to the third step, the absence of express text was only the beginning of the treaty interpretation process, but the tribunal in *Ulysseas* treated as the end point. Crucially that treaty interpretation exercise in *Ulysseas* (and unlike *Khan Resources,* and *Plama* etc), did not engage in an analysis of the objects and purpose of the treaty including the promotion of investment and a stable regulatory environment for investments.

645. As to the fourth step by the *Ulysseas* tribunal, the "*valid reason*" for the Claimant's position is supplied by the objects and purpose of encouraging investment and a stable investment environment, that were not adequately considered. While it is undeniable that there is a "possibility" [750] of a denial benefits *argument* being raised in any subsequent arbitration of any dispute – that was not an answer to the investment stability that remain the objects of the treaty. The relevant certainty required by an investor is to know whether its initial and ongoing investment is sufficiently within the terms of the treaty so that it can be assured that it can defeat any *arguments* that are raised (often opportunistically) by a respondent state to deny benefits after the dispute has already occurred. But it is *investment* certainty that is the object of investment treaties, and not certainty about the "possibility" of a host State raising *arguments* (however unfounded) about denial of benefits.

[750] *Ulysseas,* (**Exh. RLA-87**), para 173.

646. *Pac Rim Cayman LLC v El Salvador* (Decision on Jurisdiction of 1 June 2012)[751] considered the CAFTA, and chose to not refer to other decision on the topic in respect of other treaties.[752] The tribunal in *Pac Rim* also based its decision on the relevant arbitral rules with respect to timing of jurisdictional objections under the ICSID Arbitration Rules. It was reasoned that "*any earlier time-limit could not be justified on the wording of CAFTA Article 10.12.2*".[753] As explained above, giving primacy to the procedural rules is an erroneous means of interpreting the proper scope of the treaty provision. It appears from the same paragraph that the reasoning was heavily influenced by the amicus briefs from the USA and Costa Rica intervening pointing the "practical difficulties" for states "*inconsistent with this provision's object and purpose*". But that argument as to consequences for states failed to give due regard to the objects and purpose of the treaty as a whole (that were expressly stated) and the stability required for investors. Instead it gave primacy to what it perceived to be the (implied) objects and purpose of the denial of benefits clause taken alone. As the tribunal acknowledged under other rules the outcome may be different because of: "*the potential unfairness of a State deciding, as a judge in its own interest, to thwart such an arbitration after its commencement*".[754]

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[751] *Pac Rim Cayman LLC v El Salvador* (ICSID Case No. ARB/09/12, Decision on Jurisdiction of 1 June 2012), (**Exh. RLA-33**), paras 4.3–4.5.
[752] *Pac Rim*, (**Exh. RLA-33**), para 4.3.
[753] *Pac Rim*, (**Exh. RLA-33**), para 4.85.
[754] *Pac Rim*, (**Exh. RLA-33**), para 4.83.

647. *Guaracachi America, Inc. and Rurelec PLC v Plurinational State of Bolivia* (Award of 31 January 2014)[755] considered the terms of the USA-Bolivia BIT. The tribunal was heavily influenced by the reasoning in *Ulysseas.* [756] The criticisms of that reasoning above, then equally infect *Guaracachi*. In further problematic reasoning the tribunal considered the purpose of the clause turned on "withdrawing" benefits saying: "*The very purpose of the denial of benefits is to give the Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits*". [757]

648. But the notion of "withdrawing" benefits sits uncomfortably with the objects and purpose of promoting investment. The language of "denial" is consistent with prospectively preventing the benefits from accruing to the investor and thereby controlling who obtains the benefit of the treaty. By contrast "withdrawing" is likely to give rise to the "hostage factor" referred to in *Plama*. Or in less colourful language is unlikely to provide any certainty to an investor. Equating denial with "withdraw" was a linguistic slip that erroneously made the leap to retrospective operation seem open to the tribunal.

649. *NextEra v Kingdom of Spain* (Decision on Jurisdiction, Liability and Quantum Principles of 12 March 2019)[758] is a case under Art 17 of the ECT, and contrary to the Respondent's case *Next Era* does not

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[755] *Guaracachi America, Inc. and Rurelec PLC v Plurinational State of Bolivia* (PCA Case No. 2011-17, Award of 31 January 2014), (**Exh. RLA-69**), para 378.

[756] *Guaracachi*, (**Exh. RLA-69**), para 382.

[757] *Guaracachi*, (**Exh. RLA-69**), para 376.

[758] *NextEra Energy Global Holdings B.V. v Kingdom of Spain* (ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles of 12 March 2019), (**Exh. RLA-74**), paras 268–269.

assist the Respondent. While the facts of the case may be distinguishable the point of principles was resolved by reference to *Khan Resources* and assessing whether Spain's was a *"good faith exercise of its rights as contemplated by the Khan Tribunal"*. [759]

Conclusion on Prospective Denial of Benefits

650. Assessed in light of the wording of the denial of benefits clause and the objects and purpose of the AANZFTA, there remains a strong argument both in principle and supported by the reasoning of numerous investment tribunals that a State cannot wait until a dispute has arisen and not after the Respondent has taken benefits as it has in this case from the Claimant on the specific basis that it is a foreign investor, to deny benefits. Were that the case any putative respondent State would immediately deny benefits following any dispute about its wrongdoing and would thwart such an arbitration after its commencement.[760]

651. The Respondent's approach provides no answer to the concerns about the "hostage factor" raised in *Plama*, but is akin to arguing that "*the investor must have known we could have held them hostage*". The Respondent's interpretation does not sit conformably with a "good faith" interpretation of the denial of benefits clause in light of the objects and purpose of the AANZFTA in developing a favourable investment environment.

652. Accordingly, if the Tribunal adopts the prospective approach to denial of benefits it can resolve the question favourably to the Claimant on either of two basis.

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[759] *NextEra*, (**Exh. RLA-74**), paras 267 – 268.
[760] *Pac Rim*, (**Exh. RLA-33**), paras 4.83.

653. First, if the denial of benefits must occur prior to the making of the covered investment, then the Respondent's invocation of Art 11(1) during the consultation phase of the dispute resolution process, by December 2020, is too late. Rather, the invocation should have come prior to or at the time of the restructuring in early 2019 by which the Claimant made its investment in Mineralogy (and International Minerals). Or thirdly prior to the Respondent imposing taxes and penalties upon the Claimant or its investment because it is a foreign party.

654. Second, even if the notification of the denial of benefits must come before the dispute arises (rather than before the investment is made) the Respondent was again too late. The Respondent purported to invoke Art 11(1) during the consultation phase, well after its factual substratum had become manifest and the wrongful conduct of passing the Amending Act had transpired, and after the written notice of consultation was given by the Claimant on 14 October 2020.[761]

655. Finally, there are none of the practical concerns about obtaining information on the investor often raised by States as a consequentialist argument in favour of allowing a State to make a retrospective denial. Consistently with the arguments that follow in respect of acquiescence and estoppel the Claimant had undertaken administrative steps required by legislation in Australia, and had paid various taxes on the basis of its status as foreign owned, and had engaged in correspondence that provided the

[761] Written Request for Consultations on 14 October 2020, Letter from Volterra Fietta, on behalf of Zeph, to the Australian Minister for Foreign Affairs and Trade dated 14 October 2020 (raising a dispute under AANZFTA), (**Exh. C-148**).

Respondent with notice of its status as a foreign investor from as early as 4 February 2019,[762] explaining that the Claimant had substantive business operations in Singapore, and would be entitled to protection under investment treaties. It follows there is no basis to provide the Respondent with this case any additional leeway in the need to wait to notify a denial of benefit until after the dispute had arisen in the present case.

656. It also follows that the Tribunal could resolve this issue by rejecting the retrospective effect of the denial of benefits, and on that basis the Respondents denial was too late, and ineffective and was made after the Respondent had received substantial tax from the Claimant because it had determined that the Claimant and its Australian subsidiaries were foreign investors (without the need to resolve the question of whether the denial must occur before the investment or before the dispute arises) and/or before a benefit is taken.

f. <u>Issues of Principle in Respect of Estoppel and Acquiescence</u>

Acquiescence, Estoppel and the need for Detrimental Reliance

657. As a matter of principle the Claimant's case is that detrimental reliance is not required in respect of acquiescence. As Crawford has explained:

> *Estoppel should be distinguished from acquiescence too: the latter involves allowing an existing legal or factual situation to continue in circumstances where objection could and should have been made, leading, in the course of time to the*

[762] Letter from MIL to Premier McGowan dated 4 February 2019, (**Exh. R-141**). See further correspondence referred to at SOPO [293].

assumption of consent. Acquiescence is not subject to the requirement of detrimental reliance but is a promise implied in the context of the lapse of time.[763]

658. In respect of estoppel, there is a debate as to whether detrimental reliance is in fact required in all cases.[764] For example, and contrary to what the Respondent has said[765] about *Middle East Cement Shipping v Egypt*, the tribunal's analysis in that case turned centrally on *inconsistency* between positions adopted by the host-State Egypt. No mention of reliance, or inducement features in the critical reasoning:

If an authority and the courts of the Respondent treat Claimant as the owner of the Poseidon when collecting the auction price, they are barred from disputing its ownership under the BIT.[766]

659. But in any event, the Respondent[767] misconstrues the Claimant's statement that it is not necessary to establish any form of prejudice or detriment on the part of the Claimant order to establish such an estoppel. The Claimant's submission is that both the 'broader' view and the 'stricter' view in relation to estoppel are applicable and in the circumstances of this case, the requirements are established for both views. The Claimant's submission is that the 'broader' view

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[763] James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9 ed, 2019), (**Exh. CLA-255**), p. 408.

[764] See eg *Temple of Preah Vihear*, Vihear (Cambodia v. Thailand), Judgment, 15 June 1962, ICJ Reports (1962) 52 (**Exh. CLA-171**), Separate Opinion of Vice-President Alfaro at 39, focussing on inconsistency.

[765] ROPO, para 17(b).

[766] *Middle East Cement Shipping and Handling v Egypt* (ICSID Case No. ARB/99/6, Award of 12 April 2002), (**Exh. CLA-174**), para 135.

[767] ROPO, paras 10-18.

should be applied in this matter[768] but if not, the Claimant satisfies the requirements of the 'stricter' view of estoppel by reason of the benefit to the Respondent and the detriment to the Claimant.

Authority Issue Under the Second Limb of Estoppel

660. In respect of the second limb of estoppel (statements or conduct were made or performed voluntarily, unconditionally and under authority) the Respondent appears to raise, in passing, a complaint that the various organs of the Australian government did not have sufficient "authority" to make a representation on behalf of the Respondent with respect to the status of the Claimant's investment.[769]

661. But that can be answered shortly by reference to the ordinary principles of state responsibility by which any act can be attributed to a host-State in international law.

662. In order to attribute conduct to the Respondent it is necessary to have regard to the ordinary rules of attribution that form part of the customary law of state responsibility.

663. Of particular relevance are the ILC Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (**ILC Articles**).[770] Article 4 (and likely, the whole ILS Articles) is consistent with

[768] Response, paras 190 – 195.

[769] See eg ROPO, para 22 "*ASIC has no responsibility for matters under Chapter 11 of the AANZFTA"*; para 24 "*Not only did ASIC have no authority…"*.

[770] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (**Exh. CLA-10**)

customary international law,[771] and reflects "*established jurisprudence*".[772]

664. Article 4 is in the following form:

> *Article 4 Conduct of organs of a State*
>
> *1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.*
>
> *2. An organ includes any person or entity which has that status in accordance with the internal law of the State.*

665. As has been noted in arbitral decision, under international law the state is treated as a unity, and that is the reason that "*all conduct of any State organ is attributable to the State under ILC Article 4*".[773]

666. Accordingly, in the present case any suggestion that ASIC lacks the relevant authority must be rejected.

667. It is irrefutable that each of ASIC, the ATO, the FIRB, the relevant State taxing authorities are organs of Australia in the relevant

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[771] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, (**Exh. CLA-254**), p. 43 at para 202.

[772] James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9 ed, 2019), (**Exh. CLA-255**), 527.

[773] *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* ICSID Case No. ARB/12/6, Award, 4 May 2021, (**Exh. CLA-256**), para 743 (having cited the commentaries on ILC Articles Art 4).

sense. Accordingly, their conduct will be attributed to the Respondent under international law. There appears to be no serious attempt made to challenge the status of each of those organs.

The Specificity Issue in Respect of the First Limb of Estoppel

668. The argument that seems to be advanced with greater emphasis is the entities (even if having authority to bind the Respondent) were not capable of making sufficiently *specific* representations or engaging in conduct *specifically* directed to the Claimant's status as an investor under Ch 11 of the AANZFTA.[774]

669. That argument must also be rejected.

670. The Respondent has construed the operation of the principle to be so narrow and exacting it would almost never have operation. On the Respondent's case, an investor could only ever adopt a course of action based on a representation by a host-State if such a state established a body with specific responsibility for investment *under each treaty* (and not even foreign investment generally).

671. That is inconsistent with decisions of arbitral tribunals who have prevented host-States from adopting inconsistent positions between on the one hand the manner in which the investor is treated in the domestic legal system, or by the judicial, or executive

[774] See eg ROPO, para 24 re ASIC: "*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;"* para 27 re FIRB and ATO: *"Zeph's reliance on the conduct of [FIRB and ATO] is equally unavailing"*; para 28; para 29 re QRO and Revenue WA: "*The relevant tests in these Acts* [with respect to the QRO and Revenue WA] have no overlap with the definition of "investment" in Chapter 11.

arms of government, and on the other hand the position adopted by the host-State in the arbitration.

672. In *Middle East Cement Shipping v Egypt*, the tribunal referred to the position adopted by a number of organs of the Egyptian government in respect of establishing the "ownership" of a vessel (that was the contested investment in that case), saying:

> *According to Art. 1.1 of the BIT "movable and immovable property" qualifies as "investment." The Tribunal notes that GAFI [General Authority for Investment and Free Zones], in its letter of April 22, 1991 to the Suez Court (C30), expressly refers to "the Vessel owned by Middle East Cement Co (under liquidation), one of the Free Zone projects pursuant to Investment Law No. 43/1974 and Law No. 230/1989." And still the Minutes of Lodging of the Suez Court of First Instance of January 18, 2000, for a claim of the General Authority for Ports of the Red Sea, identify the lodged amount as "this amount being the remainder of the outcome collected from the sale of M.Vessel/ Poseidon 8 - which is the amount lodged in favor of Owners of the M. Vessel, i.e., Middle East Cement Co." (R12)….* [775]

673. Two important observations about this reasoning.

674. First the organs that bound the Egyptian State were not organs entrusted or authorised to make decisions specifically about investments for the purpose of the Greece-Egypt BIT. To the contrary, the relevant organs were a body with general

[775] *Middle East Cement Shipping and Handling v Egypt* (ICSID Case No. ARB/99/6, Award of 12 April 2002), (**Exh. CLA-174**), para 135.

responsibility for investments (GAFI), a Port Authority, and documents emanating from the Courts.

675. Second, the generality of the representation and conduct is stark. The assertions were on the part of GAFI that the Middle East Cement Co was the owner of the vessel. So too did the Port Authority assert a claim on the "remainder" on the basis that the Vessel's "owners" were the Middle East Cement Co. Contrary to the case advanced by the Respondent in this case, none of that conduct was specifically addressing the status or "ownership" of an investment under the relevant BIT. Rather, the conduct was of organs of the state generally accepting the status of the investment as owned by the claimant.

676. On that basis the tribunal did not permit the host-State to adopt inconsistent positions saying:

> *If an authority and the courts of the Respondent treat Claimant as the owner of the Poseidon when collecting the auction price, they are barred from disputing its ownership under the BIT.* [776]

677. The Tribunal would adopt the same approach in the present case and prevent the Respondent from adopting inconsistent positions between the manner in which it has treated the Claimant under domestic law, and its approach to this dispute.

678. In *Bankswitch Ghana Ltd v Ghana* (11 April 2014) Ghana was estopped from denying the validity of the contract, not merely because of specific representation that the contract was in fact

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[776] *Middle East Cement Shipping and Handling v Egypt* (ICSID Case No. ARB/99/6, Award of 12 April 2002), (**Exh. CLA-174**), para 135.

valid, but by a range of conduct that included "*various statements by CEPS [Ghana Customs, Excise and Preventive Service], RAGB [Revenue Agencies Governing Board] and MOFEP [Ministry of Finance and Economic Planning] officials regarding the planned implementation of the software in committee meetings and correspondence between the Parties*".[777] Again, none of those organs of the state were specifically charged with assessing the validity of contracts, but their general conduct was attributed to Ghana.

679. The Claimant's approach is this case is also consistent with the attribution of *general* conduct of organs of the state to the host-State, when assessing breaches of substantive standards of protection.

680. In *Eureko v Poland* the tribunal found that the contractual assurances made by the Polish treasury regarding the continuation of the privatisation of an insurance company were relevant undertakings of Poland. The conduct included entry into share purchase agreement by the treasury as "seller".[778] By majority, the Tribunal found that the non-compliance with those undertakings as evidenced was a breach of the umbrella clause in the treaty and therefore breaches by Poland of those obligations.[779]

681. Contrary to Respondent's Reply,[780] the statements and conduct of the Respondent did convey to the Claimant the Respondent's

[777] *Bankswitch Ghana Ltd v Ghana* (PCA Case No. 2011-10, Award Save as to Costs of 11 April 2014), (**Exh. RLA-119**), para 11.82.
[778] Eureko B.V. v. Republic of Poland, Partial Award 19 August 2005, (**Exh. CLA-257**), para 117 – 118.
[779] Eureko B.V. v. Republic of Poland, Partial Award 19 August 2005, (**Exh. CLA-257**), para 250.
[780] ROPO, paras 20 – 29.

position in a clear and unambiguous manner, despite not specifically being addressed to the legal classification of rights under the AANZFTA. To insist on such a standard of specificity would gut the doctrine of estoppel of any work to do in investment law. The specific details of the conduct and representations from which the Respondent benefited, and the Claimant suffered detriment are detailed next.

g. The Claimant has Established Acquiescence or Estoppel on the Facts

682. The facts relevant to acquiescence and estoppel are as follows.

683. The Claimant informed the Respondent in February 2019[781] that it was an investor of Singapore, had made investments in the territory of the Respondent and that it considered its investments had the protection of AANZFTA. Thereafter, by the recognition by ASIC that it was a foreign company carrying on business in Australia and by the other statements, decisions and conduct the Claimant was led to believe that the Respondent continued to accept that the Claimant was an investor of Singapore with investments in Australia.

684. That was sufficient to give rise to acquiescence on the part of the Respondent that the Claimant was a foreign investor. Each of the matters set out in paragraphs 202 to 206 of the Claimant's Response demonstrated, first that following the letter dated February 2019 notifying Western Australia of its protection as a foreign investor, the Respondent acquiesced in the that position.

[781] Response, para 152; Letter from MIL to Western Australia dated 4 February 2019, (**Exh. R-141**).

No action was then taken to deny benefit at that time. That is archetypal of the type of circumstance that called for a response. And the failure to do so amounted to acquiescence by the Respondent: see that submission at Claimant's Response 209.

685. As to estoppel, the absence of any conduct, and the numerous examples of Australian state and commonwealth departments acting entirely consistently with the Claimant being treated as a foreign entity with relevant investments in the jurisdiction and omitting to take any step (including the failure to deny benefits)[782] encouraged in the Claimant the belief that it was entitled to protection. It was on that basis that for example, the Claimant's local Australian subsidiary elected to retain over $240 million dollars of dividends in Australia.[783] That was sufficient to ground detrimental reliance for the purpose of estoppel.

686. Moreover, because of its status as a foreign person the ATO notified Mineralogy that it was in breach of the FATA for failing to seek approval to acquire [redacted] in 2019. On 31 March 2022, remediating the breach of the FATA Act Mineralogy transferred the property to Mr Palmer: Claimant's Response [203(e)-(h)]. That too was detriment sufficient to ground the estoppel.

687. Further and in the alternative a number of the steps taken by the Respondent have resulted in the Respondent obtaining a benefit, which alone is a further basis to ground an estoppel.

[782] See Claimant's Response, para 210.
[783] See Claimant's Response, para 208.

688. On 16 August 2019, Mineralogy purchased residential real estate at [redacted]. On this acquisition Mineralogy was required by Western Australia to pay Foreign Transfer Duty on the basis that Mineralogy was a foreign corporation by reason of its ownership by the Claimant. The Respondent's has had their benefit from the Claimant and from the Claimant's investment because of the Claimant's status as a foreign investor.

689. The Respondent's State of Western Australia determined that the higher rate of 'foreign transfer' duty of 7% should be payable and duty of $418,600 was paid by Mineralogy.[784]

690. That was a benefit to a State organ of the Respondent that will be treated as a relevant benefit that accrued to the Respondent by reason of its treatment of the Claimant as a foreign investor in Australia. The Respondent has not addressed that fact in its Reply.

691. For any and all of those reasons, and by whatever doctrine, the Respondent will not be permitted to resile from its acceptance of the Claimant as a foreign investor.

692. It is obvious that in these circumstances, where the Claimant had stated directly to the Respondent that the Claimant considered itself to be an investor of Singapore making investments in Australia (and then reinvesting and retain dividends in Australia) that the Claimant would rely on the ongoing statements and conduct of the Respondent which affirmed the belief and understanding of the Claimant's position. And the Claimant did rely

[784] Claimant's Response, paras 139, 203(e); The Western Australia Office of State Revenue Statement of Grounds for Foreign Transfer Duty, Notice of Intention to Submit Dispute to Arbitration, 16 August 2019, Annexure A, Exhibit 28, (**Exh. C-63**), p.322-326.

on the Respondent's statements including by, for example, maintaining and continuing its registration as a foreign corporation carrying on business in Australia, continuing to prepare and lodge financial accounts with ASIC, and paying annual fees, on the basis the Claimant was a foreign corporation with investments in Australia, maintaining and continuing its investment in Australia and being actively engaged in the management of the business of its investment. The Claimant has also incurred very substantial costs in providing its management team for the management of its investments in Australia which has also provided benefits to Australia in the form of taxes.

VI. RESPONDENT'S ALLEGED EXPERT WITNESSES

693. Opinion evidence cannot be preferred over actual evidence of fact. The Claimant does not accept that such opinion evidence has any relevance to the proceeding and accordingly does not intend to engage with it other than to comment on the experience suitability or relevance of the individuals providing such evidence.

The Respondent's Professor Thomas Lys

694. Professor Thomas Lys has according to his CV been employed at a university for the last forty-three years and has never had a job in industry or generally in any capacity. He has no practical expertise which means he would never be able to run a large industrial project. It is of note there is no evidence that he has ever visited Australia or Singapore or Asia. He sets out his views and

thoughts and then purports to make a finding of fact which always supports the Respondents position.

695. At paragraphs 28 to 48 of the Sixth Palmer WS Mr Palmer sets out evidence which will assist the Tribunal in understanding the real position set out in the Mineralogy Constitution. It is significant that Professors Lys relied on a constitution of Mineralogy dated 2002 which is not current and has not been for many years and was not current at the time the Amendment Act was passed into law. Likewise, I refer the Tribunal to the witness statements of Peter Dunning KC and the supplementary witness statement of Scott Birkett (Supplementary BDO Report), both of which confirm that it a requirement of law that a company the size of Mineralogy is required by law to keep accrual accounts.

696. At paragraph 71 of the Sixth Palmer WS, Mr Palmer notes he has been a director of companies that have paid dividends out of share capital, borrowings and other assets and he has noted this is allowed by Mineralogy's Constitution.

697. For the reasons set out in paragraphs 68 to 72 of the Sixth Palmer WS, the Respondent's use of Professor Lys' witness statement is not helpful and establishes no facts.

698. The Claimant notes that at paragraph 94 of the Reply, the Respondent audaciously questions the independence of the Claimant's expert Mr Scott Birkett based on him having previously been engaged by Mineralogy. The Claimant notes the Respondent's Professor Lys claims to be an "independent expert" but has previously been engaged by the Respondent in *Philip Morris*.

The Respondent's Mr Rogers

699. The Reply makes the point at paragraph 216 that Mr Rogers says that Mineralogy would never have got funding from Singapore for the coal project anyway due to the "inadequate expertise and size of Mineralogy as a sponsor". **Exh. C-481** is a copy of the Financial Review rich list for Australia 2023 which shows Mr Palmer as the fifth wealthiest Australian with assets more than $23.66 billion dollars. In the face of that level of success and financial capacity, Mr Rogers' assessment cannot be taken seriously. The Claimant had access to the financial capability and experience of Mr Palmer, as well as Mr Harris, both having longstanding careers in the Australian mining industry, especially in the development and operation of coal projects.[785] In 2020, Mineralogy had the reasonable expectation, as was confirmed later in the year that it would be successful in the State Agreement Arbitration and receive circa 30 billion dollars as damages. Mr Rogers' CV is absent any coal experience in Asia or Australia[786].

700. The absurdity of Mr Rogers' conclusion is further highlighted when it is considered that Mineralogy, under Mr Palmer's stewardship, has, without any debt or external borrowings, previously developed with the Chinese Government the Sino Iron Project, which has had over $18 billion invested in it to date. As a result of that development, Mineralogy currently receives around $500 million a year.

[785] Curriculum Vitae of Nui Harris, (**Exh. C-470**).

[786] In relation to Mr Rogers, see also the Sixth Palmer WS at paras 73 to 81.

701. The link set out below demonstrates the size of the Sino Iron project currently in operations on Mineralogy tenements in Western Australia:

[redacted]

702. Mr Rogers obviously by his comment in paragraph 216 of the Reply thinks size is an important matter when considering a company's financial credibility. On 24 January 2024, his company, [redacted] filed 'Accounts for a dormant company made up to 31 March 2023' which were approved by the Board of [redacted] on 24 January 2024 ([redacted]). Exhibited hereto as "**Exh. C-569**" is a copy of the [redacted] obtained from the United Kingdom's Companies House website. Mr Rogers is the sole company director of [redacted].[787] Mr Rogers is the sole person with significant control of [redacted].[788] [redacted]

703. Mr Rogers company [redacted] is much better as it has two directors (namely, Mr George Rogers and [redacted])[789] and its total net assets are £[redacted], as shown in the [redacted] which were approved by the Board on [redacted] Exhibited hereto as "**Exh. C-573**" is a copy of the [redacted] obtained from the United Kingdom's Companies House website.

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787 [redacted] Officers, (**Exh. C-570**).

788 [redacted] - Persons with Significant Control, (**Exh. C-571).**

789 [redacted] Officers (**Exh. C-572**).

Mr Rogers is the sole person with significant control of [redacted].[790] The Claimant's director Mr Palmer notes in his statement that [redacted], a level of assets which suggests he is not in a position to comment on a project involving billions of dollars in a part of the world in which he has had no presence for over 10 years and no demonstrable record of ever developing anything himself or arranging financing on such a scale.

704. The Claimant refers the Tribunal to the witness statement of Alberto Migliucci dated 27 March 2023, pages 8 to 16 being his CV. It may be helpful to consider it and the type of specific experience necessary to properly consider such matters.

705. In the case of Professor Lys and Mr Rogers, the Claimant submits they have no specific experience in industry or a success record in developing anything akin to the projects developed by the Claimant (or any projects). More importantly they have no information based on their own observations to assist the Tribunal in determining the Respondent's objections. Mr Palmer notes the Claimant would not seek their advice or employ them.[791]

The Respondent's Professor Stephan Phua and Graeme Stewart Cooper

706. Professor Stephan Phua states at paragraph 48 of his expert report as follows:

> "*Be that as it may, and assuming Mr Palmer's eventual relocation to Singapore would allow him to successfully*

[790] [redacted] Limited - Persons with Significant Control, (**Exh. C-573**).
[791] Sixth Palmer WS at para 81.

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."

707. **The expert report of Graeme Stuart Cooper dated 18 July states at paragraph 59 as follows:**

"*But so far as Australian income tax is concerned, what saves Mr Palmer $90m of Australian tax on a future dividend is ceasing to be a resident before the dividend is paid.*"

708. There were inter alia a number of reasons for the Share Swap was the dominant reason was to seek funding for coal considering tax aspects for Mr Palmer's personal tax it also seemed beneficial to have a structure set up it was also good to diversify operations and seek further business and investment opportunities.[792]

709. The Respondent's expert reports are purely hypothetical and opinion and no relevance to the questions the Tribunal must decide. It should be noted prior to any change in the future to Mr Palmer's residency, the parties may seek tax advice. The Claimant recognises international tax law in different jurisdictions change from time to time.

710. The Respondent (at paragraph 78 of its Reply) referred to the "Mineralogy Group" of companies as being "Australian resident companies" for taxation purposes in a failed attempt to provide that

[792] Sixth Palmer WS, para 84.

that was in any way relevant to a company's nationality. This is best illustrated by a practical example. For example, Google (Alphabet) or Apple, which are both US companies that are resident for tax purposes in Ireland (as is publicly known). No one would ever suggest that Google or Apple are Irish companies as they were incorporated in the United States and are listed on the New York Stock Exchange in the United States and undertake business in the United States. Their tax status does not define their nationality.

VII. RESPONSES TO SPECIFIC PARAGRAPHS OF THE REPLY

711. The Reply at paragraph 192 makes much about the transaction being urgent on 30 November 2018. Mr Palmer decided, as set out in paragraph 129 of the first Palmer WS, in June 2018 to implement a restructure. When nothing of substance had happened some five months later, he was disappointed and demanded to get things moving. He further stated that he was not in business to tread water and led by example, notwithstanding the companies incorporated were not used as he further explains he wanted to include New Zealand as the holding company which eventually did happen some three months later. If there was any real need for urgency, the companies that were initially incorporated would have been used following the actions in November 2018.

712. To correct the mischief the Respondent states in paragraph 178 of the Reply that the Claimant had abandoned its position in respect of New Zealand and lithium is untrue. The Respondent makes the unsupported statement with no basis at all. The Claimant continues

to rely on Mr Palmers witness statements and the evidence confirming MIL operations in New Zealand including its lithium operations.

713. The Respondent, at paragraph 229 in the Reply questions why a dividend paid out in 2022 was not done in accordance with Mr Palmer's personal tax plan he was considering in 2018. The structure that has been set up in Singapore was to assist Mr Palmer obtaining residency in Singapore if and when he required it (see paragraphs 60 to 72 of Mr Palmer's fifth witness statement). Paragraph 87 of the Sixth Palmer WS confirms in 2022, the implementation of the 2018 tax plan required that Mr Palmer give up his Australian residency. In 2022, Mr Palmer was 68 years old married with two young girls then aged 8 and 14 years and enrolled in local schools on the Gold Coast. While Mr Palmer had devised the tax plan in 2018, his wife 4 years later did not want to move the family to Singapore and interrupt their children's education.[793] The Respondent needs to acknowledge that what Mr Palmer and his family had decided to do in 2022 is not relevant to the decision made in 2018, four years earlier.

714. As stated earlier in these submissions evinced by Mr Palmer in paragraph 88 of the Sixth Palmer WS, the 2008 Singapore meeting was not held to discuss restructuring or relocation to Singapore as the Respondent suggests. The Singapore incorporation issue arose in the IPO discussions. During discussions Mr Palmer discussed the possibility of raising debt funding in Singapore and the explanation given to him is set out in paragraph 50 of the Fifth Palmer WS. The Singapore meeting was held 16 years ago.

[793] Sixth Palmer WS, para 88.

Mineralogy normally only keeps records for 6 years. The document was found on an old computer and included for completeness. A search has been carried out and no other documents are available.

Respondent Admits the Claimant's Claims are not a Sham

715. If a transaction is a sham as the Respondent claims, it must be carried out for an improper purpose and cannot be "lawful and effective". In paragraph 64 of the Reply, the Respondent acknowledges that the Share Swap was "lawful and effective".

716. The Respondent wastes the Tribunal and the parties time and costs by pursuing grounds which are unarguable.

Personal Attacks on the Claimant's Representative

717. The Respondent uses the Reply as an opportunity to continue to personally attack Mr Palmer despite the fact that these proceedings are between the Claimant and the Respondent. This is not surprising and is consistent with the hatred of those who instruct the Respondent in this arbitration and the persecution that has been carried out by the Respondent against Mr Palmer since 2013 when Mr Palmer founded a political party and held the balance of power in the Australian Parliament.

718. In truth, Mr Palmer was elected by the Australian people in 2012 as a Living National Treasure a title which was bestowed upon him by no lesser body than the National Trust of Australia.[794] Mr Palmer has been an adjunct professor in the facility of Law and Business

[794] Letter, from National Trust to Mr Clive F Palmer re: National Living Treasure Award, 15 March 2012, (**Exh. C-66**).

at Deakin University where he actively lectured students.[795] He was also appointed an adjunct Professor at Bond University (Queensland, Australia).[796] The Australian Government Magazine declared him Mining Entrepreneur of the Decade in 2012.[797]

719. The Australian Financial Review which is Australia's leading financial national newspaper publishes each year a power index and in 2014 Clive Palmer was second on the power index after the then Prime Minister Tony Abbott.[798] By Mr Palmer being the leader of a political party controlling the balance of power in the Australian Parliament resulted in the two major political parties in Australia unprecedently targeting him contrary to the Rule of Law. The Australian Financial Review in its yearly rich list in 2023 ranked Mr Palmer as the fifth wealthiest Australian with assets of $23.66 billion dollars.[799] The Tribunal should not be distracted. This arbitration is not about Mr Palmer. It is about the Claimants claim, the Amendment Act and the Rule of Law.

720. In short, the Respondent's stance is scandalous, scurrilous and defamatory and must be rejected by the Tribunal as an abuse of process and a delaying tactic to avoid a merit hearing for which the Respondent has no answer.

721. None of the Respondent's objections are strong and all of them are unmeritorious.

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[795] Letter, from Deakin University to Mr Clive F Palmer re: Appointment as Adjunct Professor, 2 August 2002, (**Exh. C-64**).
[796] Letter of Appointment, 13 June 2008, (**Exh. C-577**); Seventh Palmer WS at para 12.
[797] Award, "Entrepreneur of the Decade" to Mr Clive F Palmer, 20 June 2012, (**Exh. C-65**).
[798] *Australian Financial Review,* Power Index 2014, August 2014, (**Exh. C-576**); Seventh Palmer WS at para 11.
[799] First Procedural Hearing Transcript - PCA 2023/40, 10 August 2023, (**Exh. C-481**).

722. During the First Procedural Hearing on 10 August 2023,[800] the Respondent's legal representative made the following comments:

> *"..that is a very problematic deadline for Australia, which does need the time to set out its jurisdictional objections in full. And the Tribunal has already seen an outline of its three very substantial jurisdictional objections in the response to the arbitration...",*

(see from line 25 on page 55 to line 5 on page 56), and:

> *"...And the first and very obvious point is that Australia has three serious and substantive objections to jurisdiction, not just one.*
>
> *The second, equally obvious, is that it is a very different thing to formulate and make a denial of benefits as opposed to putting forward a full legal case, with full legal arguments, such evidence as is needed, before the Tribunal. The two just simply don't have any relation to one another.*
>
> *And again, I think one really has to stand back and acknowledge the enormity of the claim that is being made (against) Australia, and the important that Australia has to put forward what it regards as highly critical jurisdictional objections in the matter"*

(see from line 9 to line 22 on page 59).

723. Notwithstanding that submission the Respondent's grounds of Objections have not changed and its grounds of Objections remain unarguable, yet the Respondent has been successful in not

[800] First Procedural Hearing Transcript – PCA 2023/40, 10 August 2023 (**Exh. C-575**).

providing any defence in respect of the State Agreement Dispute for over 8 years until the Amendment Act was legislated and further that the Respondent has been successful in not providing a defence some 4 years after the passing of the Amendment Act in respect of this Arbitration.

VIII. ORDERS WHICH SHOULD BE MADE IN RESPECT OF THE RESPONDENT'S PRELIMINARY OBJECTIONS

724. The Tribunal is respectfully requested to:

a. DISMISS the objections set out in the Respondent's Statement on Preliminary Objections dated 22 January 2024 and the Respondent's Reply on Preliminary Objections dated 19 July 2024;

b. DECLARE that the claims submitted by the Claimant are within the Tribunal's jurisdiction;

c. DECLARE that the claims submitted by the Claimant are admissible;

d. ORDER, pursuant to Article 42 of the UNCITRAL Rules, that the Respondent pay all of the Claimant's costs, on an indemnity basis, of and incidental to the Respondent's Statement on Preliminary Objections dated 22 January 2024, the Respondent's Reply on Preliminary Objections dated 19 July 2024, and the hearing commencing on 16 September 2024, including the Claimant's costs and disbursements for obtaining legal representation and

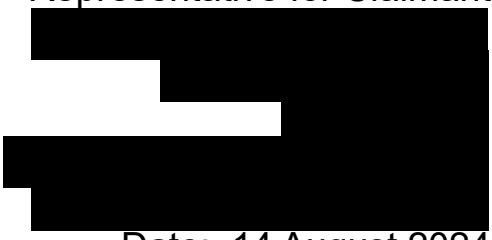
assistance in relation thereto (including, without limitation, all witness fees and disbursements), together with interest on all such amounts; and

e. FIX a date and time for a directions hearing to set a timetable for the merits and damages phase of this arbitration.

Respectfully submitted,

Clive F Palmer
Claimant's Representative and Director

Clive F Palmer
Representative for Claimant



Date: 14 August 2024