

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**The Carlyle Group L.P., Carlyle Investment Management L.L.C., Carlyle  
Commodity Management L.L.C., and others**

**v.**

**Kingdom of Morocco**

**(ICSID Case No. ARB/18/29)**

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**PROCEDURAL ORDER NO. 4  
Decision on Bifurcation**

***Members of the Tribunal***

Prof. Juan Fernández-Armesto, President of the Tribunal

Dr. Horacio A. Grigera Naón

Mr. Samuel Wordsworth, QC

***Secretary of the Tribunal***

Ms. Ella Rosenberg

***Assistant to the Tribunal***

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January 20, 2020

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**WHEREAS**

1. This arbitration arises between The Carlyle Group L.P.; Carlyle Investment Management L.L.C.; CCM, TC Group, L.L.C.; TC Group Investment Holdings, L.P.; Celadon Commodities Fund, LP; and Celadon Partners, LLC [**“Claimants”** or **“Carlyle”**] against the Kingdom of Morocco [**“Morocco”** or **“Respondent”**] under the United States-Morocco Free Trade Agreement signed on June 15, 2004 [the **“Treaty”** or the **“FTA”**]. Claimants and Respondent shall be jointly referred to as the **“Parties”**.
2. On July 31, 2019 Claimants filed their Memorial.
3. On October 11, 2019 Respondent submitted its Application for Bifurcation of the Proceedings [the **“Request”**].
4. On November 20, 2019 Claimants filed their Observations on the Request [**“Claimants’ Observations”**].
5. In the procedural calendars attached to Procedural Order No. 1 as Annex B, the Tribunal foresaw a period of two months to issue the decision on bifurcation.
6. After deliberations, the Tribunal now issues its decision on bifurcation within the established time period.

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7. The Tribunal will summarize the Parties' positions regarding bifurcation of the proceedings.

### **1. RESPONDENT'S POSITION**

8. Respondent has presented five grounds for bifurcation of the proceedings. Three of those grounds – according to Respondent – warrant mandatory bifurcation pursuant to Article 10.19.4 of the Treaty (**A.**).<sup>1</sup> The other two grounds for bifurcation are discretionary pursuant to Article 41(2) of the ICSID Convention supplemented by Article 41(3) of the ICSID Arbitration Rules (**B.**).<sup>2</sup>

9. As a preliminary matter, Respondent argues that if it raises an objection falling within the scope of Article 10.19.4, the Tribunal must suspend the proceedings on the merits until the application is resolved. This applies to any objection capable of resolution under its terms, including jurisdictional objections that do not require determinations of contested factual matters. Respondent considers that this is made clear by:<sup>3</sup>

- The use of the words “any objection” in the *chapeau* to Article 10.19.4;
- The provision in Article 10.19.4 that “[t]he respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5”; and
- The object and purpose of Article 10.19.4 to provide a method for resolving claims which do not involve contested factual matters as a preliminary matter.

### **A. Objections that would warrant mandatory bifurcation**

10. Respondent raises three different objections that would allegedly require mandatory bifurcation: the First Objection relates to the merits of the case (**a.**) but the Second (**b.**) and Third Objections (**c.**) are jurisdictional.

#### **a. First Objection**

11. Respondent's first objection turns on a specific aspect of Claimants' case [“**Claimants' alternative case**”]:<sup>4</sup> Claimants' allegation of misconduct by

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<sup>1</sup> Request, paras. 6-14.

<sup>2</sup> Request, paras. 15-18.

<sup>3</sup> Request, para. 13.

<sup>4</sup> Respondent in para. 33 of the Request defines Claimants' alternative case as that the Moroccan government:

- seized SAMIR's assets, forcing the company to shut down, and ordered SAMIR to dispose of the Commodities, giving rise to an expropriation (Article 10.6 of the Treaty) and a breach of fair and equitable treatment [“**FET**”] (Article 10.5.1 of the Treaty), and

Morocco against SAMIR (a company in which Claimants have no proprietary interest) amounting to expropriation and a violation of FET.<sup>5</sup> Respondent argues that Claimants' alternative case is misconceived because it reveals no pleaded breach of the Treaty and the alleged losses are too remote for a claim under the Treaty:<sup>6</sup>

- No breach can be derived from actions of the Moroccan government against its own nationals (SAMIR) in which Claimants have no proprietary interest and do not exercise control;<sup>7</sup> the Treaty does not provide a cause of action for a creditor to claim damages in respect of the alleged mistreatment of a third-party company which is a national of the host state;<sup>8</sup> furthermore, Claimants present no evidence of wrongdoing by Morocco against SAMIR.<sup>9</sup>
- Claimants' claim based on SAMIR's insolvency involves alleged damages that are too remote to be recoverable under international law<sup>10</sup>; the parties to the Treaty cannot possibly have considered this kind of claim to give rise to an actionable loss under Article 10.5.1 of the Treaty.<sup>11</sup>

12. Respondent insists that this objection gives rise to a pure question of law, concerning remoteness and the law of state responsibility.<sup>12</sup> It constitutes an objection that "as a matter of law, a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 10.25" within the meaning of Article 10.19.4 of the Treaty.

#### **b. Second Objection**

13. Respondent's Second Objection is that Claimants lack standing to bring a claim with respect to assets and/or losses of Cayman entities. None of the US-domiciled Claimants directly owns the claimed investments (the Investment Agreements and the Commodities), which seem to belong to Cayman entities. And the Claimants themselves were never parties to the Investment Agreements.<sup>13</sup>
14. Respondent avers that this objection is fatal and must necessarily dispose of the entire claim, since under international law, the company is distinct from its shareholders.<sup>14</sup> And under the Treaty only the company – but not a shareholder, which is what Claimants are *vis-à-vis* the Cayman entities – has the capacity to

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- forced SAMIR into liquidation and then blocked outside bids to purchase the refinery, amounting to a breach of FET.

<sup>5</sup> Request, paras. 35-36.

<sup>6</sup> Request, paras. 36-46.

<sup>7</sup> Request, para. 38.1.

<sup>8</sup> Request, para. 38.1.

<sup>9</sup> Request, para. 38.2.

<sup>10</sup> Request, para. 41.

<sup>11</sup> Request, para. 45.

<sup>12</sup> Request, para. 46.

<sup>13</sup> Request, para. 47. Where it refers to Investment Agreements below, the Tribunal does so for convenience only and does not enter into the question of whether there is any investment in this case.

<sup>14</sup> Request, para. 48, citing to *HICEE v. Slovak Republic*.

bring claims with respect to company's assets.<sup>15</sup> Nowhere in Article 10.15.1 of the Treaty is it provided that a claimant is entitled to submit a claim on behalf of an investment vehicle incorporated in a third state.<sup>16</sup> It follows that such a claim is outside the Tribunal's jurisdiction.

15. Respondent argues that this objection requires bifurcation under Article 10.19.4 since:

- The facts required to substantiate the claim have been admitted by Claimants in their Memorial, and
- The objection is a pure question of law that, if upheld, will dispose of the entire case, such that no award in their favour can be made under Article 10.25 of the Treaty.

**c. Third Objection**

16. Respondent's Third Objection is that Claimants' investments do not meet the jurisdictional requirements of Article 25(1) of the ICSID Convention or Article 10.27 of the Treaty.

17. Article 25(1) of the ICSID Convention requires, in order for ICSID to have jurisdiction over a dispute, that the claimant establish that it has an investment in the territory of the host state. Case law has established that "investment" has an inherent meaning, entailing:

- (i) contributions by the investor of
- (ii) certain duration and
- (iii) assuming a level of risk.<sup>17</sup>

Such requirements are also reflected in Article 10.27 of the Treaty which defines "investment" as "every asset [...] that has the characteristics of an investment, including such characteristics as the commitment of capital and other resources, the expectation of gain or profit, or the assumption of risk".<sup>18</sup>

18. Respondent argues that Claimants' alleged investments do not satisfy any of the requirements, mainly because:

- First, Claimants have provided no evidence that they made any contributions, financial or otherwise to the Cayman entities, and thus to the Investment

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<sup>15</sup> Request, paras. 48-49, citing to *Postova banka v. Greece*, RL-0006, *AAPL v. Sri Lanka*, RL-0007, *Karkey v. Pakistan*, RL-0008, *ST-AD v. Bulgaria*, RL-0009, and *Enkev v. Poland*, RL-0010.

<sup>16</sup> Request, paras. 51-52, citing to *Bilon v. Canada*, RL-0011.

<sup>17</sup> Request, para. 55.

<sup>18</sup> Request, para. 56.

Agreements and Commodities; and the money provided under the letters of credit was provided directly to the suppliers in third states;<sup>19</sup>

- Second, Claimants operations with SAMIR lacked the necessary duration to constitute an investment; each of the individual Transactions was intended to be entirely closed within a handful of months and the entire arrangement was only on foot for approximately six months;<sup>20</sup> despite Claimants' allegation, none of them made a commitment under the Commitment Letter written by SAMIR.<sup>21</sup>
  - Third, the risk of losing the Commodities is not a qualifying species of risk.<sup>22</sup>
19. Respondent submits that this objection is a discrete legal point and therefore warrants mandatory bifurcation under Article 10.19.4.<sup>23</sup> Alternatively, it would be a strong ground for discretionary bifurcation, since it can be dealt with shortly, it is not intertwined with the merits and, if granted, would dispose of the whole proceeding.<sup>24</sup>

**B. Objections that would warrant discretionary bifurcation**

20. As regards the Tribunal's discretion to bifurcate the proceedings under Articles 41(2) of the ICSID Convention and 41(3) of the ICSID Arbitration Rules, Respondent argues that the Tribunal must consider the following factors:<sup>25</sup>
- Whether the request is substantial or frivolous;
  - Whether the request, if granted, would lead to a material reduction in the proceedings at the next stage; and
  - Whether bifurcation is impractical in the sense that the issues are too intertwined with the merits.
21. Respondent argues that its two discretionary objections (the Fourth and Fifth Objection):<sup>26</sup>
- Are substantial and in no way frivolous;
  - If resolved in favour of Morocco, they would dispose of the entire case or materially reduce its scope; and

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<sup>19</sup> Request, para. 58.

<sup>20</sup> Request, para. 59.

<sup>21</sup> Request, para. 60.

<sup>22</sup> Request, paras. 61-63.

<sup>23</sup> Request, para. 64.

<sup>24</sup> Request, para. 64.

<sup>25</sup> Request, para. 17, citing to *Emmis v. Hungary*, RL-0003.

<sup>26</sup> Request, para. 18.

- Are not overtly intertwined with the merits or would require the Tribunal to embark on extensive fact-finding exercises.

**a. Fourth Objection**

22. Morocco's objects to the jurisdiction of the Tribunal on the basis that Claimants have failed to establish that they are investors for the purposes of Article 10.27 of the Treaty for three reasons:
23. First, Claimants have not provided any proof that they own or control the Cayman entities that directly transacted with SAMIR.<sup>27</sup> On Claimant's case, their investments are directly owned and controlled by the Cayman entities. But Claimants simply provide assertions, but no documentary evidence, on their relationship with the Cayman entities.
24. Second, the Investment Agreements (save the CSA) cannot be considered investments "in the territory of Morocco".<sup>28</sup> In order to constitute an investment in the territory of Morocco, the Investment Agreements would need to give rise to rights in Moroccan law, such that Morocco became the contractual *situs*.<sup>29</sup> Only the CSA is governed by Moroccan law, all other Investment Agreements are governed by New York law.<sup>30</sup> Thus, the majority of the Investment Agreements cannot be considered investment "in the territory of Morocco". The acceptance of this objection by the Tribunal would result in the dismissal of all the claims based on contractual rights derived from the Investment Agreements.<sup>31</sup>
25. Third, pursuant to the Investment Agreements, the Claimants never legally owned or controlled the Commodities.<sup>32</sup> If contractual rights arising from the Investment Agreements are not considered investments pursuant to Article 10.27 of the Treaty, there would only be two possible investments on which the Tribunal's jurisdiction can be founded: the CSA and the Commodities themselves.<sup>33</sup> The capacity of the CSA to give rise to a claim depends, however, on the question of who holds title to the Commodities.<sup>34</sup> Despite Claimants' factual recount of the case, Respondent submits that pursuant to the terms of the MCTA, the Cayman Entities never had title to the Commodities,<sup>35</sup> as has been confirmed by a judgement of the Commercial Court of Casablanca.<sup>36</sup>

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<sup>27</sup> Request, paras. 70-73.

<sup>28</sup> Request, paras. 74-79.

<sup>29</sup> Request, para. 77.

<sup>30</sup> Request, para. 77.

<sup>31</sup> Request, para. 79.

<sup>32</sup> Request, paras. 80-86.

<sup>33</sup> Request, para. 80.

<sup>34</sup> Request, para. 81.

<sup>35</sup> Request, paras. 83-85.

<sup>36</sup> Request, para. 86.



**b. Fifth Objection**

26. Respondent's final objection to the Tribunal's *ratione personae* jurisdiction arises out of the requirement of Article 10.27 of the Treaty that an entity can only be considered an investor if it "concretely attempts to make, is making or has made an investment in the territory of the other Party".<sup>37</sup> Respondent alleges that the word "concretely" is key, because it implies that the investor must be active in the process of investment.<sup>38</sup>
27. Respondent submits that there is no evidence that Claimants have been anything other than the passive beneficiaries of the Cayman entities' investment efforts.<sup>39</sup> As such they cannot be said to have concretely made an investment in accordance with Article 10.27 of the Treaty.
28. Furthermore, Claimants' case is that CCM was the investment adviser to Celadon Commodities Fund LP, Celadon Cayman and VMF, but Claimants do not allege that CCM had any ownership or financial interest in the entities it advised.<sup>40</sup> Thus, CCM cannot be considered an investor. As the only thing CCM provided to VMF was advisory and/or management services, it is difficult to see it could have "concretely" made an investment within the meaning of Article 10.27 of the Treaty.<sup>41</sup>

**2. CLAIMANTS' POSITION**

29. Claimants submit that bifurcation in this case should be rejected both because Respondent's arguments are substantially wrong and because to bifurcate would be inefficient and unjust to Claimants.<sup>42</sup>
30. Claimants' arguments regarding each of Respondent's objections are summarized below.

**A. Objections that would warrant mandatory bifurcation**

31. Claimants argue that Respondent's application based on mandatory grounds is untenable because Respondent has blatantly mischaracterized Claimants' claims and mistreated the pertinent legal standard on causation (a.) and due to lack of timelines under the plain language of the Treaty (b.).

**a. First Objection**

32. Claimants submit that in the First Objection Respondent attempts to build an objection pursuant to Article 10.19.4 by:

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<sup>37</sup> Request, paras. 88-98.

<sup>38</sup> Request, para. 88.

<sup>39</sup> Request, para. 93.

<sup>40</sup> Request, para. 94.

<sup>41</sup> Request, para. 96.

<sup>42</sup> Claimants' Observations, para. 2.

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- Erroneously asserting that the basis of Claimants' case is the impact of the Government's actions in SAMIR and SAMIR's insolvency;
  - Deliberately presenting out-of-context statements from Claimants' pending litigation in New York to mislead the Tribunal; and
  - Concocting a causation argument that is premised on an incorrect representation of Claimants' case and is not supported by the law.
33. First, Claimants allege that Respondent grossly mischaracterizes Claimants' case by ignoring that it is based on Morocco's wrongful seizure of assets and freezing and sweeping of accounts belonging to Claimants, and instead insisting that the impact of those actions on SAMIR and SAMIR's "insolvency"/bankruptcy does not give rise to a cognizable claim under the Treaty.<sup>43</sup>
34. Reading the Memorial in its totality (rather than the isolated passages that Respondent focuses on), there can be no question that Claimants' principal allegation is that the Government:
- Directed SAMIR to sell Carlyle's Commodities into the open market without Carlyle's consent;
  - Prevented Carlyle from ever receiving any of the proceeds from the unauthorized sales of its Commodities or from making any other business arrangements that would allow for such payments;
  - Arranged to sweep the proceeds from the unauthorized sales of Carlyle's Commodities from SAMIR's accounts; and
  - Instructed local distributors to pay the Government directly for Carlyle's Commodities.<sup>44</sup>
35. Thus, the Government's actions had the direct effect of depriving a U.S. investor (Carlyle) of its covered investments (Carlyle's Commodities and contractual rights) in violation of the Government's obligations under the Treaty.<sup>45</sup>
36. Second, Respondent presents out-of-context statements from Claimants' pending insurance litigation in New York state court to mislead the Tribunal, when there is nothing inconsistent about Claimants' allegations in either proceeding, and Claimants have unequivocally stated a cognizable claim against Respondent in this arbitration.<sup>46</sup>
37. Third, Respondent makes a "remoteness" argument based on an entirely false premise and a misstatement of Claimants' case.<sup>47</sup> Claimants have indeed met the

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<sup>43</sup> Claimants' Observations, para. 26.

<sup>44</sup> Claimants' Observations, para. 28.

<sup>45</sup> Claimants' Observations, para. 32.

<sup>46</sup> Claimants' Observations, paras. 33-34.

<sup>47</sup> Claimants' Observations, para. 35.

standard of causation by alleging that, among other things, the Government directed SAMIR to dispose of the Commodities, and that, but for the Government's subsequent actions, Claimants may have been able to recover the hundreds of millions of US dollars' worth of Commodities stored in SAMIR's facilities.<sup>48</sup>

**b. Second and Third Objections**

38. The Second and the Third Objection are treated together because, preliminarily, Claimants consider that there is no mandatory bifurcation under Article 10.19.4 of the Treaty with regards to jurisdictional objections. This would, thus, result in the dismissal of both objections.
39. Claimants allege that under the Treaty, the proper procedure for obtaining mandatory bifurcation of preliminary jurisdictional objections is pursuant to Article 10.19.5. However, Article 10.19.5 provides a window of only 45 days after the constitution of the Tribunal for Respondent to submit preliminary jurisdictional objections, and any submission after the 45 days is untimely. Having neglected to avail itself of Article 10.19.5 within the appropriate time, Respondent is not now entitled to mandatory bifurcation of its preliminary jurisdictional objections under Article 10.19.4.<sup>49</sup>
40. Furthermore, when evaluating an objection under Article 10.19.4, a tribunal must assume that all of claimant's factual allegations in support of its claims are true. Were Article 10.19.4 intended to cover jurisdictional objections, the express language of subsection (c) would effectively preclude the tribunal from assessing any such jurisdictional objection because the tribunal would be required to assume that claimant's factual allegations, including as to its standing, are true. Therefore, purely jurisdictional objections — such as those raised in Respondent's Application — are not and cannot be covered by the mandatory bifurcation process set forth in Article 10.19.4.<sup>50</sup>

Substance of the Second Objection

41. As regards the Second Objection, which deals with Claimants' alleged lack of standing, Claimants submit that their investments in Morocco were:
  - Commodities, stored in SAMIR's tanks pursuant to the Transactions and owned by Claimants under the Investment Agreements, which are protectable as "movable property" under Article 10.27(h) of the Treaty; and
  - Contractual rights derived from the Investment Agreements, such as the Put Right, protectable as an "option" under Article 10.27(d) of the Treaty.

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<sup>48</sup> Claimants' Observations, para. 37.

<sup>49</sup> Claimants' Observations, para. 10.

<sup>50</sup> Claimants' Observations, para. 13.

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No investments were made “in” SAMIR by any of the Claimants or the Cayman entities owned and/or controlled by Claimants.

42. If Respondent’s point is that Claimants did not directly make the investments at issue, that does not disqualify Claimants from being “investors” whose investments are protected by the Treaty.<sup>51</sup> And, even if Claimants were not deemed to wholly own or control the Cayman entities (*quod non*) and were mere shareholders in the Cayman entities, Claimants would still not be barred by their position as shareholders and would have standing under international law to bring the present claim against Morocco.<sup>52</sup>
43. Finally, at all relevant times Claimants exercised complete control over the entities involved in the investments and took ownership of the flow of money to and from SAMIR.<sup>53</sup> In sum, the documentation presented by Claimants establishes without question that Claimants owned and/or controlled the entities that were parties to the Investment Agreements with SAMIR, and that through those entities, Claimants owned and/or controlled the investments.<sup>54</sup>

Substance of the Third Objection

44. As regards the Third Objection, Claimants submit that their investments do comply with the jurisdictional requirements of Article 25(1) of the ICSID Convention or Article 10.27 of the Treaty.
45. First, nothing in the Treaty’s definition of investment requires each Claimant to have individually committed capital or other resources; rather, the definition indicates that one of the characteristics of the investment itself is the commitment of capital or other resources. Claimants’ investments involved the commitment of capital, as Carlyle issued more than US \$400 million in letters of credit to purchase the Commodities that were stored in SAMIR’s tanks in accordance with the Investment Agreements.<sup>55</sup>
46. Second, Respondent’s characterization of the investment as a six-month investment is incorrect, because the executed commitment letter demonstrates that Claimants committed to engage in a long series of commodities investments for a minimum of three years.<sup>56</sup> In any case, the definition of “investment” in Article 10.27 of the Treaty provides no specific minimum durational requirement.<sup>57</sup>
47. Finally, Claimants assumed the risk of both the diminution of value of their Commodities and the physical loss of their Commodities. The distinction that Respondent attempts to draw between “operational” risks (which allegedly qualify)

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<sup>51</sup> Claimants’ Observations, para. 58.

<sup>52</sup> Claimants’ Observations, para. 65.

<sup>53</sup> Claimants’ Observations, paras. 66-70.

<sup>54</sup> Claimants’ Observations, para. 70.

<sup>55</sup> Claimants’ Observations, para. 80.

<sup>56</sup> Claimants’ Observations, para. 82.

<sup>57</sup> Claimants’ Observations, para. 81.

and “commercial” risks (which allegedly do not qualify) comes from mere *dicta* in the *Postova Banka v. Greece* case and should not be given significant consideration.<sup>58</sup>

**B. Objections that would warrant discretionary bifurcation**

48. Claimants aver that Respondent’s application for bifurcation cannot be saved by requesting discretionary bifurcation, because it would not result in procedural efficiency and the objections are meritless.
49. First, Respondent’s application is frivolous.<sup>59</sup> Claimants insist that much of the documentation that Respondent alleges is missing from the record has already been provided.<sup>60</sup> Thus, granting Respondent’s Request in the present circumstances would wrongly lend credence to what was nothing more than a delay tactic.<sup>61</sup>
50. Second, Respondent’s argument that the jurisdictional issues are not intertwined with the merits is exceedingly weak and must be rejected.<sup>62</sup> Since the Government’s various wrongful actions are essentially undisputed, a correct and comprehensive understanding of the Investment Agreements and Carlyle’s contractual rights therein and how they were affected by the Government’s actions is at the very heart of Claimants’ case.<sup>63</sup> It would thus be entirely inefficient for the parties and the Tribunal to engage in an extensive review and analysis of the ownership and control issue twice over the course of multiple years.
51. Third, bifurcation of Respondent’s jurisdictional objections will not meaningfully narrow the scope of the arbitration.<sup>64</sup> This is clear from the documents submitted so far by Claimants. In addition, assuming that the Tribunal rejects Respondent’s flawed readings of the Investment Agreements and flawed understanding of Claimants’ corporate structure, then the scope of the case would remain exactly the same: did Respondent’s wrongful actions harm those investments? And did Respondent take those actions knowing that the Investments belonged to Claimants?

**a. Fourth Objection**

52. Morocco’s gave three reasons to object the jurisdiction of the tribunal on the basis that Claimants had failed to establish that they are investors for the purposes of Article 10.27 of the Treaty:

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<sup>58</sup> Claimants’ Observations, para. 83.

<sup>59</sup> Claimants’ Observations, paras. 42-46.

<sup>60</sup> Claimants’ Observations, paras. 42-46.

<sup>61</sup> Claimants’ Observations, para. 46.

<sup>62</sup> Claimants’ Observations, paras. 47-52.

<sup>63</sup> Claimants’ Observations, para. 50.

<sup>64</sup> Claimants’ Observations, paras. 53-55.

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- That Claimants have not provided any proof that they own or control the Cayman entities that directly transacted with SAMIR(i.);<sup>65</sup>
  - That the Investment Agreements (save the CSA) cannot be considered investments “in the territory of Morocco”(ii.) and;<sup>66</sup>
  - That pursuant to the Investment Agreements, the Claimants never legally owned or controlled the Commodities (iii.).<sup>67</sup>
53. (i.) Claimants’ response to the first argument was already addressed in Claimants’ observations to the Second Objection.
54. (ii.) Claimants argue that Respondent is incorrect in contending that the Investment Agreements were not “in the territory” of Morocco simply because not every one of the Investment Agreements was governed by Moroccan law. Respondent does not contest that the Commodities are “in the territory” of Morocco. And as to the contractual rights arising under the Investment Agreements, a myriad of characteristics show that the Investment Agreements were “in the territory” of Morocco for purposes of Article 10.27 of the Treaty (*i.e.* the Transactions were approved by the Moroccan Foreign Exchange Office).<sup>68</sup> In any case, no case law requires investment options to arise under agreements that have a choice of law provision designating the respondent State’s law, in order to be considered “in the territory” of the respondent State.<sup>69</sup>
55. (iii.) Claimants submit that Respondent’s argument, that Claimants “never legally owned or controlled the Commodities” under the Investment Agreements, is wrong as a matter of contract interpretation. Respondent simply ignores the plain language of both the MCTA and the CSA that unequivocally attribute ownership to Claimants.<sup>70</sup> SAMIR also expressly reaffirmed Claimants’ ownership of the Commodities in the Forbearance Agreement, which declared that SAMIR “[did] not have any ownership or property right, title or interest in or to Commodities.”<sup>71</sup>

**b. Fifth Objection**

56. Finally, Claimants submit that Respondent’s interpretation of the word “concretely” in the definition of “investor of a Party” under Article 10.27 of the Treaty, pursuant to which Claimants allegedly must be “active” investors, does not comport with the Treaty (which defines “investment” broadly) or with international law (which does not set forth any particular standard with regard to the “activity” of the investor).<sup>72</sup>

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<sup>65</sup> Request, paras. 70-73.

<sup>66</sup> Request, paras. 74-79.

<sup>67</sup> Request, paras. 80-86.

<sup>68</sup> Claimants’ Observations, para. 75.

<sup>69</sup> Claimants’ Observations, para. 76.

<sup>70</sup> Claimants’ Observations, para. 71.

<sup>71</sup> Claimants’ Observations, para. 72.

<sup>72</sup> Claimants’ Observations, fn. 87.

57. In any event, even if Respondent's interpretation were to be adopted for the sake of argument, Claimants clearly made an active investment in oil and facilitated the arrangement by providing funds in advance.<sup>73</sup>

**3. DECISION**

58. The Tribunal observed in its communication of 22 May 2019 that bifurcation may take place because:<sup>74</sup>

“- the objection has been validly raised under Art. 10.19.4 of the FTA (which warrants a mandatory bifurcation); or

- the objection falls outside the scope of Art. 10.19.4 of the FTA, but the Tribunal in its discretion finds that it should be dealt with as a preliminary question; or

- there is at least one objection in each previous category.”

59. Claimants submit that they made two types of investments in Morocco:<sup>75</sup>

- Commodities stored in SAMIR's tanks pursuant to the Transactions and owned by Claimants under the Investment Agreements, constituting “movable property” under Article 10.27(h) of the FTA; and

- Contractual rights against SAMIR derived from the Investment Agreements, such as the Put Right, which are protected as an “option” under Article 10.27(d) of the FTA.

60. These investments were made between February and August 2015.<sup>76</sup> Claimants aver that they had accepted a commitment to continue the transactions for a three-year period.<sup>77</sup>

61. Claimants are Delaware corporations, which are alleged to be controlled by The Carlyle Group LP, also a Delaware corporation. The Investment Agreements were entered into between certain Cayman entities and SAMIR, a Moroccan corporation. Claimants say that they wholly own and/or legally control the Cayman entities, but even assuming *arguendo* that were not the case, Claimants had *de facto* control over such entities and investments.<sup>78</sup> Claimants took ownership of the flows of money to and from SAMIR.<sup>79</sup>

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<sup>73</sup> Claimants' Observations, fn. 87.

<sup>74</sup> Letter to the Parties of 22 May 2019, para. 24.

<sup>75</sup> Claimants' Memorial, para. 27.

<sup>76</sup> Claimants' Memorial, para. 11.

<sup>77</sup> Claimants' Observations, para. 82.

<sup>78</sup> Claimants' Observations, para. 64.

<sup>79</sup> Claimants' Observations, para. 67.



62. Claimants submit that Morocco's actions constitute a breach of the Treaty, and more specifically of the FET obligation under Article 10.5.1<sup>80</sup> and the obligation not to expropriate without just compensation under Article 10.6 of the Treaty.<sup>81</sup>
63. Respondent raises five objections. The Tribunal will first analyse discretionary bifurcation under Article 41(2) of the Convention (**A.**), and thereafter mandatory bifurcation under Article 10.19.4 of the FTA (**B.**).

**A. Discretionary bifurcation under Article 41(2) of the Convention**

64. Article 41(2) of the ICSID Convention grants arbitral tribunals the power to bifurcate proceedings in order to address admissibility and jurisdictional objections as a preliminary matter:

“Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.”

65. The Convention is supplemented by Article 41(3) of the ICSID Arbitration Rules, which reaffirms the tribunal's discretion to suspend proceedings on the merits in order to decide objections:

“Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. [...]”

66. The Parties agree that the Tribunal should consider the following criteria in order to decide whether to bifurcate the objections raised by Respondent on discretionary grounds:
- Whether bifurcation would promote procedural efficiency;<sup>82</sup>
  - Whether the request is substantial or frivolous;<sup>83</sup>
  - Whether the request, if granted, would lead to a material reduction in the proceedings at the next stage;<sup>84</sup> and
  - Whether bifurcation is impractical because the issues are too intertwined with the merits.<sup>85</sup>

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<sup>80</sup> Claimants' Memorial, paras. 84-130.

<sup>81</sup> Claimants' Memorial, paras. 131-171.

<sup>82</sup> Claimants' Observations, paras. 40-41.

<sup>83</sup> Request, para. 17; Claimants' Observations, para. 41.

<sup>84</sup> Request, para. 17; Claimants' Observations, para. 41.

<sup>85</sup> Request, para. 17; Claimants' Observations, para. 41.



**a. Fourth Objection**

67. Under the Fourth Objection Respondent submits that Claimants are not investors for the purposes of Article 10.27 of the Treaty for three reasons:
- First, Claimants have not proven that they own or control the Cayman entities;<sup>86</sup>
  - Second, Respondent alleges that the Investment Agreements cannot be considered investments in the “territory of Morocco”, because these agreements do not give rights under Moroccan law;<sup>87</sup>
  - Third, Respondent submits that Claimants never legally owned or controlled the Commodities.<sup>88</sup>
68. The Fourth Objection appears to be *prima facie* substantial and the Arbitral Tribunal is of the view that clarifying from the outset whether Claimants are investors under the Treaty and whether their alleged investments meet the Treaty criteria will enhance procedural efficiency; furthermore if the Fourth Objection were to be accepted, it would lead to a complete dismissal of Claimants’ claims.
69. Thus, the Tribunal decides that the Fourth Objection should be bifurcated.

**b. Fifth Objection**

70. Under this Objection Respondent argues that the Treaty definition of investment requires the investor to be active in the process of investment – and submits that Claimants (and especially CCM which provided advisory and/or management services) were passive investors.
71. Since the Tribunal has decided to bifurcate the Fourth Objection, reasons of procedural efficiency and the factors at para. 66 above support that the Fifth Objection also be bifurcated and the Tribunal so decides.

**c. Second and Third Objections**

72. The Second Objection is a *ratione personae* jurisdictional objection – that Claimants lack standing to bring a claim with respect to assets and/or losses of entities incorporated in a third state (*i.e.* the Cayman Islands). And the Third Objection is a *ratione materiae* jurisdictional objection – that Claimants’ investments do not meet the “inherent-meaning-of-investment-test” pursuant to the FTA.
73. Both objections are, to a greater or less extent, factually and legally linked to the Fourth Objection, and if decided in favor of the Respondent would dispose of the case. Since the Tribunal has already decided that the Fourth Objection should be

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<sup>86</sup> Request, para. 70.

<sup>87</sup> Request, para. 74.

<sup>88</sup> Request, para. 80.

bifurcated, and bearing in mind the factors at para. 66 above, the Tribunal, using the discretionary powers conferred by Article 41 of the ICSID Convention, decides that the Second and Third Objections should also be bifurcated.

**B. Mandatory bifurcation under Article 10.19.4 of the FTA**

74. Article 10.19.4 of the FTA requires that the Tribunal bifurcate the procedure in order to address specific objections as a preliminary question:

“4. Without prejudice to a tribunal’s authority to address other objections as a preliminary question, **a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.25.**

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

(b) **On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits**, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

(c) **In deciding an objection under this paragraph, the tribunal shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration** (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

(d) [...]”. [Emphasis added]

75. Article 10.25 of the Treaty, referenced in the *chapeau* of Article 10.19.4 provides as follows:

“Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:

(a) monetary damages and interest, as appropriate; and

(b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and interest, as appropriate, in lieu of restitution.

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A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules."

76. In accordance with the FTA, a Tribunal is obliged to bifurcate "any objection by the respondent", provided that such objection meets the following requirements:
- First, the objection must refer to a claim for which as "a matter of law" no award in favor of claimant can be made;
  - Second, the objection must be submitted no later than the date the tribunal fixes for the respondent to submit its counter-memorial;
  - Third, the objection must assume that the factual allegations, as pleaded in the claimant's submissions, are true.

**a. First Objection**

77. Under this Objection Respondent submits that a part of Claimants' factual allegations cannot be held to be a breach of the Treaty and that the alleged losses are too remote to be recoverable under international law.<sup>89</sup> Respondent avers that this objection gives rise to a pure question of law, concerning the law of State responsibility and the requirement that there be a close connection between breach and damage, and that consequently bifurcation is mandatory under Article 10.19.4 of the Treaty.<sup>90</sup>
78. Claimants say that Respondent grossly mischaracterizes Claimants' case, by ignoring that it is based on Morocco's wrongful seizure of assets and freezing and sweeping of accounts belonging to Claimants, and instead insisting that the impact of those actions on SAMIR and SAMIR's bankruptcy does not give rise to a cognizable claim under the Treaty.<sup>91</sup>
79. In the Tribunal's opinion, the First Objection does not meet one of the requirements set forth under Article 10.19.4 of the Treaty: it does not accept that the totality of the factual allegations, as pleaded by Claimants in their Memorial, are true.
80. As Claimants have convincingly shown, their factual allegations have a different, and much wider scope, than those portrayed in Respondent's First Objection. In their memorial Claimants allege that:
- Respondent directed SAMIR to sell Carlyle's Commodities into the open market without Carlyle's consent;
  - Respondent prevented Carlyle from ever receiving any of the proceeds from the unauthorized sales of its Commodities or from making any other business arrangements that would allow for such payments;

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<sup>89</sup> Request, paras. 36-46.

<sup>90</sup> Request, para. 46.

<sup>91</sup> Claimants' Observations, para. 26.

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- Respondent arranged to sweep the proceeds from the unauthorized sales of Carlyle's Commodities from SAMIR's accounts; and that
- Respondent instructed local distributors to pay the Government directly for Carlyle's Commodities.<sup>92</sup>

These actions – Claimants say – constitute violations of Morocco's obligations under the Treaty which resulted in Claimants being deprived of their investments.<sup>93</sup>

81. Respondent in fact acknowledges that the First Objection does not assume the totality of Claimants' factual allegations, when it admits that it "turns on one specific aspect of the Claimants' case".<sup>94</sup>
82. Under Article 10.19.4 of the Treaty, Respondent is not authorized to select certain facts from Claimants' allegations, in order to argue that such facts by themselves do not amount to a breach of the Treaty. Respondent must accept the totality of the facts as pleaded by Claimants. The necessary consequence is that the First Objection does not meet the requirements to constitute an objection which must be mandatorily bifurcated under such provision.
83. Adjudication of the First Objection requires a full review of the facts. For this reason, the Tribunal finds that the more appropriate approach for the First Objection would be to adjudicate it jointly with the merits of the case.

**b. Second and Third Objections**

84. The Parties have discussed as a preliminary question whether jurisdictional objections can constitute objections giving rise to mandatory bifurcation under Article 10.19.4 of the FTA. The Tribunal has already decided that the Second and Third Objections should be bifurcated under Article 41(2) of the ICSID Convention. Consequently, the issue whether the Second and Third Objection should also be bifurcated under Article 10.19.4 of the FTA has become moot, and need not be addressed.

**C. Summary**

85. For the reasons stated above, the Arbitral Tribunal decides that the Second, Third, Fourth and Fifth Objections should be bifurcated, and that the First Objection should be joined to the merits phase (if any).
86. Consequently, the procedural calendar established in Scenario 3 (Annex B to Procedural Order No. 1) will be followed. The Arbitral Tribunal proposes the following alternative dates for the Hearing on Jurisdiction:

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<sup>92</sup> Claimants' Observations, para. 28.

<sup>93</sup> Claimants' Observations, para. 32.

<sup>94</sup> Request, para. 35.

Procedural Order No. 4

- January 11, 2021
  - January 18, 2021
87. The Arbitral Tribunal would appreciate if the Parties could confer and agree on the hearing dates, the place of the hearing and all other dates still to be determined under the procedural calendar, and inform the Tribunal by **February 13, 2020**.

On behalf of the Arbitral Tribunal,

[Signed]

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Prof. Juan Fernández-Armesto  
President of the Arbitral Tribunal  
Date: January 20, 2020