

IN THE MATTER OF AN ARBITRATION UNDER THE ICSID CONVENTION AND  
THE UNITED STATES–MOROCCO FREE TRADE AGREEMENT

ICSID Case No ARB/18/29

B E T W E E N

THE CARLYLE GROUP LP, CARLYLE INVESTMENT MANAGEMENT LLC,  
CARLYLE COMMODITY MANAGEMENT LLC, TC GROUP LLC, TC GROUP  
INVESTMENT HOLDINGS LP, CELADON COMMODITIES FUND LP AND  
CELADON PARTNERS LLC

Claimants

– and –

KINGDOM OF MOROCCO

Respondent

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RESPONDENT'S APPLICATION FOR BIFURCATION OF  
PROCEEDINGS

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11 October 2019

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## I INTRODUCTION

1 This is the Respondent's ("**Morocco's**") application for bifurcation of these proceedings, filed in accordance with the Tribunal's Procedural Order No 1.

2 As the Tribunal will have understood from the Claimants' Memorial ("**the Memorial**"), this is a case whereby the Claimants allege that they contracted with a private Moroccan undertaking (a local company called la *Société Anonyme Marocaine de l'Industrie du Raffinage*, or "**SAMIR**") through a complex financial structure whereby – so far as Morocco understands – a number of Cayman-incorporated companies financed the acquisition by SAMIR of hydrocarbons to be refined at SAMIR's local refinery. Following SAMIR's insolvency, the Claimants now allege that hydrocarbons and/or funds in which they allegedly held a proprietary interest were expropriated by Morocco.

3 The case advanced in the Memorial is untenable in fact and law. It is poorly articulated, with little by way of particulars or evidence.

4 More importantly for present purposes, it raises a number of issues which either require the mandatory bifurcation of these proceedings under FTA Article 10.19.4, or which strongly support bifurcation in the exercise of the Tribunal's procedural discretion. In summary:

4.1 First, the Claimants' case that Morocco caused the insolvency of SAMIR (a Moroccan company), which in turn caused loss to certain of the Claimants as creditors of SAMIR is untenable in law, even accepting every fact pleaded by the Claimants. The FTA does not give the Claimants a cause of action for Morocco's actions towards a Moroccan national in which the Claimants have no proprietary interest, and any losses allegedly suffered by the Claimants are far too remote to be the subject of a claim. That issue, going to the merits of the case and to the quantification of losses, requires mandatory bifurcation on both parties' interpretation of FTA Article 10.19.4.

4.2 Secondly, the Claimants have failed to establish some of the most basic prerequisites of the Tribunal's jurisdiction under both the FTA and the ICSID Convention. Furthermore, it is woefully unevidenced – incredibly, the Claimants have not provided Morocco or the Tribunal with a single document that establishes that they owned or controlled, directly or indirectly, their alleged investments. These jurisdictional objections reasonably ought to result in bifurcation under both under FTA Article 10.19.4 and/or under the Tribunal's case management discretion.

5 The balance of this application proceeds in four substantive parts:

5.1 **Part II** details the scope of the mandatory bifurcation procedure of FTA Article 10.19.4, as well as the Tribunal's discretionary power to bifurcate under the ICSID Convention and ICSID Rules.

5.2 **Part III** clarifies essential elements of the Claimants' case that are obfuscated in the Memorial, including the precise relationship between the Claimants and various Cayman companies, and those parts of the Claimants' case that are not supported by any documentary evidence. It also provides an outline of the Claimants' case.

5.3 **Part IV** sets out Morocco's preliminary objections which require mandatory bifurcation under FTA Article 10.19.4. The first goes to the merits of the dispute, turning on allegations relating to Morocco's interactions with SAMIR, a local company running a local refinery; the second and third go to the Tribunal's jurisdiction, turning on the fact that (even on the Claimants' own case) none of the Claimants directly owns the claimed investments and that in any event any investments by the Claimants do not satisfy the requirements of Article 25(1) of the ICSID Convention.

5.4 **Part V** outlines Morocco's further preliminary objections to jurisdiction<sup>1</sup> and establishes why each requires that these proceedings be bifurcated as a matter of the Tribunal's discretion.

## II BIFURCATION UNDER FTA ARTICLE 10.19.4 AND INVESTMENT TREATY ARBITRATION PRACTICE

6 As the Tribunal observed in its communication of 22 May 2019:

*"[B]ifurcation might take place because:*

- *the objection has been validly raised under Art 10.19.4 (which warrants 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."*<sup>2</sup>

7 Morocco's objections fulfil each category.

### A The mandatory bifurcation procedure of FTA Article 10.19.4

8 FTA Article 10.19.4 provides (emphasis added):

*"Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address other objections 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 favour 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).*

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<sup>1</sup> Morocco reserves its right to supplement or amend these jurisdictional objections in the event their bifurcation is refused.

<sup>2</sup> Tribunal's communication dated 22 May 2019, ¶ 24.

- (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) *The 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.”*

9 On 18 April 2019, the parties presented to the Tribunal their respective submissions on the interpretation of FTA Article 10.19.4 (“**the April 2019 Submissions**”). This request for bifurcation does not repeat every submission made, and the Tribunal is invited to refer to Morocco’s April 2019 Submission which is adopted as part of this Application. However, for the Tribunal’s convenience, Morocco briefly summarises below the key elements of the FTA Article 10.19.4 procedure.

10 As a starting point, it is clear from the language of the FTA, and in particular the word “*shall*”, that if Morocco raises an objection falling within the scope of Article 10.19.4, the Tribunal must suspend the proceedings on the merits until such time as Morocco’s application under that provision is resolved.<sup>3</sup> This is common ground between the Parties<sup>4</sup> and, it appears, the Tribunal, which noted in its communication

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<sup>3</sup> Further: Respondent’s submission on place of arbitration and bifurcation of proceedings dated 18 April 2019, ¶¶ 28–29.

<sup>4</sup> Claimants’ submissions addressing issues raised during the Tribunal’s first session dated 18 April 2019, ¶ 20.

of 22 May 2019 that an objection that has been validly raised under Article 10.19.4 “warrants a mandatory bifurcation”.<sup>5</sup>

11 Article 10.19.4 clearly allows Morocco to raise any preliminary objection alleging the insufficiency of a claim as a matter of law, which can be determined on the basis of assumed facts. The Claimants appear to accept that this is the case, and describe the position as far as concerns objections to the merits as follows:

*“Article 10.19.4 governs objections to merits claims (not objections to jurisdictional claims) for which no relief can be granted, or, otherwise stated, to merits claims that, as pleaded, are not cognizable, as a matter of law, and therefore cannot be sustained. A good example of a claim that would be subject to an Article 10.19.4 objection would be a claim against the government for expropriation that, as pleaded, reflects the absence of any actual damages or the receipt of adequate compensation from the government.”<sup>6</sup>*

12 Thus, the Claimants accept that insofar as a respondent state identifies an issue on the merits which, even on the facts as pleaded by a claimant, would result in the dismissal of the claim, then that issue falls within the scope of mandatory bifurcation. As explained below, one of Morocco’s preliminary objections falls squarely within this category, and mandatory bifurcation is therefore required even on the Claimants’ interpretation of FTA Article 10.19.4.

13 In their April 2019 Submissions, the Parties disagreed as to whether objections to the Tribunal’s jurisdiction, which do not require determinations of contested factual matters, also fall within the scope of FTA Article 10.19.4. In summary, Morocco’s position is as follows:

13.1 Article 10.19.4, properly construed, applies with respect to any objection capable of resolution under its terms, including objections as to the Tribunal’s jurisdiction (and admissibility). This much is made clear by the use of the words “*any* objection” in the *chapeau* to Article 10.19.4 and by the fact that

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<sup>5</sup> Tribunal’s communication dated 22 May 2019, ¶ 24.

<sup>6</sup> Claimants’ submissions addressing issues raised during the Tribunal’s first session dated 18 April 2019, ¶ 11.

Article 10.19.4 provides 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”. This language confirms that the Article 10.19.4 procedure extends to both merits and jurisdictional objections.

13.2 Interpreting Article 10.19.4 in a way which does not artificially exclude jurisdictional objections is also consistent with the object and purpose of Article 10.19.4,<sup>7</sup> viz. to provide a method for resolving claims which do not involve contested factual matters as a preliminary matter.<sup>8</sup>

14 In short, it is plain that a jurisdictional objection can fall within the scope of Article 10.19.4, provided it proceeds on the basis of the facts as pleaded by a claimant. Morocco has one jurisdictional objection which falls within the scope of Article 10.19.4 and which accordingly also warrants mandatory bifurcation.

**B The Tribunal’s discretion to bifurcate the arbitral proceedings under Article 41(2) of the ICSID Convention and Rule 41(3) of the ICSID Rules**

15 The mandatory bifurcation procedural in FTA Article 10.19.4 supplements the Tribunal’s existing power to bifurcate the proceedings under the ICSID Convention. Article 41(2) of the ICISD Convention provides:

*“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 with the merits of the dispute.”*

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<sup>7</sup> It is well established that the object and purpose of a treaty provision are relevant criteria to be taken into account in the process of Treaty interpretation: see **RL-0001**, Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331, Art 31(1).

<sup>8</sup> For consideration of the relevant case-law on similar provisions in other Treaties (so far as relevant): see Respondent’s submission on place of arbitration and bifurcation of proceedings dated 18 April 2019, ¶¶ 38–42.

16 Article 41(2) is supplemented by Rule 41(3) of the ICSID Rules, which states that “[u]pon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceedings on the merits”.

17 The factors which the Tribunal must consider on a question of bifurcation are well-established.<sup>9</sup> As the *Emmis v Hungary* tribunal explained:

*“The overarching question is one of procedural efficiency. Factors that may be relevant in this regard include:*

- (a) *Whether the request is substantial or frivolous;*
- (b) *Whether the request, if granted, would lead to a material reduction in the proceedings at the next stage;*
- (c) *Whether bifurcation is impractical in the sense that the issues are too intertwined with the merits.”*<sup>10</sup>

18 In addition to its preliminary objections which fall within the scope of the mandatory bifurcation regime under FTA Article 10.19.4, Morocco advances other preliminary objections which it requests the Tribunal also to bifurcate on a discretionary basis on grounds of procedural efficiency.<sup>11</sup> In summary, and for the reasons explained further below:

18.1 Morocco’s preliminary objections are in no way frivolous. They are substantial objections with strong prospects of success.

18.2 If the Tribunal were to resolve any and/or all of the preliminary objections in Morocco’s favour, this would be dispositive of the whole of the proceedings or materially reduce the scope of the proceedings at the next stage.

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<sup>9</sup> Further: **RL-0002**, J Commission & R Moloo, *Procedural Issues in International Investment Arbitration* (OUP 2018) ¶¶ 5.29–5.32.

<sup>10</sup> **RL-0003**, *Emmis International Holding BV & Ors v Hungary*, ICSID Case No ARB/12/2 (Decision on Respondent’s Application for Bifurcation, 13 June 2013) ¶ 37(2).

<sup>11</sup> If and to the extent that the Tribunal were to determine that mandatory bifurcation was not warranted in relation to either ground raised by Morocco, those preliminary objections would also fall to be bifurcated on grounds of procedural efficiency in any event.

18.3 Morocco has not raised any objections which are overtly intertwined with the merits or which would require the Tribunal to embark on extensive fact-finding exercises. Some of Morocco's preliminary objections can be determined without the need to determine any factual dispute. Other objections would require limited disclosure of documents. In either case, the issues raised by the preliminary objections are wholly or substantially separate from the main merits of the case.

### III BACKGROUND TO THE APPLICATION

19 The Claimants' case has been presented in a high-level, unparticularised and largely unsupported manner, designed to gloss over the numerous flaws in the claims presented. In this section, Morocco will explain certain aspects of the Claimants' case in the detail that the Claimants have sought to avoid.

#### A The Claimant entities

##### (1) *Deficiencies in the Claimants' case*

20 Between February and August 2015, the Claimants allege that they entered into transactions with SAMIR relating to oil and refined products.<sup>12</sup>

21 Throughout the Memorial, the Claimant entities are repeatedly referred to collectively as "*Carlyle*" or "*the Claimants*".<sup>13</sup> In fact, there are seven distinct Claimants: (a) The Carlyle Group LP; (b) Carlyle Investment Management LLC ("**CIM**"); (c) Carlyle Commodity Management LLC ("**CCM**"); (d) TC Group LLC; (e) TC Group Investment Holdings LP; (f) Celadon Commodities Fund LP; and (g) Celadon Partners LLC.<sup>14</sup>

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<sup>12</sup> Memorial, ¶ 11.

<sup>13</sup> Memorial, ¶ 1. See e.g. Memorial, ¶ 1 ("*Carlyle-owned commodities*"), ¶ 2 ("*Carlyle purchased and took title to oil and refined products*"), ¶ 3 ("*Carlyle's Investments*"), ¶ 14 ("*Claimants made their first investment in Morocco in February 2015 [...] Claimants continued to enter into Transactions with SAMIR until August 2015*"), ¶ 20 ("*Claimants retained exclusive ownership of and title to the Commodities*"), ¶24 ("*Claimants' Investment Agreements*").

<sup>14</sup> Memorial, ¶ 10.

22 Each of the Claimants is purportedly incorporated or sited in the US and therefore fulfils the basic nationality requirements of the FTA.<sup>15</sup> Beyond this, however, each Claimant must establish independently that it is within the Tribunal’s jurisdiction. The Memorial makes little or no attempt to fulfil this minimal requirement, proceeding largely by way of assertion and with no attempt to distinguish between individual claimants.

23 The Claimants’ decision to treat themselves as an amorphous whole is deliberate. They seek, by obfuscating the relationship between each other and their purported investments, to mask identification of which, if any, of the Claimants has met the jurisdictional preconditions of FTA Article 10.27. This has the additional advantage for the Claimants of rendering it more difficult for Morocco to formulate preliminary objections. Whilst the objections that Morocco has identified are more than sufficient to justify bifurcation of these proceedings, the Tribunal should not in any event reward the Claimants’ tactical gamesmanship with a combined hearing on jurisdiction and the merits.

(2) *The seven Claimant entities*

24 The first point to is that none of the Claimants ‘invested’ in SAMIR directly. Rather, all business with SAMIR appears to have been done via entities situated in the Cayman Islands (“**the Cayman Entities**”). The Cayman Entities are:

24.1 VMF Special Purchase Vehicle–VMF Q1 Segregated Portfolio<sup>16</sup> (“**VMF**”), a Cayman segregated portfolio company. 100 per cent of the participating shares in VMF are said to be owned by Celadon Commodities Ltd, another Cayman-incorporated company (“**Celadon Cayman**”);<sup>17</sup> and

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<sup>15</sup> Memorial, ¶ 10.

<sup>16</sup> VMF actually appears to be two Cayman entities – on the one hand, VMF Special Purpose Vehicle SPC and on the other hand its Q1 Segregated Portfolio: see e.g. **MO-0008** (referring to the seller as “*VMF Special Purpose Vehicle SPC on behalf of Q1 Segregated Portfolio*”, implying separation between the two). For reasons known best to themselves, the Claimants have failed to distinguish between these two entities. For the sake of convenience, but without prejudice to their overall position, Morocco will continue treat these two entities as the same for the purposes of this Application.

<sup>17</sup> Memorial, ¶ 11.

24.2 Carlyle Global Market Strategies Commodities Funding 2014-1 Ltd (“**2014-1 Cayman**”).

25 A further Cayman-incorporated entity is Carlyle Global Market Strategies Commodities Funding 2015-1 Ltd (“**2015-1 Cayman**”), which the Claimants allege was a party to two agreements with SAMIR.<sup>18</sup> However, 2015-1 Cayman does not appear on any documents associated with the Transactions that form the basis of the claim and (it appears) never contracted with SAMIR.

26 As to the seven Claimants themselves, the Claimants assert that:

26.1 The Carlyle Group LP is the “*ultimate parent*” of the other Claimant entities. It is a global investment firm.<sup>19</sup> No other indication is given as to its precise relationship with any of the other Claimants.

26.2 CIM is the sole parent company of 2014-1 Cayman (and 2015-1 Cayman).

26.3 CCM (formerly known as Vermillion Asset Management LLC) was the exclusive investment adviser to: (a) Celadon Commodities Fund LP; (b) Celadon Cayman; and (c) VMF.<sup>20</sup>

26.4 TC Group LLC owns 97.06 per cent of the limited partnership interest in Celadon Commodities Fund LP.<sup>21</sup>

26.5 TC Group Investment Holdings LP owns 2.94 per cent of the limited partnership interest in Celadon Commodities Fund LP.<sup>22</sup>

26.6 Celadon Commodities Fund LP owns 99.96 per cent of the participating shares in Celadon Cayman.<sup>23</sup>

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<sup>18</sup> Memorial, ¶ 11.

<sup>19</sup> Memorial, ¶¶ 10, 19.

<sup>20</sup> Memorial, ¶ 11.

<sup>21</sup> Memorial, ¶ 11 (fn 3).

<sup>22</sup> Memorial, ¶ 11 (fn 3).

<sup>23</sup> Memorial, ¶ 11.

26.7 Celadon Partners LLC is the sole and general partner of Celadon Commodities Fund LP.<sup>24</sup>

27 Significantly, the Claimants have provided little or no documentary evidence as to the links between any of these entities. In particular, whilst it is asserted that the Cayman Entities are owned or controlled directly or indirectly by various Claimants, no actual evidence of ownership or control (e.g. in the form of share certificates, trust or partnership deeds) has been produced. Equally important, and equally absent, is evidence of the precise purported contribution – especially in terms of capital flows or other forms of finance – of each individual Claimant to the Cayman Entities and thence to the alleged investment operation. As explained further below, this means that the Claimants’ claim must fail automatically for lack of jurisdiction *ratione personae*.

28 For the Tribunal’s convenience, Morocco has prepared an organisation chart showing the asserted but unproven links between the relevant entities.<sup>25</sup>

## **B The Claimants’ purported investments**

29 The Claimants’ case is that they made “*investments*” in Morocco for the purposes of Article 10.27 FTA and Article 25(1) of the ICSID Convention. Specifically, the Claimants identify two purported investments, which they describe respectively as “**the Commodities**” and “**the Investment Agreements**”:

*“Claimants’ ‘Investments’ in Morocco consisted of the following:*

- *Commodities stored in SAMIR’s tanks pursuant to the Transactions are owned by Claimants under the Investment Agreements, which are protected investments under Article 10.27(h) of the FTA as ‘moveable property;’ and*

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<sup>24</sup> Memorial, ¶ 11 (fn 3).

<sup>25</sup> See Annex 1.

- *Contractual rights derived from the Investment Agreements such as the Transactions' Put Right, which is a type of 'option' covered by Article 10.27(d) of the FTA.*"<sup>26</sup>

30 Put another way, the Claimants purported investments were *"the purchase and sale of moveable property and the provision of options"*.<sup>27</sup>

31 The evidence put forward by the Claimants with respect to their purported investments is manifestly deficient. The Memorial makes little or no attempt to explain how the various Investment Agreements interact, or to articulate the contractual relationship between the Claimants, the Cayman Entities and/or SAMIR from February 2015 onwards.<sup>28</sup> The Investment Agreements themselves, moreover, contain unexplained discrepancies and refer to material documents that have not been exhibited. By way of illustration only:

31.1 The principal document said to govern the Claimants' relationship with SAMIR is the Master Commodity Transaction Agreement ("**MCTA**"). This is dated 22 June 2015 – some five months after the Claimants claim they commenced transacting with SAMIR in February 2015 – and is signed by CCM on behalf of VMF.<sup>29</sup> There appear to have been several prior versions of the MCTA, none of which has been produced.<sup>30</sup>

31.2 Another key document is the Commodities Storage Agreement ("**CSA**"), also dated 22 June 2015 – once again months after the Claimants assert they commenced their venture with SAMIR.<sup>31</sup> It is between SAMIR and 2014-1 Cayman. As with the MCTA, there appears to have been a prior version or

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<sup>26</sup> Memorial, ¶ 27.

<sup>27</sup> Memorial, ¶ 32.

<sup>28</sup> Memorial, ¶¶ 2, 21.

<sup>29</sup> **MO-0003**.

<sup>30</sup> E.g. the CSA (**MO-0006**) refers to an amended and restated MCTA dated 11 June 2015 and a MCTA dated 30 May 2014. The MCTA Term Commitment Letter (**MO-0005**) refers to an amended and restated MCTA dated 26 March 2015.

<sup>31</sup> **MO-0004**.

versions of CSA within the applicable time period.<sup>32</sup> These have also not been exhibited.

31.3 A further key document is the MCTA Term Commitment Letter.<sup>33</sup> Again, this is dated 22 June 2015, well after the alleged commencement of the Claimants' operations. It is signed only by SAMIR – the place where CCM was supposed to sign in its own right is blank. There is no evidence it was ever formally concluded. Moreover, by its express terms, it is *“not intended to be binding on [CCM] or on any other person”*. Furthermore, it refers to a version of the MCTA that has not been exhibited.

31.4 Another key document is the Summary of Terms and Conditions for Crude Oil Purchase and Sale Transaction(s) (**“Summary of Terms”**) dated 17 December 2014.<sup>34</sup> Under this instrument, the buyer is identified as VMF and the seller as SAMIR – but it is again signed by CCM on behalf of 2014-1 Cayman.

31.5 The 16 individual Transactions that are said to form the basis of the Claimants' claim (and which are themselves said to be part of the Investment Agreements) also raise a number of serious questions. On the basis of the Transaction documents, it is difficult for Morocco to understand how these transfers of title were effected – not least because the Claimants have not disclosed the actual letters of credit said to have been issued by 2014-1 Cayman to finance each Transaction, even though these are essential to each Transaction structure.

32 These evidential failures are all the more arresting and inexplicable when it is considered that the Claimants are part of a multi-billion dollar financial corporation

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<sup>32</sup> The CSA itself (**MO-0004**) refers to a prior CSA dated 16 January 2015 and a prior amended CSA dated 11 June 2015.

<sup>33</sup> **MO-0005.**

<sup>34</sup> **MO-0006.**

which had three years to prepare for this arbitration. The irresistible inference is that they are deliberate and designed to prevent scrutiny of the underlying facts.

### C The Claimants' case in outline

33 In these proceedings, the Claimants allege that Morocco interfered with their purported investments in two ways:

33.1 First, the Claimants allege that, beginning in August 2015,<sup>35</sup> the Moroccan government “seized SAMIR’s assets and froze SAMIR’s bank accounts, forcing SAMIR to shut down operations”<sup>36</sup> and that the SAMIR disposed of the Commodities “at the Direction of the Government”.<sup>37</sup> By this, Morocco is alleged to have breached FTA Article 10.5.1 (concerning fair and equitable treatment) and Article 10.6 (concerning expropriation)<sup>38</sup> and caused the Claimants to sustain substantial losses that must be the subject of compensation.<sup>39</sup>

33.2 Secondly, the Claimants allege that, in March 2016, SAMIR was “forced [by Morocco] into liquidation” and that, thereafter, “the Government blocked all outside bids to purchase the refinery”.<sup>40</sup> By this, Morocco is again said to have breached Article 10.5.1, causing losses to the Claimants that must be compensated.<sup>41</sup>

34 The true position is rather different, but that is a matter for the merits. The Claimants entered into contractual deals with SAMIR when they knew it was insolvent and that high-risk approach appears to have come home to roost. But it had nothing to do with Morocco. It is equally striking that whilst in this arbitration the Claimants assert that Morocco expropriated “their” oil and funds, in US Court litigation against

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<sup>35</sup> Memorial, ¶ 33.

<sup>36</sup> Memorial, §IV.E.

<sup>37</sup> Memorial, §§IV.E and IV.H.

<sup>38</sup> Memorial, §V.

<sup>39</sup> Memorial, §VI.

<sup>40</sup> Memorial, §§IV.I and IV.J.

<sup>41</sup> Memorial, ¶¶ 128–129.

their insurers, the Claimants lay the blame squarely at SAMIR's door, labelling what occurred as "The SAMIR Theft".<sup>42</sup> Determination of Morocco's preliminary objections in a bifurcated procedure will avoid the unnecessary time and expense of engaging with these invented and inventive claims.

#### IV MOROCCO'S CASE FOR MANDATORY BIFURCATION

##### A. The Claimants' "alternative" case is misconceived

35 The first category of issues which Morocco submits should result in mandatory bifurcation turns on one specific aspect of the Claimants' case. In short, the Claimants advance a case in which Morocco's alleged treatment of SAMIR (a company in which the Claimants have no proprietary interest) forms the basis of the cause of action:

35.1 In the factual section of the Memorial, the Claimants allege that they were "*informed by numerous sources*" that Morocco did not negotiate in good faith with SAMIR.<sup>43</sup> That "*it was reported*" that a minister had a conflict of interest in the SAMIR refinery<sup>44</sup> and further second-hand allegations implying impropriety by Morocco towards SAMIR, the Claimants' creditor.<sup>45</sup> There is also an unsupported allegation that SAMIR was "*forced*" into liquidation, and that the government imposed "*unreasonably restrictive*" requests for a purchase of SAMIR by a third party.<sup>46</sup>

35.2 On the back of these baseless allegations of misconduct by Morocco against SAMIR, the Claimants allege a breach of the FTA in the following terms:

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<sup>42</sup> **R-0001**, *Carlyle Commodity Management LLC and Others v Certain Underwriters at Lloyds London and Others*, statement of claim dated 03.03.2017. See further: **R-0002**, *Carlyle Commodity Management LLC and Others v Certain Underwriters at Lloyds London and Others*, insurers' defence and counterclaim dated 24.04.2017.

<sup>43</sup> Memorial, ¶ 58.

<sup>44</sup> Memorial, ¶ 59.

<sup>45</sup> Memorial, ¶¶ 60–64. That unsupported allegation is then repeated at ¶ 120, where it is suggested that the liquidation of SAMIR is evidence of political motive, simply because an amicable settlement was allegedly refused by Morocco, with no evidence in support.

<sup>46</sup> Memorial, ¶¶ 80, 81.

*“Respondent effectively prevented SAMIR from avoiding bankruptcy and, in turn, prevented Claimants from recovering the moneys due to them. Furthermore, this conduct is another indication that Respondent acted in bad faith in this matter, and is additional evidence that Respondent breached the FET obligation under the FTA.”<sup>47</sup>*

36 The Claimants seek to claim in respect of the alleged treatment of a local company in which they have no proprietary interest based on unsubstantiated rumour and hearsay. Whilst that is not a promising start to a claim factually, legally it is fundamentally misconceived: it reveals no pleaded breach of the FTA, and the alleged losses to the Claimants are in any event far too remote for a claim under the FTA.

*(1) The Claimants have failed to state a case of breach of the FTA in relation to their alternative case*

37 The first issue with this aspect of the case is that it does not reveal any breach of the FTA, a matter which the Claimants themselves accepted would result in mandatory bifurcation.

38 The flaws in the Claimants’ case are both evidential, and juridical.

38.1 The juridical flaw is simple. The allegations go to actions by Morocco against one of its own nationals (SAMIR) in which the Claimants have no proprietary interest and which they do not control. The FTA does not provide a cause of action for a creditor to claim damages in respect of alleged mistreatment of a third-party company which is a national of the host state. The Claimants’ surprising proposition would mean that entirely domestic insolvency proceedings around the world would be subjected to international law standards simply by virtue of the presence of a foreign creditor. That is a concept unknown to international law.

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<sup>47</sup> Memorial, ¶¶ 128.

38.2 The evidential flaw is equally, if not more, egregious. The Claimants do not present any evidence of wrongdoing by Morocco against SAMIR. Rather they parrot the explanation given by SAMIR for not paying its debt (i.e. not our fault, but Morocco's) as the sole basis for the claim. That is not a basis upon which this Tribunal could ever find a breach of the FTA or award damages.

39 Allowing such an unparticularised, remote and un-evidenced claim to proceed would permit the Claimants to go on a fishing expedition for documents relating to the insolvency of SAMIR (whether related to the Claimants or not) with the aim of inviting this Tribunal to determine whether or not an international law wrong was committed to a national of the host state in the course of a multi-billion dollar insolvency with hundreds if not thousands of creditors. It would involve an extraordinary extension of the scope of the dispute between the parties, on the slenderest of evidence.

40 In the light of the above, the Tribunal must bifurcate the proceedings as regards any claim collateral to SAMIR's insolvency (rather than arising out of an alleged proprietary interest by the Claimants) and dismiss such claims summarily in the absence of a cause of action or indeed any evidence of wrongdoing.

(2) *The losses claimed by the Claimants even on the case as pleaded are too remote and cannot result in an award of damages*

41 In addition to failing to present a valid claim under the FTA (or supporting evidence for the same), the Claimants' claims relating to the insolvency of SAMIR involve alleged damages far too remote to be recoverable under international law.

42 Under the law of state responsibility, not every loss is compensable. This is because international law qualifies the obligation of full reparation that arises on the occurrence of an internationally wrongful act by reference to legal criteria of remoteness. The precise content of these criteria varies from obligation to obligation.

43 The International Law Commission explained this in the commentary to Article 31 of their Articles on the Responsibility of States for Internationally Wrongful Acts (“ARSIWA”):

*“The allocation of injury or loss to a wrongful act is, in principle, a legal and not only historical or causal process. Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses ‘attributable [to the wrongful act] as a proximate cause’, or to damage which is ‘too indirect, remote and uncertain to be appraised’, or to ‘any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals or corporations as a result of’ the wrongful act. Thus causality in fact is a necessary but not sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is to ‘remote’ or ‘consequential’ to be the subject of reparation. [...] In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation.”<sup>48</sup>*

44 The Claimants’ claim that Morocco’s alleged interference in the recapitalization of SAMIR prevented SAMIR from making the Claimants’ whole is said to give rise to a breach of Article 10.5.1<sup>49</sup>, but cannot meet the legal criterion of remoteness with respect to that Article.

45 The parties to the FTA cannot possibly have considered this kind of a claim to give rise to an actionable loss (per ARSIWA Article 31) under Article 10.5.1. At all times, Morocco dealt with SAMIR as one of its nationals and a tax debtor, in accordance with the provisions of Moroccan law. It cannot be right that the parties to the FTA would consider such dealings to create a cause of action for the creditors of SAMIR – the identities and nationalities of which could have been completely unknown to Morocco. Put another way, if the Claimants are correct, then any dealings that a state may have with one of its nationals could give rise to completely unquantifiable

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<sup>48</sup> **RL-0004**, J Crawford (ed), *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 204 (emphasis added).

<sup>49</sup> Memorial, ¶¶ 128–129.

liability if, in the course of those dealings, the state prejudices the position of one of the national's creditors that happens to benefit from investment treaty protection. That cannot be correct. Such damage, if indeed it was caused by the state, must be considered too remote to be recoverable under Article 10.5.1.

46 This objection gives rise to a pure question of law concerning remoteness and the law of state responsibility.<sup>50</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 FTA Article 10.19.4. It therefore compels the mandatory bifurcation of these proceedings. Furthermore, as it is solely concerned with the merits of the dispute, it qualifies as a valid Article 10.19.4 objection even under the Claimants’ unduly narrow interpretation of that provision to exclude objections concerning the Tribunal’s competence. If upheld, it will lead to the dismissal substantial part of the Claimants’ claims and result in a considerable reduction of cost and time for both the parties and the Tribunal.

**B The Claimants lack standing to bring a claim with respect to assets and/or losses of the Cayman entities**

47 On the Claimants’ case, none of the US-domiciled Claimants directly owns either of the claimed investments – that is, the Investment Agreements and the Commodities. Rather, those assets appear to ‘belong’ (if to anyone on the Claimants side) to the Cayman Entities. This is because – despite the Memorial’s attempts to imply the contrary<sup>51</sup> – the Claimants themselves were never parties to the Investment Agreements.

48 This raises an immediate problem of standing for the Claimants. The resulting objection is fatal and must necessarily dispose of the entire claim. This is derived from what the *HICEE v Slovak Republic* tribunal described as the “*default position*” in

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<sup>50</sup> Another way of characterizing this objection would be that treatment of SAMIR by Morocco does not constitute sufficiently direct “*treatment*” of a “*covered investment*” for the purposes of Art 10.5.1, such that on the facts as alleged no breach of Art 10.5.1 could ever occur.

<sup>51</sup> See e.g. Memorial, ¶ 21.

international law, namely that a company is distinct from its shareholders.<sup>52</sup> The upshot of this is that only the company has the capacity to bring claims under the FTA with respect to that company's assets. A shareholder in those companies – which is what the Claimants ultimately are *vis-à-vis* the Cayman Entities – has no such capacity in international law.

49 The leading authority on this point is *Poštová banka v Greece*. There, after an extensive review of the case law, the tribunal held:

*“As clearly and consistently established by the above referenced decisions [...] a shareholder of a company incorporated in the host State may assert claims based on measures taken against a company's asset's that impair the value of the claimant's shares. However, such claimant has no standing to pursue claims directly over the assets of the local company, as it has no legal right to such assets.*

*[...] Istrokapital thus has expressly sought to base the Tribunal's jurisdiction on its alleged 'indirect investment' in the GGBs held by Poštová banka. However, Istrokapital has failed to establish that it has any right to the assets of Poštová banka that qualifies for protection under the Cyprus–Greece BIT. Therefore, the Tribunal has no jurisdiction over Istrokapital's claims in the present arbitration.”<sup>53</sup>*

50 Similar findings have been made by other tribunals.

50.1 In *AAPL v Sri Lanka*, the tribunal said that “[t]he scope of international law protection granted to the foreign investor in the present case is limited to a single item: The value of his shareholding in the joint venture entity”.<sup>54</sup>

50.2 In *Karkey v Pakistan*, it was held that “Karkey is not entitled as a matter of international law to make a direct claim in relation to Karkey's contractual rights, as

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<sup>52</sup> **RL-0005**, *HICEE BV v Slovak Republic*, PCA Case No 2009-11 (Partial Award, 23 May 2011) ¶ 230.

<sup>53</sup> **RL-0006**, *Poštová banka as & ISTROKAPITAL SE v Hellenic Republic*, ICSID Case No ARB/13/8 (Award, 9 April 2015) ¶¶ 245–246 (emphasis added).

<sup>54</sup> **RL-0007**, *Asian Agricultural Products Limited v Republic of Sri Lanka*, Award (1990) 4 ICSID Rep 246, ¶ 95.

*Karkey does not have standing to assert claims based on the host State's treatment of the contracts and assets of the company in which it holds shares".*<sup>55</sup>

50.3 In *ST-AD v Bulgaria*, the tribunal held that *"an investor has no enforceable right in arbitration over the assets and contracts belonging to the company in which it holds shares"*.<sup>56</sup>

50.4 And in *Enkev v Poland*, while the tribunal accepted that the claimant held an investment in the form of shares in a locally incorporated company, it did not *"accept that the Claimant's 'investment' extends beyond such rights"* and that it could not *"stand in the shoes of its subsidiary, Enkev Polska, as regards the latter's moveable and immovable property (including intellectual property), contracts, assets and monies (including profits)"*.<sup>57</sup>

51 The position in general international law is reinforced in this case by the wording of the FTA. Articles 10.15.1(a) and (b) provide (respectively) that a prospective claimant can submit a claim either *"on its own behalf"* or *"on behalf of an enterprise of the respondent"* (i.e. a locally incorporated investment vehicle). Nowhere in Article 10.15.1 is it provided that a claimant is entitled to submit a claim on behalf of an investment vehicle incorporated in a third state (i.e. the Cayman Entities). It follows that such a claim is outside the Tribunal's jurisdiction.

52 This position is similar to the analysis of NAFTA Articles 1116 and 1117 in *Bilcon v Canada*. Those provisions reflected the same scheme as FTA Articles 10.15.1(a) and (b) – drawing a distinction (respectively) between a prospective claimant and a locally incorporated investment vehicle in the host state, and providing that the claimant could bring a claim on its own behalf, or on behalf of the vehicle. The *Bilcon v Canada* tribunal held that claims for the losses of the locally incorporated vehicle

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<sup>55</sup> **RL-0008**, *Karkey Karadeniz Elektrik Uretim AS v Islamic Republic of Pakistan*, ICSID Case No ARB/13/1 (Award, 22 August 2017) ¶ 716.

<sup>56</sup> **RL-0009**, *ST-AD GmbH v Republic of Bulgaria*, PCA Case No 2011-06 (Award on Jurisdiction, 18 July 2013) ¶ 278.

<sup>57</sup> **RL-0010**, *Enkev Beheer BV v Republic of Poland*, PCA Case No 2013-01 (First Partial Award, 29 April 2014) ¶ 310.

could only be made under NAFTA Article 1117 – and that no claim for reflective loss whatsoever could be made under NAFTA Article 1116.<sup>58</sup>

53 The *Bilcon v Canada* tribunal’s analysis applies equally with respect to FTA Articles 10.15.1(a) and (b). Whilst the Tribunal might have jurisdiction over a claim for losses suffered by a locally incorporated (i.e. Moroccan) vehicle, there is no jurisdiction over a claim for losses suffered by an entity incorporated in a third state (i.e. the Cayman Islands). Since the Claimants’ claims are for losses suffered by the Cayman Entities it follows that they are outside the Tribunal’s jurisdiction.

54 This objection requires bifurcation under FTA 10.19.4 since the facts required to substantiate it have already been admitted by the Claimants in their Memorial. As such, the objection is a pure question of law that, if upheld, will dispose of the Claimants’ entire claim such that no award in their favour can be made under FTA Article 10.25.

**C The Claimants’ purported investments do not meet the jurisdictional requirements of Article 25(1) of the ICSID Convention or FTA Article 10.27**

55 Article 25(1) of the ICSID Convention provides that in order for ICSID to have jurisdiction over a dispute, a claimant must be able to establish that they have an “investment” in the territory of the host state. It has since been established through case law that the word “investment” for this purpose has an inherent meaning, entailing (at least): (a) contributions by the purported investor, (b) of a certain duration, whilst (c) assuming a particular level of operational risk.<sup>59</sup>

56 The requirement of Article 25(1) of the ICSID Convention are also reflected in the FTA itself, with the definition of “investment” in Article 10.27 being “every asset [...] that has the characteristics of an investment, including such characteristics as the

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<sup>58</sup> **RL-0011**, *William Richard Clayton, Douglas Clayton, Daniel Clayton & Bilcon of Delaware Inc v Government of Canada*, PCA Case No 2009-04 (Award on Damages, 10 January 2019) ¶¶ 388–389.

<sup>59</sup> Generally: **RL-0019**, E Gaillard & Y Banifatemi, ‘The Long March towards a *Jurisprudence Constante* on the Notion of Investment’, in M Kinnear et al (eds), *Building International Investment Law: The First 50 Years of ICSID* (ICSID/Kluwer 2016) 97.

*commitment of capital and other resources, the expectation of gain or profit, or the assumption of risk*". The Claimants concede that they must meet these requirements for the Tribunal to have jurisdiction.<sup>60</sup>

57 On no view can the Claimants' purported investments – the Investment Agreements and the Commodities – satisfy these requirements.

58 First, as already noted, the Claimants (save CCM) have provided no evidence that they made any contribution, financial or otherwise, towards the Cayman Entities, and thus to the Investment Agreements and the Commodities. Moreover, none of the money provided under the various letters of credit ever entered Morocco, but instead was provided to the various suppliers of the Commodities directly in third states.

59 Secondly, the 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. Conversely, the authorities establish that a minimum period of two to five years is typically regarded as sufficient for an investment.<sup>61</sup>

60 In the Memorial, the Claimants allege that this condition is satisfied because: "[a]fter months of Transactions, Claimants and SAMIR executed a commitment letter in which Carlyle committed to engage in commodities investments for a minimum of three years".<sup>62</sup> In fact, none of the Claimants made any such commitment. The Commitment Letter was written by SAMIR, not even signed by any of the Claimants or the Cayman Entities, and by its terms was "*not intended to be and is not binding on [...] any [...] person.*"<sup>63</sup>

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<sup>60</sup> Memorial, ¶ 22.

<sup>61</sup> **RL-0020**, *Salini Costruttori SpA & Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4 (Decision on Jurisdiction, 23 July 2001), ¶¶ 52, 54.

<sup>62</sup> Memorial, ¶ 22.

<sup>63</sup> **MO-0005**.

- 61 Third, the Claimants are incorrect to claim that the risk of losing the Commodities (assuming *in arguendo* that they could be said to own or control them) is a sufficient risk for the purposes of Article 25(1) of the ICSID Convention.<sup>64</sup> The better view is that expressed in *Poštová banka v Greece*, whereby the necessary species of risk was held to be “*an operational risk and not a commercial risk or a sovereign risk*”.<sup>65</sup> Thus, the risk of a commercial counterparty defaulting on its obligation, or the risk of interference by the host state, are to be discounted as irrelevant for the purpose of determining whether an investment exists under Article 25(1) of the ICSID Convention. The Claimants have not identified a qualifying species of risk in their operations, and hence have failed to make out this criterion as well.
- 62 Looking at operations such as that purportedly operated by the Claimants in the round, other tribunals have held that the requirements of an investment have not been made out. As the Tribunal observed in *Global Trading v Ukraine* held:

*“[P]urely commercial transactions, such as contracts for the sale of goods, were never intended to fall within ICSID’s jurisdiction [...] [I]s the supplier’s outlay of money in performing a contract for the transboundary purchase and sale of goods capable of constituting an ‘investment’? As to that limited, but precise, question, the tribunal in Joy Mining Machinery decided that even a more complex contract of that kind (which contained other elements in addition) would not satisfy the test of an ‘investment’ for the purposes of Article 25 of the ICSID Convention [...] In the present case, the Tribunal considers that the purchase and sale contracts entered into by the Claimants were pure commercial transactions and therefore cannot qualify as an investment for the purposes of Article 25 of the Convention. When the circumstances of the present case are examined and weighed, it can readily be seen that the money laid out by the Claimants towards the performance of these contracts was no more than is typical of the trading supplier under a standard CIF contract. The fact that the trade in these particular goods was seen to further the policy priorities of the*

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<sup>64</sup> Memorial, ¶ 22.

<sup>65</sup> RL-0006, *Poštová banka v Greece*, Award, ¶ 369.

*purchasing State does not bring about a qualitative change in the economic benefit that all legitimate trade brings in its train [...]*<sup>66</sup>

63 The same considerations apply equally here. All that the Claimants were engaged in *vis-à-vis* SAMIR was a series of short-term contracts for the financing of oil purchases by SAMIR. Such operations are inimical to the concept of serious and enduring investment that is deemed worthy of international protection by the ICSID Convention and the FTA.

64 The question of whether the Claimants' purported investments constitute investments for the purposes of Article 25(1) of the ICSID Convention or FTA Article 10.27 is discrete legal point and therefore warrants mandatory bifurcation under Article 10.19.4. Alternatively, and in any event, since the objection gives rise to a discrete issue which can be dealt with shortly, is not intertwined with the underlying merits and, if granted, would dispose of the whole of the proceedings, there are strong grounds for discretionary bifurcation under Article 41(2) of the ICSID Convention and Rule 41(3) of the ICSID Rules.

#### IV MOROCCO'S CASE FOR DISCRETIONARY BIFURCATION

65 There are also a number of further jurisdictional issues arising out of the claim as pleaded by the Claimants, which Morocco invites the Tribunal to join to the issues in respect of which there is mandatory bifurcation in the interests of procedural efficiency.

##### A **The Claimants do not own or control an “investment” that is “in the territory” of Morocco for the purposes of FTA Article 10.27**

66 Morocco objects to the jurisdiction of the Tribunal on the basis that the Claimants have failed to establish that they are investors for the purposes of FTA Article 10.27. This provides that an “investor of a Party” means:

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<sup>66</sup> **RL-0021**, *Global Trading Resources Corp & Globex International Inc v Ukraine*, ICSID Case No ARB/09/11 (Award, 1 December 2010) ¶¶ 54–56.

*“[A] Party or state enterprise thereof, or a national or an enterprise of a Party, that concretely attempts to make, is making or has made an investment in the territory of the other Party[.]”*

67 Article 10.27 further defines an “investment” in the relevant part as:

*“[E]very asset that an investor owns or controls, directly or indirectly, 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.”*

68 Proving the existence of a qualifying investment and investor is a basic jurisdictional hurdle for nearly every investment treaty arbitration. The present proceedings are no exception. It is further trite that the Claimants have the burden of proving that these elements exist.<sup>67</sup> This is in line with the usual rule of international law that he who asserts must prove. Thus, in *Tulip v Turkey*, it was said:

*“As a party bears the proof of proving the facts it asserts, it is for the Claimant to satisfy the burden of proof requirement at the jurisdictional phase. Here, the Parties agree that whilst the [jurisdictional] Objection was raised by Respondent, the onus remains on Claimant to establish that the requirements of [the investment treaty] have been satisfied, and that the Tribunal has jurisdiction.”<sup>68</sup>*

69 Properly analysed, it is clear from the Claimants’ claim that they cannot be considered investors for the purposes of FTA Article 10.27. This is for three reasons: (a) the Claimants have not established that they own or control the Cayman Entities that directly transacted with SAMIR; (b) the Investment Agreements (save the CSA) cannot be considered investments “in the territory of Morocco”; (c) pursuant to the

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<sup>67</sup> **RL-0012**, B Vasani et al, ‘Burden and Standard of Proof at the Jurisdictional Stage’, in K Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (2<sup>nd</sup> edn: OUP 2018) 312, ¶ 13.06: “The vast majority of different international arbitral tribunals have determined that the claimant has the burden of showing that the arbitral tribunal has jurisdiction to consider the dispute”.

<sup>68</sup> **RL-0013**, *Tulip Real Estate and Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28 (Decision on Bifurcated Jurisdictional Issue, 5 March 2013) ¶ 48. See also **RL-0014**, *National Gas SAE v Arab Republic of Egypt*, ICSID Case No ARB/11/7 (Award, 3 April 2014) ¶ 118: “the burden of establishing jurisdiction, including consent, lies primarily on the Claimant”.

Investment Agreements, the Claimants never legally owned or controlled the Commodities, such that they cannot be considered investments.

**(1) *The Claimants have not established that they “own or control” the Cayman Entities and therefore the purported investments***

70 In order to be a considered an investor for the purposes of FTA Article 10.27, the Claimants must establish that they own or control, directly or indirectly, an investment in respect of which the claim is made. The Memorial identifies two such purported investments: the Investment Agreements and the Commodities.<sup>69</sup>

71 On the Claimant’s case, these purported investments are directly owned and controlled by the Cayman Entities. In order for the Tribunal to find that it has jurisdiction *ratione personae*, therefore, the Claimants must establish direct or indirect ownership or control over the Cayman Entities.

72 In the Memorial, the Claimants proceed by way of bald assertion. In particular, the Claimants claim that:

72.1 A number of the Claimants “*namely TC Group LLC, TC Group Investment Holdings LP, Celadon Partners LLC and Celadon Commodities Fund LP, owned (directly or indirectly) VMF*”.<sup>70</sup> Yet, the Claimants have provided no documentary evidence of any of these relationships.

72.2 CCM was “*the exclusive investment adviser to Celadon Commodities Fund LP, and VMF (and VMF’s parent, Celadon Commodities Ltd, and, thus, exercised control over the investments and other business decisions made by these entities*”.<sup>71</sup> Again, the Claimants have not disclosed the terms under which CCM was allegedly retained as investment advisor to those entities (notably VMF), nor proved any kind of control over the same.

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<sup>69</sup> Memorial, ¶ 27.

<sup>70</sup> Memorial, ¶ 19.

<sup>71</sup> Memorial, ¶ 19.

72.3 CIM “directly owns and controls 100% of the economic interest in [2014-1 Cayman] and [2015-1 Cayman], the entities that were parties to the MCTA and CSA with SAMIR”.<sup>72</sup> Again, no proof of that relationship has been provided by the Claimants beyond bare assertion.

72.4 The Carlyle Group LP is “the ultimate parent of all the other Claimants”.<sup>73</sup> The Claimants do not even purport to describe the precise relationship between The Carlyle Group LP and the other Claimants, much less evidence its alleged ownership and control over the same.

73 Assertion is not proof. In the absence of even the most basic evidence of the relationships above, the Tribunal can only conclude that it lacks jurisdiction *ratione personae* over the Claimants for the purposes of FTA Article 10.27.

(2) *All but one of the Investment Agreements is not located in the “territory” of Morocco*

74 FTA Article 10.27 requires that, in order for the Tribunal to have jurisdiction, the purported investor must have made an investment “in the territory of the other Party” – in this case, Morocco.

75 In order for an investment to be “in the territory” of a state, it must necessarily give rise to legal rights within the jurisdiction of that state, so as to “fall directly under the control of the host State’s legislative, executive and judicial power”.<sup>74</sup>

76 As the Singapore Court of Appeal recently held in *Swissbourgh v Lesotho*:

*“An investment must be made or located within the territory of the host State in order to be eligible for protection under the relevant investment treaty. When an investment is made, an investor acquires property and other rights which exist under the domestic law of the host State. The scope of these rights are to be determined as a matter of the host State’s domestic law. Where a host State undertakes obligations in international law to*

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<sup>72</sup> Memorial, ¶ 19.

<sup>73</sup> Memorial, ¶ 19.

<sup>74</sup> **RL-0015**, M Waibel, ‘Jurisdiction and Admissibility’, in M Bungenberg et al (eds), *International Investment Law: A Handbook* (CH Beck/Hart/Nomos 2015) 1212, ¶¶ 144–145.

*protect foreign investments, the extent of such protection depends on the rules of international law and the terms of the treaty. [...] [A] foreign investor cannot reasonably expect protection of an investment located outside the host State's borders given that the host State can only control acts that occur within its jurisdiction."*<sup>75</sup>

77 Thus, 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>76</sup> Only the CSA, which is governed by Moroccan law and subject to the exclusive jurisdiction of the Casablanca courts, meets this requirement. All of the other Investment Agreements – and notably the MCTA – are expressly governed by New York law. By their terms, their *situs* is New York.

78 Thus, the majority of the Investment Agreements – namely the MCTA, the MCTA Term Commitment Letter, the Summary of Terms and the individual Transactions – cannot be considered investments "*in the territory*" of Morocco for the purposes of FTA Article 10.27. They cannot be used to ground the jurisdiction of the Tribunal.

79 A determination that the Investment Agreements are not valid investments under Article 10.27 will result in the dismissal of half of the Claimants' claim – namely that part based on "[c]ontractual rights derived from the Investment Agreements such as the Transactions' Put Right, which is a type of 'option' covered by Article 10.27(d) of the FTA".<sup>77</sup>

### **(3) The Claimants did not hold direct or indirect title to the Commodities**

80 If contractual rights arising from the Investment Agreements are excluded as valid investments for the purposes of FTA Article 10.27 on the basis that they are not "*in the territory*" of Morocco, this leaves only two possible investments on which the Tribunal's jurisdiction might be founded: the CSA and the Commodities themselves.

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<sup>75</sup> **RL-0016**, *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* [2018] SGCA 81, ¶ 136.

<sup>76</sup> **RL-0017**, Z Douglas, *The International Law of Investment Claims* (CUP 2009) ¶ 349.

<sup>77</sup> Memorial, ¶ 27.

81 The capacity for the CSA to give rise to any claim, however, is dependent on the question of who holds title to the Commodities. CSA clause 1.1 defines the Commodities to which the CSA applies as “oil and similar products **owned by VM Party** and which are held in custody by the Custodian [i.e. SAMIR] in the Delivery Location from time-to-time”.<sup>78</sup> Thus, the antecedent question of who has title to the Commodities under Moroccan law must be answered before the CSA can be said to apply or have any intrinsic value.

82 It is clear, however, that the Cayman Entities never had title to the Commodities. The MCTA set out the general terms for acquisition of title to the Commodities, to be implemented on the basis of individual Transactions.<sup>79</sup> Each individual Transaction was to take place between SAMIR and a “VM Party”, being “the entity advised by [CCM] specified in the relevant Confirmation as the party to the Transaction evidenced by such Confirmation”. Furthermore, “VM Party may be a segregated portfolio of VMF Special Purpose Vehicle SPC, a Cayman Islands segregated portfolio company, or any segregated portfolio of another Cayman Islands segregated portfolio company advised by [CCM] or an affiliate thereof”. It was signed by “VMF Special Purpose Vehicle SPC solely on behalf of each segregated portfolio identified in a Confirmation”.

83 MCTA section 3 governed transfer of title to the Commodities:

*“Purchase of and Option to Resell, Commodities. After a Confirmation has been fully executed, with respect of the relevant Transaction evidenced thereby:*

(a) *In accordance with this Section 3, VM Party shall purchase from Counterparty [i.e. SAMIR], and Counterparty shall sell to VM Party, the Commodities on the Purchase Date for the Purchase Price.*

(b) *Delivery of the Commodities shall, subject to the terms and conditions of this Agreement, be made by Counterparty on the*

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<sup>78</sup> **MO-0004** (emphasis added).

<sup>79</sup> As noted, the version of the MCTA annexed to the Memorial was concluded on 22 June 2015: **MO-0003**. Transactions taking place prior to that time (i.e. from February 2015) were presumably governed by a different MCTA. For the purposes of this argument, Morocco assumes, without prejudice to its position, that this earlier MCTA contains materially the same terms as the one annexed to the Memorial.

*Purchase Date by the delivery of the Commodities to the Delivery Location ('Delivery'). As evidence of Delivery, Counterparty shall deliver to VM Party the relevant documentation of title, if any, associated with the Commodities, or in the case of electronic documents of title, Counterparty shall also deliver evidence satisfactory to VM Party that VM Party has control of such electronic documents of title as 'control' as determined in the applicable provisions of the proposed revisions to the Uniform Commercial Code (including, without limitation, Section 9-106 thereof).*

(c) *On the day of Delivery (subject to the terms and conditions hereof) and on presentation of the appropriate documentation of title as set forth herein, VM Party shall pay the Purchase Price to Counterparty. Title to the Commodities shall pass to VM Party upon payment of the Purchase Price to Counterparty.”<sup>80</sup>*

84 Thus, under the terms of the MCTA, title to the Commodities under each of the Transactions was to pass from SAMIR to the VM Party upon fulfilment of three conditions: (a) SAMIR would pay for and take delivery of the relevant Commodities from a supplier; (b) SAMIR would then to present appropriate documents of title to VM Party; and finally (c) the VM Party would pay SAMIR the purchase price for the Commodities. Put another way, the Investment Agreements “*contemplated that title to the Commodities would pass through SAMIR to [the VM Party]*”.<sup>81</sup>

85 On the Claimants’ own case, however, that is not what happened. What appears to have occurred is that, rather than pay SAMIR for the Commodities, a VM Party (invariably 2014-1 Cayman) instead paid the supplier directly by way of a standby letter of credit that was drawn down by the supplier on ‘failure’ of SAMIR to pay.<sup>82</sup> Thus, title to the Commodities never transferred to the VM Party under the MCTA but remained with SAMIR. That the Claimants have not produced the various

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<sup>80</sup> MO-0003.

<sup>81</sup> Witness Statement of Matthew Olivo dated 31 July 2019, ¶ 12.

<sup>82</sup> Memorial, ¶ 25.

documents of title referred to in MCTA sections 3(b) and (c), which should have been presented to the VM Party by SAMIR on transfer of title, confirms this.

86 The Claimants' lack of title to the Commodities has been expressly confirmed by a judgment of the Commercial Court of Casablanca dated 13 January 2017, which the Claimants have not disclosed to the Tribunal. There, the court declared that VMF and 2014-1 Cayman were merely unsecured creditors of SAMIR.<sup>83</sup>

\* \* \*

87 To respond to these allegations, the Claimants (if they are allowed to do so by the Tribunal despite having failed to prove their case in their Memorial) will need to disclose a limited number of documents evidencing: (a) the relationship between the various Claimants and/or the Cayman Entities; and (b) the structure of the transactions, not least the versions of the MCTA and CSA and letters of credit that applied at the relevant time. Once the relevant documents have been disclosed, it will likely be necessary for the parties to adduce evidence on certain narrow questions of New York and/or Moroccan law. Therefore, insofar as the Tribunal allows the Claimants to produce further documents, this jurisdictional objection does not fall within the FTA Article 10.19.4 mandatory bifurcation procedure. There is, however, a strong case for discretionary bifurcation. Applying the factors set out in *Emmis v Hungary*:

87.1 The request is substantial and far from frivolous. The very limited documentation supporting the Memorial falls well short of establishing that any of the Claimants made investments in the territory of Morocco. The Commercial Court of Casablanca held 2014-1 Cayman never even took title to the Commodities.

87.2 The request, if granted, would dispose of the claim entirely.

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<sup>83</sup> **R-0003**, *Carlyle Global Market Strategies Commodities Fund 2014-1 Ltd & VMF Special Purpose Vehicle SPC–VMF Q1 Segregated Portfolio v SAMIR (in liq)*, File No 717/8304/2016, Judgment of the Casablanca Court of Commerce dated 13 February 2017. See further, in English translation: **R-0004**.

87.3 Bifurcation would not be impractical. The issues raised by this objection are confined to the structure of the Transactions which are said to constitute the investments and the Claimants' purported rights in relation to the same. These issues are not at all intertwined with merits. They are discrete and entirely apposite for a bifurcated hearing.

**B The Claimants have not “concretely” made or attempted to make an investment in Morocco for the purposes of FTA Article 10.27**

88 A further objection to the Tribunal's jurisdiction *ratione personae* arises out of the requirement in FTA Article 10.27 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”. The word “concretely” is key. By its plain and ordinary meaning, it requires the purported investor to be active in the process of investment. It is not sufficient for an entity to hold passively or simply to receive the benefits of others' investment activity.

89 This requirement was well-described by reference to far more ambiguous treaty language by the tribunal in *Standard Chartered Bank v Tanzania*:

*“The Tribunal is not persuaded that an ‘investment of’ a company or an individual implies only the abstract possession of shares in a company that holds title to some piece of property.*

*Rather, for an investment to be ‘of’ an investor in the present context, some activity of investing is needed, which implicates the claimant's control over the investment or an action of transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to the other.”<sup>84</sup>*

90 The Memorial does not establish that any of the Claimants has met this threshold.

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<sup>84</sup> **RL-0018**, *Standard Chartered Bank v United Republic of Tanzania*, ICSID Case No ARB/10/12 (Award, 2 November 2012) ¶¶ 231–232.

**(1) *The Carlyle Group LP, CIM, TC Group LLC, TC Group Investment Holdings LP, Celadon Commodities Fund and Celadon Partners LLC have not established that they “concretely” made an investment in Morocco***

91 On the Claimants’ case, none of the direct investment activity with SAMIR was done by the Claimants themselves. Rather, that effort was expended by the Cayman Entities, who are said to have been parties to the Investment Agreements and the individual Transactions, and who were responsible for paying the various suppliers for shipments of Commodities via standby letters of credit.<sup>85</sup>

92 None of the Claimants has established that they made any contribution that enabled the Cayman Entities to carry out this investment activity. They have not provided evidence (e.g. by way of bank statements or loan facilities) that they were funding the Cayman Entities’ activities. Moreover, with the possible exception of CCM, they have not established that they were in any way involved with directing the Cayman Entities’ activities.

93 There is no evidence presently before the Tribunal that any of The Carlyle Group LP, CIM, TC Group LLC, TC Group Investment Holdings LP, Celadon Commodities Fund LP and Celadon Partners LLC has been anything other than an entirely passive beneficiary of the Cayman Entities’ investment efforts. As such, they cannot be said to have “concretely” made an investment for the purposes of FTA Article 10.27 – and cannot be considered investors over which the Tribunal has jurisdiction.

**(2) *CCM has not established that it “concretely” made an investment in Morocco***

94 The Claimants’ case is that CCM was the investment adviser to Celadon Commodities Fund LP, Celadon Cayman and VMF.<sup>86</sup> In his witness statement, Michael Petrick states that CCM acted as “sole investment adviser [...] and thus exercised control over the investments and other business decisions made by these entities”.<sup>87</sup> The

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<sup>85</sup> In this, 2014-1 Cayman appears to have been key, as in the 16 unclosed Transactions that provide a foundation for the claim, it was responsible for providing the standby letters of credit that ultimately paid the suppliers of the Commodities.

<sup>86</sup> Memorial, ¶ 11.

<sup>87</sup> Witness Statement of Michael Petrick dated 31 July 2019, ¶ 3 (emphasis added).

Claimants do not allege that CCM had any ownership or financial interest in the entities that it was advising.

95 However, the Claimants' bald assertion of "*control*" is not supported by any reasoned analysis, still less by any contemporaneous documents. In particular, the contracts by which CCM allegedly advised (*inter alia*) VMF are absent from the record. Under a typical investment advisory relationship, the investment adviser has no financial interest in the company that it is advising. Rather, it merely (a) provides advisory and management services to the advisee, or (b) serves as agent to the advisee without having any stake in the alleged losses (if any) suffered thereby.

96 On this basis, it is clear that 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 FTA Article 10.27.<sup>88</sup>

\* \* \*

97 For the Claimants to defeat this this objection it would be necessary for the Claimants (again, if they are allowed to do so) to disclose the contracts by which CCM allegedly advised (*inter alia*) VMF and establish that these gave it full control over VMF's activities. To this extent it is not possible for the Tribunal to determine this objection on the assumption that the Claimants' factual allegations are correct. Mandatory bifurcation pursuant to FTA Article 10.19.4 is therefore not warranted.

98 It is, however, an objection which nevertheless warrants bifurcation of the proceedings on a discretionary basis. If, as the evidence suggests, none of the Claimant entities "*concretely*" made or attempted to make an investment in the territory of Morocco, this would provide a further ground on which the Tribunal would be bound to find that it has no jurisdiction and that the entire claim should be dismissed. Little is required in terms of additional documents to have this

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<sup>88</sup> Alternatively, is also difficult to see how, in providing these services, CCM could have had any "*control*" over those it was advising – thereby failing to meet another prerequisite of FTA Art 10.27.

objection determined. Bifurcation would therefore be both practical and procedurally efficient.

## **V CONCLUSION**

99 For all of the above reasons, Morocco respectfully requests that the proceedings be bifurcated (under FTA Article 10.19.4 and/or otherwise at the Tribunal's discretion) so as to allow the objections listed in §§III and IV above to be determined.

Respectfully submitted on behalf of the Kingdom of Morocco on 11 October 2019.

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