

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

v.

Kingdom of Morocco

(ICSID Case No. ARB/18/29)

**PROCEDURAL ORDER No. 5
CONCERNING THE DESIGNATION OF PROTECTED INFORMATION**

Prof. Juan Fernández-Armesto, President of the Tribunal
Mr. Samuel Wordsworth QC, Arbitrator
Dr. Horacio A. Grigera Naón, Arbitrator

Secretary of the Tribunal
Ms. Ella Rosenberg

Assistant to the Tribunal
Ms. Krystle M. Baptista

December 3, 2020

I. PROCEDURAL HISTORY

1. On May 29, 2020, Claimants informed the Tribunal of the Parties' ongoing disagreement regarding the scope of "protected information" in this arbitration. Noting the difficulties and delays caused by the Covid-19 restrictions, Claimants requested approval from the Tribunal to provide Respondent with updated confidentiality designations by July 31, 2020.
2. On June 8, 2020, Respondent replied to Claimants' letter of May 29, informing the Tribunal that they were willing to accept Claimants' request to submit updated designations by July 31, 2020. Respondent additionally requested that the Tribunal adopt a calendar proposed by Respondent to hear the Parties and render a decision on the issue.
3. On June 11, 2020, Claimants informed the Tribunal that they agreed with all of the conditions and deadlines suggested by Respondent.
4. On June 12, 2020, the Tribunal confirmed the Parties' agreement but requested that the Parties' provide only one round of pleadings. The Tribunal noted that it would endeavor to issue a decision with respect to Protected Information¹ before December 4, 2020.
5. On July 31, 2020, Claimants submitted to the Tribunal a letter with the bases for their confidentiality designations and redactions. Claimants requested the Tribunal to confirm that the designated materials be deemed protected information under FTA Article 10.20, and additionally requested that the Tribunal adopt a protective order instructing the Parties to maintain confidentiality over information disclosed pursuant to the Protective Order.² Claimants provided an annex listing all of their proposed designations and redactions.
6. On October 2, 2020, Respondent replied to Claimants' letter of July 31, objecting to the majority of Claimants' proposed designations. Respondent attached a schedule to their letter wherein they addressed each of Claimants' proposed designations.
7. On October 5, 2020, the Tribunal received a letter from the United States Department of State noting the right of the United States, as a non-disputing Party, to make submissions to the Tribunal on issues of treaty interpretation. The United States also noted its right under the FTA to receive the Parties' pleadings with redactions for "protected information". The United States requested the Tribunal to schedule a date for any non-disputing Party submission prior to the hearing on jurisdiction. The United States also requested that the Tribunal render, if possible, a decision on the issue of protected information at least six weeks prior to the due

¹ "Protected Information" is defined at FTA Article 10.27.

² See para. 11 below.

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date of said submissions. Finally, the United States requested that it be allowed to attend the hearing scheduled for January.

8. On October 6, 2020, Claimants provided comments to the letter from the United States. Claimants proposed granting the United States access to all Claimants' pleadings as refiled July 31, 2020. Respondent agreed, and the Arbitral Tribunal confirmed the Parties' agreement.
9. The Arbitral Tribunal has deliberated and hereby issues the following:

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10. The Parties' dispute focuses on the transparency regime established in FTA Article 10.20 [the "**Transparency Regime**"]. Specifically, the Parties disagree about the scope of materials that may be properly designated as "protected information" under protections from disclosure provided in the Transparency Regime's (FTA Article 10.20.4).
11. Claimants, having originally designated a much larger amount of information as protected, now limit their designations to two grounds for protection:
 - information subject to a protective order issued by a U.S. District Court Judge for the Eastern District of Virginia [the "**Virginia Protective Order**" or "**VPO**"], and
 - information which is "commercially sensitive".
12. Respondent objects to a number of Claimants' proposed redactions, arguing that they do not comply with the FTA's Transparency Regime. Respondent argues that Claimants have failed generally to provide adequate justification for their designations and have thus failed to meet their burden of proof under the FTA.
13. The Tribunal issues this Procedural Order in order to:
 - determine the extent to which materials designated by Claimants qualify as protected information and are thus not subject to the FTA's Transparency Regime; and
 - decide whether to implement protective measures, including any measures pursuant to the VPO or Claimants' draft protective order.
14. The Tribunal will present the Parties' requests for relief (**1.**), and then outline the positions of Claimants (**2.**) and Respondent (**3.**). The Tribunal will then make its decision (**4.**).

1. RELIEF REQUESTED BY THE PARTIES

15. Claimants request that their proposed redactions be honored and that the Tribunal issue an order:³

“- Determining that the limited amount of remaining information designated by Claimants (1) in accordance with the Protective Order issued by a U.S. federal judge and (2) due to commercial sensitivity, listed in Annex A, not be disclosed but be deemed protected information under Article 10.20 of the FTA.

- Adopting the terms of Claimants’ draft protective order, attached hereto as Annex B, or ordering Respondent to negotiate with Claimants in good faith a revised version of the draft protective order within a reasonable timeframe determined by the Tribunal; or, in the alternative, issuing a procedural order instructing the parties to maintain confidentiality over information disclosed pursuant to the Protective Order and requiring Respondent to return or destroy such information within thirty (30) calendar days following the conclusion of these proceedings.”

16. Respondent notes that it has no objection over Claimants’ proposed designations of “protected information” relating to material that is clearly confidential. Respondent requests that the Tribunal reject the designations made on the basis of the Virginia Protective Order, and reject the remaining designations made on the basis of “commercial sensitivity” for their failure to provide specific reasons for the designation.⁴

17. Respondent additionally requests the Tribunal to reject:⁵

- Claimants’ request that the Tribunal adopt its proposed draft protective order;
- Claimants’ alternative request that the Tribunal order Respondent to negotiate with Claimants’ in good faith in order to agree on terms for a protective order; and
- Claimants’ third alternative request that the Tribunal issue a procedural order instructing the Parties to maintain confidentiality over information disclosed pursuant to the Virginia Protective Order and requiring Respondent to return or destroy such information within thirty calendar days following the conclusion of these proceedings.

2. CLAIMANTS’ POSITION

18. Claimants designate as confidential the following two categories of information:⁶

³ Claimants’ letter dated July 31, 2020, p. 7.

⁴ Respondent’s letter dated October 2, 2020, pp. 5-9.

⁵ Respondent’s letter dated October 2, 2020, pp. 9-10.

⁶ Claimants’ letter dated July 31, 2020, p. 1.

- (i) information subject to the “VPO”;
 - (ii) certain highly sensitive commercial information belonging to Claimants and their affiliates that is not pertinent to the issues in this case.
19. Additionally, Claimants request that the Tribunal either (i) adopt the terms of Claimants’ draft protective order, or (ii) order Respondent to negotiate in good faith a revised version of the draft protective order, or, in the alternative, (iii) issue a procedural order instructing the Parties to maintain confidentiality over information disclosed pursuant to the VPO and requiring Respondent to return or destroy such information within thirty (30) calendar days following the conclusion of these proceedings.
20. Claimants arguments are summarized in the following subsections.
- 2.1 CLAIMANTS’ GROUND 1: PROTECTIVE ORDER⁷**
21. Claimants refer to a protective order entered by a U.S. federal judge in proceedings pursuant to 28 U.S.C. § 1782⁸ in the U.S. District Court for the Eastern District of Virginia.
22. Claimants argue that information subject to the VPO is protected from disclosure under FTA Article 10.27, which refers to “information protected from disclosure under a Party’s law”.
23. Claimants note that Article 9(2) of the IBA Rules on the Taking of Evidence [the “**IBA Rules**”] includes “legal impediment” as a ground for excluding documents from production. According to Claimants, a legal impediment can be defined as a rule of law or an order of a public authority which prohibits disclosure.
24. Claimants explain that the VPO contains provisions protecting the confidential information of third parties from disclosure. Claimants assert that this includes the entirety of the witness statement of George Salem, the exhibits thereto, and any additional documents obtained from Mr. Salem. Claimants assert that this information is protected, even if portions of the statement touch on matters in the public domain.
25. Claimants aver that Mr. Salem’s witness statement fits within the VPO’s definition of “confidential information” because no portion of Mr. Salem’s witness statement has ever been public and – at the request of Mr. Salem and his counsel – was not intended to be made available to the public.⁹

⁷ Claimants’ letter dated July 31, 2020, pp. 3-4.

⁸ 28 U.S. Code § 1782. Assistance to foreign and international tribunals and to litigants before such tribunals.

⁹ Claimants’ letter dated July 31, 2020, p. 4, referring to VPO, Section 2.3 (“‘Confidential’ information shall mean [. . .] any other information that any Party to the Matter may reasonably characterize as confidential and that has not previously been made available to the public.”).

26. Claimants note that regardless of whether Mr. Salem’s statement makes reference to underlying facts that have been made public, it is Mr. Salem’s comments and recollections about those facts and events that render his statement confidential.

2.2 CLAIMANTS’ GROUND 2: COMMERCIAL SENSITIVITY

27. Claimants emphasize that they have lifted the designations on most of the corporate documents previously designated under this category.

28. Claimants continue to redact the following:¹⁰

- bank account numbers of Claimants and/or their affiliates;
- identifying information such as Carlyle’s former employee’s frequent flyer number and Carlyle entities’ corporate tax identification numbers;
- information related to certain agreements that Carlyle entered into with investors that contain their own independent confidentiality provisions; and
- information related to other investments that Carlyle engaged in which are unrelated to this matter.

29. Claimants note that out of all of their submissions, redactions on this ground amount to fewer than four sentences of text and parts of four footnotes on the basis of commercial sensitivity.

30. According to Claimants, their redactions on this ground fall within a narrow set of information that is precisely the type of information covered by the FTA’s concept of “confidential business information”.

2.3 PROPOSED PROTECTIVE ORDER

31. Claimants believe that a protective order is necessary in this arbitration in order to comply with the terms of the VPO.

32. Claimants have provided a draft protective order to Respondent and the Tribunal.

33. Respondent has rejected the proposed protective order, and Claimants assert that Respondent’s position has been unreasonable. Claimant notes that Respondent has provided no justification or reference for its assertions that certain provisions of the protective order are “impossible for Morocco to agree to” and “would breach Moroccan legislation on record keeping”.

34. Claimants also note that, even if such legislation did render the requirement to return or destroy information unenforceable, Respondent has not provided any explanation for why the rest of Claimants’ draft protective order is unacceptable.

¹⁰ Claimants’ letter dated July 31, 2020, pp. 5-6.

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35. Claimants emphasize that they remain willing to negotiate the language of the protective order, so long as it preserves the requirements of the VPO.
36. Claimants inform the Tribunal that, in the alternative, they would be amenable to the issuance of a regular procedural order, so long as the procedural order expressly instructs the Parties to maintain confidentiality over information disclosed pursuant to the VPO and requires Respondent to return or destroy such confidential information within 30 calendar days following the conclusion of these proceedings.
37. Claimants note that the VPO contains requirements that are not included in the FTA, such as the requirement to return or destroy confidential information after the conclusion of these proceedings. Therefore, Claimant argues that the protections offered by the FTA alone are insufficient and an order signed by the Tribunal is necessary.

3. RESPONDENT'S POSITION

38. Respondent claims that, although Claimants' remaining redactions are more limited, a significant proportion of them remain impermissible under the terms of the FTA.
39. Respondent argues that some of the proposed redactions touch on important aspects of the jurisdictional case that will be heard January 2021 and that Morocco cannot accept them – as they are not in accordance with the Transparency Regime agreed in the FTA.
40. Additionally, Respondent argues that a number of the proposed redactions would be disruptive and materially increase the costs of the proceedings, because they would require procedures to prevent a non-party attendee from hearing references to that information and then redactions of the transcript, any future submissions, and any award.
41. With respect to Claimants' proposed protective order, Respondent notes that such an order would extend and/or contradict the FTA's existing carefully negotiated confidentiality provisions. Respondent emphasizes that it is unable to consent to such an order, which would materially increase the administrative burden on the Parties and the Tribunal, while contravening Moroccan mandatory laws and the terms of the FTA it agreed with the United States.

42. Respondent's positions are summarized in the following subsections.

3.1 THE FTA'S PROVISIONS RELATING TO THE TRANSPARENCY OF ARBITRAL PROCEEDINGS.

43. Respondent explains that the FTA places special emphasis on transparency, noting that in the FTA's preamble both parties affirmed "their commitment to transparency and their desire to eliminate corruption in international trade and investment".

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44. Respondent argues that, in line with that commitment, FTA Article 10.20 sets out the transparency framework for arbitral proceedings. Respondent explains that Article 10.20.1 provides that key submissions by the parties, transcripts of hearings, and decisions by the Tribunal will be made public.
45. Respondent acknowledges that there is an exception to the general rule of transparency in FTA Article 10.20.4, which provides for a mechanism whereby information properly designated as “protected information” will not be disclosed to the public.
46. Respondent notes that “protected information” is defined at FTA Article 10.27, as “confidential business information or information that is privileged or otherwise protected from disclosure under a Party’s law”.
47. According to Respondent, the burden is on Claimants to justify any designation by reference to this definition.¹¹
48. Respondent recognizes that the FTA does not define what constitutes “confidential business information” or “information that is privileged or otherwise protected from disclosure under a Party’s law”. According to Respondent, however, this language derives from the US Model BIT, and when considered against that background, and in their context, the meaning of the terms is clear.

“Confidential business information”

49. Respondent claims that this category refers to business information which is so confidential as to require protection from disclosure.
50. Respondent argues that FTA Article 10.13 sheds light on the meaning of “confidential business information”. Article 10.13 allows either state which is a Party to the FTA to request any information from an investor but requires the requesting state to protect “confidential business information [...] that would prejudice the competitive position of the investor or the covered investment”.
51. Therefore, according to Respondent, the burden is on Claimants not simply to assert some general proposition on confidentiality, but to demonstrate to the Tribunal that the relevant information is of such nature that its disclosure would cause serious prejudice to Claimants or their alleged investments.¹²

¹¹ Respondent’s letter dated October 2, 2020, para. 11, referring to *David R Aven & Ors v Republic of Costa Rica*, ICSID Case No UNCT/15/3 (Procedural Order No 3, 5 April 2016) ¶ 14, considering the similarly worded DR-CAFTA Art 10.21: “[i]t follows from Article 10.21.3 that the burden to justify the nature of the protected information is on the party that alleges the exception”.

¹² Respondent’s letter dated October 2, 2020, para. 12.1.1, referring to *Vito Gallo v. Canada*, PCA Case No 55798 (Confidentiality Order, 4 June 2008).

“Information that is privileged or otherwise protected from disclosure under a party’s law”

52. Respondent argues that this category is clear on its face, and that it means that the protection from disclosure of such information be enshrined in statute or have a doctrinal status similar to legal professional privilege.
53. According to Respondent, on the rare occasions where parties have sought to use this basis it has been to protect sensitive personal information that was allegedly caught by domestic privacy legislation.¹³
54. Respondent notes that there is no dispute about the application of the provision to sensitive personal information in this case, and that Morocco accepts Claimants’ redactions of sensitive personal information.

3.2 DESIGNATIONS MADE ON THE BASIS OF THE VIRGINIA PROTECTIVE ORDER

55. Respondent rejects the authority of the VPO, arguing that a local court cannot issue a protective order that contradicts or overrides language that was agreed to by the signatory parties. Furthermore, Respondent argues that Claimants have failed to explain how these materials are protected under the FTA.
56. Respondent argues that Claimants’ position with respect to the VPO is flawed for two reasons.
57. First, Respondent argues that the VPO cannot be what is meant by “information that is privileged or otherwise protected from disclosure under a Party’s law”. According to Respondent, if Claimants’ argument were accepted, this would mean that investment treaty tribunals under the FTA would be subject to the whims of confidentiality designations by United States and Moroccan courts. This would be untenable, says Respondent, because it would mean that a non-party to the FTA (*i.e.*, an investor) could completely override the transparency mechanism agreed upon by the two treaty parties simply by getting a consent order in a local state court.
58. Furthermore, Respondent claims that the language in Section 1 of the VPO demonstrates that it is not an order to protect specific information, but rather it is a general order of confidentiality.
59. Respondent highlights that Section 2 includes a broad definition of confidentiality, and Section 3 sets out a broad scope of the order, which includes all documents produced by the Virginia Court Action (none of which have been provided by Claimants).

¹³ Respondent’s letter dated October 2, 2020, para. 12.2.2, referring to *Elliot Associates LP v Republic of Korea*, PCA Case No 2018-51 (Procedural Order No 4, 22 July 2019); *Aven v Costa Rica* (Procedural Order No 3).

60. Finally, according to Respondent, the Virginia court does not appear to have considered the nature of the relevant information, and Claimants have provided no evidence suggesting that the court substantively assessed whether the relevant information deserved protection.
61. Second, Respondent argues that the VPO does not actually prevent the disclosure of information in this arbitration. Respondent notes that Section 2.7 of the VPO expressly contemplates that it is for the present Tribunal to determine what is or is not confidential material pursuant to the terms of the FTA.
62. Respondent claims that all the VPO does is record what is essentially an agreement between Claimants and Mr. Salem. Under the terms of the VPO, Claimants would be permitted to rely on information received by Mr. Salem in their Request for Arbitration, following which they had no permission to do so.

3.3 DESIGNATIONS MADE ON THE BASIS OF COMMERCIAL SENSITIVITY

63. Respondent does not object to the protection of certain information which is plainly confidential (such as bank account information, frequent flyer miles, etc.).
64. Respondent does, however, object to several other designations made by Claimants on the basis of “commercial sensitivity”. Respondent alleges that some of Claimants’ designations seek to protect information that is in the public domain. Respondent’s other objections assert that no adequate explanation has been provided for why the information should be considered “commercially sensitive”.
65. Respondent provides the example of Claimants’ proposal to redact every reference to the fact that a Maryland pension fund was the sole major investor in their fund structure, on the basis of unidentified confidentiality provisions. Respondent notes that, like many other designations, the involvement of the Maryland pension fund is in the public domain.
66. Respondent also takes issue with Claimants’ proposal to redact information relating to some of their historical investments. According to Respondent, it is unclear why details of such historic investments are commercially sensitive, and Claimants have provided no explanation.
67. Respondent argues that Claimants have the burden of satisfying the Tribunal as to the necessity of confidentiality for each and every proposed redaction. Respondent argues that Claimants, having had the best part of a year to consider Morocco’s objections, have failed to provide any substantive justifications for their designations.

3.4 CLAIMANTS’ PROPOSAL FOR A CONFIDENTIALITY AGREEMENT

68. Respondent objects to the draft protective order proposed by Claimants, arguing that it is not in line with the terms of the FTA. Respondent also objects to Claimants’ request that the Tribunal order Respondent to destroy or return all materials

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pursuant to the VPO within thirty calendar days following the conclusion of the proceedings, asserting that this would be contrary to Moroccan data retention law.

69. Respondent's position is that there is no basis for adopting an alternative Transparency Regime to that which is already contained in the FTA. Furthermore, Respondent questions whether the disputing parties even have the power to amend the FTA's regime or to adopt an alternative.
70. Respondent claims that Claimants' draft protective order goes far beyond that which is contemplated in the FTA. Respondent notes that the protective order would replace the FTA's definition of "protected information" and provide that in case of conflict the protective order would override the FTA. According to Respondent, neither the disputing Parties nor the Tribunal have the power to override the express provisions of the FTA. Furthermore, the draft order includes very lengthy definitions of key terms, including the terms "confidential" and "business confidentiality", which are broader than the FTA regime and also very ambiguous.
71. Respondent highlights a significant problem with the draft protective order's requirement to return or destroy information within 30 days following the conclusion of the proceedings. According to Respondent, not only is there no basis for this provision in the FTA, but such order would also breach Moroccan Law 69-99 relating to archives, and Decree 2.14.267 dated November 4, 2015, which provide for the preservation of documents. Respondent alleges that, presently, document relating to arbitrations involving the state must be preserved for 60 years before being archived.
72. Respondent notes that, Moroccan law aside, it is extraordinary for Claimants to demand that Morocco destroy evidence of arbitral proceedings where an alleged investor seeks hundreds of millions of USD. According to Respondent, it would be unlikely for a state to accept such a requirement, if only to protect against allegations of corruption where evidence of proceedings is destroyed.
73. Respondent accuses Claimants of abusing the FTA's Transparency Regime for more than a year – by designating their entire Memorial and associated evidence as "protected information" and repeatedly insisting on further untenable designations. Respondent asserts that Claimants actions in this respect have left Morocco very reluctant to agree to a protective order, which Respondent feels would only provide more ammunition to Claimants and result in further wasted costs.
74. Respondent asserts that, in bringing their claim under the FTA, Claimants are bound by the FTA's Transparency Regime as it was agreed to by the United States and Morocco. Respondent argues that the FTA regime is a fair and reasonable regime and the Tribunal should apply it.

4. DECISION OF THE ARBITRAL TRIBUNAL

75. The Tribunal is tasked with determining the extent to which materials designated by Claimants as “protected information” may be protected from disclosure under the FTA’s Transparency Regime. Additionally, the Tribunal is asked to decide whether to adopt additional protective measures proposed by Claimants.
76. The Tribunal will first address the FTA’s Transparency Regime (4.1) and Claimants’ asserted grounds for protection (4.2). The Tribunal will then address Claimants’ proposal for a protective order in this arbitration (4.3).

4.1 THE TRANSPARENCY REGIME IN THE FTA

77. The starting point for the Tribunal is the terms of the FTA.
78. FTA Article 10.20.1 states that Respondent shall transmit to the non-disputing Party and make available to the public:
- (a) the notice of intent;
 - (b) the notice of arbitration;
 - (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 10.19.2 and 10.19.3 and Article 10.24;
 - (d) minutes or transcripts of hearings of the tribunal, where available; and
 - (e) orders, awards, and decisions of the tribunal.
79. Only the documents specially designated in Article 10.20.1 – pleadings, and main submissions, as well as the hearing transcript and tribunal decisions – will be made available to the non-disputing Party and the public [the “**Public Documents**”]. All other documents, such as exhibits, witness statements, expert reports, letters between the Parties and to the Arbitral Tribunal, *etc.* remain outside the Transparency Regime, and thus, confidential.
80. The procedures for protecting information from disclosure are contained in FTA Article 10.20.4, which provides that:
- “Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:
- (a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);

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(b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;

(c) A disputing party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1; and

(d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may

(i) withdraw all or part of its submission containing such information, or

(ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c).

In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information." [Emphasis added]

81. The procedures laid out in FTA Article 10.20.4 require only that a disputing party clearly designate information contained in the Public Documents as protected and provide redacted versions of any such materials. Subsection (d) grants the Tribunal the authority to "decide any objection regarding the designation of information claimed to be protected information".

82. The definition of "protected information" is provided in FTA Article 10.27:

"protected information means confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law." [Emphasis added]

83. Thus, according to the FTA's definition of "protected information", there are three distinct categories of information protected from disclosure:

- (i) confidential business information;
- (ii) information that is privileged;
- (iii) information that is otherwise protected from disclosure under a Party's law.

84. Claimants' proposed designations fall within the first and third categories ("confidential business information" and "information protected from disclosure under a Party's law").
85. With respect to "confidential business information", Respondent suggests that this term should be interpreted with reference to FTA Article 10.13, which provides that:
- "[...] a Party may require an investor of the other Party, or a covered investment, to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the investor or the covered investment." [Emphasis added]
86. Respondent thus argues that "confidential business information" under the FTA's Transparency Regime refers only to "information that would prejudice the competitive position of the investor or the covered investment".
87. The Tribunal is not convinced that this is the case. FTA Article 10.13 is a provision which is tailored to a specific circumstance: the protection of confidential information when such information is required from the investor solely for information or statistical purposes of the host state.
88. The Tribunal, therefore, agrees with Claimants that FTA Article 10.13 has no bearing on the FTA's definition of "protected information" – which must be interpreted by the Tribunal in accordance with Article 31 of the Vienna Convention on the Law of Treaties.¹⁴
89. As a preliminary point, and before deciding on the designations made by Claimants, the Arbitral Tribunal notes that most of those designations relate to documents which are not Public Documents. Since those documents will remain confidential, the designation of information contained therein as protected under the FTA is moot and the Tribunal need not decide on them.
90. In the following section the Tribunal will determine whether the materials designated as "protected information" by Claimants in Public Documents fall within the scope of the FTA's protections from disclosure.

4.2 GROUNDS FOR PROTECTION

A. Protected by Law: The Virginia Protective Order

91. Claimants argue that information subject to the VPO is protected from disclosure under the FTA because it is "information that is protected from disclosure under a

¹⁴ VCLT, Article 31: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Party's law".¹⁵ This includes any language from or citation to the Salem Witness Statement.

Legal significance of the VPO with respect to this arbitration

92. As a preliminary matter, the Tribunal agrees with Respondent that the VPO cannot fall within the scope of "information that is privileged or otherwise protected from disclosure under a Party's law". The FTA is a treaty with specific language that was agreed to by Morocco and the United States, and the Tribunal cannot give any legal significance to a court order that would seek to expand or amend the treaty's terms or scope. This is especially true when the desire to amend the FTA's terms is unilateral and there is no agreement between the Parties.
93. Furthermore, having reviewed the VPO, the Tribunal notices that it does not seek to have any binding or legal effect on this arbitration. Section 2.7 of the VPO, which defines "foreign proceedings", specifically addresses the circumstance of an investment arbitration brought by one or more of the Applicants against the Kingdom of Morocco:
- "[...] the Applicants agree that they may use Confidential Information in the initial Request for Arbitration provided that they identify it as Confidential in such pleading and that, thereafter, they will avail themselves of all opportunities to incorporate procedures in the arbitration to ensure the protection of any Confidential information submitted or produced in such proceeding, including making an application to the panel in the proceeding to enter a protective order incorporating the protections provided by this Order, to ensure proper treatment of Confidential information pursuant to the terms of this Order. If the arbitration panel declines to enter such protective order or other procedures to protect Confidential information from disclosure, the Applicants will immediately (within two (2) business days), notify the Producing Party in writing about such declination so the Parties can confer regarding appropriate steps to ensure the protection of Confidential information. If the Parties cannot agree, they will seek an order or other direction from this Court." [Emphasis added]
94. By its terms, the VPO directs the Applicants (Carlyle Commodity Management L.L.C., *et al.*) to identify as confidential any confidential information which they use in their Request for Arbitration, and thereafter directs the applicants to "avail themselves of opportunities" to incorporate procedures to protect confidential information. The VPO recognizes that the Arbitral Tribunal in this case may decline to accept or adopt any or all of its protective measures, in which case the Applicants are directed to reach an agreement with the Producing Party or, failing that, seek an order or other direction from the Virginia court.
95. The Tribunal notes, however, that it may take the VPO into consideration in making its own determinations.

¹⁵ FTA, Article 10.27.

Claimant's Designations with respect to the VPO

96. Claimants have proposed the following redactions, each of which is made on the basis that it involves language from, or makes citation to, the Salem Witness Statement:

Claimants' Memorial:

- Paragraphs: 6 (line 1–2), 48 (lines 11-13, 14-16), 49 (lines 5-6), 63 (lines 2-5), 65 (lines 13), 142 (lines 4–5)
- Footnotes: 49, 76, 78, 80, 83, 112, 125, 132, 133, 243, 245

Claimants' Observations on Respondent's Application for Bifurcation:

- Paragraph: 72 (lines 10-13, 15-18)
- Footnotes: 91, 93

Claimants' Counter-Memorial on Jurisdiction:

- Footnotes: 15, 30, 224

97. Claimants argue that these materials are covered by the VPO's definition of confidential information¹⁶ because no portion of Mr. Salem's witness statement has ever been available to the public, and at the request of Mr. Salem and his counsel, was not intended to be made available to the public.

98. Respondent's objection is the same for each of these designations:

“The Claimants rely solely on the VPO. That does not satisfy the standard for protected information under the FTA and the Claimants have made no effort to justify this as confidential business information See Respondent's letter at paragraphs 14 to 21.”

99. The Tribunal agrees that relying on the VPO does not in and of itself satisfy the requirements of the FTA. Nevertheless, the Tribunal recognizes that Claimants may have compelling reasons to protect this information and that the redactions are *de minimis*.

100. Therefore, the Tribunal determines – *pro tem* – that these proposed redactions should be accepted. The Parties may, if they find it necessary, revert to the Tribunal with respect to the designations affected by this decision.

¹⁶ VPO, Section 2.3 defines “Confidential” information as “[...] any other information that any party to the Matter may reasonably characterize as confidential and that has not previously been made available to the public”.

B. Commercial sensitivity

101. Claimants have made several designations on the basis of commercial sensitivity, which they argue involve precisely the type of information covered by the FTA's concept of "confidential business information".
102. There is no doubt that commercially sensitive information is to be protected from disclosure, and Respondent has provided no evidence disproving the majority of Claimants' designation. There is, however, an exception: information that is in the public domain cannot be designated as "protected information" under the FTA.
103. Respondent has provided certain links to publicly available information related to the following redactions:

Claimants' Counter-Memorial on Jurisdiction:

- Paragraphs: 20 (lines 3-4), 55 (lines 6-7)
- Footnotes: 38, 84
- Diagram 2
- Annex C, Section (c)

104. In so far as such redactions refer to publicly available information, the Arbitral Tribunal must reject them. All other redactions to confidential business information are accepted.

4.3 PROTECTIVE ORDER

105. For the reasons stated above and under the current circumstances, the Tribunal finds little room for the issuance of a protective order unless the Parties mutually agree otherwise.
106. The Tribunal will therefore not issue a protective order at the present time; however, it remains open to proposals from the Parties if they feel it is necessary in the future.

III. DECISION

107. The Tribunal determines that only those documents specially designated in Article 10.20.1 – including the Parties’ pleadings and primary submissions, as well as the hearing transcript and tribunal decisions – will be made available to the non-disputing Party and the public (the Public Documents). All other documents, such as exhibits, witness statements, expert reports, letters between the Parties and to the Arbitral Tribunal, *etc.* remain outside the Transparency Regime, and thus, confidential.
108. With respect to Claimants’ proposed redactions involving materials within the scope of the FTA’s transparency regime, the Tribunal accepts – *pro tem* – all the proposed redactions, except for those which relate to publicly available information.
109. The Tribunal determines that, in light of the determinations in this Procedural Order, no additional protective order is necessary at this time.

On behalf of the Arbitral Tribunal,

[Signed]

Prof. Juan Fernández-Armesto
President of the Arbitral Tribunal
Date: December 3, 2020