

14 October 2020

Senator the Hon. Marise Payne  
Minister for Foreign Affairs  
Department of Foreign Affairs and Trade  
R.G. Casey Building  
John McEwen Crescent  
Barton ACT 2600  
Australia

**Re: Request for consultations in relation to a dispute under the Singapore-Australia Free Trade Agreement and pertaining to the Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Act 2020 (WA)**

Dear Minister,

I write to you in your capacity as the Minister of Foreign Affairs of the Commonwealth of Australia ("Australia"), as the counsel representing Zeph Investments Pte Ltd ("Zeph Investments"). This communication is being sent pursuant to the 2003 Singapore-Australia Free Trade Agreement ("SAFTA").

Zeph Investments is a legal person properly constituted and incorporated under the law of the Republic of Singapore ("Singapore") and actively engaged in business there. Zeph Investments owns and controls two Australian-incorporated companies: Mineralogy Pty Ltd ("Mineralogy") and International Minerals Pty Ltd ("International Minerals", together, the "Zeph Affiliates"; and the Zeph Affiliates and Zeph Investments together the "Zeph Group").

## **Zeph Investments is raising a dispute with Australia under SAFTA**

Zeph Investments hereby respectfully gives Australia notice of a dispute that has arisen in relation to its investments in Australia (the "Dispute"). As set out in further detail below, the Dispute involves, *inter alia*, a breach of Chapter 8, Articles 4, 5 and 6 of SAFTA, which has arisen as a consequence of the *Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Act 2020 (WA)* (the "2020 Amendment Act"), enacted by the Government of Western Australia on 13 August 2020. Zeph Investments is raising the Dispute on its own behalf and on behalf of the Zeph Affiliates, which it owns and controls. Under Chapter 8, Article 23 of SAFTA, in the event of an investment dispute, Zeph Investments and Australia should initially seek to resolve it through consultation and negotiation. For avoidance of doubt, I confirm that this communication constitutes the delivery to Australia by Zeph Investments of a written request for consultations pursuant to Chapter 8, Article 23 of SAFTA. Zeph Investments hopes that the Dispute can be resolved expeditiously and amicably through consultations and negotiations.

## Background to the Dispute

Zeph Investments has made investments in Australia *inter alia* in the form of its direct shareholding in Mineralogy and indirect shareholding in International Minerals.

On 5 December 2001, the Zeph Affiliates, among others, entered into an agreement in writing with the Government of Western Australia for the purpose of developing mineral resources in the Pilbara region of Western Australia (the “**Original Agreement**”). The Government of Western Australia ratified and authorised the implementation of the Original Agreement by section 6 of the *Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Act 2002* (WA) (the “**2002 State Agreement Act**”).

On 14 November 2008, the Zeph Affiliates, among others, entered into an agreement in writing with the Government of Western Australia varying the terms of the Original Agreement (the “**2008 Variation Agreement**”). The Government of Western Australia ratified and authorised the implementation of the 2008 Variation Agreement by section 6 of the *Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Act 2008* (WA). The Original Agreement, as varied by the 2008 Variation Agreement, is hereafter described as the “**State Agreement**”.

On 8 August 2012, the Zeph Affiliates submitted a comprehensive proposal to the Government of Western Australia to develop the Balmoral South Iron Ore Project (the “**BSIOP**”) in the Pilbara region (the “**BSIOP Proposal**”).

On 4 September 2012, the Government of Western Australia refused to consider and therefore effectively rejected the BSIOP Proposal in breach of the State Agreement (the “**First Breach**”). The Government of Western Australia’s refusal arose out of a difference of view between the Zeph Affiliates and the Government of Western Australia as to whether the BSIOP Proposal constituted a proposal for the purposes of the State Agreement.

Pursuant to the State Agreement’s arbitration clause, this difference of view was referred to arbitration under the *Commercial Arbitration Act 1985* (WA). The Supreme Court of Western Australia appointed the eminent retired Justice the Hon. Michael McHugh AC QC of the High Court of Australia as arbitrator to decide this difference of view (the “**First McHugh Arbitration**”). On 20 May 2014, the arbitrator resolved this difference of view in favour of the Zeph Affiliates (the “**First McHugh Award**”). In the First McHugh Award, the arbitrator held:

- (a) that the BSIOP Proposal was a proposal for the purposes of the State Agreement and that “[t]he Minister was required to deal with it under Clause 7 of that Agreement, which he has failed to do”;<sup>1</sup> and

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<sup>1</sup> *Mineralogy Pty Ltd and International Minerals Pty Ltd v. The State of Western Australia*, Award, 20 May 2014 (“**First McHugh Award**”), paragraph 66.



- (b) that the failure of the Minister to give a decision on the BSIOP proposal within two months of its receipt “means that he is in breach of the State Agreement and is liable in damages for any damage that the [Zeph Affiliates] may have suffered as a result of the breach”.<sup>2</sup>

Having failed once, the Government of Western Australia made a second attempt to circumvent its obligations to the Zeph Affiliates under the State Agreement. On 22 July 2014, the Government of Western Australia purported to approve the BSIOP Proposal subject to the imposition of 46 “conditions precedent”. This purported approval subject to 46 conditions precedent was so unreasonable as to constitute a further breach of the State Agreement (the “**Second Breach**”).

In 2019, the Zeph Affiliates and the Government of Western Australia referred to Mr McHugh a further arbitration under the State Agreement (the “**Second McHugh Arbitration**”). Mr McHugh described the issues referred to him in the Second McHugh Arbitration as being:

(a) whether the Applicants’ right to recover damages (the First Damages Claim) was heard and determined in the May 2014 Award and whether they are now precluded from pursuing that claim (the Finality Issue);

(b) alternatively, if the First Damages claim was not determined in that Award and remains to be determined in that arbitration, whether I should adjourn those proceedings to allow the Respondent to apply to the Supreme Court of Western Australia under section 46 of the *Commercial Arbitration Act* (WA) 1985 to terminate the arbitration (the Section 46 Issue);

(c) whether there has been inordinate and inexcusable delay on the part of the Applicants in conducting another or alternative damages claim and in conducting a claim that the Minister had erred in subsequently making the carrying out of the Proposal subject to 46 conditions. If there had been such delay, whether those claims should be dismissed under section 25(2) of the *Commercial Arbitration Act* (WA) 2012 (the Section 25 Issue).<sup>3</sup>

On 11 October 2019, Mr McHugh held again in favour of the Zeph Affiliates (the “**Second McHugh Award**”). In the Second McHugh Award, the arbitrator held:

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<sup>2</sup> First McHugh Award, paragraph 67.

<sup>3</sup> *Mineralogy Pty Ltd and International Minerals Pty Ltd v. The State of Western Australia*, Award, 11 October 2019 (“**Second McHugh Award**”), paragraph 2.

- (a) that “the [Zeph Affiliates] right to recover damages was not heard and determined in the [First McHugh Award]”;<sup>4</sup>
- (b) that “the [Zeph Affiliates] are not foreclosed from further pursuing claims for damages arising from any breach or breaches of the State Agreement”;<sup>5</sup>
- (c) that the First McHugh Award terminated the First McHugh Arbitration such that he had “no jurisdiction to adjourn the proceedings to allow time for the [Government of Western Australia] to apply to the Supreme Court under section 46 of the *Commercial Arbitration Act* 1985 (WA) to terminate the [First McHugh Arbitration]”;<sup>6</sup>
- (d) that “there had not been inordinate and inexcusable delay on the part of the [Zeph Affiliates] in progressing” their claims for damages.<sup>7</sup>

On 28 February 2020, the Supreme Court of Western Australia dismissed the Government of Western Australia’s purported appeal against the Second McHugh Award.<sup>8</sup> On 12 March 2020, the Government of Western Australia discontinued its further application to set aside the Second McHugh Award.

Following the Second McHugh Award, the Zeph Affiliates sought to proceed with their claims against the Government of Western Australia for damages by reason of the Government of Western Australia’s breaches of the State Agreement (the “Third McHugh Arbitration”). On 26 June 2020, Mr McHugh set down these claims for damages for hearing commencing on 30 November 2020 and undertook to render his award on damages on or before 12 February 2021. On 26 June 2020, Mr McHugh also directed the Zeph Affiliates and the Government of Western Australia to attend mediation by no later than 30 October 2020. On 8 July 2020, the Government of Western Australia executed an agreement setting out the terms of Mr McHugh’s engagement in the Third McHugh Arbitration. Pursuant to Mr McHugh’s direction, on or around 5 August 2020, the Government of Western Australia further confirmed the terms of engagement of the Hon. Wayne Martin AC QC as mediator.

## The Dispute

### The 2020 Amendment Act

Faced with the consequences of its unlawful actions, the Government of Western Australia enacted the 2020 Amendment Act. This was an arbitrary and discriminatory attempt to derail the Third McHugh Arbitration and to escape the rulings in the First and Second McHugh Awards.

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<sup>4</sup> Second McHugh Award, paragraph 122.

<sup>5</sup> Second McHugh Award, paragraph 122.

<sup>6</sup> Second McHugh Award, paragraph 122.

<sup>7</sup> Second McHugh Award, paragraph 122.

<sup>8</sup> *The State of Western Australia v Mineralogy Pty Ltd* [2020] WASC 58.



By no later than about 30 June 2020, as the Government of Western Australia's own Attorney-General has confirmed, the Government of Western Australia was already drafting the 2020 Amendment Act in secrecy.<sup>9</sup> This directly contradicted the Government of Western Australia's commitments in executing terms of engagement for Mr McHugh and Mr Martin as arbitrator and mediator on 8 July and 5 August 2020 respectively. Contrary to the Government of Western Australia's clear representations to the Zeph Affiliates, on which the Government of Western Australia intended Zeph Investments to rely to its detriment, the Government of Western Australia in fact had no intention to participate any further in the Third McHugh Arbitration.

Having drafted the 2020 Amendment Act in secrecy, the Government of Western Australia then rushed the 2020 Amendment Act through parliament in just two days. First announced on the evening of 11 August 2020, the WA Parliament passed the 2020 Amendment Act by late 13 August 2020. The Government of Western Australia's own Premier and Attorney-General left no doubt in their public statements about the purposes of the 2020 Amendment Act: to terminate and thwart the arbitral proceedings brought by the Zeph Affiliates and to escape any liability in connection with the State Agreement.

The 2002 State Agreement Act, as amended by the 2020 Amendment Act, provides *inter alia* that:

- (a) the BSIOP Proposal is to have no contractual or other legal effect under the State Agreement or otherwise (section 9);
- (b) any relevant arbitration concerning the BSIOP that is in progress or otherwise not completed immediately before commencement of the 2020 Amendment Act is terminated with immediate effect (section 10);
- (c) the First and Second McHugh Awards are of no effect and are taken never to have had any effect (section 10);
- (d) on and after commencement of the 2020 Amendment Act, Western Australia and its government and agencies have and can have no liability to any person in any way connected with the BSIOP (and that any such liability existing before commencement is extinguished) (section 11);
- (e) on and after commencement of the 2020 Amendment Act, no proceedings can be brought to establish, quantify or enforce any such liability (section 11);

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<sup>9</sup> See "Unleash the left hook: WA law to block Clive Palmer set to pass swiftly", *The New Daily*, 13 August 2020, available at [thenewdaily.com.au/news/state/wa/2020/08/13/clive-palmer-wa-government/](https://thenewdaily.com.au/news/state/wa/2020/08/13/clive-palmer-wa-government/) (reporting statements by the Government of Western Australia's Attorney-General that "[t]his legislation has been crafted over the last six weeks in secret by the best legal minds in this city").

- (f) there can be no appeal against or review of any WA state conduct concerning the BSIOP Proposal and the rules of natural justice, including any duty of procedural fairness, shall not apply (section 12);
- (g) the Zeph Affiliates must indemnify, and keep indemnified, Western Australia against any loss or liability connected with the BSIOP (section 14);
- (h) the Zeph Affiliates must indemnify, and keep indemnified, Western Australia against any legal costs and any liability to pay any legal costs of any other person in connection with legal proceedings connected with the BSIOP, as well as any loss connected with a stated intention or threat to bring such proceedings (section 14);
- (i) Western Australia may (without limitation) enforce this indemnity even if it has not made any payment or done anything else to meet, perform or address the proceedings, liability or loss in question (section 14);
- (j) no conduct of Western Australia connected with consideration of courses of action for resolving disputes about the BSIOP, including anything in connection with the 2020 Amendment Act itself and any communications and statements made in connection therewith, has or has ever had the effect of causing or giving rise to the commission of a civil wrong by Western Australia (section 18);
- (k) no such conduct of Western Australia has or has ever had the effect of placing Western Australia in breach of or of frustrating the State Agreement, any related arbitration agreement, any related mediation agreement or any other agreement or understanding, nor of giving rise to any right or remedy against Western Australia (section 18);
- (l) no document, other thing or oral testimony connected with such conduct is admissible in evidence or can otherwise be relied upon or used in any proceedings in any way that is against the interests of Western Australia (section 18);
- (m) Western Australia has and can have no liability to any person that is in any way connected with such conduct and any such liability that Western Australia had before commencement of the 2020 Amendment Act is extinguished (section 19);
- (n) no such conduct of Western Australia can be appealed against, challenged, quashed or called into question on any basis and the rules of natural justice, including any duty of procedural fairness, shall not apply (section 20);
- (o) any proceedings in which such conduct is appealed against, challenged, quashed or called into question on any basis that are not completed before commencement of the 2020 Amendment Act are terminated (section 20);
- (p) if any proceedings in which such conduct is appealed against, challenged, quashed or called into question on any basis have been completed before commencement of the 2020 Amendment Act, any remedy, ruling or other outcome unfavourable to Western



Australia or that requires Western Australia to do or not do anything is extinguished (section 20); and

- (q) any such conduct of Western Australia before, on or after commencement of the 2020 Amendment Act does not constitute and is taken never to have constituted an offence (section 20).

On 14 August 2020, immediately following the enactment of the 2020 Amendment Act, the Government of Western Australia wrote to Mr McHugh asserting that the Third McHugh Arbitration had been terminated pursuant to the 2020 Amendment Act.

By any fair and objective assessment, this conduct on the part of the Government of Western Australia shocks the conscience. Amongst other things, it represents an unmitigated departure by the Government of Western Australia from the rule of law. The Government of Western Australia's conduct in connection with the 2020 Amendment Act has directly and indirectly resulted in significant harm to Zeph Investments' investments in Australia. The Dispute has arisen from these actions by the Government of Western Australia.

#### The 2020 Amendment Act violates Australia's international legal obligations under SAFTA

Under public international law, including SAFTA, Australia is responsible for the conduct of the Government of Western Australia. The 2020 Amendment Act manifestly violates Australia's international legal obligations under SAFTA. These obligations include, but are not limited to, the obligations on Australia to:

- (a) accord "fair and equitable treatment" to the Zeph Group and their investments (Chapter 8, Article 6);
- (b) accord "full protection and security" to the Zeph Group and their investments (Chapter 8, Article 6);
- (c) accord treatment to the Zeph Group and their investments that is no less favourable than the treatment Australia accords to its own investors and investments (Chapter 8, Article 4); and
- (d) accord treatment to the Zeph Group and their investments that is no less favourable than the treatment Australia accords, in like circumstances, to investors of any other third country (the "most-favoured nation" clause), including the obligation to adhere to any undertakings given by Australia concerning an investment<sup>10</sup> (Chapter 8, Article 5).

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<sup>10</sup> An obligation that Australia has assumed, for example, pursuant to Article 11 of the 1990 Agreement between the Government of Australia and the Government of the Independent State of Papua New Guinea for the Promotion and Protection of Investments.

## Request for consultations

Chapter 8, Article 23 of SAFTA entitles Zeph Investments to the benefit of consultations and negotiations with Australia to resolve the Dispute amicably and it has hereby requested to do so. The Zeph Group is committed to trying to settle the Dispute expeditiously and amicably. It is the Zeph Group's belief that an expeditious and amicable settlement of the Dispute is in the interest of both the Zeph Group and Australia and, indeed, of Western Australia. With this communication, Zeph Investments therefore transmits, both on its own behalf and on behalf of the Zeph Affiliates, a written request for consultations in accordance with Chapter 8, Article 23.2 of SAFTA.

In the event that the requested consultations and negotiations do not conclude in a settlement of the Dispute within six months of the date of this communication, Zeph Investments reserves its right to refer the Dispute to international arbitration pursuant to Chapter 8, Article 24 of SAFTA. For avoidance of doubt, Zeph Investments hereby respectfully gives Australia notice of its consent to the operation of the dispute resolution provisions in SAFTA, including arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Zeph Investments may decide in the future to refer the Dispute to arbitration if it is not settled by the expiry of this six-month period.

Zeph Investments reserves its rights to amend, develop and supplement the Zeph Group's claims.

Zeph Investments respectfully requests that all formal communications relating to this request for consultations be directed to its counsel:

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Yours sincerely,



Robert G. Volterra

cc.:



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