

IN THE MATTER OF AN ARBITRATION UNDER THE 1965 CONVENTION FOR THE
SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF
OTHER STATES

PURSUANT TO THE 2004 UNITED STATES – MOROCCO FREE TRADE AGREEMENT

ICSID Case No. ARB/18/29

BETWEEN:

**THE CARLYLE GROUP L.P., CARLYLE INVESTMENT MANAGEMENT L.L.C.,
CARLYLE COMMODITY MANAGEMENT L.L.C., AND OTHERS
(Claimants)**

v.

**KINGDOM OF MOROCCO
(Respondent)**

**CLAIMANTS' OBSERVATIONS ON
RESPONDENT'S APPLICATION FOR BIFURCATION**

20 NOVEMBER 2019

WEIL, GOTSHAL & MANGES LLP
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I. Introduction

1. Pursuant to the Tribunal's Procedural Order No. 1, Claimants hereby respond to Respondent's October 11, 2019 application for bifurcation (the "Application").

2. Infused with inflammatory rhetoric, a shrill tone, and a host of meritless assertions, Respondent's Application is designed to delay these proceedings; granting the relief requested would yield none of the results it purports to achieve. To the contrary, bifurcation in this case should be rejected not only because Respondent's arguments are substantively wrong, but because bifurcation would waste enormous amounts of time and money and be grossly unfair to Claimants. Bifurcation would be wholly inefficient and deeply unjust in this proceeding because it would necessitate addressing the very same contractual and transactional issues twice, first in the jurisdictional phase of the case, and then again in the merits phase.

3. Respondent's Application seeks bifurcation under Article 10.19.4 of the U.S. – Morocco Free Trade Agreement ("FTA") on mandatory and discretionary grounds, based principally on jurisdictional objections. The Application, however, fails for numerous reasons on both grounds. As demonstrated below, the Application based on mandatory grounds is untenable both because it is unavailable due to lack of timeliness under the plain language of the FTA, and because Respondent has blatantly mischaracterized Claimants' claims and misstated the pertinent legal standard on causation. As to timeliness, Article 10.19.5 of the FTA required Respondent to submit preliminary jurisdictional objections within 45 days of the constitution of the Tribunal, over seven months ago.¹ Respondent, however, failed to do this, and cannot now invoke Article 10.19.4 of the treaty to remedy such failure because the provision does not allow for it. As to causation, Respondent both misstates the pertinent causation standard and wrongly characterizes Claimants' claims

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] For these reasons, all of Respondent's arguments on mandatory bifurcation are utterly devoid of merit.

4. Respondent fares no better with regard to its arguments for bifurcation on a discretionary basis. As reflected in multiple ICSID cases addressing discretionary bifurcation, the key consideration in determining the appropriateness of bifurcation is whether its application would be procedurally efficient, either by dismissing the case in its entirety or by significantly reducing its scope. Respondent, however, simply cannot meet this test here. Indeed, each of its arguments in support of discretionary bifurcation is easily addressed in this submission. To dedicate additional time to the issues raised by Respondent would not even narrow the scope of any of Claimant's claims, much less result in their dismissal.

5. As explained further below, Respondent's arguments in support of discretionary bifurcation are replete with egregious errors of fact and law that render them frivolous. For example, the arguments that Claimants lack standing because they are not "investors" within the

¹ See FTA art 10.19.5 (CL-0001-ENG)

meaning of the FTA and lacked ownership and control of the Investments² can be dispensed with through a plain reading of the FTA, the pertinent transactional agreements, and the documents attached to this submission—many of which, though alleged to be “missing” by Respondent, were in fact provided by Claimants to ICSID and Respondent *last year*. These documents show that Claimants are indeed proper investors under the FTA because they owned or controlled every one of the Investments at issue in the case, which is what is necessary to meet all requirements under applicable law. Similarly, the argument that the Investments do not constitute investments “in the territory of Morocco” can be disposed of by reference to both the FTA and the pertinent transactional agreements, as well as previously submitted sworn witness statements.

[REDACTED]

6. Respondent’s other arguments for discretionary bifurcation—i.e., that Claimants’ Investments do not comply with the ICSID Convention and the FTA because of issues concerning risk and duration—are also frivolous. Claimants cited extensive precedent in its Memorial showing that the very existence of a dispute of this magnitude is sufficient evidence of risk. And as to duration, while the FTA itself does not even provide a duration requirement, Respondent’s arguments are rendered meaningless by both [REDACTED] and the flexibility with which investment tribunals approach the duration concept.

7. Accordingly, none of Respondent’s arguments can possibly justify what would lead (under Scenario 3 of the potential bifurcation schedule laid out by the Tribunal) to a totally unnecessary, inefficient, and costly proceeding. Granting the requested relief would be particularly unwarranted and duplicative given not only the baselessness of Respondent’s arguments but also the strong interconnection between the facts underlying Respondent’s Application and those underlying the merits of Claimant’s case. Indeed, as noted above, a bifurcated proceeding to address the issues raised by Respondent in its Application would involve a review of the very same agreements and transactions—and Respondent’s authorization of same—that are at the heart of Claimants’ case.

8. Consequently, while none of Respondent’s jurisdictional points warrant review by this Tribunal, even if any are deemed worthy of review, they should be joined to the merits of the case rather than considered independently during a separate, inefficient, *year-long* bifurcated proceeding. For all of these reasons, and in light of recent literature disfavoring bifurcation, the Tribunal should reject Respondent’s Application in its entirety.

² Capitalized terms otherwise not defined herein shall have the meanings ascribed to them in Claimants’ Memorial.

II. Mandatory Bifurcation under Article 10.19.4 of the FTA

A. There is No Mandatory Bifurcation Under Article 10.19.4 of the FTA with Respect to Respondent’s Jurisdictional Objections

9. The FTA makes clear that mandatory bifurcation is only available under certain limited circumstances, and with respect to mandatory bifurcation based on jurisdiction, those circumstances are subject to strict time limitations relating to the submission of preliminary objections. Respondent has failed to abide by those time limitations. Therefore, its Application as to jurisdictional objections must be rejected.

10. Under the FTA, 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. This Tribunal was constituted on February 21, 2019. Forty-five days from that date was April 6, 2019. Having neglected to avail itself of Article 10.19.5 *more than seven months ago*, Respondent is not now entitled to mandatory bifurcation of its preliminary jurisdictional objections under Article 10.19.4.

11. To determine whether Article 10.19.4 requires bifurcation in light of Respondent’s jurisdictional objections, the Tribunal need only look to the ordinary meaning of the plain language of the FTA.³

12. Article 10.19.4(c) states as follows: “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” (emphasis added).

13. In other words, when evaluating an objection under Article 10.19.4, a tribunal *must* assume that *all* of the 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.

14. Respondent essentially concedes this point when it states that, to the extent “it is not possible for the Tribunal to determine [its jurisdictional] objection *on the assumption that the Claimants’ factual allegations are correct*”—as required by Article 10.19.4(c)—“[m]andatory bifurcation pursuant to FTA Article 10.19.4 is . . . not warranted.”⁴

³ See Vienna Convention on the Law of Treaties (23 May 1969) art 31 (CL-0049-ENG).

⁴ Application, para 97 (emphasis added).

15. Moreover, the preamble to Article 10.19.4 states that a tribunal “shall address and decide” objections by the respondent that, “as a matter of law,” the claimant’s claim is “not a claim for which an award in favor of the claimant may be made under Article 10.25.” Article 10.25 sets forth the types of relief that can be granted under the FTA pursuant to an award by the tribunal (e.g., monetary damages, restitution). Taking these provisions together, it is clear that the only objection that can be addressed and decided pursuant to Article 10.19.4 is a legal, merits-related objection—one where the respondent argues that the claim put forth by the claimant is not the *type of claim* for which the *type of relief* under Article 10.25 can be awarded, whether because the claimant has failed to adequately plead the claim “as a matter of law” or because the claim is one for which no relief can be granted “as a matter of law.” In short, Article 10.19.4 governs only failure-to-state-a-claim objections, not jurisdictional ones such as those asserted by Respondent.

16. Article 10.19.5 further provides that “the tribunal shall decide on an expedited basis an objection under paragraph 4 *and* any objection that the dispute is not within the tribunal’s competence” if the respondent so requests within 45 days after the tribunal is constituted (emphasis added).

17. The separate mention of “an objection under paragraph 4,” on the one hand, and “any objection that the dispute is not within the tribunal’s competence,” on the other, indicates that there is no overlap between the two categories.⁵ The drafters of the FTA could easily have written, for example: “the tribunal shall decide on an expedited basis an objection under paragraph 4, *including* any objection that the dispute is not within the tribunal’s competence.” But they did not. Rather, the use of the conjunction “and” reinforces the drafters’ intent to differentiate between the two categories of objections.

18. Notably, this is the same textual argument that the United States itself made—and which the tribunal accepted—in *Bridgestone v. Panama*. In *Bridgestone*, the tribunal was asked to consider Articles 10.20.4 and 10.20.5 of the United States – Panama Trade Promotion Agreement (the “Panama Treaty”), which are virtually identical to Articles 10.19.4 and 10.19.5 of the FTA, respectively. Although Panama had invoked the expedited procedure of Article 10.20.5 for its preliminary jurisdictional objections, the claimants argued that the evidentiary standard of Article 10.20.4(c) should apply because Article 10.20.5 itself did not contain an evidentiary standard.⁶

19. In a submission as a non-disputing party, the United States contested claimants’ position, stating that Article 10.20.4(c) of the Panama Treaty (virtually identical to Article 10.19.4(c) of the FTA) was *not* intended to apply to jurisdictional objections:

As noted, paragraph 5 of Article 10.20 of the Agreement provides that the tribunal shall decide on an expedited basis ‘an objection under paragraph 4 *and any objection that the dispute is not within the tribunal’s competence*’ (emphasis

⁵ FTA, art 10.19.5 (CL-0001-ENG).

⁶ *Bridgestone Licensing Services, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34 (“*Bridgestone*”), Decision on Expedited Objections (13 December 2017) para 69 (CL-0050-ENG).

supplied), emphasizing that objections asserted under paragraph 4 are distinct from objections to the tribunal’s competence. As correctly noted by the tribunal in *The Renco Group*, when discussing this language in paragraph 5 of the Trade Promotion Agreement between the United States and Peru, ‘this sentence provides additional and cogent information that the Treaty drafters intended to draw a clear demarcation between Article 10.20.4 objections and objections to competence, and that the latter do not fall within the scope of the Article 10.20.4 objections.’⁷

20. The *Bridgestone* tribunal sided with the United States on this issue, holding that “[a]s a matter of textual analysis, Article 10.20.4(c) only applies to an objection under 10.20.4 **and not to objections as to the competence of the Tribunal.**”⁸

21. The other tribunals that have considered treaty provisions identical or virtually identical to Articles 10.19.4 and 10.19.5 of the FTA have similarly and uniformly determined that the process under an Article 10.19.4-like provision is inapplicable to jurisdictional objections.

22. The tribunal in *The Renco Group v. Peru*, for example, similarly considered a provision under the Trade Promotion Agreement between the United States and Peru (the “Peru Treaty”) that contained language virtually identical to Article 10.19.4 of the FTA. The tribunal held that under the Peru Treaty’s near identical provision (Article 10.20.4 of the Peru Treaty) preliminary objections did not extend to jurisdictional objections. Specifically, the tribunal in *The Renco Group* noted that the principal clause in Article 10.20.4, like Article 10.19.4, makes no reference to competence objections, unlike Article 10.20.5 of the Peru Treaty (the pertinent equivalent of Article 10.19.5 of the FTA), which does. As the tribunal further explained:

If the State Contracting Parties to the Treaty had intended competence objections to fall within the scope of Article 10.20.4 objections, they could have easily drafted language for inclusion in the principal clause of Article 10.20.4 to achieve this. However, both the language and the logic of the provisions suggest that this was not done because the drafters intended to draw a distinction between Article 10.20.4 objections on the one hand and ‘other objections,’ such as competence objections, on the other.⁹

For these reasons, the tribunal expressly declined to decide jurisdictional objections concurrently with the Article 10.20.4 objections that were before it, choosing instead to consider and decide only the preliminary objection regarding the claimant’s alleged failure to state a claim for breach of the investment agreement at issue. As for Peru’s “other preliminary objections, which

⁷ *Bridgestone*, Submission of the United States of America (28 August 2017) para 10 (CL-0051-ENG).

⁸ *Bridgestone*, para 110 (CL-0050-ENG).

⁹ *The Renco Group*, UNCT/31/1, (“*The Renco Group*”), Decision as to the Scope of the Respondent’s Preliminary Objections Under Article 10.20.4 (18 December 2014) para 194 (CL-0052-ENG).

relate[d] to competence,” the tribunal directed Peru to bring them together with its counter-memorial on liability.¹⁰ The result in this case should be the same.

23. In another example, *Pac Rim v. El Salvador*, the tribunal likewise considered nearly identical language in the Dominican Republic – Central America – United States Free Trade Agreement, and similarly interpreted the pertinent equivalent of Article 10.19.4 of the FTA so as not to include jurisdictional objections.¹¹

24. In sum, by attempting to inject jurisdictional objections under the ambit of Article 10.19.4 of the FTA, Morocco is improperly seeking to circumvent the plain language of the FTA and discredit the findings of multiple investment tribunals. Mandatory bifurcation of this case based on jurisdictional objections is simply not available to Respondent, and thus its Application for such relief must be rejected.

B. Respondent Has No Other “Case” for Mandatory Bifurcation

25. Respondent also attempts to cobble together a non-jurisdictional “case” for mandatory bifurcation by (i) [REDACTED] (ii) [REDACTED] and (iii) concocting a “remoteness” (causation) argument that is again premised on an incorrect representation of Claimants’ case and is not supported by the law. Each of these efforts is misguided and cannot form the basis of a determination ordering mandatory bifurcation in this arbitration.

26. First, Respondent grossly mischaracterizes Claimants’ case by [REDACTED]
[REDACTED]
[REDACTED]

¹⁰ *Id.*, para 256 (CL-0052-ENG).

¹¹ See *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID ARB/09/12, Decision on the Respondent’s Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5 (2 August 2010) paras 106, 255 (CL-0053-ENG).

¹² [REDACTED]

27.

[REDACTED]

28.

[REDACTED]

29.

[REDACTED]

30.

[REDACTED]

31.

[REDACTED]

¹³ Memorial, para 3 (emphasis added).

¹⁴ *Id.*, para 92.

[REDACTED]

32.

[REDACTED]

33.

[REDACTED]

34.

[REDACTED]

35. Third, Respondent makes a “remoteness” argument based on an entirely false premise.

[REDACTED]

¹⁵ Application, para 34.

¹⁶ [REDACTED]

¹⁷ *Id.*

[REDACTED]. Given this assertion, it would be absurd for Respondent to dispute that it was the proximate cause of any of those actions under applicable law, and on this basis alone, Respondent's Application must be rejected.

36. It is well established under international law that “[p]roof of causation [only] requires . . . (A) cause, (B) effect, and (C) a logical link between the two[,]” where the cause (A) is the action by the State; the effect (B) is the damage suffered by the claimant; and the causal link (C) is “the chain which leads from cause to effect.”¹⁸ As one tribunal ruled, such chain need not be established with “total certainty,” but rather, “if it can be proven that in the normal cause of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists, and that the first is the proximate cause of the other.”¹⁹ Alternatively, the causal link also will be established if the State is unable to identify a break in the chain, “such as factors attributable to the [claimant], to a third party or for which no one can be made responsible (like *force majeure*).”²⁰ Stated another way, the State cannot be released from liability *unless* an intervening event is “(i) the cause of a specific, severable part of the damage, or (ii) makes the original wrongful conduct of the State become too remote.”²¹

37. [REDACTED]

¹⁸ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18 (“*Lemire*”), Award (28 March 2011) paras 157-163 (CL-0054-ENG); see also *SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Award (22 May 2014) para 340 (CL-0045-FR).

¹⁹ *Lemire*, para 169 (CL-0054-ENG). In *Lemire*, it was established that the respondent State (Ukraine) had arbitrarily denied the claimant's bids for radio frequencies, and the effect of the State's improper action was that “[claimant's] business plans could not be achieved, that its planned development was curtailed, its market position eroded, its capacity to generate profits impaired and its potential market value was never achieved. . . .” *Id.* para 161. The *Lemire* tribunal held that the causal chain had been established, noting further that Ukraine had not proved that (i) the denial of claimant's bids was due to reasons other than the wrongful behavior; (ii) if tenders had not been rigged, claimant would have been successful in its bids; or (iii) had claimant been successful, it would not have been able to obtain and utilize the necessary resources to successfully operate on the frequencies. *Id.* para 208.

²⁰ *Id.* para 163.

²¹ *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award (11 December 2013) para 926 (CL-0014-ENG). See also *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (International Law Commission 2001) (the “ILC Articles”) art 31 commentary 13 (CL-0041-ENG) (“[U]nless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct.”).

38.

39. For the foregoing reasons, Respondent has failed to articulate a basis for mandatory bifurcation under Article 10.19.4 of the FTA with regard to both the jurisdictional issues mentioned above and the non-jurisdictional or “failure-to-state-a-claim” issues, and, thus, Respondent’s application for such bifurcation should be rejected.

III. Discretionary Bifurcation under Article 41(2) of the ICSID Convention and Rule 41(3) of the ICSID Rules

40. Respondent’s application for bifurcation cannot be saved by requesting discretionary bifurcation of its jurisdictional objections under Article 41(2) of the ICSID Convention and Rule 41(3) of the ICSID Rules. Discretionary bifurcation is appropriate only when it would result in procedural efficiency; here, bifurcating the proceedings to address Respondent’s jurisdictional objections would do just the opposite and would unnecessarily prolong the arbitration without resolving any dispositive issues. Belying Respondent’s “kitchen

²² The amount of compensation due to a claimant for the host State’s breach of an investment treaty is also determined by querying whether the State’s action was the “but for” cause of the claimant’s damages. *See* ILC Articles art 31(2) (CL-0041-ENG) (“Injury includes *any* damage, whether material or moral, *caused by* the internationally wrongful act of a State.” (emphasis added)); *Lemire* para 244 (CL-0054-ENG) (“The damage suffered by Claimant can thus be defined as the difference between a real ‘as is’ value of [Claimant’s radio company] – what the investor now actually owns – and a hypothetical ‘but for’ value – what the investor would have owned if the host State had respected the BIT.”); *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award (12 July 2019) para 286 (CL-0055-ENG) (“Claimant is entitled to compensation in the amount of the value that its investment would have had *but for* Respondent’s breaches.” (emphasis in original)).

²³ *See Dan Cake (Portugal) S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability (24 August 2015) (CL-0056-ENG). In *Dan Cake*, the subsidiary of the claimant (a Portuguese company manufacturer of cakes and similar goods) required multiple loans from the claimant to survive and failed repeatedly to pay its suppliers, ultimately landing in a bankruptcy proceeding. Further, the subsidiary failed to respond to the bankruptcy court’s order on the issue, which resulted in such court declaring the subsidiary insolvent. *Id.*, paras 8-41. Nonetheless, the tribunal found Hungary liable for breaching the fair and equitable provision of the relevant treaty due to the bankruptcy court’s refusal to grant the subsidiary a composition hearing that may have resulted in a composition agreement and salvaged the claimant’s investment. *Id.*, para 145.

sink” jurisdictional objections, there is, in fact, clear evidence of Claimants’ ownership/control of the covered investments at issue, and Claimants otherwise comply with all of the requirements under Article 25(1) of the ICSID Convention and Article 10.27 of the FTA. Accordingly, discretionary bifurcation is plainly not warranted in this case.

A. Discretionary Bifurcation of Respondent’s Jurisdictional Objections Would Not Promote Procedural Efficiency

41. Although Article 41(2) of the ICSID Convention and Rule 41(3) of the ICSID Rules provide investment tribunals with considerable discretion to bifurcate proceedings, when tribunals are faced with a request to exercise that discretion, “fairness and procedural efficiency[] are the determining factors that should guide the Tribunal[]”²⁴ Elements identified by various tribunals as relevant to the inquiry include (1) whether the request for bifurcation is substantial or frivolous; (2) whether the objections are “intimately linked” or intertwined with the merits; and (3) whether the request, if granted, will result in a significant reduction in the proceedings or even dismissal of the entire case.²⁵ As set forth below, none of these factors weighs in favor of bifurcation of this case.

42. First, Respondent’s Application is frivolous. Respondent complains of “refer[ences] to material documents that have not been exhibited[,]” “bald assertion[s,]” and “no documentary evidence” demonstrating ownership and control amongst Claimants and with respect to Claimants’ covered investments.²⁶ In fact, however, much of the documentation and other information that Respondent claims is missing from the record was *already provided* to Respondent and ICSID either in July/August 2018 (more than a year prior to Respondent’s Application),²⁷ or in Claimants’ Request for Arbitration and/or Memorial.

43. For example, in its August 8, 2018 letter, ICSID asked Claimants to provide copies of the “Investment Agreements” as defined at paragraph 32 of the Request for Arbitration,

⁸ In response, on August 10, 2018, Claimants produced the Investment Agreements as Exhibits C-5,

²⁴ *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-7 (“*Cairn Energy*”), Decision on the Respondent Application for Bifurcation (Procedural Order No. 4) (19 April 2017) para 78 (CL-0057-ENG).

²⁵ See, e.g., *Tulip Real Estate Inv. & Dev. Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28 (“*Tulip Real Estate*”), Decision on the Respondent’s Request for Bifurcation under Article 41(2) of the ICSID Convention (2 November 2012) para 30 (CL-0058-ENG); *Glamis Gold v. United States*, UNCITRAL, Procedural Order No 2 (31 May 2005) para 12(c) (CL-0059-ENG); *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41 (“*Eco Oro Minerals*”), Procedural Order No. 2 (28 June 2018) para 49 (CL-0060-ENG).

²⁶ Application, paras 31, 72-73.

²⁷ And that Respondent’s counsel might not have been retained at that point to review Claimants’ documents contemporaneously does not excuse Respondent from failing to review them prior to the submission of this Application.

²⁸ See August 8, 2018 Letter from ICSID to Claimants (C-0014-ENG)

C-6, C-7, and C-8²⁹ to Ms. Ella Rosenberg of ICSID, the Kingdom of Morocco, and Her Highness Princess Lalla Joumala Alaoui, via email. Given these productions, it is absurd for Respondent to now claim, among other things, [REDACTED]

[REDACTED] that these purported “evidential failures” support discretionary bifurcation of the proceedings.³⁰

44. To the extent that Respondent argues that Claimants have not adequately explained how the various Investment Agreements interact, the RFA, the Memorial, and the witness statements together supply the necessary information.³¹

45. [REDACTED]

46. As for any other documentation or information that Respondent claims to still be missing, there is no reason why Claimants cannot address those purported gaps (which are all addressed herein) through their present observations on Respondent’s Application and the accompanying documents. It is quite another thing, however, for the parties and the Tribunal to participate in multiple rounds of additional, costly and superfluous briefing over the course of another year, based on Respondent’s conclusory and self-serving declaration that its request is

²⁹ See August 10, 2018 Letter from Claimants to ICSID attaching Exhibits C-4 – C-8 (C-0015-ENG). [REDACTED]

³⁰ Application, paras 31.1-31.3.

³¹ See RFA, paras 21-23, 29-36; Memorial, paras 39-42; Witness Statement of Matthew Olivo, paras 11-15; Witness Statement of Vishal Suvagiya, paras 5-9; Witness Statement of Christopher Zuech, paras 6-9.

³² See Exhibit C-2 Submitted with RFA (C-0016-ENG).

³³ [REDACTED]

³⁴ Application, para 27.

“substantial and far from frivolous.”³⁵ Indeed, since all of the information Respondent may need has either already been produced or is submitted herewith, granting Respondent’s Application in these circumstances would wrongly lend credence to what was nothing more than a delay tactic designed to hinder the Tribunal from expeditiously evaluating the merits and awarding Claimants the relief they have been seeking since August 2015. This is especially true because, as will be demonstrated below, all of Respondent’s other arguments (including its specious arguments with regard to standing, risk, and duration) are wholly without merit—the Tribunal clearly has jurisdiction over Claimants’ claims.

47. Second, Respondent’s argument that the jurisdictional issues are “not at all” intertwined with the merits is exceedingly weak and must be rejected. Even assuming that they had any support (which they do not), Respondent’s jurisdictional objections cannot be decided separately from a merits determination. In other words, although Claimants believe Respondent’s jurisdictional arguments can be easily addressed by reference to the plain language of the Investment Agreements, if the Tribunal believes this to be insufficient, it would have to examine the operation and interaction of those agreements. Based on that analysis, the Tribunal then would have to determine how Respondent’s improper actions affected the rights and obligations arising under the Investment Agreements. These, however, are *all* issues that the Tribunal will need to consider at the merits stage.

48. In particular, Respondent raises issues of ownership and control of the Investments, stating (incorrectly) that “pursuant to the Investment Agreements, the Claimants never legally owned or controlled the Commodities, such that they cannot be considered investments.”³⁶ Although, as shown below, this argument is entirely devoid of merit, the issue itself is not confined to jurisdiction. Certainly, for jurisdiction purposes, the Tribunal must analyze the operation of the Investment Agreements [REDACTED]. But for purposes of determining liability, the Tribunal *must also* conduct that exercise at the merits stage. [REDACTED]

49. [REDACTED]

³⁵ *Id.*, para 87.1.

³⁶ *Id.*, paras 69, 80-86.

[REDACTED]

This is analogous to the situation in *MetLife v. Argentina*, where the respondent state (Argentina) attempted to bifurcate a jurisdictional objection that the claimants had not established that they were investors with investments in Argentina under the relevant treaty. Noting first that Argentina’s objection raised “standard issues that arise in almost all investor-state disputes” (and not necessarily ones warranting bifurcation), the *MetLife* tribunal then denied Argentina’s application for bifurcation.³⁷ The tribunal reasoned that “[t]he allegations [would] require a close examination of the Claimants’ corporate structure and operations” such that “[i]f the hearing of the jurisdictional objections were to be bifurcated, and such objection did not succeed, much of the same ground would have to be covered at the hearing on the merits into the corporate structure, who owned what, what investments were taken and (if any were taken) how are they to be valued.”³⁸ Respondent’s jurisdictional objections here are similarly tied to the question of whether and when Respondent in fact took any actions against Claimants’ Investments that constituted an FTA violation.

50. Because 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. In other words, the same documents and same witness testimony that establish jurisdiction *also* establish Respondent’s liability. 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 (especially when, as explained below, Claimants’ ownership and control of the Investments is clear from the face of the documents submitted herewith). Therefore, bifurcation should be rejected in this case.³⁹

³⁷ *MetLife, Inc., MetLife Servicios S.A. and MetLife Seguros de Retiro S.A. v. Argentine Republic*, ICSID Case No. ARB/17/17, Procedural Order No. 2 (21 December 2018) para 19 (CL-0061-ENG).

³⁸ *Id.*; see also *Tulip Real Estate*, paras 32-38 (denying Turkey’s application to bifurcate a jurisdictional objection that the claimant’s claims were contractual claims, not treaty claims, because the issues raised by Turkey’s application were “intimately linked” to the merits of the claimant’s contentions that certain representations and conduct of Turkey frustrated and destroyed the claimant’s contractually-facilitated investments); *Eco Oro Minerals*, para 52 (CL-0060-ENG) (denying Colombia’s request for bifurcation because, among other reasons, “to determine the validity of the first objection [the Tribunal] will be required to delve into the substance of the alleged breaches. In its view, the issues are not sufficiently distinct from the merits that this consideration could be undertaken without duplication of the Parties’ and the Tribunal’s efforts.”)

³⁹ Notably, Respondent’s current position that its jurisdictional objections are not “*overtly* intertwined with the merits” and would not “require the Tribunal to embark on *extensive* fact-finding exercises” (emphasis added) contradicts Respondent’s counsel’s admission during the Tribunal’s first session that Respondent’s jurisdictional objections would require them to “delve a little bit deeper” into the facts, when Respondent was seeking to postpone submission of its jurisdictional objections until after reviewing Claimants’ merits Memorial. See Recording of the Tribunal’s First Session starting at 39:20. Respondent’s statements also reveal that Respondent too believes that its jurisdictional objections are intertwined (if not “*overtly*” intertwined) with the merits and that they would result in at least some (if not “*extensive*”) fact-finding exercises for the Tribunal—all of which cuts against its other statement that its objections are “not at all” intertwined with the merits.

51. The same conclusion was reached by another investment tribunal in a very recent decision. In *Orlandini v. Bolivia*, the tribunal reasoned that it would be problematic to bifurcate jurisdictional objections that were intertwined with the merits for two reasons, one of which was the fact that (similar to the situation here) evidence relevant to the jurisdictional issues would also be relevant to the liability issues. As for the second reason, the *Orlandini* tribunal explained:

[P]erhaps more significantly, such overlap of evidence may result in due process concerns. At the jurisdictional stage, the Tribunal will need to make certain findings of fact. To the extent that the same facts are also relevant to liability, and if the Tribunal reaches that stage, the Tribunal may have prejudged some of the issues of fact without having heard (at the jurisdictional stage) all the relevant evidence, which will only become fully available to the Tribunal at the liability stage.⁴⁰

52. Here, since Respondent’s jurisdictional objections are inextricably intertwined with the merits, if the proceedings were bifurcated and the Tribunal were to review the documents relevant to both Respondent’s jurisdictional objections and Claimants’ merits case, the Tribunal may, whether intentionally or inadvertently, make certain findings of fact in the course of reaching a determination on the jurisdictional objections. In that event, it would be unfairly prejudicial to Claimants for the Tribunal to have predetermined certain points at the jurisdictional stage that are also significant to the liability stage. Therefore, to the extent any of Respondent’s jurisdictional objections have any merit, they should be heard together with the liability issues, rather than in a wasteful bifurcation of the proceedings.

53. Third, bifurcation of Respondent’s jurisdictional objections will not meaningfully narrow the scope of the arbitration (let alone dispose of Claimants’ case in its entirety). This is clear because, as demonstrated below, the lack of merit of those objections is already evident based on the documents presented with this submission, along with those previously produced. In addition, assuming that the Tribunal rejects Respondent’s flawed readings of the Investment Agreements and flawed understanding of Claimants’ corporate structure, as it should, 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? As set forth above, resolution of the objections is intimately linked with resolution of these merits questions.

54. Notably, tribunals frequently deny requests for bifurcation due to their overall lack of procedural inefficiency and costliness.⁴¹ According to one empirical study, bifurcation

⁴⁰ *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. Plurinational State of Bolivia*, PCA Case No. 2018-39, Decision on the Respondent Application for Termination, Trifurcation and Security for Costs (9 July 2019) paras 133-135 (CL-0062-ENG).

⁴¹ See *Cairn Energy*, para 84 (CL-0057-ENG) (“The Tribunal thus concludes that bifurcating these proceedings would not increase procedural efficiency and would not result in very significant savings even if a bifurcated case would result in a dismissal, which in any event would not occur significantly earlier than the release of Award on the full case; to the contrary, it might significantly increase time and costs.”); *Eco Oro Minerals*, paras 56-57 (CL-0060-

has statistically resulted in longer proceedings, as bifurcation will rarely dispose of claims in their entirety at the first phase.⁴² ICSID itself has observed that, based on the available data reflecting the average length of bifurcated proceedings, “bifurcation is not the best option for all cases with jurisdictional objections.”⁴³ If discretionary bifurcation is granted here, the parties and the Tribunal will be subjected fruitlessly to a minimum of one year of additional proceedings pursuant to the scenario set out in Schedule 3—the very antithesis of procedural efficiency. This comes at great cost to Claimants, who have already waited years for just relief.

55. In short, because there are no indicators that bifurcation of Respondent’s jurisdictional objections would result in procedural efficiency, discretionary bifurcation should not be granted.

B. Respondent’s Jurisdictional Objections Are Meritless

56. Putting aside the complete lack of any efficiency-related justification for bifurcation, there is also no factual or legal justification. In the Application, Respondent launches one unsubstantiated argument after another, as if trying to see what (if anything) will stick. Unfortunately for Respondent, Claimants are indeed “investors” with “investments” under Article 10.27 of the FTA, and Claimants otherwise comply with all of the requirements under the ICSID Convention and the FTA.

1. Claimants Have Standing as “Investors” with “Investments” Under Article 10.27 of the FTA

57. Respondent attacks Claimants’ standing as “investors” as defined in Article 10.27 of the FTA by arguing that [REDACTED] Each of these points, however, is contrary to the facts.

58. [REDACTED]

ENG) (considering whether there would be any procedural efficiency in bifurcating Respondent’s jurisdictional objections and finding none).

⁴² Lucy Greenwood, ‘Does Bifurcation Really Promote Efficiency?’ (2011) 28 J. Int’l Arbitration 105, 107 (CL-0063-ENG).

⁴³ ICSID Secretariat, Proposals for Amendment of the ICSID Rules, Volume 3, Schedule 9 Addressing Time and Cost in ICSID Arbitration(2 August 2018) para 12, available at https://icsid.worldbank.org/en/Documents/Amendments_Vol_3_Schedule%209.pdf .

⁴⁴ Application, para 69 (emphasis in original).

[REDACTED]

59. Article 10.27 of the FTA defines an “investor of a Party” to mean “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[.]” An “enterprise of a Party” is defined to mean “an enterprise constituted or organized under the law of a Party[.]” And, an investment is defined as “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment”⁴⁶

60. Various tribunals have analyzed the scope of the word “control” in the definitions of “investment” and/or “investor” within various investment treaties. In this regard, as an initial matter, a majority shareholder (*e.g.*, one with 100% indirect ownership of an entity) is *presumed* to control the entity at issue, and this general presumption can be rebutted only if there are special circumstances, such as strong evidence of a lack of actual control, which “create doubts about the owner’s control.”⁴⁷

61. As for a minority shareholder, it is instructive to review the interpretation of the term “control” promulgated by tribunals determining claims under NAFTA, another free trade agreement executed by the United States that contains provisions nearly identical to those in the FTA.⁴⁸ In assessing the claimant’s “control” over the investment at issue, NAFTA tribunals

⁴⁵ Memorial, para 27. [REDACTED]

⁴⁶ FTA, art 10.27 (CL-0001-ENG).

⁴⁷ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment (2 November 2015) para 104 (CL-0064-ENG); *Caratube Int’l Oil Co. LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube Int’l Oil Co. LLP (21 February 2014) para 271 (CL-0065-ENG).

⁴⁸ For example, Article 1139 (Definitions) of NAFTA defines “investment of an investor of a Party” to mean an investment (as defined in Article 1139) that is “*owned or controlled directly or indirectly* by an investor of such Party.” North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) (“NAFTA”) art 1139 (emphasis added) (CL-0066-ENG). Similarly, Article 10.27 (Definitions) of the FTA defines “investment” as “every asset that an investor *owns or controls, directly or indirectly*, that has the characteristics of an investment” (emphasis added). FTA, art. 10.27 (CL-0001-ENG). NAFTA and the FTA have identical definitions of the term “enterprise,” which is defined “any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association[.]” See NAFTA, art 201(1) (CL-0066-ENG); FTA, art 1.3 (CL-0001-ENG).

Further, Article 1117 of NAFTA provides a cause of action under the treaty to “an investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor *owns or controls directly or indirectly*” (emphasis added) (CL-0066-ENG). Similarly, Article 10.15(1)(b) of the FTA provides a cause of action under the

have taken a less formalistic approach, ruling that legal control is not necessary so long as there is *de facto* control.

62. For example, in *International Thunderbird v. Mexico*, Thunderbird, a Canadian company with its principal offices in the U.S., sought to bring NAFTA claims on behalf of certain Mexican entities based on its minority interest in those companies. Mexico objected on the basis of jurisdiction, arguing that Thunderbird failed to demonstrate legal control over the Mexican entities. The tribunal rejected Mexico's formalistic argument, holding instead that Thunderbird had standing because it had sufficiently demonstrated *de facto* control over the entities:

Despite Thunderbird having less than 50% ownership of the Minority EDM Entities, the Tribunal has found sufficient evidence on the record establishing an unquestionable pattern of *de facto* control exercised by Thunderbird over the EDM entities. Thunderbird had the ability to exercise a significant influence on the decision-making of EDM and was, through its actions, officers, resources, and expertise, the consistent driving force behind EDM's business endeavour in Mexico.

It is quite common in the international corporate world to control a business activity without owning the majority voting rights in shareholders meetings. ***Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise*** and, under certain circumstances, control can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know how, and authoritative reputation. Ownership and legal control may assure that the owner or legally controlling party has the ultimate right to determine key decisions. However, ***if in practice a person exercises that position with an expectation to receive an economic return for its efforts and eventually be held responsible for improper decisions, one can conceive the existence of a genuine link yielding the control of the enterprise to that person.***⁴⁹

63. The *International Thunderbird* tribunal's position has been echoed over the years by other NAFTA tribunals, including as recently as July of this year, in *B-Mex v. Mexico*, in which the tribunal reached the same conclusion.⁵⁰ Several non-NAFTA ICSID tribunals have

treaty to a "claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant *owns or controls directly or indirectly*" (emphasis added) (CL-0001-ENG).

⁴⁹ *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award (26 January 2006) paras 106-108 (emphasis added) (CL-0067-ENG).

⁵⁰ *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award (19 July 2019) para 221 (CL-0068-ENG) ("The Tribunal therefore finds that 'control' in Article 1117, in accordance with its ordinary meaning, means both legal capacity to control and *de facto* control.").

likewise held that *de facto* control is sufficient to establish standing to bring a claim on behalf of the controlled entity.⁵¹

64. [REDACTED]

65. Respondent, however, ignores all of this directly pertinent case law. According to Respondent, “the ‘*default position*’ in international law” is that “a company is distinct from its shareholders . . . [and so] only the company has the capacity to bring claims under the FTA with respect to that company’s assets.”⁵² It states, “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.”⁵³ These statements of Respondent, however, are simply incorrect. It has been well established for several decades that a shareholder of an entity that made the investment at issue (*even a minority one*) may bring a claim against the host State for a breach of the relevant investment treaty.⁵⁴ [REDACTED]

⁵¹ See, e.g., *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on the Remaining Issues of Jurisdiction and on Liability (12 September 2014) paras 526-530 (CL-0069-ENG); *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015) para 324 (CL-0070-ENG).

⁵² Application, para 48 (citations omitted).

⁵³ *Id.*

⁵⁴ See, e.g., *Antoine Goetz and others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award (containing the Tribunal’s decision on jurisdiction and liability and the Parties’ settlement agreement) (10 February 1999) para 89 (CL-0071-FR) (holding that ICSID jurisprudence does not limit the right of standing to only legal entities that are directly affected by contested measures; the right extends to the shareholders of those entities who were bona fide investors); *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award on Jurisdiction (17 July 2003) paras 48-52, 63-65, 69 (CL-0072-ENG) (finding no bar under either current international law or the applicable legal instruments in that case to allowing claims by shareholders independently from those of the corporation at issue, not even if those shareholders are minority or non-controlling shareholders); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction (30 April 2004) paras 50, 63 (CL-0073-ENG) (holding that, for the purposes of the ICSID Convention and the BIT, the claimants are foreign investors, even though they did not directly operate the investment in the respondent’s territory but acted through companies created for that purpose); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Jurisdiction (14 November 2005) paras 89-94 (CL-0074-ENG) (“[T]here is really no question that the ICSID Convention and the France-Argentina BIT give corporate shareholders, whether majority or minority, the status of investors.”); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004) paras 140-143 (CL-0075-ENG) (rejecting respondent’s attempt to establish that the effective seat criterion for determining nationality of a company limits the possibility of advancing indirect claims under the BIT and holding that indirect claims can be brought under the applicable BIT by a shareholder based on damage to the company in which it holds shares).

66. Moreover, when considering broad definitions of “investor” and “investment” (similar to the ones in the FTA), investment tribunals generally have not found any “hint of any concern” that the investments may be held through entities that are incorporated in *non-Party* States, so long as “the beneficial ownership at relevant times is with a [Party] investor.”⁵⁵ For example, in *Waste Management v. Mexico*, the investment agreement at issue was signed by a wholly-owned subsidiary of the claimant, a U.S. company. In between the contracting subsidiary and the claimant, however, were certain Cayman holding companies. As a result, Mexico argued that the claimant lacked standing under NAFTA because the direct shareholder of the contracting subsidiary was in fact a Cayman entity and not a U.S. entity. Looking at the broad definitions of “investment” and “enterprise” and the language of the NAFTA provisions allegedly breached by Mexico, however, the *Waste Management* tribunal rejected Mexico’s position, holding that NAFTA imposed no such restrictions on the nationality of the non-claimant corporation that suffered the direct injury, and upheld the claimant’s standing because it was undisputed that “at the time the actions said to amount to a breach of NAFTA occurred, [the contracting subsidiary] was an enterprise owned or controlled indirectly by the Claimant, an investor of the United States.”

[REDACTED]

[REDACTED]. As Claimants did indeed have such ownership and/or control here, Respondent’s jurisdictional objection is wholly misplaced.

67. Indeed, Respondent’s Application utterly fails to grasp the Claimants’ Investment structure as a factual matter. 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.⁵⁶

68. [REDACTED]

[REDACTED]

- [REDACTED]

⁵⁵ *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, (30 April 2004) para 80 (emphasis added) (CL-0013-ENG); *Siemens A.G. v. Argentine Republic*, para 137 (CL-0075-ENG) (holding that a literal reading of the applicable BIT “[did] not require that there be no interposed companies between the investment and the ultimate owner of the company”); *S.D. Myers, Inc. v. Gov’t of Canada*, UNCITRAL, Partial Award (13 November 2000) para 229 (CL-0076-ENG) (finding that claimant was an “investor” under the relevant treaty and that an “otherwise meritorious” claim should not fail “solely by reason of the corporate structure adopted by a claimant in order to organise the way in which it conducts its business affairs”).

⁵⁶ The ownership percentages for the various entities involved in the Investments varied slightly over time from the date of the initial Investments in February 2015 to July 31, 2018, when Claimants filed their Request for Arbitration. However, at all points in time, the Investments were owned and/or controlled by Claimants.

[REDACTED]

- [REDACTED]

69. Together, the seven Carlyle Claimants exercised complete ownership of, and control over [REDACTED] and, through them, the Investments:

- i. **Carlyle Commodity Management L.L.C. (“CCM”):** CCM, a Delaware Limited Liability Company⁶⁴, [REDACTED]

⁵⁷ [REDACTED]

⁵⁸ [REDACTED]

⁵⁹ *See, e.g.*, [REDACTED]

⁶⁰ [REDACTED]

⁶¹ Claimants issued two series of notes, the 2014-1 notes and the 2015-1 notes. The 2014-1 notes were co-issued by Carlyle Global Market Strategies Commodities Funding 2014-1, Ltd. (Cayman) and Carlyle Global Market Strategies Commodities Funding 2014-1, LLC (Delaware) (together, the “2014-1 Issuers”). *See* 2014-1 Form D (C-0021-ENG). The 2015-1 notes were co-issued by Carlyle Global Market Strategies Commodities Funding 2015-1, Ltd. (Cayman) and Carlyle Global Market Strategies Commodities Funding 2015-1, LLC (Delaware) (together, the “2015-1 Issuers”). *See* 2015-1 Form D (C-0022-ENG).

⁶² [REDACTED]

⁶³ [REDACTED]

⁶⁴ *See* CCM Entity Details (C-0023-ENG).

⁶⁵ [REDACTED]

[REDACTED]⁶⁶ Because CCM exercised such *de facto* control over the Investments, CCM has standing under the FTA.

- ii. **Carlyle Investment Management, LLC (“CIM”)**: CIM, a Delaware Limited Liability Company,⁶⁷ [REDACTED]
[REDACTED] Because CIM thus indirectly owned the Investments through the Notes Entities, CIM has standing under the FTA.

- iii. **Celadon Commodities Fund, L.P. (the “Onshore Feeder”)**: The Onshore Feeder, a Delaware Limited Partnership⁷⁰, [REDACTED]
[REDACTED] Thus, the Onshore Feeder has standing under the FTA.

- iv. **Celadon Partners, L.L.C. (“Celadon Partners”)**: Celadon Partners, a Delaware Limited Liability Company⁷³, [REDACTED]

⁶⁶ See [REDACTED]

⁶⁷ See CIM Entity Details (C-0027-ENG).

⁶⁸ [REDACTED]

⁶⁹ [REDACTED]

⁷⁰ See Celadon Commodities Fund, LP Entity Details (C-0031-ENG).

⁷¹ [REDACTED]

⁷² [REDACTED]

⁷³ See Celadon Partners, LLC Entity Details (C-0035-ENG).

[REDACTED]

⁷⁴ Because Celadon Partners, through the Onshore Feeder, indirectly controlled the Investments, it too has standing under the FTA.

- v. **TC Group, L.L.C.** (“TC Group”): TC Group, a Delaware Limited Liability Corporation⁷⁵, sits above the Celadon Entities directly involved in the Investments. TC Group owns 100% of the economic interest in CCM.⁷⁶

[REDACTED]

TC Group therefore indirectly controlled the Investments and has standing under the FTA.

- vi. **TC Group Investment Holdings, LP:** TC Group Investment Holdings, a Delaware Limited Partnership⁸²,

[REDACTED]

⁷⁴ [REDACTED]

⁷⁵ See TC Group, LLC Entity Details (C-0036-ENG).

⁷⁶ See 2017 The Carlyle Group, LP 10-K, p 121 (C-0037-ENG) (“Beginning in July 2015 in connection with the departure of certain Vermillion principals and the restructuring of its operations, our economic interests were increased in stages to currently 88% (to the extent Vermillion exceeds certain performance hurdles). Otherwise, our economic interest, and share of management fees of Vermillion, is 100%”). The 88% figure accounts for two former Carlyle employees who each once held a 6.25% stake in CCM.

[REDACTED]

⁷⁷ [REDACTED]

⁷⁸ [REDACTED]

⁷⁹ [REDACTED]

⁸⁰ [REDACTED]

⁸¹ [REDACTED]

⁸² TC Group Investment Holdings, LP Entity Details (C-0042-ENG).

[REDACTED]⁸³ TC Group Investment Holdings therefore also indirectly controlled the Investments and has standing under the FTA.

- vii. **The Carlyle Group LP** (“The Carlyle Group”): The Carlyle Group is a Delaware Limited Partnership⁸⁴ that serves as the ultimate parent for the Claimant entities involved in the Investments.⁸⁵ The Carlyle Group exercises complete ownership and control of TC Group and TC Group Investment Holdings through the corporate structure depicted in Exhibit C-0020-ENG.⁸⁶ Accordingly, through its ownership and control interests in all of the other Claimants, The Carlyle Group, too, had indirect ownership and control over the Investments—and accordingly, standing under the FTA.

70. In sum, the above recitals and accompanying documentation establish without question that [REDACTED]

Claimants also owned and/or controlled the Investments.⁸⁷

⁸³ [REDACTED]

⁸⁴ See The Carlyle Group LP Entity Details (C-0043-ENG).

⁸⁵ [REDACTED]

⁸⁶ Exhibit C-0020-ENG is taken directly from The Carlyle Group’s publicly-filed Form S-1. The S-1 was filed on September 6, 2011 and remains current through the date of this filing. See The Carlyle Group, LP, Form S-1, p 3 (C-0044-ENG). As shown in Exhibit C-0020-ENG, and as more fully described on p 80 of The Carlyle Group’s Form S-1, Carlyle Holdings I GP, Inc. and Carlyle Holdings II GP L.L.C. are wholly-owned subsidiaries of The Carlyle Group. The Carlyle Group LP, Form S-1, p 80 (C-0044-ENG). Carlyle Holdings I GP, Inc., in turn, serves as general partner for Carlyle Holdings I L.P., and Carlyle Holdings II GP L.L.C., in turn, serves as general partner for Carlyle Holdings II L.P. *Id.* Carlyle Holdings I L.P. and Carlyle Holdings II L.P. (together, “Carlyle Holdings”) each issue partnership units equal to the number of common stock units that The Carlyle Group has issued. *Id.* Through this equity interest, The Carlyle Group benefits from the income of Carlyle Holdings. *Id.*

For the avoidance of doubt, the following entities shown sitting under The Carlyle Group in Exhibit C-0020-ENG are not involved in the Investments at issue in this arbitration: Carlyle Holdings III GP L.P., Carlyle Holdings III L.P., TC Group Cayman, L.P., and TC Group Cayman Investment Holdings L.P.

⁸⁷ Turning briefly to Respondent’s interpretation of the word “concretely” in the definition of “investor of a Party” under Article 10.27 of the FTA: Respondent’s reading of the term, pursuant to which Claimants allegedly had to have been the “active” investors in the investment, does not comport with the FTA (which defines “investment” broadly) or with international law (which does not set forth any particular standard with regard to the “activity” of the investor). The one case that Respondent cites in support of its interpretation (*Standard Chartered Bank v. Tanzania*) unpacks the preposition “of” in the phrase “investment of,” not the term “concretely,” and, therefore, bears no weight here. *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No ARB/10/12, Award (2 November 2012) (RL-0018). [REDACTED]

2. Claimants Have Standing as Owners of the Investments Under the Investment Agreements

71. Respondent’s next 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 [REDACTED]

[REDACTED]

72.

[REDACTED]

[REDACTED]

88 [REDACTED]

⁸⁹ Application, paras 83-85.

⁹⁰ [REDACTED]

⁹¹ See SAMIR Board Presentation (4 December 2014), slide 6 (C-0047-ENG).

⁹² Olivo Statement, Ex. 27, p 3 (MO-0027).

[REDACTED]

73.

[REDACTED] Under Article 10.21.1 of the FTA, the law applicable to Claimants' claims is the FTA and international law. The laws of Morocco have no binding effect on this Tribunal [REDACTED]

74.

[REDACTED]

3. Claimants' Investments Were "In The Territory" of Morocco

75. Respondent is also incorrect in contending that the Investment Agreements were not "in the territory" of Morocco simply because not every one⁹⁵ of the Investment Agreements was governed by Moroccan law. [REDACTED]

[REDACTED]

⁹³ [REDACTED]

⁹⁴ See, e.g., *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections (31 May 2016) paras 185, 187 (CL-0077-ENG). In this case under CAFTA DR, which contains an identical provision to Article 10.21 of the FTA, the tribunal found that the role of domestic law in the arbitration, if any, is marginal:

Article 10.22, Governing Law, sets out the governing law for a claim of this type; the Tribunal 'shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law'. This means that the law to be applied by the Tribunal is public international law, constituted primarily by the specific source provided by the DR-CAFTA as *lex specialis*, but also interpreted and completed as the case may be by general international law (i.e. customary international law)

As the case may be, municipal law might provide some pertinent elements of consideration to the Tribunal, but . . . whatever the importance devoted to DR municipal law by the Parties, and in particular by the Claimant, both in its written pleadings and during the Hearing as well as in its Post-Hearing Brief, *the DR's Law plays nothing but a marginal or subsidiary role*, including when the Tribunal addresses the issue of an alleged denial of justice committed by the Respondent against the Claimant. (emphasis added).

⁹⁵ [REDACTED]

[REDACTED]

76. There is no case law that requires investment options (*i.e.* [REDACTED]) 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. Rather, investment tribunals have repeatedly found that the location of financial instruments (such as options),⁹⁶ as investments, must be evaluated as to “where and/or for the benefit of whom the funds are ultimately used”⁹⁷

77. [REDACTED]

78. In sum, the “benefit” to SAMIR *in* Morocco, and the “benefit” *to* Morocco itself, are so clear as to be self-evident. Accordingly, Respondent’s argument that Claimants’ Investments are not “in the territory” of Morocco is a complete failure.

4. Claimants Otherwise Comply with the FTA and the ICSID Convention

79. As set forth in Claimants’ Memorial, [REDACTED] [REDACTED] comply with all of the characteristics of a covered investment under Article 10.27 of the FTA. Thus, contrary to Respondent’s assertions, Claimants also comply with the jurisdictional requirements of Article 25(1) of the ICSID Convention.

80. First, Respondent argues that no Claimant other than CCM has provided evidence that it made any financial or other contribution toward the Investments, and that the money provided [REDACTED] by Carlyle never entered Morocco. Nothing in the

⁹⁶ See Stephen G. Ryan, ‘Derivatives’ in *Financial Instruments & Institutions: Accounting and Disclosure Rules*, (Wiley Finance, 2002) p 225 (RW-0058) (listing options as a financial instrument and explaining that “[a]n options contract provides the purchaser with the right but not the obligation to buy or sell the underlying at a specified strike price over a specified term. An option to buy is a ‘call option’ and an option to sell is a ‘put option.’”).

⁹⁷ *Abaclat v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) para 374 (CL-0078-ENG). See also *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18/BCB-BZ, Award (19 December 2014) paras 206-207 (CL-0079-ENG); *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02 (“*Deutsche Bank*”), Award (31 October 2012) para 291 (CL-0002-ENG); *Ambiente Ufficio S.P.A. and Others v Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) (CL-0080-ENG). Respondent’s reliance on a case issued by a Singaporean court is wholly inapposite, and the Tribunal has no obligation to defer to the ruling of a judicial tribunal of a non-Party state.

FTA's definition of "investment," however, 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.

81. Second, Respondent argues that Claimants' Investments "lacked the necessary duration" for a qualifying investment because, in Respondent's words, the "entire arrangement was only on foot for approximately six months."⁹⁸ Although as explained below, Respondent's characterization of the investment as a six-month investment is incorrect, the definition of "investment" in Article 10.27 of the FTA provides no specific minimum durational requirement.⁹⁹ The supposed "minimum period of two to five years" that Respondent advances comes from the so-called "*Salini* test," which has been disregarded by several investment tribunals and is now recognized as merely a "non-binding, non-exclusive means of identifying (rather than defining) investments that are consistent with the ICSID Convention."¹⁰⁰ Moreover, even those investment tribunals that have considered duration as a factor have further held that "duration" is a flexible term, which can mean anything "from a couple of months to many years."¹⁰¹ In *Deutsche Bank v. Sri Lanka*, for example, the Tribunal found that a 12-month hedging agreement satisfied the duration criterion and was therefore a protected investment under the relevant treaty. The *Deutsche Bank* tribunal explained that, as a prior investment tribunal observed, "short-term projects are not deprived of 'investment' status solely by virtue of

⁹⁸ Application, para 59.

⁹⁹ Notwithstanding that certain of Claimants' prior submissions have listed the duration "requirement" with the other requirements qualifying an "investment" under Article 10.27 of the FTA, Claimants hereby clarify that (i) Article 10.27 of the FTA does not, in fact, set forth any requirement with respect to duration, and (ii) the duration of Claimants' Investments was mentioned only because duration is a factor that investment tribunals have considered (but not as a dispositive factor) when discussing the definition of "investment." In this case, however, the FTA is *lex specialis* and prevails over any case law-created requirement.

¹⁰⁰ *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction (8 March 2010) (CL-0081-ENG). See also *Bivater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) paras 312-18 (CL-0010-ENG); *Malaysian Historical Salvors SDN BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (16 April 2009) paras 75-79 (CL-0082-ENG); cf., *MCI Power Group, LC and New Turbine, Inc. v. Ecuador*, ICSID Case No. ARB/03/6, Award (31 July 2007) para 165 (CL-0083-ENG); *RSM Production Corp. v. Grenada*, ICSID Case No. ARB/05/14, Award (13 March 2009) paras 236-38 (CL-0084-ENG).

¹⁰¹ *Deutsche Bank*, para 303 (CL-0002-ENG). See also *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009) para 43 (CL-0085-ENG) (rejecting the application of the *Salini* test and specifically voicing criticism of the duration requirement: "It comes down to this: does the word 'investment' in Article 25(1) carry some inherent meaning which is so clear that it must be deemed to invalidate more extensive definitions of the word 'investment' in other treaties? *Salini* made a respectable attempt to describe the characteristics of investments. Yet broadly acceptable descriptions cannot be elevated to jurisdictional requirements unless that is their explicit function. They may introduce elements of subjective judgment on the part of arbitral tribunals (such as 'sufficient' duration or magnitude or contribution to economic development) which (a) transform arbitrators into policy-makers and above all (b) increase unpredictability about the availability of ICSID to settle given disputes.").

their limited duration” but “[d]uration is to be analysed in light of all the circumstances, and of the investor’s overall commitment.” The *Deutsche Bank* tribunal also observed that, in a prior ICSID case, a tribunal had noted that, “the ‘duration’ characteristic is not necessarily an element that is necessarily required for the existence of an investment, but is to be considered a mere example of a typical characteristic.”¹⁰²

82. Moreover, even if the duration of the investment were somehow relevant under the pertinent case law, the duration element is satisfied here. [REDACTED]

[REDACTED] In short, even if the FTA or the ICSID Convention imposed a “duration element”—in fact, neither does—Claimants’ Investments undoubtedly satisfy any such element.

83. Third, Respondent argues that the risk assumed by Claimants in making the Investments was not an “operational risk” sufficient for purposes of Article 10.27 of the FTA and Article 25(1) of the ICSID Convention. [REDACTED]

[REDACTED] The distinction that Respondent attempts to draw between “operational” risks (which allegedly qualify) 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. Investment case law and scholarly writing, by contrast, have established that the very existence of a dispute regarding [REDACTED] is sufficient to render the arrangement a qualifying “investment.”¹⁰³

84. Finally, Respondent does not contest that, by making the Investments, Claimants plainly anticipated gains or profits from the accrued investment premium that would be due from SAMIR to Claimants if Claimants [REDACTED] under the Investment Agreements.

* * *

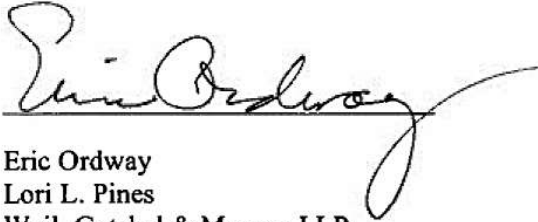
¹⁰² *Id.* (citations and internal quotation marks omitted).

¹⁰³ See *Deutsche Bank*, para 301 (CL-0002-ENG) (citing Professor Schreuer’s, *The ICSID Convention: A Commentary* (2nd Ed.) art 25 para 163). See also *Fedax N.V. v. The Republic of Venezuela*, ICSID Case ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 July 1997) para 40 (CL-0003-ENG) (stating as follows with respect to whether or not promissory notes could be considered an “investment” under Article 25 of the ICSID Convention: “[n]or can the Tribunal accept the argument that, unlike the case of an investment, there is no risk involved in this transaction: the very existence of a dispute as to the payment of the principal and interest evidences the risk that the holder of the notes has taken.”).

85. In sum, Respondent's jurisdictional objections are weak and unclear at best, frivolous and misleading at worst. To the extent the Tribunal sees any merit to Respondent's arguments, the parties should be prompted to address any such outstanding issues in conjunction with their merits submissions and hearing. Claimants also reserve the right to further develop any arguments (whether or not stated herein) in response to Respondent's objections on the basis that the present document merely constitutes Claimants' observations on Respondent's Application.

Dated: November 20, 2019

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Eric Ordway", written over a horizontal line. The signature is fluid and cursive, with a long, sweeping tail that extends to the right.

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