IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT ESTABLISHING THE ASEAN-AUSTRALIA-NEW ZEALAND FREE TRADE AREA

- and -

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

- between -

ZEPH INVESTMENTS PTE LTD

("Claimant" or "Zeph")

and

THE COMMONWEALTH OF AUSTRALIA

("Respondent" or "Australia")

(PCA Case No. 2023-40)

AWARD

Tribunal

Prof. Gabrielle Kaufmann-Kohler (Presiding Arbitrator)
Mr. William Kirtley
Prof. Donald McRae

Tribunal Secretary
Mr. Lukas Montoya

Registry
Mr. Bryce Williams
Permanent Court of Arbitration

26 September 2025

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TABLE OF ABBREVIATIONS

2020 Arbitration	Proceedings between Mineralogy and International Minerals (as Applicants) and the State of Western Australia (as Respondent) arising from the Companies' submission of an "amended statement of issues, facts, and contentions" to Mr. McHugh (sole arbitrator) on 28 May 2020
2020 Arbitration Agreement	Arbitration agreement between Mineralogy, International Minerals, the State of Western Australia, and Mr. McHugh, dated 8 July 2020
2020 Mediation Agreement	Mediation agreement between Mineralogy, International Minerals, and the State of Western Australia, dated 5 August 2020
AANZFTA or **Treaty**	Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area
Acceleration Request	Claimant's request of 18 and 21 August 2023 that the briefing schedule regarding the IMA be accelerated
ACRA	Accounting and Corporate Regulatory Authority (Singapore)
Additional Project Proposal	A significant modification, expansion, or otherwise variance of a Project Proposal, under Clause 8 of the State Agreement
Agreement Act	Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Act 2002 (WA)
Amendment Act	Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Act 2020 (WA)
A-NoA	Claimant's amended Notice of Arbitration, dated 30 September 2023
ANZCERTA Protocol	Protocol on Investment to the Australia and New Zealand Closer Economic Relations Trade Agreement
ASEAN	Association of Southeast Asian Nations
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
BIT	Bilateral investment treaty
BSIOP Proposal	The Project Proposal submitted by Mineralogy and International Minerals entitled "Balmoral South Iron Ore Project"
Chapter 11	Chapter 11 of the AANZFTA (Investment)
CITIC	CITIC Pacific Limited
CITIC Parties	CITIC, Sino Iron, and Korean Steel
Claimant or **Zeph**	Zeph Investments Pte Ltd, the Claimant
Closeridge	Closeridge Pty Ltd
Companies	Mineralogy and International Minerals

CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
Engineering Companies	GCS Engineering Service Pte, Visco Engineering Pte Ltd, and Visco Offshore Engineering Pte Ltd
ER	Expert Report
FATA	Foreign Acquisitions and Takeovers Act (Cth)
FIRB	Foreign Investment Review Board
First Award	Award dated 20 May 2014, in the proceedings between Mineralogy and International Minerals (as Applicants) and the State of Western Australia (as Respondent)
FY / FYE	Financial Year / Financial Year ending
Hearing	Hearing on Preliminary Objections, held at the Peace Palace in The Hague, the Netherlands from 16 to 18 September 2024
IMA	Claimant's Application for Interim Measures, dated 4 August 2023
IMA Hearing	Hearing on the IMA, held by videoconference on 18 October 2023
IMA Rejoinder	Respondent's Rejoinder to the IMA, dated 9 October 2023
IMA Reply	Claimant's Reply to the IMA, dated 27 September 2023
IMA Response	Respondent's Response to the IMA, dated 15 September 2023
Individuals	Mr. Clive Palmer, Ms. Emily Palmer, Mr. Declan Sheridan, Ms. Baljeet Singh, and Mr. Bernard Wong
International Minerals	International Minerals Pty Ltd, a subsidiary of Mineralogy
JVA	Joint Venture Agreement between Zeph and the Kleenmatic Companies
Kleenmatic Companies	Kleen Venture Pte Ltd and One Kleenmatic Pte Ltd
Korean Steel	Korean Steel Pty Ltd
Korean Steel Project	The Project Proposal submitted by Mineralogy and Korean Steel, and approved by WA on 11 June 2009, together with the Additional Project Proposal approved by WA on 6 January 2010
MC	Mineralogy's Constitution
MCP Litigation	The court proceedings commenced by the CITIC Parties against Mineralogy, and including WA as a respondent
MCPs	Mining Continuation Proposals
MIL	Mineralogy International Limited
Mineralogy	Mineralogy Pty Ltd
Mineralogy Group	Mineralogy, its direct and indirect shareholders, and its subsidiaries

MIPL	Mineralogy International Pte Ltd, the original name of the Claimant
NoA	Claimant's Notice of Arbitration, served 29 March 2023
NoA Response	Respondent's Response to the Notice of Arbitration, dated 28 April 2023
NoI	Claimant's Notice of Intent, dated 20 October 2022
Objection 1	Respondent's first preliminary objection (that Zeph is not a protected investor)
Objection 2	Respondent's second preliminary objection (that Zeph holds no protected investment)
Objection 3	Respondent's third preliminary objection (that the Respondent denied the benefits of Chapter 11 to Zeph and its alleged investments)
Objection 4	Respondent's fourth preliminary objection (that Zeph's claims constitute an abuse of process)
Parties	Claimant and Respondent
PCA	Permanent Court of Arbitration
PO1	Procedural Order No. 1, dated 1 September 2023
PO2	Procedural Order No. 2, dated 17 November 2023
PO3	Procedural Order No. 3, dated 19 January 2024 (revised 14 February 2024)
PO6	Procedural Order No. 6, dated 23 September 2024
Preliminary IMA	Claimant's request of 21 August 2023 that the IMA be granted on a preliminary basis
Project Proposal(s)	One or more detailed proposals concerning pre-determined types of projects, under Clause 6 of the State Agreement
QRO	Queensland Revenue Office
Rejoinder	Claimant's Rejoinder on Preliminary Objections, dated 14 August 2024
Reply	Respondent's Reply on Preliminary Objections, dated 19 July 2024
Respondent or **Australia**	The Commonwealth of Australia
Restructure	The Mineralogy Group's corporate restructuring in December 2018 and January 2019
River Crescent	River Crescent Pty Ltd
ROPO	Claimant's Response on Preliminary Objections, dated 18 March 2024
SAFTA	Singapore-Australia Free Trade Agreement

Second Award	Award dated 11 October 2019, in the proceedings between Mineralogy and International Minerals (as Applicants) and the State of Western Australia (as Respondent)
SFT	Swiss Federal Tribunal
Singapore	The Republic of Singapore
Sino Iron	Sino Iron Pty Ltd (known as Bellswater Pty Ltd at the time of the State Agreement)
Sino Iron Project	The Project Proposal submitted by Mineralogy and Sino Iron on 19 November 2007 (and in varied form on 29 February 2008), together with the two Additional Project Proposals approved by WA on 22 June 2009 and 6 January 2010
SOPO	Respondent's Statement on Preliminary Objections, dated 22 January 2024
State Agreement	The Iron Ore Processing (Mineralogy Pty Ltd) Agreement between the Government of WA, Mineralogy, International Minerals, Korean Steel, Sino Iron, Austeel Pty Ltd, Balmoral Iron Pty Ltd, and Brunei Steel Pty Ltd
ToA	Terms of Appointment, dated 1 September 2023
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law (2021)
VCLT	Vienna Convention on the Law of Treaties
WA	Western Australia, one of the constituent states of Australia
WARO	WA Revenue Office
WS	Witness Statement

I. INTRODUCTION

1. This case concerns a dispute under Chapter 11 of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (the "**AANZFTA**", or "**Treaty**"), signed on 27 February 2009, with respect to an iron ore project located in the Pilbara region of Western Australia ("**WA**"), one of the constituent states of the Commonwealth of Australia ("**Australia**"). The Republic of Singapore ("**Singapore**") is a State party to the Association of Southeast Asian Nations ("**ASEAN**"), and is thus a Treaty Party to the AANZFTA together with Australia.[1]

A. THE PARTIES

1. The Claimant

2. The Claimant is Zeph Investments Pte Ltd ("**Zeph**"), a company incorporated in Singapore on 21 January 2019, originally under the name Mineralogy International Pte Ltd ("**MIPL**"),[2] with registered offices at 80 Genting Lane #11-02, Ruby Industrial Complex, Singapore, 349565.[3] For simplicity, where applicable MIPL is referred to as Zeph.

3. The Claimant is represented in this arbitration by Mr. Clive F. Palmer, Chairman of the Claimant.

4. The Claimant is further assisted by the following parties:

Mr. George Spalton KC of the English Bar, London, United Kingdom

Dr. Simon Foote KC of the New Zealand Bar, Auckland, New Zealand

Dr. Anna Kirk of the New Zealand Bar, Auckland, New Zealand

Mr. Kris Byrne of the Queensland Bar, Brisbane, Queensland, Australia

Mr. Michael Sophocles, Solicitor, Sydney, New South Wales, Australia

Mr. Jonathan Shaw, Solicitor, Gold Coast, Queensland, Australia

Ms. Anna Palmer, Solicitor, Brisbane, Queensland, Australia

Ms. Baljeet Singh, Administrator and Director of the Claimant, Gold Coast, Queensland, Australia

Mr. Shane Bosma, Solicitor, Gold Coast, Queensland, Australia

Mr. Daniel Jacobson, Solicitor, Brisbane, Queensland, Australia

Mr. Thomas Browning, Solicitor, Brisbane, Queensland, Australia

Ms. Yevheniya Sophocles, Solicitor, Sydney, New South Wales, Australia

Mr. George Sokolov, Manager Litigation Support, Gold Coast, Queensland, Australia

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[1] The AANZFTA entered into force in January 2010 for Australia and Singapore.

[2] MIPL changed its name to Zeph on 4 December 2019 (**R-48**, Notice of Special Resolution for Change of Name, 4 December 2019; **C-71**, Business profile of Zeph Investments Pte Ltd, 19 January 2021, p. 2 (of PDF)).

[3] **C-71**, Business profile of Zeph Investments Pte Ltd, 19 January 2021, pp. 2-3 (of PDF).

2. The Respondent

5. The Respondent is Australia and is represented in this arbitration by:

Mr. Jesse Clarke, General Counsel

Mr. James Mason

Dr. Stephen Donaghue KC, Solicitor-General of Australia

Mr. Samuel Wordsworth KC

Prof. Chester Brown SC

Dr. Naomi Hart

Ms. Anna Garsia

Dr. Esme Shirlow

6. The Claimant and the Respondent are jointly referred to as the "**Parties**".

B. THE TRIBUNAL

7. The Tribunal is composed of:

Prof. Gabrielle Kaufmann-Kohler (Presiding Arbitrator)

Lévy Kaufmann-Kohler
3-5 rue du Conseil-Général
P.O. Box 552
1211 Geneva 4
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Prof. Donald McRae (Co-Arbitrator)

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57 Louis Pasteur Street
Ottawa, Ontario K1N 6N5
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8. With the consent of the Parties, the Tribunal appointed as Secretary to the Tribunal:

Mr. Lukas Montoya

Lévy Kaufmann-Kohler
3-5 rue du Conseil-Général
P.O. Box 552
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Switzerland
Email: lukas.montoya@lk-k.com

II. FACTUAL BACKGROUND

A. MINERALOGY (1985-PRESENT)

9. Mineralogy Pty Ltd ("**Mineralogy**") is an Australian company incorporated on 18 June 1985.[4] Since then, Mineralogy has held or developed numerous mining rights in different regions of Australia, be it directly or indirectly through local subsidiaries, including International Minerals Pty Ltd ("**International Minerals**").[5]

10. For simplicity, Mineralogy, its direct and indirect shareholders, and its subsidiaries, are collectively referred to as the "**Mineralogy Group**". It is undisputed that Mr. Clive Frederick Palmer, an Australian national, in addition to having been a director of Mineralogy and International Minerals, has been the Mineralogy Group's ultimate beneficial owner at all relevant times.[6]

B. THE STATE AGREEMENT (2002-PRESENT)

11. On 5 December 2001, Mineralogy, together with various "Co-Proponents", which it owned at the time, concluded the Iron Ore Processing (Mineralogy Pty Ltd) Agreement (the "**State Agreement**") with the Government of WA.[7] The Co-Proponents included *inter alia* International Minerals, Korean Steel Pty Ltd ("**Korean Steel**"),[8] and Sino Iron Pty Ltd ("**Sino Iron**").[9]

12. The State Agreement envisaged Mineralogy, "by itself or in conjunction with one or more of the Co-Proponents", developing projects in WA's Pilbara region with respect to the "mining and concentration of iron ore"; "the processing of that iron ore predominantly as magnetite"; "the transportation of magnetite concentrates and processed iron ore"; "the establishment of new port facilities"; and the "shipping of processed iron ore through such port facilities".[10] To that end, the State Agreement notably provided:

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4 **C-74**, ASIC, Current & Historical Company Extract for Mineralogy, 9 February 2023.

5 Palmer WS I, ¶¶ 109-112, 115-116.

6 **C-74**, ASIC, Current & Historical Company Extract for Mineralogy, 9 February 2023; **C-75**, ASIC, Current & Historical Company Extract for International Minerals, 9 February 2023; SOPO, ¶¶ 30, 43; Rejoinder, ¶¶ 126, 128(e).

7 **CLA-2**, State Agreement, 5 December 2001, p. 7 (of PDF).

8 **CLA-2**, State Agreement, 5 December 2001, p. 7 (of PDF).

9 **CLA-2**, State Agreement, 5 December 2001, p. 7 (of PDF). At the time, Sino Iron bore the name Bellswater Pty Ltd (**CLA-2**, Variation to the State Agreement, 14 November 2008, p. 75 (of PDF)).

10 **CLA-2**, State Agreement, 5 December 2001, Preamble ¶ (c), p. 8 (of PDF). *See also* **CLA-2**, Agreement Act, 24 September 2002, p. 5 (of PDF).

i. Under Clause 6, that Mineralogy could submit for approval to the Government of WA one or more detailed proposals concerning pre-determined types of projects, either "alone or with a Co-Proponent" ("**Project Proposal(s)**").[11]

ii. Under Clause 8, that the proponents of an approved Project Proposal, namely Mineralogy alone or together with a Co-Proponent, could seek approval from the Government of WA to "significantly modify", "expand", or "otherwise vary" a Project Proposal ("**Additional Project Proposal**").[12]

iii. Under Clause 7, that upon receiving a Project Proposal or an Additional Project Proposal, the Government of WA was either to "approve" the proposal;[13] "defer consideration [or] decision" of the proposal until the proponent(s) submitted a further proposal or proposals on certain identified matters;[14] or impose "condition[s] precedent" to the approval deemed "reasonable".[15]

13. On 24 September 2002, the Parliament of WA passed the "Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 (WA)" (the "**Agreement Act**"), which ratified and authorized the implementation of the State Agreement.[16]

14. On 14 November 2008, Mineralogy, the Co-Proponents (including International Minerals, Korean Steel, and Sino Iron), and the Government of WA agreed on a "variation" to the State Agreement,[17] which the Parliament of WA ratified and implemented on 10 December 2008 through an amendment to the Agreement Act.[18]

C. PROJECTS/PROPOSALS UNDER THE STATE AGREEMENT (2006-2023)

1. The Sino Iron and Korean Steel Projects and ensuing dispute (2006-2023)

15. In July 2006, Mineralogy sold Sino Iron to a subsidiary of CITIC Pacific Limited, a Chinese entity ("**CITIC**").[19]

[11] **CLA-2**, State Agreement, 5 December 2001, Clause 6(1), p. 16 (of PDF).

[12] **CLA-2**, State Agreement, 5 December 2001, Clause 8, p. 23 (of PDF).

[13] **CLA-2**, State Agreement, 5 December 2001, Clause 7(1)(a), p. 20 (of PDF).

[14] **CLA-2**, State Agreement, 5 December 2001, Clause 7(1)(b), p. 20 (of PDF).

[15] **CLA-2**, State Agreement, 5 December 2001, Clause 7(1)(c), p. 20 (of PDF).

[16] **CLA-2**, Agreement Act, 24 September 2002, pp. 5, 109 (of PDF).

[17] **CLA-2**, Variation to the State Agreement, 14 November 2008, pp. 76ff (of PDF).

[18] **CLA-2**, Agreement Act, 10 December 2008, pp. 5-6 (§§ 3,6), 109 (of PDF).

[19] **R-169**, ASIC Current & Historical Company Extract for Sino Iron Pty Ltd, 20 December 2023, pp. 8, 12-13 (of PDF); **R-91**, *Mineralogy Pty Ltd v. Sino Iron Pty Ltd (No 6)* [2015] FCA 825, ¶ 109.

16. On 19 November 2007,[20] and in varied form on 29 February 2008,[21] Mineralogy and Sino Iron (as Co-Proponent) submitted a Project Proposal, which WA approved on 2 May 2008.[22] Subsequently, Mineralogy and Sino Iron submitted two Additional Project Proposals, which WA approved on 22 June 2009[23] and 6 January 2010[24] (together with the approved Project Proposal, the "**Sino Iron Project**").

17. In October 2008, Mineralogy sold Korean Steel to a subsidiary of CITIC.[25]

18. On 22 April 2009, Mineralogy and Korean Steel (as Co-Proponent) submitted a Project Proposal, which WA approved on 11 June 2009.[26] Subsequently, Mineralogy and Korean Steel submitted an Additional Project Proposal, which WA approved on 6 January 2010 (together with the approved Project Proposal, the "**Korean Steel Project**").[27]

19. On 9 December 2016, CITIC, on behalf of Sino Iron and Korean Steel (jointly with CITIC, the "**CITIC Parties**"), provided Mineralogy with draft Mining Continuation Proposals ("**MCPs**") allegedly "required for the continuity" of the Sino Iron Project and the Korean Steel Project, copying the Government of WA.[28]

20. On 12 December 2016, Mineralogy wrote to the Government of WA stating that it had not agreed to the submission of the MCPs to WA and therefore that these did not constitute Additional Project Proposals.[29] It is noted that, were the MCPs submitted jointly with Mineralogy to WA pursuant to Clause 8 of the State Agreement, the MCPs would constitute Additional Project Proposals with respect to the Sino Iron and Korean Steel Projects under Clause 8 of the State Agreement,[30] which would then be up for consideration by WA pursuant to Clause 7 of the State Agreement.[31] In its letter of 12 December 2016, Mineralogy further condemned the CITIC Parties' attempt to involve WA in what Mineralogy considered to be negotiations between private commercial parties.[32]

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[20] **C-196,** Letter from Mineralogy and Sino Iron to WA (Deputy Premier; Treasurer; Minister for State Development), 19 November 2007, p. 806 (of PDF).

[21] **C-196**, Sino Iron Pellet Project Proposal (Amended), February 2008, p. 815 (of PDF); **C-196**, Letter from WA (Deputy Premier; Treasurer; Minister for State Development) to Mineralogy and Sino Iron, 2 May 2008, p. 896 (of PDF).

[22] **C-196**, Letter from WA (Deputy Premier; Treasurer; Minister for State Development) to Mineralogy and Sino Iron, 2 May 2008, p. 896 (of PDF).

[23] **C-196**, Letter from WA (Premier Barnett) to Sino Iron, 22 June 2009, p. 938 (of PDF).

[24] **C-196**, Letter from WA (Premier Barnett) to Mineralogy, 6 January 2010, p. 975 (of PDF).

[25] **R-170**, ASIC Current & Historical Company Extract for Korean Steel Pty Ltd, 20 December 2023, pp. 7-8, 12 (of PDF); **R-91**, *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825, ¶ 121.

[26] **C-196**, Letter from WA (Premier Barnett) to Sino Iron concerning Korean Steel, 11 June 2009, p. 1010 (of PDF).

[27] **C-196**, Letter from WA (Premier Barnett) to Mineralogy, 6 January 2010, p. 975 (of PDF).

[28] **R-106**, Letter from CITIC to Mineralogy (cc. WA Minister for State Development), 9 December 2016.

[29] **R-107**, Letter from Mineralogy to WA (Minister for State Development), 12 December 2016, p. 1 (of PDF); *see supra*, ¶¶ 12.ii-iii.

[30] *See supra*, ¶ 12.ii.

[31] *See supra*, ¶ 12.iii.

[32] **R-107**, Letter from Mineralogy to WA (Minister for State Development), 12 December 2016, p. 2 (of PDF).

21. On 23 January 2017, Mineralogy formally indicated to CITIC that it did not agree with the submission of the MCPs to WA as Additional Project Proposals.[33]

22. On 18 December 2017, CITIC wrote to Mineralogy, copying the Government of WA, providing Mineralogy with revised MCPs, while asking it to "support [the MCPs] and join [Sino Iron and Korean Steel] in submitting them formally to [WA]".[34]

23. On 21 December 2017, the Government of WA informed Mineralogy that Sino Iron and Korean Steel's revised MCPs had been "amended following communications between [WA] and [CITIC]".[35] For the Government, the revised MCPs now "provide[d] sufficient detail to meet the requirements of the State Agreement" to be "considered by [WA] pursuant to Clause 7 of the State Agreement".[36] The Government further noted that CITIC had "advised that these [revised MCPs were] essential to the ongoing operation of the Sino Iron and Korean Steel Projects", while noting "the strategic importance of these projects to [WA]".[37] The Government thus requested Mineralogy to "carefully consider submitting [the revised MCPs] for consideration by [WA] under the State Agreement".[38]

24. On 29 December 2017, Mineralogy *inter alia* informed the Government of WA that no "commercial agreement" had yet been reached with Sino Iron and Korean Steel with respect to their revised MCPs.[39] Mineralogy therefore confirmed that it did not consent to the submission of these MCPs as Additional Project Proposals under the State Agreement.[40]

25. The Tribunal notes that thereafter and until July 2018 there appears to be no correspondence on record on the MCP issue. The next communication on record is dated 23 July 2018 and refers to an earlier communication by CITIC of 29 June 2018 that is not on the record.[41] Be that as it may, matters continued to escalate.

26. On 23 July 2018, Mineralogy wrote to CITIC, labelling "deplorable" the latter's "continued attempts to involve [the Government of WA] in what is essentially a commercial dispute".[42]

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[33] **R-109**, Letter from Mineralogy to CITIC, 23 January 2017.

[34] **R-112**, Letter from CITIC to Mineralogy, 18 December 2017, p. 1. *See also* **R-113**, Sino Iron MCP (revised), December 2017; **R-114**, Korean Steel MCP (revised), December 2017.

[35] **R-190**, Letter from WA (Department of Jobs, Tourism, Science and Innovation) to Mineralogy (cc. CITIC), 21 December 2017.

[36] **R-190**, Letter from WA (Department of Jobs, Tourism, Science and Innovation) to Mineralogy (cc. CITIC), 21 December 2017.

[37] **R-190**, Letter from WA (Department of Jobs, Tourism, Science and Innovation) to Mineralogy (cc. CITIC), 21 December 2017.

[38] **R-190**, Letter from WA (Department of Jobs, Tourism, Science and Innovation) to Mineralogy (cc. CITIC), 21 December 2017.

[39] **R-117**, Letter from Mineralogy to WA (Department of Jobs, Tourism, Science and Innovation), 29 December 2017, p. 3 (of PDF).

[40] **R-117**, Letter from Mineralogy to WA (Department of Jobs, Tourism, Science and Innovation), 29 December 2017, p. 3 (of PDF).

[41] **R-124**, Letter from Mineralogy to CITIC, 23 July 2018, p. 1 (of PDF).

[42] **R-124**, Letter from Mineralogy to CITIC, 23 July 2018, p. 1 (of PDF).

According to Mineralogy, it had complied with its contractual obligations and, if the CITIC Parties considered otherwise, it was "open" to them to "commence legal proceedings".[43]

27. On 9 August 2018, CITIC replied to Mineralogy, copying the Government of WA, stating that in view of the MCPs' importance to ensuring the continuity of the Sino Iron and Korean Steel Projects, and in light of Mineralogy's refusal to cooperate in this respect, it was "entirely appropriate" for CITIC to "seek the assistance" of the WA Government, the latter being a party to the State Agreement and thus a "critical stakeholder" in the projects at issue.[44]

28. On 13 August 2018, with reference to CITIC's communication of 9 August 2018, Mineralogy wrote to the Government of WA stating that the latter should not be involved in the "commercial dispute" between Mineralogy and the CITIC Parties.[45]

29. On 19 October 2018, the CITIC Parties commenced court proceedings against Mineralogy (and included WA as an additional respondent), seeking orders that Mineralogy submit the MCPs to the Government of WA for approval as Additional Project Proposals to the Sino Iron and Korean Steel Projects ("**MCP Litigation**").[46]

30. On 3 November 2018, in light of the MCP Litigation, WA Premier Mark McGowan reportedly "urge[d]" Mineralogy to "resolve the issues with CITIC as soon as possible to ensure CITIC can continue to operate" and stated that WA was "considering its options", including amending the State Agreement.[47] Opposition Leader Mr. Michael Nahan was also reported as stating that, given their "State significance", it was "important" for WA to do all it could to "sustain" the Sino Iron and Korean Steel Projects, "including altering the State Agreement".[48]

31. On 5 November 2018, referring to his reported statements of 3 November 2018, Mineralogy wrote to Premier McGowan asserting that the State Agreement was "sacrosanct" and went "to the sovereign risk of Western Australia"; and that Mineralogy was in negotiations with Sino Iron and Korean Steel, which were "commercial discussions [that] only involve[d] commercial matters".[49]

32. On 29 November 2018, Premier McGowan made the following statement on the floor of WA's Parliament, in relation to Mineralogy's refusal to submit the MCPs for approval by WA, as well as the possibility that the latter could amend the State Agreement to resolve that impasse with bipartisan support:

> The operators of Sino Iron, CITIC Pacific, simply want to expand their tailings area onto the adjoining leases. They have been in discussions for a long time now with Mineralogy trying to organise a reasonable outcome. If CITIC is denied access to these leases by Mineralogy, that puts at risk the future development of this important and large magnetite project. I am very disappointed in Mr Palmer's unreasonable response and his behaviour

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[43] **R-124**, Letter from Mineralogy to CITIC, 23 July 2018, p. 2 (of PDF).

[44] **R-125**, Letter from CITIC to Mineralogy (cc. WA Premier McGowan and Department of Jobs, Tourism, Science and Innovation), 9 August 2018, p. 1 (of PDF).

[45] **R-194**, Letter from Mineralogy to WA (Premier McGowan), 13 August 2018.

[46] **R-128**, *Sino Iron Pty Ltd v. Mineralogy Pty Ltd* [2019] FCA 675, ¶¶ 2, 10(1).

[47] **R-130**, Ben Harvey, 'State set to protect Sino Iron' *The West Australian*, 3 November 2018. *See also* SOPO, ¶ 112(g) ("The comments made by Premier McGowan foreshadowed that the WA Government might consider amending the State Agreement unless there was a resolution [to the MCP issue]").

[48] **R-130**, Ben Harvey, 'State set to protect Sino Iron' *The West Australian*, 3 November 2018.

[49] **R-131**, Letter from Mineralogy to WA (Premier McGowan), 5 November 2018.

> on this matter. Three thousand Australian jobs are at risk and the ongoing investment of hundreds of millions of dollars is in limbo. I urge Mr Palmer to resolve these issues with CITIC as soon as possible in the interests of Western Australia, Australia and the livelihoods of 3 000 Australian workers and their families. […]
>
> State agreements are an important instrument. They are a privileged instrument for the companies that are a party to them, and by their very nature they are there to ensure the state's best interests are looked after, but there is a responsibility on the beneficiary, Mineralogy, to do the right thing. I noted the recent comments of the opposition leader and his offer to help the government do all he can to sustain the project including altering the state agreement. I thank the opposition leader for this commitment. It appears we are as one on this issue, which is good to know. I am pleased we both agree that this issue needs to be resolved. Clive Palmer and Mineralogy are now on notice. At the end of the day, this government will do what is in the best interests of Western Australia and the 3 000 hardworking Australians who work in CITIC's operations.[50]

33. On 30 November 2018, in reaction to his statements in the WA Parliament, Mineralogy indicated to Premier McGowan that amending the State Agreement would *inter alia* "greatly diminish [the] value" of projects under that agreement "to a prospective purchaser".[51]

34. On 2 December 2018, Mineralogy wrote to the Government of WA, asserting that, given the MCPs involved the acquisition of "new rights and property" by "Chinese State-owned companies" that could potentially impact national security, Mineralogy could not consider the MCPs until the Foreign Investment Review Board ("**FIRB**") approved such activities.[52] In this context, Mineralogy asserted that the CITIC Parties needed to comply with Australian law as opposed to circumventing it by seeking the intervention of WA. Mineralogy added that this was impermissible *inter alia* because the commercial dispute regarding the approval of the MCPs was already before the Australian courts.[53] Mineralogy nevertheless requested that, if WA indeed intended to amend the State Agreement, the amendment proposals be sent to it for consideration.[54]

35. On 15 May 2019, Mineralogy again wrote to Premier McGowan, stressing that any communication between the Government of WA and the CITIC Parties constituted a "serious breach" of Mineralogy's agreements with the CITIC Parties; that the Parliament of WA did not have the power to change Mineralogy's rights under the State Agreement, which were also protected by the "relevant Free Trade Agreement" through its "parent company"; and that any amendments to the State Agreement should be submitted first to Mineralogy for its review.[55]

36. On 7 March 2023, the Supreme Court of WA decided the MCP Litigation largely in Mineralogy's favor.[56]

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[50] **R-133**, WA, *Parliamentary Debates*, Legislative Assembly, 29 November 2018, pp. 2-3 (of PDF).

[51] **R-134**, Letter from Mineralogy to WA (Premier McGowan), 30 November 2018.

[52] **R-136**, Letter from Mineralogy to WA (Premier McGowan), 2 December 2018, p. 1 (of PDF).

[53] **R-136**, Letter from Mineralogy to WA (Premier McGowan), 2 December 2018, p. 2 (of PDF).

[54] **R-136**, Letter from Mineralogy to WA (Premier McGowan), 2 December 2018, p. 2 (of PDF).

[55] **R-143**, Letter from Mineralogy to WA (Premier McGowan), 15 May 2019, p. 4 (of PDF).

[56] **CLA-70**, *Sino Iron Pty Ltd v. Mineralogy Pty Ltd [No 15]* [2023] WASC 56, pp. 631ff (of PDF).

2. Balmoral South Iron Ore Project Proposal and ensuing dispute (2012-2020)

37. On 8 August 2012, Mineralogy and International Minerals as Co-Proponent (jointly, the "**Companies**") submitted for approval a Project Proposal which was entitled "Balmoral South Iron Ore Project" (the "**BSIOP Proposal**").[57]

38. On 4 September 2012, the Government of WA advised the Companies that it was unable to "accept the [BSIOP Proposal] as a valid proposal" under Clause 6 of the State Agreement, as it envisaged port "works" at Cape Preston already "approved under the [Sino Iron Project]".[58]

39. On 12 September 2012, the Companies denied that the BSIOP Proposal was invalid. They emphasized that Clause 7 of the State Agreement did not empower WA to refuse consideration of a Project Proposal "on the basis that some elements of it are already approved".[59] Moreover, the Companies noted that Mineralogy, party to both the Sino Iron Project and the BSIOP Proposal, held the necessary ministerial "environmental approval" with respect to the Cape Preston port,[60] as well as the "underlying tenements for the whole port area", thus giving it "exclusive control over the tenement areas".[61] According to the Companies, this meant that the inclusion of port works at Cape Preston in the BSIOP Proposal was consistent with the State Agreement, "whereby various projects may utilize common facilities".[62]

40. On 6 November 2012, after additional exchanges between the Government of WA and the Companies,[63] the Companies informed WA that, due to the latter's "refusal to consider" the BSIOP Proposal, a dispute had arisen, and they would therefore initiate arbitration in accordance with the State Agreement and the Commercial Arbitration Act (WA).[64]

41. On 16 November 2012, the Government of WA replied that the BSIOP Proposal was "invalid on the basis that it included the undertaking of certain port works [at Cape Preston] already approved under the [Sino Iron Project]".[65] WA further observed that neither Mineralogy's environmental approval, nor the underlying tenements for the development of the "relevant port works", affected Mineralogy and Sino Iron's obligation to "develop the port facilities" pursuant to the Sino Iron Project.[66]

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57 **C-410**, Letter from Mineralogy and International Minerals to WA (Premier Barnett), 8 August 2012, p. 18 (of PDF).

58 **C-410**, Letter from WA (Premier Barnett) to Mineralogy, 4 September 2012, p. 125 (of PDF).

59 **C-410**, Letter from the Companies to WA (Premier Barnett), 12 September 2012, p. 127 (of PDF).

60 **C-410**, Letter from the Companies to WA (Premier Barnett), 12 September 2012, p. 126 (of PDF).

61 **C-410**, Letter from the Companies to WA (Premier Barnett), 12 September 2012, p. 126 (of PDF).

62 **C-410**, Letter from the Companies to WA (Premier Barnett), 12 September 2012, pp. 126-127 (of PDF).

63 **C-410**, Letters from the Director General of the Department of State Development of WA to the Companies, 12 September 2012, pp. 128-135 (of PDF) (setting out additional alleged "key issues" in the BSIOP Proposal to be resolved); **C-410**, Letter from Mineralogy to WA (Premier Barnett), 19 October 2012, pp. 136-140 (of PDF).

64 **C-196**, Letter from International Minerals to WA (Premier Barnett), 6 November 2012, p. 1214 (of PDF); **C-196**, Letter from Mineralogy to WA (Premier Barnett), 6 November 2012, p. 1215 (of PDF).

65 **C-410**, Letters from WA (Premier Barnett) to the Companies, 16 November 2012, pp. 142, 144 (of PDF).

66 **C-410**, Letters from WA (Premier Barnett) to the Companies, 16 November 2012, pp. 142, 144 (of PDF).

(i) The First Award

42. On 19 March 2013, the Hon. Michael McHugh AC KC was appointed as arbitrator to decide the dispute between the Companies and WA regarding the latter's refusal to consider the BSIOP Proposal.[67]

43. On 20 May 2014, Mr. McHugh issued an award declaring that the BSIOP Proposal constituted a Project Proposal under Clause 6.[68] Therefore, WA had failed to "deal" with the BSIOP Proposal in breach of Clause 7 of the State Agreement ("**First Award**").[69] Mr. McHugh further observed that, while the Companies had "foreshadowed a potential claim for damages" resulting from this breach, they had "tendered no evidence in support of such a claim" and thus it would not be "appropriate" to make "any [o]rder" in that respect.[70]

(ii) The Second Award

44. In a letter of 11 June 2014 to WA's State Solicitor, Mineralogy referred to the First Award, submitted that the Companies had "suffered substantial damages", and requested a without prejudice meeting to discuss the matter.[71]

45. On 17 June 2014, the State Solicitor replied that WA was open to engage in discussions, although it was of the view that the Companies were not entitled to damages. It argued that the First Award, which was "final", had "decided the question of damages" by not issuing an order in the Companies' favor after "expressly noting" that they had "failed to bring any evidence to support their [damages] claim".[72]

46. Between July 2014 and December 2017, the Companies and WA discussed the Companies' potential claim for damages and related matters following the First Award, such as WA's imposition of multiple conditions precedent to the approval of the BSIOP Proposal.[73]

47. On 2 July 2018, the Companies alleged that there was a dispute in connection with the liability of WA to pay damages following the First Award, which they would refer to arbitration pursuant to the State Agreement.[74]

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67 **CLA-8**, *Western Australia v. Mineralogy Pty Ltd* [2020] WASC 58, ¶¶ 52(4)(a)-(b).

68 **C-442**, First Award, 20 May 2014, "Award" ¶ 1, p. 51 (of PDF); *see supra*, ¶ 12.i.

69 **C-442**, First Award, 20 May 2014, "Award" ¶ 1, p. 51 (of PDF); *see supra*, ¶ 12.iii.

70 **C-442**, First Award, 20 May 2014, ¶ 70.

71 **R-95**, Letter from Mineralogy to WA State Solicitor, 11 June 2014.

72 **R-96**, Letter from WA State Solicitor to Mineralogy, 17 June 2014, ¶ 1.

73 **R-97**, Letter from Mineralogy to WA State Solicitor, 8 July 2014; **C-196**, Letter from WA (Premier Barnett) to Mineralogy, 22 July 2014, pp. 2726-2763 (of PDF); **R-98**, Letter from International Minerals to WA (Premier Barnett), 12 August 2014; **R-99**, Letter from WA State Solicitor to International Minerals, 18 August 2014; **R-100**, Letter from Mineralogy to Mr. McHugh, 26 September 2014; **R-101**, Letter from WA's State Solicitor's Office to Mineralogy, 9 October 2014; **R-102**, Letter from Mineralogy, on behalf of itself and International Minerals, to WA State Solicitor's Office, 13 February 2015; **R-103**, Letter from Alexander Law, on behalf of Mineralogy and Australasian Resources Limited, to WA State Solicitor's Office, 29 December 2016; **C-196**, Letters from WA (Premier McGowan) to the Companies, 16 August 2017, pp. 2764-2765 (of PDF); **R-115**, Letter from Mr. Wood, Director General of the Department of Jobs, Tourism, Science and Innovation to Mineralogy, 21 December 2017.

74 **C-184**, Letter from Mr. Palmer on behalf of the Companies to WA (Premier McGowan), 2 July 2018, p. 345 (of PDF).

48. On 27 July 2018, the Government of WA reiterated its position that the Companies were precluded from pursuing damages claims.[75] Nevertheless, between 2 and 9 August 2018, the Companies and WA had further exchanges about their dispute and how to proceed.[76]

49. By 28 August 2018, the Companies and WA had agreed in principle to refer their disagreements to Mr. McHugh for determination.[77] These included whether the Companies could pursue damages claims with respect to WA's refusal to consider the BSIOP Proposal (subject of the First Award), and/or WA's alleged other breaches of the State Agreement arising from the imposition of conditions precedent to the approval of the BSIOP Proposal (subsequent to the First Award).[78]

50. On 11 October 2019, Mr. McHugh issued an award holding that the Companies' "right to recover damages was not heard and determined in the [First Award]",[79] and that they were therefore "not foreclosed from further pursuing claims for damages arising from any [other] breach or breaches [by WA] of the State Agreement" ("**Second Award**").[80] Mr. McHugh further held that, contrary to WA's contentions, "there [had] not been inordinate and inexcusable delay on the part of the [Companies] in progressing" their damages claims.[81] This was so in particular because Mineralogy and Sino Iron had been engaged in litigation with respect to access to the port facilities at Cape Preston since before the First Award,[82] which created uncertainty as to whether and to what extent the BSIOP Proposal could proceed, and raised questions of causation and quantification of loss, which thus partly explained the Companies' delay in their decision to pursue damages claims.[83]

51. On 15 October 2019, Mineralogy informed the Government of WA that its direct shareholder Zeph and itself were "concerned" that WA would "act in a way which would affect their rights to pursue their claim for damages as set out in the [Second] Award", which would be contrary to the Singapore-Australia Free Trade Agreement ("**SAFTA**").[84] Mineralogy also stressed that any interference with the rights of the Companies under the State Agreement would "cause loss and damage" and prompt the initiation of SAFTA proceedings to obtain compensation.[85]

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75 **R-118**, Letter from WA (Premier McGowan) to Mineralogy and International Minerals, 27 July 2018.

76 **R-119**, Letter from Mineralogy and International Minerals to WA (Premier McGowan), 2 August 2018; **R-120**, Letter from Mineralogy and International Minerals to WA (Premier McGowan), 6 August 2018; **R-121**, Letter from WA State Solicitor's Office to Mineralogy, 9 August 2018.

77 **R-122**, Letter from the Companies to Mr. McHugh, 24 August 2018; **R-123**, Letter from WA State Solicitor's Office to Mineralogy, 28 August 2018.

78 **C-412**, Letter from the Companies to WA State Solicitor's Office, 30 October 2018; **C-413**, Letter from WA State Solicitor's Office to Mineralogy, 14 December 2018.

79 **C-443**, Second Award, 11 October 2019, "Award" ¶ 1, p. 41 (of PDF).

80 **C-443**, Second Award, 11 October 2019, "Award" ¶ 2, p. 41 (of PDF).

81 **C-443**, Second Award, 11 October 2019, "Award" ¶ 4, p. 41 (of PDF).

82 *See* SOPO, ¶¶ 94(b), 127(c); *see also, supra*, ¶¶ 38-39, 41.

83 **C-443**, Second Award, 11 October 2019, ¶¶ 99-100, 116-117. *See also* **R-91**, *Mineralogy Pty Ltd v. Sino Iron Pty Ltd (No 6)* [2015] FCA 825; **R-104**, *Mineralogy Pty Ltd v. Sino Iron Pty Ltd* [2017] FCAFC 55.

84 **R-145**, Letter from Mineralogy to WA (Premier McGowan), 15 October 2019, p. 1 (of PDF). *See infra*, ¶ 57.

85 **R-145**, Letter from Mineralogy to WA (Premier McGowan), 15 October 2019, p. 2 (of PDF).

(iii) The 2020 Arbitration

52. On 28 May 2020, the Companies submitted to Mr. McHugh an "amended statement of issues, facts, and contentions", claiming damages from WA for the refusal to consider the BSIOP Proposal and the imposition of conditions precedent for approval (the "**2020 Arbitration**").[86] As part of these proceedings:

i. On 26 June 2020, Mr. McHugh circulated procedural directions requiring the Companies and WA to attempt mediation in October; fixing hearing dates in November-December; and setting 12 February 2021 as the date for the issuance of the award.[87]

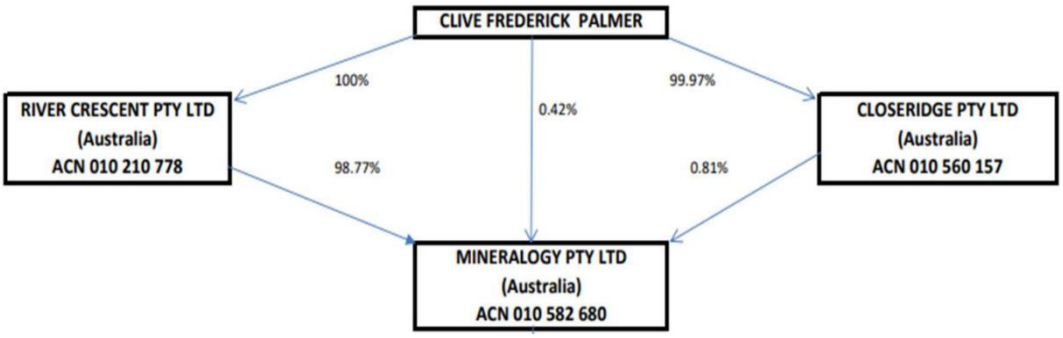
ii. On 8 July 2020, the Companies, WA, and Mr. McHugh concluded an arbitration agreement, setting out the damages issues for determination and confirming Mr. McHugh's appointment as arbitrator ("**2020 Arbitration Agreement**").[88]

iii. On 5 August 2020, in line with Mr. McHugh's procedural directions, the Companies and WA entered into a mediation agreement, appointing a mediator and agreeing to conduct the mediation in October ("**2020 Mediation Agreement**").[89]

53. The 2020 Arbitration never reached its conclusion due to the amendment of the Agreement Act that the Parliament of WA passed on 13 August 2020.[90]

D. THE MINERALOGY GROUP'S RESTRUCTURE (2018-2019)

54. Until late 2018, Mineralogy's 6,002,896 ordinary shares were owned by Mr. Palmer (0.42%) and two Australian companies, River Crescent Pty Ltd ("**River Crescent**") (98.77%) and Closeridge Pty Ltd ("**Closeridge**") (0.81%).[91] Mr. Palmer owned 100% of River Crescent and 99.97% of Closeridge:[92]



86 **C-170**, Mineralogy's and International Minerals' Amended Statement of Issues, Facts and Contentions, 28 May 2020.

87 **C-384**, Minute of Directions, 26 June 2020, pp. 3-5 (of PDF).

88 **C-242**, 2020 Arbitration Agreement, 8 July 2020, pp. 9ff, 15ff (of PDF).

89 **C-269**, 2020 Mediation Agreement, 5 August 2020, pp. 6-12 (of PDF).

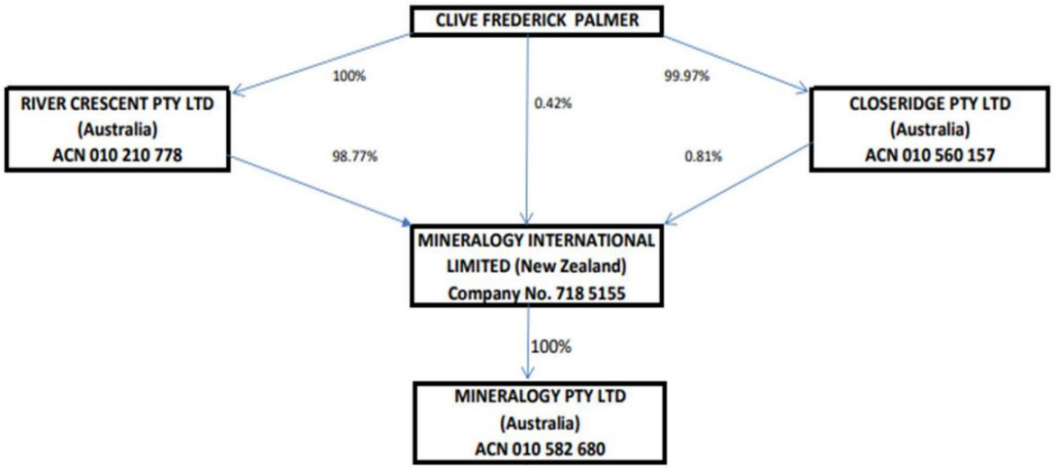
90 *See infra*, ¶ 66; *see supra*, ¶ 13.

91 **C-63**, PwC Section 411 Application on behalf of Mineralogy Group, 27 August 2019, p. 183 (of PDF).

92 **R-53**, ASIC, Company Extract for River Crescent Pty Ltd, 30 October 2020; **R-54**, ASIC, Company Extract for River Crescent, 30 September 2022; **R-55**; ASIC, Company Extract for Closeridge Pty Ltd, 30 October 2020; **R-56**, ASIC, Company Extract for Closeridge Pty Ltd, 30 September 2022; **R-57**, ASIC, Company Extract for Elect The President Pty Ltd, 30 October 2020.

55. In the months of December 2018 and January 2019, the Mineralogy Group underwent a corporate restructure (the "**Restructure**"), which started with the incorporation on 14 December 2018 of Mineralogy International Limited ("**MIL**"), a New Zealand company,[93] with Mr. Palmer holding one subscriber share.[94]

56. Two days later, on 16 December 2018, MIL entered into a share purchase agreement with Mr. Palmer, River Crescent, and Closeridge.[95] As a result, MIL acquired the totality of Mineralogy's shares, and in turn issued 6,002,896 new ordinary shares of its own, which Mr. Palmer, River Crescent, and Closeridge received in proportion to their former shareholding in Mineralogy (0.42%, 98.77%, and 0.81%, respectively).[96] Mr. Palmer's single subscriber share in MIL was redeemed or cancelled:[97]



57. On 21 January 2019, MIL incorporated Zeph in Singapore (then named MIPL),[98] with MIL holding one subscriber share.[99] A few days later, on 29 January 2019, Zeph and MIL entered into a share purchase agreement.[100] As a result, Zeph acquired the totality of Mineralogy's shares from

[93] **C-99**, New Zealand Companies Office, Company Extract for MIL, 25 July 2022.

[94] **R-58**, New Zealand Companies Office, New Company Incorporation Filing for MIL, 14 December 2018; **C-63**, PwC Section 411 Application on behalf of Mineralogy Group, 27 August 2019, p. 184 (of PDF).

[95] **C-63**, Share Purchase Agreement between Mr. Palmer, River Crescent, Closeridge, and MIL, 16 December 2018, p. 92 (of PDF).

[96] **C-63**, Share Purchase Agreement between Mr. Palmer, River Crescent, Closeridge, and MIL, 16 December 2018, p. 98 (of PDF).

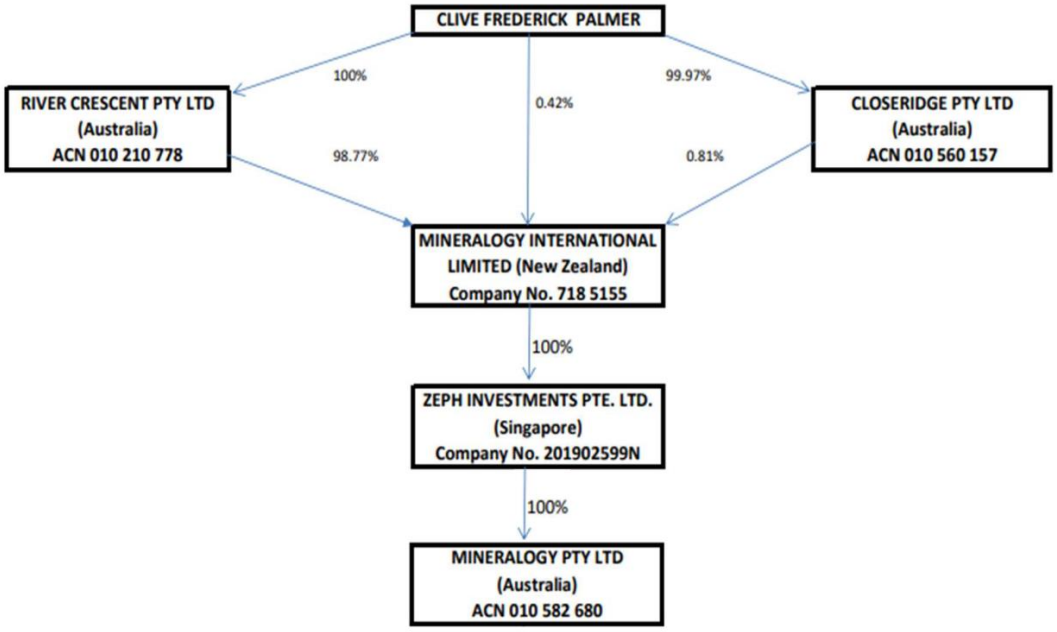
[97] **C-63**, Share Purchase Agreement between Mr. Palmer, River Crescent, Closeridge, and MIL, 16 December 2018, p. 99 (of PDF); **C-63**, Record of Resolution of Sole Director, 16 December 2018, p. 87 (of PDF); *supra*, fn. 94.

[98] *See supra*, ¶ 2.

[99] **C-63**, PwC Section 411 Application on behalf of Mineralogy Group, 27 August 2019, p. 184 (of PDF).

[100] **C-63**, Share Purchase Agreement between MIL and MIPL (Zeph), 29 January 2019, p. 168 (of PDF).

MIL, and in turn issued 6,002,896 new ordinary shares of its own, which MIL received in consideration.[101] MIL's single subscriber share was redeemed or cancelled:[102]



E. MIL AND ZEPH INVOKE INVESTMENT TREATY PROTECTION (2019)

58. On 18 and 19 January 2019, referring to Mineralogy's letter of 2 December 2018,[103] MIL informed the Government of WA that any amendment to the State Agreement aimed at allowing Sino Iron and Korean Steel to progress with the MCPs without Mineralogy's consent would cause MIL to file an investment arbitration against Australia under the AANZFTA[104] and the Protocol on Investment to the Australia and New Zealand Closer Economic Relations Trade Agreement ("**ANZCERTA Protocol**").[105]

59. On 4 February 2019, MIL followed up on its letter of 19 January 2019, and notified the Government of WA that, Zeph being its subsidiary and the direct shareholder of Mineralogy, any interference with the rights of Mineralogy under the State Agreement would result in both MIL and Zeph "purs[uing] all their rights" under the SAFTA.[106]

60. Thereafter, on 20 May 2019, in line with MIL's previous communications, Zeph wrote to the Government of WA, indicating that "remov[ing] the requirement [under the State Agreement] for the [CITIC Parties] to have [Mineralogy's consent to submit the MCPs for approval by WA]" would trigger "an arbitration in Washington under existing Free Trade Agreements".[107]

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[101] **C-63**, Share Purchase Agreement between MIL and MIPL (Zeph), 29 January 2019, p. 173 (of PDF).

[102] **C-63**, Share Purchase Agreement between MIL and MIPL (Zeph), 29 January 2019, p. 174 (of PDF); **C-63**, PwC Section 411 Application on behalf of Mineralogy Group, 27 August 2019, p. 185 (of PDF).

[103] *See supra*, ¶ 34.

[104] **R-44**, Letter from MIL to WA (Premier McGowan), 18 January 2019.

[105] **R-139**, Letter from MIL to WA (Premier McGowan), 19 January 2019.

[106] **R-141**, Letter from MIL to WA (Premier McGowan), 4 February 2019.

[107] **R-144**, Letter from Zeph to WA (Premier McGowan), 20 May 2019, p. 2.

F. ZEPH'S ACTIVITIES IN SINGAPORE (2019-2022)

61. On 31 January 2019, ten days after its incorporation, Zeph acquired all the shares in Singaporean companies GCS Engineering Service Pte, Visco Engineering Pte Ltd, and Visco Offshore Engineering Pte Ltd (jointly, the "**Engineering Companies**").[108]

62. About a year later, on 24 January 2020, Zeph entered into a Joint Venture Agreement ("**JVA**") with two Singaporean companies, Kleen Venture Pte Ltd and One Kleenmatic Pte Ltd (the "**Kleenmatic Companies**"),[109] the stated purpose of which was to "conduct cleaning businesses in Singapore and any other matter [that Zeph] determine[d] from time to time".[110] The JVA refers to an Option Agreement "executed by [Zeph] on or about the date of the [JVA's] date […] for an option by [Zeph] to acquire all the issued shares of [the Kleenmatic Companies]".[111]

63. On 12 October 2020, the Engineering Companies passed resolutions to "wind up voluntarily", as they could not "continue [their] business" by "reason of [their] liabilities".[112] On the same date, liquidators were appointed to each of the Engineering Companies.[113]

64. On 4 August 2022, pursuant to the Option Agreement, Zeph acquired all the shares in the Kleenmatic Companies.[114]

65. The Engineering Companies "completed their voluntary liquidation process" on 27 September 2022[115] and were deregistered on 28 December 2022.[116]

G. THE AMENDMENT ACT (2020)

66. On 13 August 2020, the Parliament of WA passed the "Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Act 2020" ("**Amendment Act**"),[117] providing *inter alia* that:

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[108] **R-201**, Notice of transfer of shares in GCS Engineering Service Pte, 14 February 2019; **R-202,** Notice of transfer of shares in Visco Offshore Engineering Pte Ltd, 14 February 2019; **R-203**, Notice of transfer of shares in Visco Engineering Pte Ltd, 14 February 2019.

[109] **C-469**, Joint Venture Agreement, 24 January 2020.

[110] **C-469**, Joint Venture Agreement, 24 January 2020, Recital B, p. 3 (of PDF).

[111] **C-469**, Joint Venture Agreement, 24 January 2020, p. 4 (of PDF) (definition of "Option Agreement").

[112] **R-73**, Record of Resolution for GCS Engineering Pte Ltd, 12 October 2020; **R-77**, Record of Resolution for Visco Engineering Pte Ltd, 12 October 2020; **R-81**, Record of Resolution for Visco Offshore Engineering Pte Ltd, 12 October 2020.

[113] **R-75**, Notice of Appointment of a Liquidator for GCS Engineering Service Pte Ltd, 12 October 2020; **R-78**, Notice of Appointment of Liquidator for Visco Engineering Pte Ltd, 12 October 2020; **R-82**, Notice of Appointment of Liquidator for Visco Offshore Engineering Pte Ltd, 12 October 2020.

[114] **R-89**, One Kleenmatic Pte Ltd financial statements for year ended 30 June 2021, p. 54 (of PDF); **R-90**, Kleen Venture Pte Ltd financial statements for year ended 30 June 2021, p. 42 (of PDF).

[115] **C-86**, Consolidated financial reports of Zeph for year ended 30 June 2022, fn. 1 of p. 27 (of PDF).

[116] **R-84**, Business profile for GCS Engineering Service Pte Ltd, 26 October 2023; **R-85**, Business profile for Visco Engineering Pte Ltd, 26 October 2023; **R-86**, Business profile for Visco Offshore Engineering Pte Ltd, 26 October 2023.

[117] **C-1**, Amendment Act, 13 August 2020.

i. The First and the Second Awards are of "no effect" and are "taken never to have had any effect",[118] and the underlying arbitration agreements are "not valid" and are "taken never to have been valid";[119] and

ii. The 2020 Arbitration, Arbitration Agreement, and Mediation Agreement are "terminated".[120]

III. PROCEDURAL HISTORY

A. COMMENCEMENT OF PROCEEDINGS AND CONSTITUTION OF THE TRIBUNAL

67. On 14 October 2020, pursuant to Article 19 of Chapter 11 of the AANZFTA ("**Chapter 11**"), the Claimant gave the Respondent notice of a dispute arising from alleged breaches of the Treaty as a result of the Amendment Act, and requested consultations.[121] On the same date, the Claimant also sent notices of dispute and requests for consultation under the SAFTA[122] and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("**CPTPP**").[123]

68. On 21 December 2020, the Claimant's and the Respondent's representatives held a consultation meeting.[124]

69. On 22 December 2020, the Respondent provided notice to both the Claimant[125] and Singapore[126] of its intention to deny benefits to Zeph pursuant to Article 11 of Chapter 11.

70. On 10 May 2021, the Claimant's and the Respondent's representatives held a second consultation meeting.[127]

71. On 24 June 2021, the Respondent informed the Claimant of its decision to deny the benefits of Chapter 11 to "Zeph […] and its investments".[128]

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[118] **C-1**, Amendment Act, 13 August 2020, § 7, introducing §§ 10(4) and 10(6) of the Agreement Act, pp. 23-24 (of PDF).

[119] **C-1**, Amendment Act, 13 August 2020, § 7, introducing §§ 10(5) and 10(7) of the Agreement Act, pp. 23-24 (of PDF).

[120] **C-1**, Amendment Act, 13 August 2020, § 7, introducing §§ 10(1)-(2) of the Agreement Act, p. 23 (of PDF). *See also* **C-1**, Amendment Act, 13 August 2020, § 7, introducing § 7(1) of the Agreement Act (definition of "relevant arbitration"), p. 18 (of PDF); **C-404**, Letter from WA's State Solicitor to Mr. McHugh (cc. Mineralogy and International Minerals), 17 August 2020, ¶¶ 2-3.

[121] **C-148**, Letter from Volterra Fietta to the Minister for Foreign Affairs, 14 October 2020.

[122] **R-148**, Letter from Volterra Fietta to the Minister for Foreign Affairs, 14 October 2020.

[123] **R-147**, Letter from Volterra Fietta to the Minister for Foreign Affairs, 14 October 2020.

[124] **C-152**, Emails between the Office of International Law of the Attorney-General's Department of Australia and Volterra Fietta, 18 December 2020, pp. 4-5 (of PDF); **C-63**, Notice of Intent, 20 October 2022, p. 30 (of PDF).

[125] **C-153**, Letter from the Office of International Law of the Attorney-General's Department of Australia to Volterra Fietta, 22 December 2020.

[126] **R-149**, Letter from the Office of International Law of the Attorney-General's Department of Australia to the Ministry of Trade and Industry of Singapore, 22 December 2020.

[127] **C-156**, Letter from the Office of International Law of the Attorney-General's Department of Australia to Volterra Fietta, 29 April 2021; **C-156**, Letter from Volterra Fietta to the Office of International Law of the Attorney-General's Department of Australia, 29 April 2021; **C-63**, Notice of Intent, 20 October 2022, p. 31 (of PDF).

[128] **C-155**, Letter from the Office of International Law of the Attorney-General's Department of Australia to Volterra Fietta, 24 June 2021.

72. On 20 October 2022, the Claimant served on the Respondent a notice of intent pursuant to Articles 20 and 21 of Chapter 11 ("**NoI**").[129]

73. On 29 March 2023, the Claimant served on the Respondent a notice of arbitration pursuant to Articles 20 and 21 of Chapter 11 ("**NoA**"). In the NoA, the Claimant appointed Mr. William Kirtley as co-arbitrator.[130]

74. On 28 April 2023, the Respondent submitted a response to the NoA ("**NoA Response**"). In the NoA Response, the Respondent appointed Prof. Donald McRae as co-arbitrator.[131]

75. On 9 June 2023, the Parties agreed to appoint Prof. Gabrielle Kaufmann-Kohler as Presiding Arbitrator, and on 19 June 2023, the Tribunal was duly constituted.

76. On the same date, the Tribunal *inter alia* acknowledged the Parties' agreement to conduct this arbitration under the 2021 UNCITRAL Arbitration Rules ("**UNCITRAL Rules**") and that the Permanent Court of Arbitration ("**PCA**") administer the proceedings. The Tribunal noted moreover that:

    i. Pursuant to Article 25.1 of Chapter 11, it was to decide the Respondent's preliminary objections before proceeding to the merits;

    ii. In accordance with Article 20(1) of the UNCITRAL Rules, the Claimant elected to treat its NoA as its Statement of Claim;[132] and

    iii. By contrast, the Respondent elected not to treat the NoA Response as its Statement of Defence.[133]

77. On 29 June 2023, the Tribunal *inter alia* proposed an agenda for the first procedural hearing scheduled for 10 August 2023, circulated drafts of the Terms of Appointment and Procedural Order No. 1, and invited the Parties' comments on these documents by 3 August 2023.

78. On 3 August 2023, the Parties provided their comments on the draft initial procedural documents and made submissions on other procedural matters, including the seat of the arbitration.

79. On 10 August 2023, the Tribunal held the first procedural hearing with the Parties by videoconference.

80. On 18 August 2023, the Claimant and the Respondent made additional submissions with respect to the seat of the arbitration.

81. On 1 September 2023, the Tribunal issued the Terms of Appointment ("**ToA**") together with Procedural Order No. 1 ("**PO1**").

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[129] **C-63**, NoI.

[130] NoA, ¶ 77.

[131] NoA Response, ¶ 51.

[132] NoA, ¶ 48.

[133] NoA Response, ¶ 52.

82. On 28 September 2023, further to Article 25.5 of Chapter 11 and Article 18(1) of the UNCITRAL Rules, the Tribunal determined Geneva, Switzerland, as the seat of the arbitration.

B. INTERIM MEASURES

83. On 4 August 2023, the Claimant filed an application for interim measures ("**IMA**").

84. On 18 and 21 August 2023, the Claimant requested that the briefing schedule regarding the IMA be accelerated ("**Acceleration Request**") or, alternatively, that the IMA be granted on a preliminary basis ("**Preliminary IMA**") until the hearing on the IMA.

85. On 28 August 2023, the Respondent opposed both the Acceleration Request and the Preliminary IMA.

86. On 12 September 2023, after additional exchanges between the Parties on 31 August and 5-6 September 2023, the Tribunal dismissed both the Acceleration Request and the Preliminary IMA.

87. On 15 September 2023, the Respondent submitted its response to the IMA ("**IMA Response**").

88. On 27 September 2023, the Claimant submitted its reply ("**IMA Reply**").

89. On 9 October 2023, the Respondent submitted its rejoinder ("**IMA Rejoinder**").

90. On 18 October 2023, the Parties and the Tribunal held a hearing by videoconference on the IMA ("**IMA Hearing**").

91. On 17 November 2023, the Tribunal issued Procedural Order No. 2 ("**PO2**"), dismissing the IMA while ordering the Respondent to take certain cautionary measures with respect to the issues subject of the IMA; reminding the Parties of their duty to arbitrate in good faith and thus to refrain from conduct that could undermine the fairness and integrity of the proceedings; and deferring certain aspects concerning confidentiality and transparency for determination in a subsequent procedural order on the matter.

C. TRANSPARENCY, COORDINATION,[134] AND JOINT INTERPRETATION

92. On 6 and 7 October 2023, the Tribunal confirmed that its decision on the seat of the arbitration, and the procedural calendar, could be shared with the tribunal in a second arbitration between the Parties (PCA Case No. 2023-67), in accordance with the Parties' agreement.

[134] On 6 September 2023, the Tribunal wrote to the Parties noting that "in another arbitration under the AANZFTA between the Parties which appear in these proceedings, the tribunal, which has just been constituted, comprises Prof. McRae as co-arbitrator and Dr. Laurent Lévy as president […] Dr. Lévy and [Prof. Kaufmann-Kohler] are partners in LKK and Prof. McRae sits in this arbitration. This being so, the Tribunal understands that, by making these choices, the Parties have waived any potential challenge against the Tribunal or its Members and against the Tribunal's decisions or awards on the basis of developments that may take place in the other arbitration". On 12 September 2023 and 13 September 2023 respectively, the Claimant and the Respondent confirmed that they were not aware of the existence of nor did they foresee the occurrence of any circumstances linked to the second arbitration that could give rise to a right of challenge of any arbitrator or decisions or awards in this arbitration, and that if such circumstances were to arise nevertheless, the Parties had waived any right of challenge.

93. On 19 October 2023, the Tribunal wrote to the Parties, inviting comments on Article 27.2 of Chapter 11, regarding the joint interpretation of the Treaty.[135] The Parties provided their comments on 31 October 2023.

94. On 17 November 2023, the Tribunal circulated to the Parties a draft of Procedural Order No. 3 on transparency and invited the Parties' comments by 1 December 2023.

95. On 1 December 2023, the Parties provided their comments on the draft Procedural Order No. 3.

96. On 21 December 2023, the Respondent requested the Tribunal's permission to share PO2 with the tribunal in the second arbitration. On 29 December 2023, after additional exchanges between the Parties and with the Tribunal, the Tribunal allowed the Parties to share PO2 with the second tribunal.

97. On 19 January 2024, having consulted the Parties, the Tribunal issued Procedural Order No. 3 ("**PO3**") setting out the transparency regime governing the proceedings, in accordance with Article 26 of Chapter 11. In addition, the Tribunal invited the Claimant to comment on a proposal by the Respondent on document sharing between this arbitration and the second arbitration. On 30 January 2024, the Claimant provided its comments in that regard.

98. On 14 February 2024, in view of the Parties' comments, the Tribunal updated the transparency rules annexed to PO3, with a document sharing protocol between this and the second arbitration.

99. On 20 February 2024, the PCA informed the Parties that a request to intervene had been received from a third party (in relation to this arbitration and the second arbitration) and invited the Parties to comment on the request. On 27 February 2024, the Parties wrote jointly to the Tribunal, indicating their view that there was no apparent basis to accept the request.

100. On 31 January 2025, the Respondent requested the Tribunal update the document sharing protocol in the transparency rules annexed to PO3, in light of the commencement of a third and fourth arbitration between the Parties (PCA Case Nos. 2024-23 and 2024-48, respectively). On 3 February 2025, the Claimant provided its comments on the Respondent's request. On 12 March 2025, after additional exchanges between the Parties and with the Tribunal, the Respondent's request was denied.

D. WRITTEN PHASE AND DOCUMENT PRODUCTION

101. On 29 September 2023, the Claimant submitted an amended NoA pursuant to Paragraph 1.2 of PO1 ("**A-NoA**").[136]

[135] AANZFTA, Chapter 11, Article 27.2 ("The tribunal shall, on its own account or at the request of a disputing party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of the delivery of the request. Without prejudice to Paragraph 3, if the Parties fail to issue such a decision within 60 days, any interpretation submitted by a Party shall be forwarded to the disputing parties and the tribunal, which shall decide the issue on its own account.").

[136] PO1, ¶ 1.2 ("The Claimant shall have 30 days from the issuance of this Order to bring its Notice of Arbitration (which it has elected to be treated as its Statement of Claim in accordance with Article 20 of the 2021 UNCITRAL Rules) and accompanying evidence into conformity with the requirements of this Procedural Order."). The A-NoA is dated 30 September 2023, but was submitted on 29 September 2023.

102. On 4 October 2023, the Respondent wrote to the Claimant, copying the Tribunal, noting concerns with the amendments in the A-NoA and its accompanying materials, and reserving its rights.

103. On 1 November 2023, after additional exchanges between the Parties and with the Tribunal, the Tribunal noted that the Respondent ultimately did not object to the A-NoA and its accompanying materials as submitted on 29 September 2023. The A-NoA and these materials would thus remain part of the record.

104. On 12 December 2023, the Parties wrote jointly to the Tribunal to inform the Tribunal of their agreement to extend the due date for the Respondent's Statement on Preliminary Objections. On the same date, the Tribunal confirmed the agreed extension and issued a revised version of the procedural calendar.

105. On 22 January 2024, the Respondent submitted a Statement on Preliminary Objections ("**SOPO**").

106. On 14 March 2024, the Claimant submitted a Response on Preliminary Objections ("**ROPO**").

107. On the same date, the Tribunal invited the Respondent's comments on the Claimant's request, in Paragraph 683(e) of the ROPO, that the Tribunal fix a date and time for a directions hearing for the merits phase of this arbitration as swiftly as possible. On 21 March 2024, the Respondent provided its comments on the Claimant's request. On 25 March 2024, the Tribunal denied the Claimant's request.

108. On 8 April 2024, the Parties submitted their document production requests.

109. On 29 April 2024, the Parties submitted their objections to the other Party's document production requests.

110. On 10 May 2024, the Parties submitted their replies on the document production requests.

111. On 24 May 2024, the Tribunal issued Procedural Order No. 4 on document production.

112. On 19 July 2024, the Respondent submitted a Reply on Preliminary Objections ("**Reply**").

113. On 14 August 2024, after receiving an extension, the Claimant submitted a Rejoinder on Preliminary Objections ("**Rejoinder**").

E. ORAL PHASE

114. From 16 to 18 September 2024, the hearing on preliminary objections ("**Hearing**") was held at the Peace Palace in The Hague, the Netherlands. The following individuals attended the Hearing:

Arbitral Tribunal

Prof. Gabrielle Kaufmann-Kohler (Presiding Arbitrator)
Mr. William Kirtley
Prof. Donald McRae

Tribunal Secretary

Mr. Lukas Montoya

Claimant

Mr. Clive F. Palmer
Claimant's Representative and Director

Dr. Anna Kirk
Counsel and Claimant Party Assisting

Mr. Kris Byrne
Counsel and Claimant Party Assisting

Mr. Michael Sophocles
Counsel and Claimant Party Assisting

Ms. Anna Palmer
Counsel and Claimant Party Assisting

Ms. Baljeet Singh
Administrator, Claimant Party Assisting and Director of the Claimant

Mr. Daniel Jacobson
Counsel and Claimant Party Assisting

Mr. Thomas Browning
Counsel and Claimant Party Assisting

Mr. Jonathan Shaw
Counsel and Claimant Party Assisting

Ms. Emily Palmer
Director of the Claimant

Mr. Declan Sheridan
Director of the Claimant

Ms. Leanne McCormack
Administrative Assistant

Mr. Domenic Martino
Corporate Advisor to the Claimant

Mr. Nui Harris
Director of the Claimant's subsidiary company

Mrs. Yevheniya Sophocles
Solicitor

Mr. George Sokolov (attending remotely)
Claimant Party Assisting

Expert Witness

[redacted], BDO

Respondent

Dr. Stephen Donaghue KC
Solicitor-General of Australia

Mr. Samuel Wordsworth KC
Prof. Chester Brown
Dr. Naomi Hart
Dr. Esme Shirlow
Ms. Penelope Bristow

Mr. Jesse Clarke
General Counsel, Office of International Law, Attorney-General's Department

Ms. Lucy Martinez
Office of International Law, Attorney-General's Department

Mr. Kyle Dickson-Smith
Office of International Law, Attorney-General's Department

Ms. Stephanie Brown
Office of International Law, Attorney-General's Department

Mr. Charles Light
Office of International Law, Attorney-General's Department

Ms. Erin Manuel
Office of International Law, Attorney-General's Department

Mr. Jeremy Shirm
Department of Foreign Affairs and Trade

Mr. Craig Bydder
Solicitor-General of Western Australia

Ms. Annie Tan
Senior Assistant State Solicitor, Western Australia

Permanent Court of Arbitration

Mr. Bryce Williams, Legal Counsel
Ms. Lilia Mendoza-Rosales, Assistant Legal Counsel
Mr. Benjamin Craddock, Senior Case Manager

Court Reporter

Mr. Trevor McGowan

Electronic Presentation of Evidence, Opus 2 International Limited

Mr. John Lopez

F. POST-HEARING PHASE

115. On 23 September 2024, the Tribunal issued Procedural Order No. 6 ("**PO6**") on post-hearing matters.

116. On 16 October 2024, the Parties filed short post-hearing submissions regarding Article 27.2 of Chapter 11.[137]

117. On 7 February 2025, the Parties filed their Statements of Costs.

118. On 14 February 2025, the Respondent sought leave to comment on the Claimant's Statement of Costs. At the same time, the Claimant "decided to withdraw its claim for costs", adding that its costs were thus "zero".[138] The Claimant further confirmed that it did "not seek leave to submit comments in reply to the Respondent's Statement of Costs".[139]

119. On 16 February 2025, the Tribunal noted that the Claimant's withdrawal of its claim for costs rendered moot the Respondent's request for comment on the Claimant's Statement of Costs.

120. On 28 March 2025, the Claimant confirmed having withdrawn, not only its claim for costs, but its entire Statement of Costs.

121. On 14 July 2025, the Respondent wrote to the Tribunal, enquiring whether the Tribunal would be assisted by the submission of judgments of the Svea Court of Appeal in relation to two awards cited by the Parties, and by short written submissions on the relevance of the judgments. On 15 July 2025, the Claimant provided its comments on the Respondent's letter. On 21 July 2025, the Tribunal indicated that it considered that the existing record provided it with all the materials necessary and useful to reach its determinations on preliminary objections, and accordingly denied the Respondent's request.

IV. PRAYERS FOR RELIEF

122. The Respondent requests the Tribunal to:

> (a) declare that the claims submitted by Zeph are outside the Tribunal's jurisdiction and/or inadmissible;
>
> (b) dismiss Zeph's claims in their entirety; and
>
> (c) order that Zeph bear the costs of the arbitration, including Australia's costs of legal representation and assistance, pursuant to Article 42 of the UNCITRAL Rules, together with interest on these costs.[140]

123. The Claimant requests the Tribunal to:

> a. DISMISS the objections set out in the [SOPO] and the [Reply];
>
> b. DECLARE that the claims submitted by the Claimant are within the Tribunal's jurisdiction;

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[137] *See* PO6, ¶ 5.

[138] Claimant's communication of 14 February 2025 (dated 15 February 2025).

[139] Claimant's communication of 14 February 2025 (dated 15 February 2025) (emphasis removed).

[140] SOPO, ¶ 354; Reply, ¶ 270.

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 [SOPO], the [Reply], and the [Hearing], 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.[141]

V. PRELIMINARY MATTERS

A. SCOPE OF THE AWARD

124. Pursuant to Article 25.1 of Chapter 11 of the AANZFTA,[142] this Award addresses the Respondent's preliminary objections.

B. LEGAL FRAMEWORK

1. Law governing jurisdiction

125. The Tribunal's jurisdiction over this dispute is governed by Chapter 11 of the AANZFTA and where applicable other rules of international law.

2. Law governing the procedure

126. The procedure for this arbitration is governed by (in the following order of precedence):

i. The mandatory rules of the law on international arbitration applicable at the seat of the arbitration, namely Geneva, Switzerland;

ii. Chapter 11 of the AANZFTA;

iii. The UNCITRAL Rules; and

iv. The ToA and the procedural rules issued by the Tribunal, as reflected in PO1 and any amendments thereof.[143]

3. Relevance of Previous Awards

127. While both Parties have relied on previous awards in support of their positions, the Tribunal is not bound by the decisions of other arbitral tribunals. However, the Tribunal considers that, unless there are compelling reasons to the contrary, it should adopt the legal solutions established in a series of consistent cases, subject to the particular provisions of the Treaty and the circumstances

[141] Rejoinder, ¶ 724.

[142] AANZFTA, Chapter 11, Article 25.1 ("Where issues relating to jurisdiction or admissibility are raised as preliminary objections, a tribunal shall decide the matter before proceeding to the merits.").

[143] ToA, ¶ 9.1.

of the instant case. This will contribute to the harmonious development of investment law and thereby meet the legitimate expectations of the community of States and investors towards legal certainty and the rule of law.

C. JOINT INTERPRETATION

128. Articles 27.2 and 27.3 of Chapter 11 envisage joint interpretations by the Treaty Parties to the AANZFTA, in the following terms:

> 2. The tribunal shall, on its own account or at the request of a disputing party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of the delivery of the request. Without prejudice to Paragraph 3, if the Parties fail to issue such a decision within 60 days, any interpretation submitted by a Party shall be forwarded to the disputing parties and the tribunal, which shall decide the issue on its own account.
>
> 3. A joint decision of the Parties, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.

129. On three different occasions in the course of the arbitration, the Parties have confirmed that they do not seek a joint interpretation of the Treaty by the Treaty Parties to the AANZFTA. The Parties have also affirmed that the Tribunal is under no obligation to request a joint interpretation.[144]

D. PUBLICATION

130. Pursuant to Article 26 of Chapter 11, this Award shall be published on the PCA website, subject to any redactions of protected information in accordance with Section I of Annex I to PO3.[145]

131. To that end, the Parties have agreed that the Tribunal would "not become *functus officio* until it has decided any disputed redactions of the […] Award or of any interpretation, correction, or additional Award pursuant to Articles 37, 38, or 39 of the [UNCITRAL Rules]".[146]

VI. DISCUSSION

132. The Claimant submits that, through the Amendment Act, the Respondent breached Articles 6 (Treatment of Investment) and 9 (Expropriation and Compensation) of Chapter 11 of the AANZFTA, and claims damages on that basis.[147] In turn, the Respondent objects to the Tribunal's jurisdiction and argues that the claims are inadmissible on the following grounds:

    i. Zeph is not a protected investor ("**Objection 1**"). Article 2(d) of Chapter 11 defines an "investor of a Party" as "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".

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[144] Respondent's communication of 31 October 2023; Claimant's communication of 31 October 2023; Tr. (Day 3) 50:1-51:2 (Respondent); Tr. (Day 3) 115:16-116:11 (Claimant); Respondent's Submission on Article 27 of Chapter 11, 16 October 2024; Claimant's Submission on Article 27 of Chapter 11, 16 October 2024.

[145] PO3, ¶¶ 12.ii-iii. *See also* PO3, Annex I (as revised on 14 February 2024), ¶ 5.

[146] PO3, Annex I (as revised on 14 February 2024), ¶ 6.

[147] NoA, ¶¶ 2, 75-82.

Yet, Zeph has not "made an investment" as it has made no contribution upon acquiring its purported investments or thereafter.[148]

ii. Zeph holds no protected investment ("**Objection 2**"). Article 2(c) of Chapter 11 defines "investment" as "every kind of asset owned or controlled by an investor, including but not limited to" certain listed categories of assets. However, whether Zeph directly or indirectly holds listed assets in Australia is immaterial, since it did not commit any resources in respect of those assets and assumed no risk, thereby failing to meet the characteristics of an investment deserving protection under Chapter 11.[149]

iii. The Respondent denied the benefits of Chapter 11 to Zeph and its alleged investments pursuant to Article 11.1(b) of Chapter 11 on 24 June 2021 ("**Objection 3**").[150]

iv. The claims constitute an abuse of process as Zeph incorporated in Singapore for the main if not only purpose of bringing an investment claim against Australia arising out of an existing or foreseeable investment dispute ("**Objection 4**").[151]

133. Objections 1 and 2 both hinge on the question of whether Chapter 11 required Zeph to make a contribution. The Tribunal thus finds it most efficient to address these objections together **(A)**. Thereafter, it will deal with the Claimant's submissions that the doctrines of estoppel, acquiescence, unilateral acts, or approbation/reprobation, preclude the Respondent from raising Objections 1 and 2 **(B)**.[152] Considering the outcome of its analysis of Objections 1 and 2, the Tribunal will dispense with reviewing Objections 3 and 4.

134. Prior to discussing each issue, the Tribunal provides an overview of the Parties' positions, which are set out in greater detail in the analysis where appropriate. For the avoidance of doubt, the Tribunal has considered all of the Parties' allegations and arguments, even if specific reference is not made to a given allegation or argument.

A. OBJECTIONS 1 AND 2 – NO INVESTOR / NO INVESTMENT

1. Overview of the Parties' positions

(i) The Respondent

135. The Respondent does not dispute that, for the purposes of Articles 2(c) and 2(d) of Chapter 11, Zeph is a Singaporean corporation that directly or indirectly owns or controls assets in Australia, including Mineralogy's shares and interests in the State Agreement.[153] However, it argues that the term "investment" appearing in both provisions has an inherent and objective meaning, which requires a contribution or commitment of resources at risk for a certain duration.[154] According to

[148] NoA Response, ¶ 5(a); SOPO, § III; Reply, § III.

[149] SOPO, § IV; Reply, § IV.

[150] NoA Response, ¶ 5(b); SOPO, § V; Reply, § V.

[151] NoA Response, ¶ 5(c); SOPO, § VI; Reply, § VI.

[152] ROPO, § II; Rejoinder, Parts I.b, I.d, V.

[153] SOPO, ¶¶ 119, 143-144, 169-171, 186-187; Reply, ¶¶ 64, 109-110.

[154] SOPO, ¶ 188.

the Respondent, this requirement applies in both ICSID and non-ICSID contexts,[155] and is confirmed by the jurisdictional and substantive provisions of Chapter 11.[156]

136. The Respondent stresses that Article 2(d) of Chapter 11 only protects a person who "seeks to make, is making, or has made an investment".[157] It submits that, as a matter of ordinary meaning, "making" an investment "requires some form of active contribution by the putative investor".[158] Moreover, it contends that "making" an investment must be distinguished from "having", "holding", "owning", "acquiring", or "controlling" an investment, as these other terms either appear in distinct provisions of Chapter 11 to serve a specific function or do not appear at all.[159] To conclude otherwise, says the Respondent, would ignore the context of Article 2(d), the object and purpose of the AANZFTA, and the principle of *effet utile*.[160]

137. On this basis, the Respondent submits that, contrary to the Claimant's contention,[161] Zeph did not make a contribution through its acquisition of Mineralogy,[162] or subsequently by managing Mineralogy[163] or reinvesting returns.[164] Therefore, it requests that the Tribunal decline jurisdiction as Zeph is not an investor that has made an investment under Chapter 11.

(ii) The Claimant

138. The Claimant disputes that the term "investment" has an inherent meaning entailing a contribution, duration, and risk. It contends that these elements are prescribed by the so-called *Salini* test under Article 25 of the ICSID Convention, which does not apply to the instant case.[165]

139. In this context, the Claimant initially argued that the AANZFTA only requires a juridical person of Singapore "holding" qualifying assets in Australia,[166] as Zeph does *inter alia* with its shares in Mineralogy. The Claimant emphasized that the definitions of "investment" and "investor" in Articles 2(c) and (d) of Chapter 11 are "straightforward",[167] such that "passive ownership of an asset" is "sufficient to constitute a protected investment".[168]

140. The Claimant adjusted its position in later submissions by acknowledging, in relation to Article 2(d), that "making" an investment differs from "owning" or "holding" it.[169] However, it

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[155] SOPO, ¶¶ 188-194; Reply, ¶¶ 103-108.

[156] Reply, ¶¶ 101-102.

[157] SOPO, ¶ 146.

[158] SOPO, ¶¶ 147, 150-161; Reply, ¶ 55.

[159] SOPO, ¶ 147; Reply, ¶¶ 53-54, 57(a).

[160] SOPO, ¶¶ 148-149; Reply, ¶¶ 53, 58.

[161] *See infra*, ¶ 141.

[162] SOPO, ¶¶ 164-177; Reply, ¶¶ 64-73.

[163] Reply, ¶¶ 74-80.

[164] Reply, ¶¶ 81-96.

[165] ROPO, ¶ 352; Tr. (Day 3) 136:18-137:6.

[166] ROPO, ¶ 270. *See also* ROPO, ¶ 279.

[167] ROPO, ¶¶ 268, 279.

[168] ROPO, ¶ 279. *See also* ROPO, ¶¶ 253-278, 350-358.

[169] Rejoinder, ¶ 158.

then argued that the only action required to *make* an investment was to "participate" in the transaction that brings about ownership or control over the investment, adding that it did so by being a party to the share purchase agreement with MIL.[170] The Claimant thus maintains that nothing in Chapter 11 required it to make "a contribution by way of capital or otherwise to the investment".[171]

141. In addition, it is the Claimant's submission that, in any event, it has and continues to commit resources in relation to its assets in Australia, thereby satisfying the contribution requirement, were it deemed applicable.[172] The Claimant contends that it provided the totality of its shares to MIL as valuable consideration in exchange for ownership over Mineralogy;[173] actively managed Mineralogy on a daily basis;[174] and reinvested returns from Mineralogy.[175] Therefore, the Claimant requests the Tribunal to uphold jurisdiction as it is an investor with protected investments under Chapter 11.

2. Analysis

142. Considering the Parties' positions, there are two main issues for the Tribunal's determination. First, whether Chapter 11 required Zeph to make a contribution **(i)**. If so, second, whether Zeph did in fact make a contribution **(ii)**.

(i) Whether Chapter 11 required Zeph to make a contribution

143. In international investment law, the concept of a "contribution" is understood as the allocation or commitment of economic resources,[176] irrespective of the form of the commitment.[177] Contributions may be financial, such as payment of a purchase price or capital injections into a company or project, or in-kind by committing assets, technology, know-how, services, or labor.[178] What matters is that the investor incurs "outlays, in some way, in order to pursue an economic objective".[179]

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[170] Rejoinder, ¶¶ 161-162, 166.

[171] Rejoinder, ¶ 161. *See also* Rejoinder, ¶¶ 130-145, 166.

[172] Rejoinder, ¶ 196.

[173] Rejoinder, ¶¶ 149, 167-172, 196(a); ROPO, ¶¶ 230-237, 280-283, 330-334.

[174] Rejoinder, ¶¶ 116-127, 191-193; ROPO, ¶¶ 74-82, 248-249.

[175] Rejoinder, ¶¶ 173-190; ROPO, ¶¶ 238-243.

[176] **RLA-99**, *Ipek Investment Limited v. Republic of Turkey*, ICSID Case No. ARB/18/18, Award, 8 December 2022, ¶¶ 282-283.

[177] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶ 297.

[178] **CLA-187**, *Westwater Resources, Inc. v. Republic of Türkiye*, ICSID Case No. ARB/18/46, Award, 3 March 2023, ¶ 148; **RLA-56**, *Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan (I)*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶ 131; **RLA-54**, *Salini Costruttori S.p.A and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, ¶¶ 52-53; **RLA-128**, *Luigiterzo Bosca v. Republic of Lithuania*, PCA Case No. 2011-05, Award, 17 May 2013, ¶ 168; **RLA-129**, *Rasia FZE and Joseph K. Borkowski v. Republic of Armenia*, ICSID Case No. ARB/18/28, Award, 20 January 2023, ¶ 394.

[179] **RLA-62**, *Consorzio Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award, 10 January 2005, § II, ¶ 14(i). Regarding the timing of the contribution, *see* **CLA-187**, *Westwater Resources, Inc. v. Republic of Türkiye*, ICSID Case No. ARB/18/46, Award, 3 March 2023, ¶ 148.

144. To determine whether Chapter 11 required Zeph to make a contribution to qualify as a protected investor with protected investments, the Tribunal will resort to the customary rule of treaty interpretation codified in Article 31 of the Vienna Convention on the Law of Treaties ("**VCLT**"). More specifically, it will review the ordinary meaning of the words in the definitions of "investment" **(a)** and "investor" **(b)** provided in Chapter 11, in their context, and considering the object and purpose of the Treaty.

(a) The definition of "investment"

145. Article 2(a) of Chapter 11 provides that a "covered investment" qualifies as such *inter alia* if "established, acquired or expanded" after the AANZFTA entered into force.[180] The ordinary meaning of these verbs which appear here in the form of past participles can be given different interpretations. For instance, one can establish an (investment) project but equally an argument or a fact. Similarly, one can expand a theory or an industrial plant. Hence, the ordinary meaning taken in isolation is unhelpful for interpretative purposes.

146. Under Article 31 of the VCLT, the Tribunal must also consider context. The general context is the use of these terms in a chapter of a treaty concerned with the promotion and protection of foreign investments. In other words, the terms "established, acquired or expanded" must be understood in an economic context. In that context, the three verbs entail the deployment of resources. Differently put, the notion of "covered investment" involves a contribution.

147. More specific context is found in other provisions of Chapter 11 of the AANZFTA. In particular, Article 8.1 of Chapter 11 confirms this interpretation. It requires the Treaty Parties to "allow all transfers relating to a covered investment to be made freely and without delay into and out of its territory",[181] such as "contributions to capital, including the initial contribution".[182] This language not only shows that a "covered investment" typically involves monetary transfers and capital contributions. It also makes clear that the drafters contemplated that a "covered investment" would involve an "initial contribution". As noted by the Respondent, the Claimant has left the significance of this provision entirely unaddressed.[183]

148. Further, Article 2(c) of Chapter 11 defines "investment" as "every kind of asset owned or controlled by an investor",[184] and then provides a non-exhaustive list of assets that may constitute investments.[185] However, while ownership or control by an investor are necessary, they are insufficient for a given asset to benefit from investment protection. A contextual interpretation of Article 2(c) indicates that the asset must also involve a contribution.

149. Indeed, the definition of "investment" in Article 2(c) must be read in conjunction with the definition of "covered investment" in Article 2(a) addressed above. The substantive protections

[180] AANZFTA, Chapter 11, Article 2(a).

[181] AANZFTA, Chapter 11, Article 8.1.

[182] AANZFTA, Chapter 11, Article 8.1(a).

[183] Tr. (Day 1) 35:9-20 (Respondent).

[184] AANZFTA, Chapter 11, Article 2(c).

[185] AANZFTA, Chapter 11, Article 2(c)(i)-(vi).

of Chapter 11 apply, not to an "investment", but to a "covered investment".[186] Moreover, the Tribunal's jurisdiction is limited to "disputes" concerning "loss or damage to [a] covered investment".[187] Therefore, to be covered by the Treaty, an asset will need to be owned and controlled by an investor as prescribed by Article 2(c) and be the result of a contribution as mandated by Article 2(a).

150. It is also noteworthy that Article 2(c) specifies that, "[f]or the purpose of the definition of investment[,] returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their character as investments".[188] Article 2(j) then defines "return" as "an amount yielded by or derived from an investment, including profits, dividends, interest, capital gains, royalties and all other lawful income".[189]

151. These provisions confirm that the terms "investment", "invested", and "reinvested" must be read as requiring a contribution. As income yielded by an existing "investment", returns are deemed a distinct "investment" only if they are "invested" or "reinvested", that is, if they are put back into the investor's undertaking from where they derived. By contrast, returns merely received do not qualify as an "investment", despite being assets owned or controlled by an investor. In other words, returns constitute an "investment" provided that they are contributed to the investor's business.

152. The Tribunal sees no basis in the Treaty for treating returns differently from other types of assets.[190] A consistent line of decisions, including in non-ICSID contexts such as the present one, has held that the commitment of economic resources is intrinsic to the notion of investment.[191]

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[186] *See in particular* AANZFTA, Chapter 11, Article 6.1 ("Each Party shall accord to **covered investments** fair and equitable treatment and full protection and security") (emphasis added) and Article 9 ("A Party shall not expropriate or nationalise a **covered investment** either directly or through measures equivalent to expropriation or nationalisation (expropriation)[...].") (emphasis added). As noted above, the Claimant submits that the Respondent breached these two provisions and claims damages on that basis (see *supra*, ¶ 132).

[187] AANZFTA, Chapter 11, Article 18.1 ("This Section [on "Investment Disputes between a [Treaty] Party and an Investor"] shall apply to disputes between a [Treaty] Party and an investor of another [Treaty] Party concerning an alleged breach of an obligation of the former under Section A which causes loss or damage to the **covered investment** of the investor.") (emphasis added).

[188] AANZFTA, Chapter 11, Article 2(c), Second Paragraph.

[189] AANZFTA, Chapter 11, Article 2(j).

[190] In particular, AANZFTA, Chapter 11, Article 2(c)(iv) and footnote 3 to that provision do not provide such a basis.

[191] *See inter alia* **RLA-60**, *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award, 26 November 2009, ¶ 207; *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Award, 5 June 2012, ¶ 360; **CLA-186**, *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶ 215; **RLA-68**, *KT Asia Investment Group BV v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶¶ 165-166; **RLA-64**, *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Excerpts of Award, 30 April 2014, ¶¶ 78, 80-81, 84; **RLA-65**, *Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain*, SCC Case No. V2013/153, Award, 12 July 2016, ¶¶ 683-685; **CLA-193**, *Orascom TMT Investments Sarl v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017, ¶¶ 370-372; **RLA-61**, *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, ¶¶ 117-118, 125-126; **RLA-49**, *AMF Aircraftleasing Meier & Fischer GmbH & Co KG v. Czech Republic*, PCA Case No. 2017-15, Final Award, 11 May 2020, ¶¶ 470-472; **RLA-66**, *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/17/1, Award, 13 September 2021, ¶¶ 293-294; **RLA-63**, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶ 148; **RLA-28**, *Antonio del Valle Ruiz and Others v. Kingdom of Spain*, PCA Case No. 2019-17, Final Award, 13 March 2023, ¶ 372; **RLA-129**, *Rasia FZE and Joseph K. Borkowski v. Republic of Armenia*, ICSID Case No. ARB/18/28, Award, 20 January 2023, ¶¶ 372-374, 376, 378; **RLA-150**, *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31, Award, 8 March 2024, ¶¶ 647, 649.

153. Finally, the object and purpose of the AANZFTA is reflected in its preamble and in Article 1 of Chapter 1. The preamble provides that one of the Treaty's aims is to "deepen and widen economic linkages among the [Treaty] Parties", while "increas[ing] trade and investment".[192] The preamble also "recognis[es] the important role and contribution of business in enhancing trade and investment among the [Treaty] Parties".[193] For its part, Article 1 specifies that one of the "objectives" of the AANZFTA is to "facilitate, promote and enhance investment opportunities among the [Treaty] Parties".[194] These objects and purposes are achieved by the deployment of economic resources by investors of a Treaty Party in the territory of another Treaty Party, not simply by investors owning and controlling assets.

(b) The definition of "investor"

154. Article 2(d) of Chapter 11 defines an "investor" as a natural or juridical person of a Treaty Party that "seeks to make, is making, or has made an investment in the territory" of another Treaty Party.[195] The repeated use of the verb *to make* shows the importance given by the Treaty Parties to the AANZFTA to such action, which involves bringing something into existence through deliberate effort.

155. *To make an investment* a putative investor therefore must engage in conduct that can be deemed *investing*. As was discussed above, under Chapter 11 such conduct involves committing resources.[196]

156. Footnote 4 to Article 2(d) confirms that active investment conduct is required. It states that "[f]or greater certainty, the [Treaty] Parties understand that an investor that 'seeks to make' an investment refers to an investor […] that has taken active steps to make an investment".[197] If an investor who merely "seeks to make" an investment must take "active steps", *a fortiori* an investor who "has made" an investment must have taken "active steps" to that end.

157. Indeed, *making* an investment must be distinguished from *owning* or *controlling* it. This distinction follows from the text of the AANZFTA and appears to be common ground between the Parties.[198] In defining "investment", Article 2(c) of Chapter 11 refers to assets "owned or controlled by an investor".[199] This past participle refers to the status of the investment or to the result of the act of investing that is captured by Article 2(d) and primarily consists in making a contribution.[200]

158. By contrast, the Claimant submits that *to make an investment* under Chapter 11, an investor need only participate in the transaction that produces ownership or control of the asset, without making

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[192] AANZFTA, Preamble.

[193] AANZFTA, Preamble.

[194] AANZFTA, Chapter 1, Article 1(c).

[195] AANZFTA, Chapter 11, Article 2(d).

[196] *See supra*, ¶¶ 145ff.

[197] AANZFTA, Chapter 11, footnote 4 at Article 2(d).

[198] SOPO, ¶ 147 ("As a matter of ordinary meaning, 'making' an investment requires some form of active contribution by the putative investor. It therefore requires more than, for example, 'having', 'holding', 'owning' or 'controlling' an investment."); Rejoinder, ¶ 158 ("'*Making*' differs from '*owning*' or '*holding*'") (cursive original). *See supra*, ¶ 140.

[199] *See supra*, ¶ 148.

[200] *See supra*, ¶¶ 148ff.

a contribution.[201] In support, it mainly relies on *Addiko v. Montenegro*.[202] In that award, the tribunal held that the "ordinary meaning" of the verb "making" in the definition of investor in the Austria-Montenegro bilateral investment treaty ("**BIT**") "include[d] an act of acquiring an investment", meaning an act of "gaining possession or control of, or getting or obtaining something", even in the absence of any "exchange of monetary value".[203]

159. The Respondent contends that *Addiko* is an "outlier".[204] Indeed, treaty provisions identical or materially equivalent to Article 2(d) of Chapter 11 have consistently been interpreted as requiring investors to make a contribution, rather than to merely hold an asset.[205] Be that as it may, as a general matter, the *Addiko* tribunal left it open whether only assets that involve a contribution warrant investment protection. It neither accepted nor dismissed Montenegro's argument that the notion of investment has an objective meaning, entailing "an active investment via a contribution of resources".[206] Instead, it assumed that the objective investment definition was applicable and concluded that, although the investor had initially acquired the investment at no cost, it had satisfied the contribution requirement through subsequent capital injections.[207]

160. Moreover, there are material differences between the BIT in *Addiko* and Chapter 11. For instance, the verb *to make* appears only once in the BIT's relevant definition of investor and plays a limited role,[208] whereas Article 2(d) of Chapter 11 uses it in three distinct tenses, thereby emphasizing the investor's conduct as an element of the definition. Further, the BIT makes no reference to the *acquisition* of investments, whereas Article 2(a) of Chapter 11 lists "acquired" as a modality for obtaining an investment that requires the commitment of resources.[209] Therefore, although the *Addiko* tribunal could equate *making* with *acquiring* an investment without addressing the need for a contribution, the wording of Chapter 11 precludes that interpretation. In any event, the Claimant's position that merely participating in a transaction is equivalent to making an investment is untenable. Accepting it would merge the concept of *making* an investment with that of *owning* or *controlling* an investment, ignoring the distinction that Chapter 11 draws between these terms.

161. For these reasons, the Tribunal determines that Chapter 11 required Zeph to commit resources in relation to its assets in Australia, to qualify as a protected investor with protected investments.

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[201] Rejoinder, ¶¶ 161-162. *See also* Rejoinder, ¶ 166; *see supra*, ¶ 140.

[202] Rejoinder, ¶¶ 159-161; Tr. (Day 3) 125:18-127:3, 139:14-21 (Claimant).

[203] **RLA-52**, *Addiko Bank AG v. Montenegro*, ICSID Case No. ARB/17/35, Excerpts of Award, 24 November 2021, ¶¶ 352, 354.

[204] SOPO, ¶ 159; Reply, ¶ 59.

[205] *See inter alia* **RLA-44**, *Gold Reserve Inc v. Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm), [2016] 1 WLR 2829, ¶¶ 32, 35, 37, 44-46, 48; **RLA-49**, *AMF Aircraftleasing Meier & Fischer GmbH & Co KG v. Czech Republic*, PCA Case No. 2017-15, Final Award, 11 May 2020, ¶¶ 450-457; **RLA-34**, *Sergei Viktorovich Pugachev v. Russian Federation*, Award on Jurisdiction, 18 June 2020, ¶¶ 413-417; **CLA-86**, *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶¶ 571, 606.

[206] **RLA-52**, *Addiko Bank AG v. Montenegro*, ICSID Case No. ARB/17/35, Excerpts of Award, 24 November 2021, ¶¶ 308, 315.

[207] **RLA-52**, *Addiko Bank AG v. Montenegro*, ICSID Case No. ARB/17/35, Excerpts of Award, 24 November 2021, ¶¶ 337-339.

[208] Austria-Montenegro BIT, Article 1(2)(b).

[209] *See supra*, ¶¶ 145-147.

(ii) Whether Zeph made a contribution

162. Having established that Chapter 11 required Zeph to make a contribution, the question is now whether Zeph satisfied that requirement. According to the Claimant, it did so by providing its shares to MIL in exchange for Mineralogy's shares **(a)**; by managing Mineralogy **(b)**; and/or by reinvesting returns from Mineralogy **(c)**.

(a) Contribution by acquiring Mineralogy's shares through the provision of Zeph's shares

163. The Claimant acquired ownership over Mineralogy and control over its other assets in Australia through two share swaps, both part of the Mineralogy Group Restructure, which took place between late 2018 and early 2019:[210]

i. On 14 December 2018, Mr. Palmer "incorporated MIL, and became the sole shareholder of the redeemable subscriber share on issue in MIL with paid up capital of NZD $ 1".[211]

ii. On 16 December 2018, MIL issued 6,002,896 new ordinary shares, which it gave to the original owners of Mineralogy (namely Mr. Palmer, River Crescent, and Closeridge) in exchange for the totality of Mineralogy's shares. At the same time, Mr. Palmer's single subscriber share was redeemed/cancelled.[212]

iii. On 21 January 2019, "MIL incorporated [Zeph], and became sole shareholder of the subscriber share on issue in [Zeph], with paid up capital of SGD $ 1".[213]

iv. On 29 January 2019, Zeph issued 6,002,896 new ordinary shares, which it gave to MIL in exchange for the latter's shares in Mineralogy. Simultaneously, MIL's single subscriber share was redeemed/cancelled.[214]

164. The Respondent does not dispute that these share swaps were lawful under their governing law and effective in transferring ownership of the shares in Mineralogy to Zeph.[215] Nor does the Respondent contend that an investment can never be made through a cashless transaction.[216] It acknowledges that cashless share swaps "*may* constitute an active contribution in certain circumstances".[217]

165. However, the Respondent argues that such circumstances were not met in the present case, as the "Zeph Share Swap" did not entail Zeph "providing anything of value".[218] For Australia, Zeph

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[210] *See supra*, ¶¶ 55-57.

[211] **C-63**, PwC Section 411 Application on behalf of Mineralogy Group, 27 August 2019, p. 184 (of PDF); *see also supra*, ¶ 55.

[212] *See supra*, ¶ 56.

[213] **C-63**, PwC Section 411 Application on behalf of Mineralogy Group, 27 August 2019, p. 184 (of PDF); *see also supra*, ¶ 57.

[214] *See supra*, ¶ 57.

[215] Reply, ¶ 64. *See also* Reply, ¶ 72 ("Australia does not question that an acquisition by way of share swap is 'legitimate' in the sense that it can be a lawful and valid transaction which effects a change in ownership.").

[216] Reply, ¶ 68.

[217] Reply, ¶ 71 (cursive original).

[218] Reply, ¶ 71.

"was an empty corporate vehicle whose shares were worth nothing immediately before their transfer to MIL in exchange for 100% of the shares in Mineralogy".[219] Therefore, the Respondent submits that the transfer of shares by Zeph cannot be regarded as a valid contribution at risk qualifying for investment protection under Chapter 11.

166. By contrast, the Claimant argues that it satisfied the contribution requirement by paying for Mineralogy's shares with its own.[220] It asserts that it is "incorrect to say that [Zeph's] shares had no value" but that, even if that were true, it "would not be fatal to the existence of an investment" under Chapter 11.[221] For Zeph, the Respondent's objection conflates the notions of contribution and purchase price, and ignores that the contribution need not be "adequate or of a specific value" for the investment to deserve protection,[222] especially in cases involving corporate restructures and share swaps, such as the present one.[223]

167. On this basis, the Claimant insists that there was "nothing unusual" in the Mineralogy Group Restructure, and that it conformed to "standard corporate practice".[224] It adds that "share swaps or transfers have been recognized by investment tribunals time and again as being a legitimate way of making an investment in the context of corporate restructurings",[225] and that in none of those decisions have "elements of risk or contribution been deemed unsatisfied simply because the transaction was a face-value share swap or transfer".[226] According to the Claimant, "issues of nominal or face value" are "irrelevant" and "simply [do] not arise" in the context of a corporate restructure.[227]

168. As noted above, the notion of a "contribution" refers to the allocation of economic resources by an investor.[228] If a putative investor allocates no value to a project, it does not commit any resources and hence makes no contribution. Numerous investment awards suggest that the requisite contribution must be of value.[229]

169. At the time of the share swap with MIL, Zeph had no value. Zeph's Board of Directors met on 29 January 2019, the day of the transaction, and noted that Zeph had never "been party to [any] agreement [or] a beneficiary or trustee of a trust", and that it had "no assets and liabilities other

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[219] Reply, ¶ 115.

[220] Rejoinder, ¶ 149.

[221] Rejoinder, ¶ 149.

[222] Rejoinder, ¶ 149. *See also* ROPO, ¶¶ 330-334.

[223] Tr. (Day 3) 137:22-23 (Claimant).

[224] Tr. (Day 3) 134:8-10 (Claimant).

[225] Tr. (Day 3) 135:3-6 (Claimant). *See also* ROPO, ¶¶ 230-237, 256, 268, 281-282.

[226] Tr. (Day 3) 136:4-7 (Claimant).

[227] Tr. (Day 3) 135:9-17 (Claimant).

[228] *See supra*, ¶ 143.

[229] *See inter alia* **RLA-62**, *Consorzio Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award, 10 January 2005, § II, ¶ 14(i); **RLA-68**, *KT Asia Investment Group BV v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶¶ 203-206; *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Award, 5 June 2012, ¶¶ 433-435; *Cairn Energy PLC and Cairn UK Holdings Limited v. Republic of India*, PCA Case No. 2016-07, Final Award, 21 December 2020, ¶ 706; *Elliott Associates L.P. v. Republic of Korea*, PCA Case No. 2018-51, Award, 20 June 2023, ¶ 484; **RLA-63**, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/074, Final Award, 3 August 2022, ¶¶ 167, 169, 170, 175; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶¶ 297-300.

than [the] share capital of 1 fully paid ordinary share of SGD $1 held by [MIL]",[230] which was redeemed/cancelled concurrently with the swap.[231] In other words, the intrinsic value of Zeph on the relevant date was nil.[232] By way of consequence, Zeph's shares were also valueless. The economic reality of the transaction is such that Zeph contributed nothing in exchange for the acquisition of Mineralogy's shares.

170. The Claimant posits that acquiring assets through a share swap prompted by a corporate restructure exempted it from committing resources of value. However, the contribution requirement as discussed above applies irrespective of the type of transaction through which the investor chooses to obtain its putative investment.

171. The decisions which Zeph invokes to argue otherwise are of little assistance. It notably relies on the decision of the Swiss Federal Tribunal ("**SFT**") setting aside the award in *Clorox v. Venezuela*.[233] In that case, Clorox Company and Clorox International Company, both US companies, had invested in Venezuela since 1990 through Clorox Venezuela, which they fully owned and to which they contributed capital, technology, and know-how.[234] In 2011, Clorox España was incorporated by Clorox International Company,[235] which paid Clorox España's nominal share value (EUR 3,000) and share premium (EUR 13,993,654.94) by transferring the shares of Clorox Venezuela to Clorox España.[236] In return, Clorox España transferred its shares to Clorox International Company.[237] In 2015, Clorox España filed a claim with respect to measures concerning Clorox Venezuela pursuant to the Spain-Venezuela BIT.[238] That treaty defined "investment" as any asset "invested by investors" and added a non-exhaustive list of protected assets.[239]

172. The SFT noted that the arbitral tribunal had declined jurisdiction on the ground that contributions were made, not by Clorox España, but by Clorox Company and/or Clorox International Company, before the intra-group transfer of Clorox Venezuela's shares.[240] In this context, the SFT held that

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[230] **C-63**, Zeph Minutes of Meeting of Directors, 29 January 2019, p. 158 (of PDF).

[231] *See supra*, ¶ 163.iv.

[232] Lys ER II, ¶ 37 ("Because the Consideration Shares represent ownership of an enterprise with no assets and no intrinsic value immediately prior to the restructuring transaction, they have zero value outside of this share exchange.").

[233] **RLA-144**, *Clorox España S.L. v. Bolivarian Republic of Venezuela*, Swiss Federal Tribunal, 4A_306/2019, Judgment of 25 March 2020; **RLA-148**, *Clorox España S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019; ROPO, ¶¶ 269-270, 293, 311; Rejoinder, ¶¶ 154, 156; Tr. (Day 3) 129:24-130:3.

[234] **RLA-148**, *Clorox España S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶¶ 811, 827, 833.

[235] **RLA-148**, *Clorox España S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶ 828.

[236] **RLA-148**, *Clorox España S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶ 828.

[237] **RLA-148**, *Clorox España S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶ 830.

[238] **RLA-148**, *Clorox España S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶ 4.

[239] **RLA-148**, *Clorox España S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, ¶¶ 787, 801.

[240] **RLA-144**, *Clorox España S.L. v. Bolivarian Republic of Venezuela*, Swiss Federal Tribunal, 4A_306/2019, Judgment of 25 March 2020, ¶¶ 3.4.2.7 ("*Le Tribunal arbitral veut priver la recourante, une société espagnole détenant une participation dans une société vénézuélienne, de la protection du TBI en raison du fait que ledit investissement a été initialement effectué par une société sise dans un État tiers avant d'être transféré à la recourante*"), 3.4.2.4 ("*Ce qui semble véritablement conduire le Tribunal arbitral à nier à la recourante un droit à la protection des investissements litigieux réside dans le fait que l'acte d'investissement - tel que l'a défini le Tribunal arbitral - n'a pas été effectué par une société espagnole mais par une ou plusieurs société (s) américaine (s) du même groupe*.").

the BIT did not indicate an intention to exclude such investments from its scope.[241] For the SFT, the words "invested by investors" in the definition of investment did not suggest that an "active investment […] must necessarily have been made by the investor itself".[242] The SFT added that, besides requiring that assets be owned or controlled by an investor, the remainder of the investment definition did not contain "any particular restriction or requirement regarding the nature of protected investments".[243]

173. In the Tribunal's reading, the SFT's judgment does not mean that no contribution at all is needed. The judgment merely accepts that claimant-investors may benefit from contributions made by prior foreign investors, including investors from third States. In *Clorox* the existence of a contribution was not at issue. Be that as it may, the situation here is different both as a matter of fact and law:

    i. In terms of facts, there is no indication or even allegation here that another foreign investor made a contribution before Zeph acquired ownership over Mineralogy.

    ii. As to the law, the wording of the AANZFTA differs from that of the Spain-Venezuela BIT. While the latter contains no specific requirements, Chapter 11 expressly requires the qualifying investor to "make" the "investment".[244] Both of these terms are treated throughout Chapter 11 as involving the commitment of resources.[245]

174. The Claimant also invokes *Phoenix Action v. Czech Republic*, *Investmart v. Czech Republic*, and *Gavrilović v. Croatia*, stressing that the latter deemed "immaterial" the amount paid by investors for their investments.[246] None of these awards supports the proposition that committing what is in substance zero value fulfils the contribution requirement:

    i. In *Gavrilović*, the investors had paid for their investments an amount determined by a bankruptcy court.[247] Croatia objected that they had failed to make a contribution because the purchase price had been set significantly below book value.[248] The tribunal considered that, as the treaty did not require a "certain threshold" for the purchase price of an asset to constitute an investment, it was "unnecessary to inquire into the adequacy

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[241] **RLA-144**, *Clorox España S.L. v. Bolivarian Republic of Venezuela*, Swiss Federal Tribunal, 4A_306/2019, Judgment of 25 March 2020, ¶ 3.4.2.7 ("*Or, rien ne permet de dégager du TBI la volonté des États contractants d'exclure pareil investissement de son champ d'application*".).

[242] **RLA-144**, *Clorox España S.L. v. Bolivarian Republic of Venezuela*, Swiss Federal Tribunal, 4A_306/2019, Judgment of 25 March 2020, ¶ 3.4.2.7 ("*Rien ne permet de déduire de la formule 'investis par des investisseurs' l'exigence d'un investissement actif devant impérativement avoir été effectué par l'investisseur lui-même[.]*").

[243] **RLA-144**, *Clorox España S.L. v. Bolivarian Republic of Venezuela*, Swiss Federal Tribunal, 4A_306/2019, Judgment of 25 March 2020, ¶ 3.4.2.5 ("*Abstraction faite de la formule litigieuse 'investis par des investisseurs', force est de constater que cette définition ne contient aucune restriction ou exigence particulière au sujet de la nature des investissements protégés.*").

[244] *See supra*, ¶ 154.

[245] *See supra*, ¶¶ 145ff.

[246] **CLA-195**, *Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, ¶ 210, fn. 221; ROPO, ¶¶ 330-332; Tr. (Day 3) 137:13-21 (Claimant).

[247] **CLA-195**, *Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, ¶¶ 196, 200, 204.

[248] **CLA-195**, *Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, ¶¶ 195, 198, 202.

of [the] consideration".[249] At issue was the extent of the contribution, not its very existence.

ii. In *Phoenix*, the tribunal found that, albeit at a "low price",[250] the investor had indeed "contributed some money for the purchase" of the assets.[251]

iii. The investor in *Investmart* did not make a payment in exchange for shares in the investment companies but had agreed to assume the debt of other shareholders and to fund a capital increase. The Czech Republic argued that, by defaulting on those obligations, the investor "made no substantive investment in the sense of committing capital" for the shares.[252] According to the tribunal, to address the State's contention it was necessary to inquire into the "value of the investment" and whether the "total amount invested was sufficiently substantial […] to stimulate the flow of capital and economic development" of the host State.[253] Unlike in that case, here, it is neither the Respondent's contention nor the Tribunal's view that Zeph's contribution must stimulate Australia's economic development. While that is the expected consequence of a successful investment, it is not a precondition for its existence.[254]

175. The Claimant cites still other awards about corporate restructures and share swaps, including *Gold Reserve v. Venezuela*,[255] *Westwater v. Turkey*,[256] *Renergy v. Spain*,[257] *Tidewater v. Venezuela*,[258] *Aguas del Tunari v. Bolivia*,[259] and *Mobil v. Venezuela*.[260] Again, these decisions do not assist the Claimant:

i. In *Gold Reserve*, it was not at issue whether the shares involved in the swap had intrinsic value and thus entailed a commitment of economic resources.[261]

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[249] **CLA-195**, *Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, ¶ 210.

[250] **RLA-91**, *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 119, 140.

[251] **RLA-91**, *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 120.

[252] **CLA-196**, *Invesmart BV v. Czech Republic*, UNCITRAL, Award, 26 June 2009, ¶ 181.

[253] **CLA-196**, *Invesmart BV v. Czech Republic*, UNCITRAL, Award, 26 June 2009, ¶ 188.

[254] **RLA-67**, *Rand Investments Ltd., William Archibald Rand, Kathleen Elizabeth Rand, Allison Ruth Rand, Robert Harry Leander Rand and Sembi Investment Limited v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award, 29 June 2023, ¶ 228; **CLA-203**, *Mercuria Energy Group Limited v. Republic of Poland (II)*, SCC Case No. V 2019/126, Final Award, 29 December 2022, ¶ 546; *Spółdzielnia Pracy Muszynianka v. Slovak Republic*, PCA Case No. 2017-08/AA629, Award, 7 October 2020, ¶ 289.

[255] **CLA-32**, *Gold Reserve Inc v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014.

[256] **CLA-187**, *Westwater Resources, Inc. v. Republic of Türkiye*, ICSID Case No. ARB/18/46, Award, 3 March 2023.

[257] **CLA-179**, *RENERGY S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022.

[258] **RLA-93**, *Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe C.A. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013.

[259] **CLA-185**, *Aguas del Tunari SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005.

[260] **RLA-92**, *Mobil Corporation et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010.

[261] **CLA-32**, *Gold Reserve Inc v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶¶ 256, 260-261.

ii. Similarly, in *Westwater*, there was no question of lack of value, as the investor had paid in treasury shares, the value of which was not disputed.[262] In addition, it had "brought to Turkey considerable uranium mining expertise and know-how as well as USD 1,283,000 in development expenditures".[263]

iii. In *Renergy*, the investor had paid important sums in cash during the restructure to acquire control over the investments.[264] Hence, once more, the issue did not hinge on the very existence of a contribution. It turned on the applicability of the objective definition of investment.[265] Chapter 11 also differs from the operative treaty in that case.[266]

iv. *Tidewater*, *Aguas del Tunari* and *Mobil* addressed corporate restructures in the context of alleged fraud or abuse.[267] With the exception of *Mobil*, the tribunals in these cases did not assess whether the investors had made a contribution during the restructures. In *Mobil*, the investors had committed to investing considerable capital,[268] and the tribunal noted that the investors had "contributed their part to [the] investments".[269]

176. On this basis, the Tribunal comes to the conclusion that Zeph did not make a contribution when transferring its shares to MIL in exchange for ownership of Mineralogy.

(b) Contribution by managing Mineralogy

177. The Claimant submits that it made a contribution by playing "an active role in managing Mineralogy",[270] and that the "economic reality" of the relationship between Zeph and Mineralogy shows that the former is "closely involved in, and monitors, all aspects of Mineralogy's business".[271] As evidence, Zeph refers to how it appoints the directors of Mineralogy;[272] approves the annual accounts of Mineralogy;[273] produces independently audited and consolidated yearly financial statements that include Mineralogy[274] and files these with the Australian Securities and Investments Commission ("**ASIC**"). It also refers to Mr. Palmer, Ms. Emily Palmer, Mr. Declan

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[262] **CLA-187**, *Westwater Resources, Inc. v. Republic of Türkiye*, ICSID Case No. ARB/18/46, Award, 3 March 2023, ¶ 148.

[263] **CLA-187**, *Westwater Resources, Inc. v. Republic of Türkiye*, ICSID Case No. ARB/18/46, Award, 3 March 2023, ¶ 148.

[264] **CLA-179**, *RENERGY S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022, ¶¶ 121, 126.

[265] **CLA-179**, *RENERGY S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022, ¶¶ 548ff.

[266] *See supra*, ¶¶ 145ff.

[267] **RLA-93**, *Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe C.A. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013, ¶ 184; **CLA-185**, *Aguas del Tunari SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ¶ 330; **RLA-92**, *Mobil Corporation et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, ¶¶ 204-205.

[268] **RLA-92**, *Mobil Corporation et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, ¶ 196.

[269] **RLA-92**, *Mobil Corporation et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, ¶ 197.

[270] ROPO, ¶ 248. *See also* Rejoinder, ¶ 191.

[271] ROPO, ¶ 249.

[272] ROPO, ¶ 248(e); Rejoinder, ¶ 193.

[273] Rejoinder, ¶ 193.

[274] ROPO, ¶ 248(g).

Sheridan, Ms. Baljeet Singh, and Mr. Bernard Wong (jointly the "**Individuals**") as directors of Zeph who reside in Australia, have roles in Mineralogy, and are involved in the day-to-day operations of Mineralogy.[275]

178. The Respondent contends that a contribution through management requires "concrete evidence" of the "nature and reality" of that contribution,[276] and that the Claimant has failed to meet that burden.[277] For the Respondent, all Zeph has shown is "some overlap" between its own corporate officers and those of Mineralogy, without specifying the duties carried out within Mineralogy.[278] It further contends that there is no evidence showing that "anything substantially changed" in the "governance and management" of Mineralogy following the interposition of Zeph in the Mineralogy Group.[279]

179. Specialized labor, know-how or expertise, including management, may constitute a contribution of economic value.[280] By contrast, acts that Zeph performs in its capacity as shareholder of Mineralogy are distinct from the management of the latter. Zeph's appointment of Mineralogy's directors and the approval of Mineralogy's annual accounts are such shareholder actions. Additionally, Zeph's filing of consolidated financial statements with ASIC simply seeks to comply with its legal obligations as a registered foreign company in Australia.[281] Neither of these acts represents a contribution to the management of Mineralogy.

180. Moreover, neither the residence nor dual roles of the Individuals show "active management" by Zeph, contrary to the Claimant's argument.[282] The appointment of Australian residents to Zeph's Board of Directors appears to have been a strategic tax decision, as opposed to a measure aimed at facilitating the management of Mineralogy. On 22 January 2019, the day after Zeph's incorporation, Mr. Palmer was advised to "clearly demonstrate" that the "majority" of the Board would be composed of Australian residents to "ensure" Zeph's "Australian tax residency".[283]

181. More importantly, the Individuals either held their roles in Mineralogy before joining Zeph or joined the latter after the Amendment Act. While the first scenario indicates that their work with respect to Mineralogy can hardly be deemed a contribution on the part of Zeph, the second scenario means that their work is irrelevant for jurisdictional purposes as it post-dates the alleged breaches of Chapter 11:

[275] ROPO, ¶¶ 248(a)-(f); Rejoinder, ¶ 193.

[276] Reply, ¶ 75.

[277] Reply, ¶ 76.

[278] Reply, ¶ 77.

[279] Reply, ¶ 77, quoting Lys ER II, ¶ 149.

[280] *See supra*, ¶ 143.

[281] **CLA-161**, Corporations Act, § 601CK(1), p. 1516 (of PDF).

[282] Rejoinder, ¶ 192.

[283] **R-600**, Email from Graham Sorensen to Mr. Palmer, 22 January 2019.

i. Mr. Palmer, who was appointed as director of Zeph on 23 January 2019,[284] has held numerous positions in Mineralogy since its inception and continues to do so currently as director since February 2019.[285]

ii. Ms. Palmer, who was appointed as director of Zeph on 28 February 2019,[286] at that time already acted as Administration Manager at Mineralogy, where she also served as director between May and August 2021 [redacted].[287]

iii. Mr. Sheridan, who was appointed as director of Zeph on 28 February 2019,[288] was then Mineralogy's Head of Finance and Financial Relationships.[289]

iv. Ms. Singh, who was appointed as director of Zeph on 22 October 2021,[290] that is, after the Amendment Act, had served as a director of Mineralogy between July 2012 and January 2013.[291] She resumed her employment at Mineralogy in January 2019,[292] where she also acts as director since November 2020.[293]

v. Mr. Wong, who was appointed director of Zeph on 22 October 2021,[294] has acted as Mineralogy's Chief Financial Officer since March 2021 and as Zeph's Chief Investment Officer since August 2021.[295]

182. Even assuming *arguendo* that the Individuals were closely involved in Mineralogy's daily operations, the Tribunal cannot presume that they were so involved in their capacity as Zeph's directors. It is much more likely that they acted in their capacity as officers of Mineralogy, meaning that their activity cannot be construed as management by Zeph. Rather than as Zeph directors making a valuable contribution to the management of Mineralogy, the Individuals were instead acting as Mineralogy officers whose job description included sitting on the Board of Zeph.

183. Therefore, the Tribunal finds that the Claimant has failed to establish having made a contribution by managing Mineralogy, which had little to no need for foreign input to begin with. Mineralogy had successfully established and operated multiple substantial and complex ventures in Australia

[284] **C-73**, ACRA, Register of Directors of Zeph Investments Pte Ltd, 2 February 2023.

[285] **C-522**, ASIC, Current & Historical Company Extract for Mineralogy, 14 March 2024.

[286] **C-73**, ACRA, Register of Directors of Zeph Investments Pte Ltd, 2 February 2023.

[287] Palmer WS VI, ¶¶ 56-58.

[288] **C-73**, ACRA, Register of Directors of Zeph Investments Pte Ltd, 2 February 2023.

[289] Palmer WS V, ¶ 29(f).

[290] **C-73**, ACRA, Register of Directors of Zeph Investments Pte Ltd, 2 February 2023.

[291] **C-522**, ASIC, Current & Historical Company Extract for Mineralogy, 14 March 2024.

[292] Palmer WS VI, ¶ 60.

[293] **C-522**, ASIC, Current & Historical Company Extract for Mineralogy, 14 March 2024.

[294] **C-73**, ACRA, Register of Directors of Zeph Investments Pte Ltd, 2 February 2023.

[295] **R-344**, LinkedIn Profile of Mr. Bernard Wong, screenshot dated 29 October 2023. Mr. Wong replaced Mr. Chitondo Mashayanyika, who acted as Zeph's director and Chief Investment Officer from January 2019 to February 2021, while also serving as Mineralogy's Chief Financial Officer (**C-73**, ACRA, Register of Directors of Zeph Investments Pte Ltd dated 2 February 2023; Palmer WS V, ¶ 32). The considerations *inter alia* with respect to Ms. Palmer and Mr. Sheridan thus apply to Mr. Mashayanyika *mutatis mutandis*.

long before its acquisition by Zeph, with assets, revenue, and net income eclipsing those of Zeph.[296]

(c) Contribution by reinvesting returns in Mineralogy

184. In the fiscal year ending in June 2019, Mineralogy did not declare or pay dividends to Zeph.[297] In the fiscal year ending in June 2020, Mineralogy declared a total of AUD 8,115,000 in dividends.[298] Of that amount, AUD 1,115,000 were paid to Zeph on 29 June 2020.[299] The remaining AUD 7,000,000 were identified as a "final dividend […] payable" to Zeph on 31 October 2020,[300] but were never paid.

185. Zeph does not claim the unpaid 2020 dividends as a contribution into Mineralogy in the form of reinvested returns, and rightly so. Indeed, Mineralogy kept those dividends to set-off two interest-free loans, which it had granted to Zeph in 2019 and 2020.[301] The Claimant's submission is that, by choosing not to receive any dividends in 2019 and not to receive dividends in excess of AUD 8,115,000 in 2020, it allowed Mineralogy to retain profits.[302] It argues that these retained profits qualify as reinvested "returns" under Articles 2(c) and 2(j) of Chapter 11, and thus constitute protected investments additional to its shares in Mineralogy.[303] In support, the Claimant relies on its expert, [redacted], who quantifies the alleged retained profits.[304]

186. The Respondent disputes that Mineralogy's profits are covered by Articles 2(c) and 2(j) of Chapter 11.[305] With the support of its expert, Prof. Thomas Lys,[306] it argues that Zeph had no right to, or power to decide on, the distribution of dividends by Mineralogy,[307] and that in any event the Claimant has not established that a hypothetical distribution of (additional) dividends in 2019 or

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296 Lys ER I, ¶¶ 195-200.

297 **C-476**, Mineralogy's Special Purpose Consolidated Financial Report FYE June 2019, 2 December 2019, p. 3 (of PDF); **C-546**, Mineralogy Shareholders' (Zeph) Resolution approving FY2019 Accounts, 2 December 2019.

298 **C-477**, Mineralogy's Special Purpose Consolidated Financial Report FYE June 2020, 13 April 2021, p. 3 (of PDF); **C-539**, Mineralogy Minutes of Meeting of Directors (Declaration of Dividends), 29 June 2020; **C-540**, Mineralogy Minutes of Meeting of Directors (Declaration of Dividends), 29 June 2020; **C-547**, Mineralogy Shareholders' (Zeph) Resolution approving FY2020 Accounts, 13 April 2021.

299 **C-539**, Mineralogy Minutes of Meeting of Directors (Declaration of Dividends), 29 June 2020.

300 **C-540**, Mineralogy Minutes of Meeting of Directors (Declaration of Dividends), 29 June 2020; *cf* **C-477**, Mineralogy's Special Purpose Consolidated Financial Report FYE June 2020, 13 April 2021, p. 3 (of PDF); **C-547**, Mineralogy Shareholders' (Zeph) Resolution approving FY2020 Accounts, 13 April 2021.

301 **C-79**, Zeph's Audited Financial Statements for Financial Year ended on 30 June 2019, p. 21 (of PDF) ("Loan from subsidiary"); **C-81**, Zeph's Audited Financial Statements for Financial Year ended on 30 June 2020, p. 11 (of PDF) ("Amounts due to subsidiaries"); ROPO, ¶ 246; Reply, ¶ 49; Lys ER II, ¶¶ 187-195; Tr. (Day 1) 200:4-7 (Claimant).

302 Rejoinder, ¶¶ 173, 178-189.

303 Rejoinder, ¶¶ 174-176; ROPO, ¶¶ 238, 243.

304 [redacted] ER I; [redacted] ER II.

305 Reply, ¶¶ 82-84.

306 Lys ER I; Lys ER II.

307 Reply, ¶¶ 85-93.

2020 was possible.[308] Therefore, the Respondent asserts that Zeph has made no contribution by reinvesting returns in Mineralogy.[309]

187. The Tribunal recalls its analysis of Articles 2(c) and 2(j) of Chapter 11.[310] Article 2(c) provides that "returns shall be treated as investments" so long as they are "invested", while Article 2(j) defines a "return" as "any amount yielded by or derived from an investment", including profits and dividends.[311] Therefore, only income that stems from an existing investment and is then reinvested deserves independent protection as a "return".[312] However, as Zeph did not make a contribution by acquiring or managing Mineralogy,[313] Zeph's shareholding in Mineralogy cannot be deemed an investment. Consequently, profits yielded by Mineralogy, whether retained or not, cannot qualify as "returns" of an investment under Articles 2(c) and 2(j) of Chapter 11.

188. Another question is whether by not claiming any or higher dividends from Mineralogy in 2019 and 2020, Zeph made a contribution into Mineralogy which in itself constituted an investment. This question can only be answered in the affirmative if Zeph had a right to claim dividends and chose not to exercise it. Otherwise, the retention of profits by Mineralogy cannot be attributed to Zeph.

189. In this respect, Clause 31.1 of the relevant version of Mineralogy's Constitution ("**MC**") provided that Mineralogy could "declare a dividend **if, and only if** the directors [had] **recommended** a dividend and such dividend [did] **not exceed** the amount **recommended** by the directors".[314] In conformity with this provision, Mineralogy only declared dividends as recommended by its Board of Directors, that is, none in 2019 and AUD 8,115,000 in 2020.[315]

190. Accordingly, Zeph was not entitled to dividends in 2019 or 2020 beyond those declared by Mineralogy. The profits that Mineralogy might have retained did not constitute dividends payable to Zeph. Hence, the alleged retained profits could not have been contributed by Zeph as they were not Zeph's assets. Shareholders own shares and are entitled to the benefits associated with those shares, including dividends, but they do not own the company's assets.

191. The Claimant nevertheless insists that the "economic reality" shows that it relinquished dividends "in favour of reinvesting those profits into Mineralogy's business",[316] because if it "had […] wanted to receive a dividend in any given year, that dividend would have been paid".[317] In support of this argument, the Claimant contends that, as sole shareholder of Mineralogy, it had the power

[308] Reply, ¶ 94.

[309] Reply, ¶¶ 81, 95-96.

[310] *See supra*, ¶¶ 149-150.

[311] *See supra*, ¶ 150.

[312] *See supra*, ¶ 151.

[313] *See supra*, ¶¶ 176, 183.

[314] **C-563**, Constitution of Mineralogy, 16 May 2014, Clause 31.1 (emphasis added).

[315] **C-539**, Mineralogy Minutes of Meeting of Directors (Declaration of Dividends), 29 June 2020; **C-540**, Mineralogy Minutes of Meeting of Directors (Declaration of Dividends), 29 June 2020.

[316] Rejoinder, ¶ 181.

[317] Rejoinder, ¶ 182.

to change the MC in its favor;[318] to appoint and remove the directors;[319] and to approve or not the accounts regarding the dividends recommended in 2019 and 2020.[320] It adds that the MC permitted the Board of Directors to act in the best interest of Zeph,[321] and that the MC empowered Mr. Palmer as "Governing Director" of Mineralogy, who at the time was also director of Zeph, to recommend that dividends be declared.[322] For the Claimant, if it had intended that additional dividends be paid, "Mr. Palmer would have recommended such a dividend in the accounts for the Claimant to approve".[323]

192. The Tribunal cannot follow this line of reasoning. The Claimant's arguments are premised on what it *could* have done, not on what it did. Nothing in the record suggests that Zeph even attempted any of the actions which it now puts forward. To the contrary, although the MC provided that the Board may act in Zeph's best interests,[324] the Board did not recommend additional dividends in 2019 or 2020. Moreover, for dividends to be payable and thus at Zeph's disposal for reinvestment, they must not only be recommended by the Board but also declared as such at the General Meeting of Shareholders.[325] Yet, the fact is that no additional dividends were declared.

193. These findings dispose of the Claimant's arguments and lead to the conclusion that Zeph did not make a contribution by investing or reinvesting Mineralogy's profits.

194. In any event, even assuming *arguendo* that Zeph could somehow compel Mineralogy to distribute additional dividends (*quod non*), the condition of the company was such that it is highly unlikely that it would have done so. The Claimant initially argued that the sums available to Mineralogy for distribution as additional dividends amounted to AUD 35.55 million for 2019 and AUD 207.17 million for 2020.[326] Yet, cash liquidity is key when it comes to determining whether the distribution of dividends is possible.[327] The MC enshrines that principle in Clause 22.3, which provides that the Board of Directors may only advance Zeph's interests in a "manner […] contrary" to Mineralogy's own interests, "provided that [Mineralogy] is not insolvent or does not become insolvent because of the [Board's] action".[328] This condition was not met:

    i. In 2019, Mineralogy had an end of year cash balance of AUD 84 million, with AUD 70 million net cashflow from operating activities.[329] According to Prof. Lys, the Respondent's expert, AUD 70 million was close to "half of the average year-end cash

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[318] Rejoinder, ¶ 188.

[319] Rejoinder, ¶ 188.

[320] Rejoinder, ¶¶ 184(d), 186.

[321] Rejoinder, ¶ 184(b).

[322] Rejoinder, ¶¶ 184(c), 185.

[323] Rejoinder, ¶ 186.

[324] **C-563**, Constitution of Mineralogy, 16 May 2014, Clause 22.3.

[325] **C-563**, Constitution of Mineralogy, 16 May 2014, Clause 31.1.

[326] ROPO, ¶¶ 208, 239, 304, 345(b), 681(c); Rejoinder, ¶¶ 177-178; [redacted] ER I, ¶¶ 2.1, 6.2-6.3, 6.6; Lys ER II, ¶ 102.

[327] Lys ER II, ¶ 104; [redacted] ER II, ¶ 2.7.

[328] **C-563**, Constitution of Mineralogy, 16 May 2014, Clause 22.3.

[329] **R-424**, ASIC copy of Mineralogy Pty Ltd's financial statements and reports for year ended 30 June 2019, pp. 9, 11 (of PDF); **R-440**, ASIC copy of Mineralogy Pty Ltd's financial statements and reports for year ended 30 June 2020, p. 11 (of PDF); Lys ER I, Figure 88; Lys ER II, Figure 3; Rejoinder, ¶ 178.

balance […] held in the 2017-22 period",[330] meaning "it is highly doubtful that Mineralogy could have paid any dividends in 2019 without leaving it in a significantly illiquid position".[331] Neither the Claimant nor its expert, [redacted], challenged Prof. Lys's analysis in this respect.

ii. In 2020, Mineralogy had an end of year cash balance of AUD 33 million.[332] Hence, Mineralogy could not have distributed AUD 207.17 million without rendering Mineralogy insolvent.

195. Confronted with these objections, the Claimant argued that Mineralogy could have distributed its 2019-2020 cash balance, totaling AUD 117 million, as additional dividends.[333] [redacted] added that, "[n]otwithstanding the cash position", Mineralogy could have "paid greater dividends" by using "leverage".[334]

196. Without a working capital assessment, which the Claimant did not provide, it cannot be accepted that Mineralogy's entire cash balance could have been paid out as dividends. [redacted] confirmed that he had no understanding of Mineralogy's "working capital requirements".[335] However, using leverage to facilitate the distribution of dividends does not conform to sound corporate practice. Despite [redacted] opinion, the Claimant conceded that Mineralogy did not distribute additional dividends in 2019-2020 to avoid incurring debt.[336]

197. Therefore, the Tribunal finds that Zeph did not make a contribution by reinvesting or investing returns, profits, or dividends.

(d) Conclusion

198. For the reasons set out above, the Tribunal concludes that, having not made a contribution in any form, Zeph is not an investor with a protected investment under Chapter 11. Consequently, subject to the analysis below on the doctrines invoked by the Claimant,[337] it must decline jurisdiction over the dispute.

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[330] Lys ER II, ¶ 109, fn. 89. *See also* Lys ER I, Figure 88.

[331] Lys ER II, ¶ 109.

[332] **R-440**, ASIC copy of Mineralogy Pty Ltd's financial statements and reports for year ended 30 June 2020, p. 11 (of PDF); Lys ER I, Figure 88; Lys ER II, Figure 3; Rejoinder, ¶ 178.

[333] Rejoinder, ¶ 181. *See also* [redacted] ER II, ¶ 2.7.1 ("[T]he $84 million cash balance as at the end of 2019 and $33 million cash balance as at the end of 2020 indicate many millions of dollars could have been paid as a dividend.").

[334] [redacted] ER II, ¶¶ 2.7.2, 2.7.2.1.

[335] Tr. (Day 2) 291:15-16 ([redacted]).

[336] Tr. (Day 1) 198:22-199:13 (Claimant) ("The Claimant must approve the annual accounts of Mineralogy in which a decision to retain profits is formalised. And the Claimant actively approved retention of these profits of Mineralogy instead of paying a dividend to the Claimant. The Claimant did so in 2019 and 2020. […] It [was] in Mineralogy's best interest to have more funds available to pursue its activities, **and not to have to borrow money**") (emphasis added).

[337] *See infra*, § VI.B.

B. ESTOPPEL, ACQUIESCENCE, AND RELATED DOCTRINES

1. Overview of the Parties' positions

(i) The Claimant

199. The Claimant submits that Objections 1 and 2 "must fail, either because [the Respondent] has itself already accepted that the Claimant is a foreign Singaporean investor, and meets the jurisdictional requirements of the AANZFTA, or because, by reason of the Respondent's previous conduct and the Claimant's reliance on that conduct, the Respondent should not now be allowed to advance its jurisdictional objections to the contrary".[338] In this respect, the Claimant invokes *inter alia* the doctrines of estoppel, acquiescence, unilateral acts, and approbation/reprobation.[339] According to the Claimant, given the admissions made by the Respondent,[340] Objections 1 and 2 constitute an abuse of process.[341]

(ii) The Respondent

200. The Respondent replies that the Claimant misstates the applicable test for estoppel[342] and unilateral acts.[343] It argues that, in any event, the facts do not support the application of any of the doctrines invoked by the Claimant.[344] The Respondent submits that the "factual foundation for Zeph's reliance on these principles is a grab-bag of administrative decisions, often of a non-discretionary kind, by which Australian authorities have applied domestic statutory definitions".[345]

2. Analysis

201. The Tribunal has declined jurisdiction on the basis that the Claimant has failed to meet two of the jurisdictional requirements set out in Chapter 11. Because the conditions for the application of estoppel or other doctrines are in any event not satisfied on the facts before the Tribunal, it will leave the question open whether reliance on these doctrines may create jurisdiction when some of the jurisdictional requirements provided in the applicable treaty are not fulfilled.

202. Turning to the application of the doctrines, estoppel arises when a party has made unambiguous and unequivocal representations by statement or conduct, which are voluntary and unconditional, and the other party relies on those representations to its detriment or to the advantage of the

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[338] ROPO, ¶ 49. While the Claimant raised similar arguments with respect to Objections 3 and 4, these are irrelevant in view of the Tribunal's finding that its lacks jurisdiction over the present dispute pursuant to Objections 1 and 2.

[339] ROPO, § II; Rejoinder, Parts I.b, I.d, V.

[340] *See inter alia* Rejoinder, ¶¶ 553-556, 560, 563, 577, 582-583. *See also* Claimant's Table of "Respondent's Admissions", 16 September 2024.

[341] Rejoinder, ¶ 599.

[342] Reply, ¶¶ 10-18.

[343] Respondent's Opening Statement, pp. 123-124 (of PDF).

[344] Reply, ¶¶ 19-33, 38-40; Tr. (Day 1) 117:23-128:11 (Respondent).

[345] Tr. (Day 1) 118:1-4 (Respondent).

representing party.[346] Similarly, a party may acquiesce to the loss of a right or claim by tacit recognition manifested through unilateral conduct, typically by silence or omission, which the other party may interpret as consent, provided that said conduct is objective and clear.[347] As for unilateral acts or declarations, they may have the effect of creating legal obligations for the formulating State, but only if the declaration is stated in clear and specific terms.[348] Last, the doctrine of approbation/reprobation essentially prevents a party from advancing a position that is inconsistent with a position it has advanced previously.[349]

203. All these doctrines require that Australia represented expressly or impliedly that Zeph was an investor with an investment under the terms of the AANZFTA. The Tribunal has searched the record in vain for such a representation. The facts of the case do not show that Australia displayed conduct or made statements that would even suggest that it considered Zeph as an investor with an investment for purposes of Chapter 11, let alone with the required unequivocal nature and specificity of such conduct or statements. Relying on inapposite or misconstrued evidence, Zeph advances the following arguments:

    i. As Chapter 11 only envisages the denial of benefits "to an investor" and "to investments",[350] Australia's denial of benefits of June 2021 "was made on the implicit basis that the Claimant is an investor of Singapore and has investments in Australia".[351] That reasoning is ill-conceived. Upon denying benefits in June 2021, Australia was under no obligation to inform Zeph of any other preliminary objection it may raise should Zeph decide to pursue the arbitration.

    ii. ASIC approved Zeph's application to be registered as a "foreign company" and recognized it as "carrying on business" in Australia.[352] However, ASIC was acting under the Corporations Act, which says nothing about whether Zeph is an investor having made an investment within the meaning of Chapter 11. The Corporations Act

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[346] **RLA-112**, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, ICJ Judgment, 2018, ¶¶ 158-159; *Cengiz İnşaat Sanayi ve Ticaret A.S. v. Libya*, ICC Case No. 21537/ZF/AYZ, Award, 7 November 2018, ¶ 325; *Green Power Partners K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V2016/135, Award, 16 June 2022, ¶ 455; **RLA-120**, *Oded Besserglik v. Republic of Mozambique*, ICSID Case No. ARB(AF)/14/2, Award, 28 October 2019, ¶¶ 423(i)-(iii); *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, ¶¶ 151, 160; **RLA-116**, *Pope & Talbot v. Government of Canada*, Interim Award, 26 June 2000, ¶ 111; **CLA-35**, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010, ¶¶ 350-351, 353; **RLA-118**, *Cambodia Power Company v. Kingdom of Cambodia and Electricité du Cambodge*, ICSID Case No. ARB/09/18, Decision on Jurisdiction, 22 March 2011, ¶ 261; *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Award, 18 August 2008, ¶ 249; *Ceskoslovenska Obchodni Banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, ¶ 47.

[347] **CLA-230**, *Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, ICJ Judgment, 1984, ¶ 130; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, ICJ Judgment, 2021, ¶ 51; **RLA-104**, D. W. Bowett, "Estoppel before International Tribunals and its Relation to Acquiescence" (1957) *British Yearbook of International Law* 176, pp. 22ff (of PDF); **RLA-112,** *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, ICJ Judgment, 2018, ¶ 152.

[348] **CLA-247**, International Law Commission, "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto", *Yearbook of the ILC, 2006*, vol 2, part 2, A/CN.4/SER.A/2006/Add.l (Part 2), ¶¶ 1, 7, pp. 3, 10 (of PDF).

[349] Rejoinder, ¶¶ 568, 593; Respondent's Opening Statement, p. 122 (of PDF).

[350] ROPO, ¶¶ 123-124, quoting AANZFTA, Chapter 11, Articles 2(d) and 11.1(b).

[351] Rejoinder, ¶ 558(a). *See also* ROPO, ¶¶ 55(d), 122-126.

[352] ROPO, ¶¶ 64-72.

simply defines a "foreign company" as one incorporated "outside Australia",[353] and deems the "carrying on business" requirement satisfied merely by the "foreign company" having "a place of business in Australia".[354] Further, if these and other formal criteria were fulfilled, ASIC was under an obligation to grant the application and register the applicant as a foreign company.[355]

iii. The Australian Taxation Office ("**ATO**") and the FIRB treated Zeph as a "foreign corporation" and Mineralogy as a "foreign person" with an "investment".[356] In fact, the ATO and the FIRB acted under the Foreign Acquisitions and Takeovers Act ("**FATA**"). Like the Corporations Act, the FATA does not refer to Chapter 11 nor adopt its definitions of "investor" or "investment". Zeph qualified as a "foreign corporation" because it was a Singaporean entity,[357] and given Zeph's ownership of Mineralogy, the latter qualified as a "foreign person".[358] On this basis, the ATO found that Mineralogy (not Zeph) had breached Section 94(1) of the FATA when it purchased a residential property in Perth without prior approval by the FIRB.[359] Neither the ATO's finding, nor Section 94(1) of the FATA, refers to such property as an investment, let alone one made by Zeph.

iv. The WA Revenue Office ("**WARO**") and the Queensland Revenue Office ("**QRO**") determined that, through the share swap with MIL, Zeph "made" a "relevant acquisition" in Mineralogy.[360] Yet again, the WARO and the QRO acted under distinct statutes, namely the Duties Acts of WA and Queensland, which do not concern the AANZFTA. That being said, the view taken by the WARO and the QRO is consistent with Australia's position in this arbitration. As noted above, the Respondent accepts that the share swap with MIL was effective in transferring ownership of Mineralogy's shares to Zeph, and that investments under Chapter 11 can be made through cashless transactions in given circumstances.[361] The fact that Zeph acquired Mineralogy has never been questioned. The issue is that Zeph did not make a contribution in relation to

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353 **CLA-161,** Corporations Act, § 9, p. 98 (of PDF).

354 **CLA-161,** Corporations Act, § 21(1), p. 182 (of PDF). The Claimant further refers to its alleged management of Mineralogy and to the filing of audited and consolidated yearly financial statements with ASIC to elaborate on how Zeph "carried on business" in Australia (ROPO, ¶¶ 73ff, 84ff). The Tribunal already dismissed those submissions above and its reasoning applies here *mutatis mutandis* (*see supra*, ¶ 183). Hence, it is unnecessary to do so again here.

355 **CLA-161,** Corporations Act, § 601CE(h), p. 1514 (of PDF).

356 ROPO, ¶¶ 98-109.

357 **CLA-166**, FATA, § 4, p. 23 (of PDF) ("***foreign corporation*** means a foreign corporation to which paragraph 51(xx) of the Constitution applies") (emphasis and cursive original); **R-603**, The Treasury, "Guidance Note 2 on Australia's Foreign Investment Framework", 1 July 2023, pp. 5-6 (of PDF) ("A foreign corporation is defined in section 4 to mean a foreign corporation to which paragraph 51(xx) of the Australian Constitution applies. It is generally accepted that a foreign corporation is a corporation established or incorporated outside of Australia, notwithstanding that its shares may be owned by Australian interests").

358 **CLA-166**, FATA, § 4, pp. 24, 32 (of PDF) ("***foreign person*** means […] a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest. […] a person holds a ***substantial interest*** in an entity […] if […] the person holds an interest of at least 20% in the entity[.]") (emphasis and cursive original).

359 **C-63**, ATO communication to Mineralogy, 30 July 2021, pp. 327-328 (of PDF); **C-63**, ATO communication to Mineralogy, 7 March 2022, pp. 329-330 (of PDF); **CLA-166**, FATA, § 94(1), p. 169 (of PDF) ("A foreign person who proposes to take a notifiable action or notifiable national security action that is a residential land acquisition must not take the action if the foreign person has not given a notice relating to the action under section 81.").

360 ROPO, ¶¶ 110-121.

361 *See supra*, ¶ 164.

its assets in Australia and therefore does not deserve investment protection under Chapter 11. The WARO and QRO did not state otherwise, nor has any other Australian authority for that matter.

v. The Respondent cannot argue that the Claimant is not an investor that has made an investment because in these proceedings it has admitted that its objections have nothing to do with the value of Mineralogy at the time Zeph acquired the shares; that the share swap through which Zeph acquired its shares in Mineralogy was lawful and effective; that an investment can be made through cashless transactions; and that Chapter 11 covers both direct and indirect investments.[362] However, to have effect, an admission must unequivocally address disputed issues before the Tribunal,[363] and that is not the case here. The Claimant refers to uncontroversial facts that are immaterial to determine whether the jurisdictional requirements of Chapter 11 are met.

204. In short, the Claimant's case in connection with the above doctrines is largely premised on administrative decisions made by Australian domestic authorities pursuant to their governing statutes. These decisions and statutes have no bearing on the interpretation of the AANZFTA. They do not bind the Respondent with respect to its position under international law regarding Zeph's compliance with the jurisdictional requirements in Chapter 11. Nor has the Respondent admitted in these proceedings that the Claimant is an investor that has made a covered investment. Hence, Objections 1 and 2 do not constitute an abuse of process. Therefore, the Tribunal dismisses the Claimant's contentions *inter alia* on estoppel, acquiescence, unilateral acts and declarations, and approbation/reprobation, and confirms that it lacks jurisdiction over this dispute.

VII. COSTS

A. LEGAL FRAMEWORK

205. These proceedings were bifurcated in accordance with Article 25.1 of Chapter 11 of the AANZFTA. Article 25.4 specifies that, in case of bifurcation, the tribunal may award "the prevailing party reasonable costs and fees incurred in submitting or opposing the objection".

206. In addition, Article 40(1) of the UNCITRAL Rules, which are also applicable to this arbitration,[364] requires the tribunal to "fix the costs of the arbitration in the final award", while Article 40(2) defines "costs" as follows:

> The term "costs" includes only:
>
> (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
>
> (b) The reasonable travel and other expenses incurred by the arbitrators;
>
> (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;

[362] Claimant's Table of "Respondent's Admissions", 16 September 2024; Rejoinder, ¶¶ 553, 560, 563.

[363] **RLA-171**, *Channel Tunnel Group Limited and France-Manche S.A. v. United Kingdom and France*, PCA Case No. 2003-06, Partial Award, 30 January 2007, ¶ 277.

[364] *See supra*, ¶ 76.

(d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.

207. This provision thus recognizes broadly three categories of costs: Tribunal costs, comprising the fees and expenses of the Tribunal and the Secretary; administrative costs, comprising the fees and expenses of the PCA, including Hearing and other expenses; and Party costs, covering the legal fees and other costs incurred by the Parties in connection with the arbitration.

208. In line with Article 25.4 of Chapter 11, Article 42(1) of the UNCITRAL Rules states that the "costs of the arbitration shall in principle be borne by the unsuccessful party" and adds that the tribunal "may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case".

B. FEES AND COSTS INCURRED

209. Pursuant to Section 4.1 of the ToA, "the fees of the Arbitral Tribunal shall be reasonable, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the Tribunal members and any other relevant circumstances of the case". Section 4.2 of the ToA specifies that "[e]ach member of the Tribunal shall be remunerated at an hourly rate of EUR 650", that the "Secretary shall be remunerated at an hourly rate [of] EUR 300", and that "[t]ravel time shall be remunerated at half rate". Section 4.3 of the ToA further provides that the "members of the Tribunal and the Secretary shall be reimbursed for all travel expenses, disbursements and charges reasonably incurred in connection with the arbitration", and that "Value Added Tax (VAT) and any other local tax or duty applicable to any Tribunal member's fees shall also be reimbursed". In this respect:

i. The Tribunal's fees are as follows: Mr. William Kirtley, EUR 139,925.50; Prof. Donald McRae, EUR 98,029.75; and Prof. Gabrielle Kaufmann-Kohler, EUR 329,875.00.

ii. The Secretary's fees amount to EUR 126,750.00.

iii. The Tribunal and the Secretary have incurred expenses in the amount of EUR 18,008.44.

210. In addition, the PCA's fees for the administration of the proceedings amount to EUR 55,461.50 and other costs, including Hearing-related expenses, to EUR 66,998.06.

211. Therefore, the total cost of the proceedings is EUR 835,048.25. The Parties have made advances on costs of EUR 940,000 in equal parts. The PCA shall refund half of the remainder to each Party.

212. In terms of the Parties' legal and other costs, and excluding advances on costs, the Respondent seeks reimbursement of AUD 12,903,184.10,[365] plus interest at a rate of 4.35%, compounded

[365] Respondent's Statement of Costs, 7 February 2025 (Total claimed costs of AUD 13,672,574.65 *minus* "Respondent's Share of Advances to PCA" of AUD 769,390.55).

quarterly as of 30 days of the Award,[366] while the Claimant initially sought reimbursement of EUR 7,444,751.[367] However, as noted above, the Claimant subsequently withdrew its Statement of Costs, while clarifying that, for purposes of this arbitration, its costs are "zero".[368]

C. COST ALLOCATION

213. Under Article 25.4 of Chapter 11 and Article 42(1) of the UNCITRAL Rules, costs in principle follow the event, and the Tribunal has no reason to depart from this principle in the instant case.

214. The Respondent has prevailed on jurisdiction. Although Australia's costs are significant, they are comparable to those initially sought by the Claimant once the relevant currencies are converted. More importantly, the Respondent's potential liability was extraordinarily high. On the merits, the Claimant sought compensation for USD 198,202,414,285.[369] This being so, it appears legitimate for Australia to have taken the utmost precautions to protect its public funds.

215. In any event, the reasonableness of the Respondent's claim for costs is undisputed. With its own claim for costs, the Claimant withdrew its entire Statement of Costs; it also stated that it did not seek to comment on the Respondent's costs statement.[370] In doing so, the Claimant withdrew its submissions on the proper cost allocation. Thus, it assumed the risk that the Respondent's costs would stand unrebutted.

216. As a result, in the exercise of its power in matters of cost allocation and taking into consideration the applicable rules and relevant circumstances, the Tribunal deems it fair and appropriate that the Claimant bear its own legal fees and costs, the costs of the proceedings, and the Respondent's legal fees and costs.

217. The Respondent seeks post-Award interest at a rate of 4.35% compounded quarterly as of 30 days from the Award,[371] on all claimed costs, including its share of the advance on costs.[372]

218. The rate claimed is equivalent to the "Australian 'cash rate' […] set by the Reserve Bank of Australia […] as of 31 January 2025".[373] As such, it is designed to apply to AUD-denominated debts, such as the legal costs incurred by the Respondent. By contrast, it is not a rate intended to apply to debts in EUR, which is the currency of the advances on costs. Consequently, the Tribunal will not award interest on the reimbursement of the cost advances, but only on the Respondent's legal and other costs.

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366 Respondent's Statement of Costs, 7 February 2025, ¶¶ 20-21.

367 Claimant's Statement of Costs, 7 February 2025 (Total claimed costs of EUR 7,913,358 *minus* "PCA Costs (including Tribunal fees)" of EUR 468,607).

368 *See supra*, ¶¶ 118, 120. Pursuant to Article 26 of Chapter 11 and PO3, the Parties' Statements of Costs and the Claimant's letter withdrawing its own have been published on the PCA's website "[i]n order for the public record to fully reflect the proceedings" (Tribunal's communication of 8 April 2025). For this same reason, the Tribunal deems it appropriate to refer to the Claimant's Statement of Costs in the present context without prejudice to its withdrawal.

369 A-NoA, ¶ 81.

370 *See supra*, ¶¶ 118, 120.

371 *See supra*, ¶ 212.

372 Respondent's Statement of Costs, 7 February 2025, ¶¶ 20-21.

373 Respondent's Statement of Costs, 7 February 2025, ¶ 21.

219. For these reasons, the Claimant shall pay the Respondent for its share of the costs of the proceedings, that is EUR 417,524.12. In addition, it shall pay the Respondent's legal and other costs in an amount of AUD 12,903,184.10, which shall carry interest at 4.35% per annum, compounded quarterly, commencing from 30 days after the date of this Award until payment in full.

VIII. DECISION

220. For the foregoing reasons, the Tribunal:

i. Declines jurisdiction;

ii. Fixes the costs of the proceedings at EUR 835,048.25;

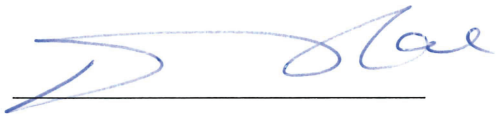
iii. Orders the Claimant to reimburse to the Respondent the latter's share of the advance on costs of the proceedings in the amount of EUR 417,524.12; and

iv. Orders the Claimant to pay to the Respondent the latter's legal representation and other costs in the amount of AUD 12,903,184.10, with interest at 4.35% per annum, compounded quarterly, commencing 30 days after the date of this Award until payment in full.

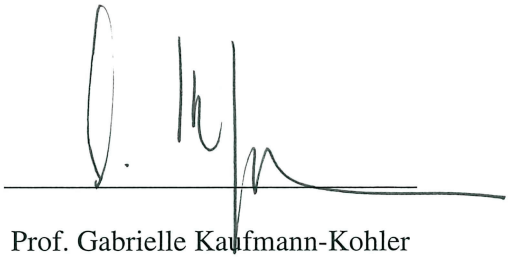
Seat of arbitration: Geneva, Switzerland

Date: 26 September 2025

Mr. William Kirtley



Prof. Donald McRae



Prof. Gabrielle Kaufmann-Kohler
(Presiding Arbitrator)