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' RESPONSE TO THE SUBMISSION OF THE UNITED STATES OF AMERICA UNDER ARTICLE 10.19.2

22 DECEMBER 2020

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1 Claimants respectfully respond herein to the Submission of the United States of America under Article 10.19.2 of the U.S.-Morocco FTA ("FTA"), dated 4 December 2020 (the "U.S. Submission"). Specifically, Claimants address the following matters raised in the U.S. Submission:

I. The interpretation of Article 10.15.1(a) of the FTA; and

II. The definition of "Investment" under Article 10.27 of the FTA.

2 For the reasons discussed in Section I below, Claimants disagree with the United States' interpretation of Article 10.15.1(a) of the FTA. As discussed in Section II below, while Claimants do not disagree with the United States' interpretation of the term "Investment" under Article 10.27 of the FTA generally, Claimants believe it is necessary to clarify certain factual issues as they relate to the United States' comments on subparagraph (c) of Article 10.27 pertaining to debt instruments and loans.

I. The Interpretation of Article 10.15.1(a) of the FTA

3 The U.S. Submission interprets Article 10.15.1(a) of the FTA to mean that an investor may bring a claim under this provision *only where* it has incurred damages "directly."[1] Claimants respectfully submit that this interpretation is incorrect and cannot be squared with: (A) the rules on treaty interpretation contained in Article 31(1) of the Vienna Convention on the Law of Treaties (the "Vienna Convention"); (B) international investment law; and (C) the history of the United States' investment treaties.

A. The United States' Interpretation of Article 10.15.1(a) is Contrary to Article 31(1) of the Vienna Convention

4 Article 10.15.1(a) of the FTA states, in relevant part, that "1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Section A, . . . and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach . . . ."

5 According to Article 31(1) of the Vienna Convention, "[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." (CL-0049-ENG) Nothing in the text of Article 10.15.1(a) or other pertinent articles of the FTA discussed below prohibits a claimant from seeking to recover on its own behalf for losses it incurred arising out of a breach of Section A that were suffered by an entity it owns or controls that is incorporated in a third State. That Article 10.15.1(a) is silent as to this possibility clearly does not mean that it is excluded. In fact, under the Vienna Convention, such silence (together with the pertinent text discussed below) demands that the opposite inference be drawn. Indeed, when interpreting the provision of a treaty (here Article 10.15.1(a)), the treaty's entire text is part of the

[1] U.S. Submission, para 2 ("Where the investor seeks to recover loss or damage that it incurred *directly*, it may bring a claim under Article 10.15.1(a).") (Emphasis in original) (footnotes omitted).

"context" for purposes of Article 31 of the Vienna Convention. This is particularly so in cases such as this one, where the treaty offers a definition which applies to the entire investment chapter of the FTA. Article 31(2) of the Vienna Convention,[2] in explaining context, specifically refers to the treaty's text, which can only mean the treaty's entire text.[3]

6 Therefore, looking at the ordinary meaning of the terms of the provision "in their context and in the light of its object and purpose" – as the Vienna Convention requires – only reinforces the conclusion that Article 10.15.1(a) allows a qualified investor to recover losses it incurred that were suffered by an entity it owns or controls that is incorporated in a third State. The United States and Morocco have expressly consented to the submission of such claims in Article 10.16 of the FTA, as evidenced by the following:

a) The FTA permits a "claimant," defined as an "investor of a Party that is a party to an investment dispute with the other Party," to file claims arising from "investment disputes." *See* Articles 10.14-10.15, 10.27;

b) Although the FTA does not define the term "investment disputes," it has previously been defined in the 1994 U.S. Model BIT as "a dispute between a Party and a national or company of the other Party arising out of or relating to . . . an alleged breach of any right conferred, created, or recognized by this Treaty with respect to a covered investment."[4];

c) The FTA, in turn, broadly defines the term "investment" as "every asset that an investor owns or controls, ***directly or indirectly***, that has the characteristics of an investment . . . ." Article 10.27 (emphasis added); and

d) Utilizing that broad definition, the FTA then defines a "covered investment" as follows: "with respect to a Party, an investment (as defined in Article 10.27 (Investment – Definitions)) in its territory of an investor of the other Party . . . ." Article 1.3.

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[2] Article 31(2) of the Vienna Convention states: "2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) [A]ny agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." (CL-0049).

[3] *See Strabag SE v Libya*, ICSID Case No. ARB(AF)/15/1, Award (29 June 2020) para 117 (CL-0113-ENG) ("Under Article 31(2) of the VCLT, context includes the other words of the treaty. In light of these principles, the Tribunal believes that the Treaty's definitions of 'investor' and 'investment' should be understood in their ordinary meaning and in a manner that renders them consistent."); *see also Itisaluna v Iraq*, ICSID Case No. ARB/17/10, Award (3 April 2020) para 160 (CL-0114-ENG).

[4] *See* Article IX of the U.S. 1994 Model BIT 506, *International Investment Instruments: A Compendium Vol. VI* 506 (United Nations Pub. 2001), available at: https://unctad.org/system/files/official-document/dite2vol6_en.pdf. There is no indication that the term means anything different in more recent investment treaties.

7 Accordingly, the United States and Morocco have expressly consented to arbitrate *all claims* of alleged violations of Chapter 10, Section A of the FTA, that relate to any "covered investment" – that is, any assets of an investor of a Party that qualify as "investments" and that are owned or controlled, ***directly or indirectly***, by the claimant.[5] The U.S. Submission, however, departs from this clear treaty framework. It not only adds requirements and terms to Article 10.15.1(a) that simply do not exist, but it also inexplicably ignores the text of the FTA, most glaringly Article 10.27's definition of "investment." The United States' interpretation thus fails under the ordinary meaning test of the FTA.[6]

8 The United States does not dispute that by its own terms, Article 10.15.1(a) applies generally to any "loss or damage." It does not, for example, include a qualifier that claims for only "direct" injuries may be brought.[7] It is of no moment that Article 10.15.1(a) does not explicitly address situations involving an enterprise constituted in a third State, as mere silence in no way precludes a claimant from seeking losses on its own behalf just because the enterprise at issue is not locally incorporated. Notably, Article 10.15.1(a) contains no limitation, whether express or implied, on the claims that can be brought by qualifying "investors" on their own behalf for qualifying "investments." As noted above, Article 10.27 broadly defines qualifying "investments" as "every asset that an investor owns or controls, ***directly or indirectly***, that has the characteristics of an investment . . . ." Had the parties to the FTA intended to preclude recovery of indirect damages under Article 10.15.1(a), they could have easily stated that this provision applies only to "*direct* loss or damage." Yet they did not do so.

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[5] *See* FTA, Article 10.16 ("[e]ach Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement") (CL-0001-ENG).

[6] The United States argues that if shareholders were allowed to claim under Article 10.15.1(a) for indirect injury, Article 10.15.1(b) would be superfluous. *See* U.S. Submission, para 7. This argument makes no sense, at least with respect to cases such as this one where the investment is made through a company incorporated in a third State. Article 10.15.1(b) is inapplicable to this type of case, but it is not superfluous in situations where the investment is made through a company incorporated in the host State, which provides greater certainty that the parties to the FTA have derogated from the customary international law rule that would prevent companies of the host State from filing claims against that State.

[7] The only authorities cited by the United States to support its position are the North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. I, 103d Cong., 1st Sess., at 145 (1993), ("the NAFTA SAA") and Lee M. Caplan & Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT*, Commentaries on Selected Model Investment Treaties 824-25 (Chester Brown ed., 2013) ("Caplan & Sharpe"). The SAA is a unilateral statement by one of the parties to a different treaty (NAFTA), and therefore has little, if any, value in determining the proper interpretation of the FTA. With respect to Caplan & Sharpe, not only does the United States acknowledge that this source is not referring to the FTA, but the quoted portion states only examples of situations in which claims could be brought to arbitration. Neither Caplan & Sharpe nor the NAFTA SAA purports to contradict the plain language of the FTA and suggest the existence of an exhaustive rule precluding investors from making claims for damages on their own behalf that were not incurred by them directly, such as in situations where, as here, the investment is made through companies registered in a third State.

The Post-Facto Unilateral Expression of Intention of One of the Parties to the FTA is Not Covered by Article 31 of the Vienna Convention

9 To advance its position that Article 10.15.1(a) only allows for *direct* claims (with indirect claims the province of Article 10.15.1(b)), the U.S. Submission argues that this purported bifurcation "was drafted purposefully in light of two existing principles of customary international law addressing the status of corporations" and that "[n]othing in the text of Article 10.15.1(a) suggests that the Treaty Parties ***intended*** to derogate from customary international law restrictions on the assertion of shareholder claims."[8] Even assuming that this unsupported contention is true, which Claimants contest, the unspoken and subjective intentions of the parties are nevertheless irrelevant to its interpretation.

10 It is well-settled that Articles 31 and 32 of the Vienna Convention[9] do not follow a subjective approach that relies on the intentions of the parties to the treaty.[10] On the contrary, the so-called "objective approach," which avoids reliance on subjective elements such as intention, prevailed at the Vienna Conference. This is further reinforced by Article 31 of the Vienna Convention, which not only accords primacy to the terms of the treaty and their ordinary meaning, but does not even mention intention. In fact, neither Article 31 nor Article 32 mentions intention at all.[11]

11 The International Law Commission ("ILC"), in connection with its work on the Vienna Convention, stated that "the Commission's approach to treaty interpretation was on the basis that the *text of the treaty* must be presumed to be the authentic expression of the intentions of the parties, and that the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation."[12]

12 It is also well established among investment tribunals that, unless expressly reflected in the language of the treaty, the intentions of the parties to a treaty are irrelevant in interpreting treaty

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[8] *See* U.S. Submission, paras 3, 8 (emphasis added).

[9] Article 32 of the Vienna Convention reads: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) [L]eaves the meaning ambiguous or obscure; or (b) [L]eads to a result which is manifestly absurd or unreasonable." (CL-0049).

[10] *See* J.R. Weeramantry, *Treaty Interpretation in International Investment Arbitration*, paras 3.14-3.20 (2012) (CL-0115-ENG).

[11] *See* Fn 2 above. Article 31(3) of the Vienna Convention states: "3. There shall be taken into account, together with the context: (a) [A]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) [A]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) [A]ny relevant rules of international law applicable in the relations between the parties." (CL-0049).

[12] *See* Reports of the Commission to the General Assembly, *Yearbook of the International Law Commission 1966, Vol. II* 223 (1967) (emphasis added) (CL-0116-ENG).

language. For example, in *Methanex* v *United States*, the tribunal paraphrased the above quote from the ILC and found that "the approach of the Vienna Convention is that the text of the treaty is deemed to be the authentic expression of the intentions of the parties; and its elucidation, rather than wide-ranging searches for the supposed intentions of the parties, is the proper object of interpretation."[13]

13 Notably, the tribunal in *Wintershall* v *Argentina* explained that:

> The carefully worded formulation in Article 31 is based on the view that the text must be presumed to be the authentic expression of the intention of the parties. ***The starting point of all treaty-interpretation is the elucidation of the meaning of the text, not an independent investigation into the intention of the parties from other sources*** …
>
> In the circumstances, the Tribunal holds that, there is no room for any presumed intention of the Contracting Parties to a bilateral treaty, as an independent basis of interpretation; because this opens up the possibility of an interpreter (often, with the best of intentions) altering the text of the treaty in order to make it conform better with what he (or she) considers to be the treaty's "true purpose".[14]

14 Since the United States has provided no support for its assertion regarding the parties' intentions, in the form of any contemporaneous documents that expressly reflect an agreement of the parties on the interpretation of Article 10.15.1(a) at the time of the conclusion of the FTA – and the United States points to none – the Tribunal should not take into account any *post-facto*, unilateral statements on the issue by one of the parties to the treaty many years later.

15 Indeed, if the Parties wished to agree to a rule along the lines of the U.S. Submission and exclude claims of indirect damage that are not excluded in the FTA text, Article 10.21(3) of the FTA, like NAFTA Article 1131(2), offered the parties the chance to reach an agreement on the interpretation of a particular provision, which would have then been

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[13] *See Methanex Corp.* v *United States of America*, UNCITRAL, Final Award (3 August 2005) Part II-Chapter B para 22 (CL-0117-ENG) (footnote omitted); *see also Salini Costruttori S.p.A. and Italstrade S.p.A.* v *The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (9 November 2004) para 79 (CL-0118-ENG) (holding that "[t]he common intention of the Parties is reflected in this clear text that the Tribunal has to apply").

[14] *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008) paras 78, 88 (CL-0119-ENG) (emphasis added); *see also El Paso Energy International Co.* v *The Argentine Republic*, ICSID Case No. ARB/03/15 ("*El Paso v. Argentina*") Award (31 October 2011) para 590 (CS-0025) (emphasis added) ("The Tribunal considers that, pursuant to Article 31(1) of the Vienna Convention, any interpretation has to begin with an examination of the *terms* of the treaty taken in their ordinary meaning. The wording of the treaty is deemed to express the intention common to the Parties, and what the Parties effectively agreed to, even though a Party might have wished otherwise on one or another point. ***As long as such wishes are not expressed, the content of the treaty's provisions is paramount, and what is not there cannot be read into them."***) (emphasis added); *see also Belenergia S.A. v Italian Republic*, ICSID Case No. ARB/15/40, Award (6 August 2019) para 304 (CL-0120-ENG) ("The Tribunal disagrees with Italy that the *inter se* doctrine applies as a matter of '*intent*.' Rather, Articles 31 to 33 VCLT give preference to the treaty's text as its main source of interpretation.").

binding on any tribunal deciding a claim under Chapter 10 of the FTA.[15] Yet in this case, the parties issued no such agreed-upon interpretation of Article 10.15.1(a). If anything, the mere fact that the FTA includes a mechanism by which the parties *could have provided* an interpretation of a provision – but did not – is further evidence that the Tribunal should apply the ordinary meaning of the text. Finally, since this is the first case brought under Article 10.15.1(a) that involves an indirect claim and entities incorporated in a third State, there is no "subsequent practice" in the application of this provision that shows any agreement of the parties regarding its interpretation.[16]

16 For the above reasons, the United States' interpretation of Article 10.15.1(a) is not supported by the text of the FTA as interpreted in accordance with Article 31 of the Vienna Convention. Moreover, reliance on the purported intentions of the parties to the FTA, derived from sources extraneous to the treaty's text, does not accord with the accepted canons of treaty interpretation. The Tribunal should thus not accept or take into account the United States' interpretation of Article 10.15.1(a) of the FTA.

B. The Position of the United States on Article 10.15.1(a) of the FTA is Contrary to International Investment Law

17 The United States' interpretation of Article 10.15.1(a) is also completely out-of-sync with modern international investment-treaty arbitration, which provides for indirect claims and serves to protect shareholders. For these reasons, it is unsurprising that the so-called *Barcelona Traction* rule – relied upon by the United States (and Respondent) – does not apply in modern, investment-treaty arbitrations. Indeed, several decades-worth of investment treaties concluded by the United States show that the United States has consistently derogated from the *Barcelona Traction* rule, and the United States has shown no reason why it would have reverted to the *Barcelona Traction* rule in agreeing to NAFTA and subsequent BITs and FTAs with dispute settlement clauses modeled after NAFTA Articles 1116-1117.

a) The Barcelona Traction Rule Does Not Apply

18 As Claimants' expert Professor Schreuer has explained, the International Court of Justice ("ICJ") "has acknowledged that its decisions, given in the context of diplomatic protection on the basis of customary international law, ***do not apply in the framework of contemporary***

[15] Article 10.21(3) states: "[a] decision of the Joint Committee declaring its interpretation of a provision of this Agreement under Article 19.2 (Joint Committee) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision." (CL-0001-ENG).

[16] Indeed, Claimant is aware of only one case under NAFTA or any other FTA or BIT that contains dispute settlement clauses modeled on NAFTA Articles 1116 and 1117 that has involved damage incurred by an entity owned or controlled by a claimant that was incorporated in a third State – *Waste Management v Mexico*, discussed *infra* – and in that case, the other NAFTA Parties made no submissions on that issue, and the tribunal found that it had jurisdiction over the relevant claim. Claimant is therefore unaware of any practice of the parties to any treaty that have precluded investors who have invested through an entity in a third State from making a claim for indirect damages.

international investment law which is dominated by treaties."[17] In fact, the ICJ made these acknowledgments in both *Barcelona Traction* and *Diallo* – the two cases relied upon by the United States that precluded shareholders from claiming damages suffered by a corporation in which such shareholders hold shares.[18] Likewise, investment tribunals have also "*consistently* stressed the inapplicability of *Barcelona Traction* to contemporary investment law."[19] For example, in *GAMI v Mexico* the tribunal stated: "[t]he Tribunal however does not accept that *Barcelona Traction* established a rule that must be extended beyond the issue of the right of espousal by diplomatic protection."[20] Similarly, the Tribunal in *Waste Management v Mexico* held: "[w]here a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise."[21] Indeed, all but one of the NAFTA cases that have considered arguments to exclude claims for indirect damages under Article 1116 have rejected these arguments.[22] Professor Schreuer explains why the one NAFTA case that excluded claims under NAFTA Article 1116, *Bilcon v Canada,* is inapposite to the current case because it addresses the options of an investor that operates through a company it owns or controls in the host State, rather than the situation of an investor that operates by way of an enterprise in a third State.[23]

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[17] Second Legal Opinion of Chistoph Schreuer ("Second Schreuer Legal Opinion"), (19 October 2020) para 66 (emphasis added).

[18] *Barcelona Traction, Light and Power Co, Ltd (Belgium v Spain),* ICJ Reports (1970) Judgment (5 February 1970) paras 89-90 (CS-0146); *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, ICJ Reports (2007), Judgment (24 May 2007) para 88-90 (CS-0147); *see also* U.S. Submission, para 3.

[19] Second Schreuer Legal Opinion, para 67 (emphasis added); *see also, e.g., CMS Gas Transmission Co. v Argentine. Republic*, ICSID Case No. ARB/01/8, Decision on Annulment (25 September 2007) para 69 (CS-0188); *El Paso v Argentina*, para 213 (CS-0025). In fact, in *GAMI v Mexico*, the tribunal expressly rejected the United States' argument that the *Barcelona Traction* rule was applicable in the NAFTA Article 1116 context. *See GAMI Investments, Inc. v The Government of the United Mexican States*, UNCITRAL ("*GAMI*"), Final Award (15 November 2004) paras 29-30 (CS-0203).

[20] *GAMI*, para 30 (CS-0203).

[21] *Waste Management Inc. v United Mexican States*, ICSID Case No. ARB(AF)/00/3 ("*Waste Management*") Award (30 April 2004) para 85 (CL-0013-ENG).

[22] *Id. See also GAMI*, paras 29-33, 43 (CS-0203); *United Parcel Service of America, Inc. v Government of Canada*, Award on the Merits (24 May 2007) para 35 (CL-0121-ENG); *Pope & Talbot v Government of Canada*, Award in Respect of Damages ("*Pope & Talbot (May 2002)*") para 80 (CL-0109-ENG); *S.D. Myers v. The Government of Canada*, Second Partial Award (21 October 2002) paras 143, 160 (CL-0122), *Mondev International Limited v. United States*, ICSID No. ARB(AF)/99/2, Arbitral Award (11 October 2022) para 86 (CL-0016-ENG).

[23] Second Schreuer Legal Opinion, paras 70-73. Professor Schreuer stated: "*Bilcon* concerned the question whether an investor that had the possibility to claim on behalf of a company established under the law of the host State, retained the right to claim on its own behalf for losses incurred by that company.

19 There is also long-standing case law protecting shareholders in investment treaty arbitration. These cases hold that indirect investors enjoy protection not only with respect to their shareholding interests, but also with respect to the assets of the company they own or control indirectly.[24] For example, in *Mera v Serbia*, the tribunal clearly held that a controlling shareholder's rights extended to the rights held by the company through which it had made the investment. The tribunal found:

> Other tribunals when faced with the similar issue have supported the principle that where a company is controlled, legally or factually, by a certain shareholder or group of shareholders, the latter may be entitled to a direct claim in respect of the assets of the former. Accordingly, in situations where a shareholder controls the company that owns the assets in issue, tribunals may consider those underlying assets to be the investments of the shareholder.[25]

20 In another example, the tribunal in *Pezold v Zimbabwe* ratified the principle that the use of an indirect corporate holding structure does not constitute an obstacle to the protection of investments:

> The von Pezold Claimants' ownership and control of the Zimbabwean Properties (and related assets) through an indirect corporate holding structure presents no bar to their claims for restitution and/or compensation for the loss suffered to those investments. The Respondent's objection that the von Pezold Claimants lack standing to bring claims relating to the protected investments is therefore dismissed.[26]

b) The History of Investment Agreements Concluded by the United States Also Does Not Support the United States' Position on Article 10.15.1.(a) of the FTA

21 The United States argues that "[n]othing in the text of Article 10.15.1(a) suggests that the Treaty Parties intended to derogate from customary international law restrictions on the assertion of shareholder claims." As discussed above, however, the text of Article 10.15.1(a),

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The discussion in *Bilcon*, including the cases considered there, address the options of an investor that operates through a company it owns or controls in the host State. It does not address the situation of an investor that operates by way of an enterprise in a third State." *Id.*, para 72.

[24] *See* Second Schreuer Legal Opinion, para 56; *see also Siemens* A.G. *v The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004) para 150 (CS-0175); *Bogdanov v Republic of Moldova*, Award (22 September 2005) para 5.1 (CS-0204); *Total S.A. v The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Jurisdiction (25 August 2006) para 74 (CS-0205); *Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012) para 91 (CS-0149); *Hochtief AG v Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability (29 December 2014) para 303 (CS-0173); *Anglo American PLC v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award (18 January 2019) para 213 (CS-0234).

[25] *Mera Investment Fund Limited v Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction (30 November 2018) para 130 (CS-0086). For more cases with similar findings *see also* First Legal Opinion of Christoph Schreuer ("First Schreuer Legal Opinion") paras 180-88.

[26] *Bernhard von Pezold v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015) para 326 (CS-0080).

together with the definition of the terms it incorporates, most notably of "investment," shows that the Treaty Parties in fact derogated from the *Barcelona Traction* rule. This language is consistent with the United States' longstanding practice concerning investment agreements. Just like NAFTA and subsequent U.S. BITs and FTAs with dispute settlement clauses modeled after its terms, prior U.S. BITs have consistently permitted investors to file claims involving alleged BIT violations for investments that they own or control directly or indirectly, without including specific language that derogates from the *Barcelona Traction* rule.

22 If the position asserted in the current U.S. Submission were accepted by tribunals adjudicating claims under older U.S. BITs, none of these tribunals would have permitted investors to file claims involving indirect damages. However, tribunals under these U.S. BITs (as well as other similar BITs and investment treaties) have consistently held that shareholders have standing to assert claims for damages incurred by companies in which they hold shares. It follows, then, that Article 1116 of the NAFTA and its equivalent provisions in later U.S. investment treaties – ***including FTA Article 10.15.1(a)*** – were never intended to limit the types of claims that a protected investor could bring with respect to a qualifying investment.[27]

23 For example, in *Noble Energy v Ecuador*, a case under the United States-Ecuador BIT, the holder of the concession in Ecuador, Machalapower, was indirectly owned by Noble Energy through two levels of intermediaries registered in the Cayman Islands and in Delaware respectively. Ecuador argued that Noble Energy had no standing to bring a claim because it did not make the investment itself and because Article 25 of the ICSID Convention did not allow a "grandparent company" to bring a claim. The tribunal, though, disagreed:

> The Tribunal concurs with previous tribunals that have held that an indirect shareholder can bring a claim under the ICSID Convention and under a BIT in respect of a direct and an indirect investment. Failing any contrary wording, the BIT and the ICSID Convention encompass actions of indirect shareholders for their damages.[28]

24 Similarly, in another case under the United States-Argentina BIT, the tribunal relied on the definition of "investment" in the treaty that included "a company or shares of stock or other interests in a company or interests in the assets thereof," and concluded as follows:

> [T]he treaty protection is not limited to the free enjoyment of the shares, that is the exercise of the rights inherent to the position as a shareholder, specifically a controlling or sole

[27] Even in the absence of an express provision equivalent to Article 10.15.1(b), shareholders have consistently been allowed to bring claims under United States BITs while investing through a locally incorporated company.

[28] *Noble Energy, Inc. v The Republic of Ecuador*, ICSID Case No. ARB/05/12, Decision on Jurisdiction (5 March 2008) para 77 (CS-0048).

> shareholder. It also extends to the standards of protection spelled out in the BIT with regard to the operation of the local company that represents the investment.[29]

25 The above examples, in which several tribunals have abandoned the *Barcelona Traction* rule, are only illustrative; many more recognize the now-normative principle that United States BITs protect shareholders and allow for indirect claims.[30] Nor is this principle even of particularly recent vintage. Over three decades ago in *ELSI*, the United States argued and the ICJ itself accepted the principle that U.S. shareholders of an Italian company could bring a claim against Italy for the alleged violation of the U.S.-Italy Friendship, Commerce & Navigation Treaty, arising from measures imposed on that company.[31]

26 Presumably, if the United States had wished to revert to the *Barcelona Traction* rule after derogating from it in all of its prior BITs, it would have stated expressly that it was doing so, as well as stated why it wished to do so. There is no evidence of such contemporaneous statements from the time it negotiated NAFTA or any of the subsequent FTAs that adopted the language of NAFTA Articles 1116 and 1117.

27 To this day, the United States has failed to explain why it would want to exclude investors who invest through an entity in a third State from having standing to assert a claim under its BITs and FTAs. In situations involving minority investments or other investments in an enterprise of the host State, the United States has explained the policy reasons for wanting separate provisions for such claims to protect the rights of other shareholders or creditors.[32] No such explanation of policy reasons for limiting the types of recovery available in cases in which the investor, making an investment through a third State, owns or controls the investment can be found in the current U.S. submission.

28 Finally, in its initial submissions on the interpretation of Articles 1116 and 1117 of NAFTA, the United States took a different view and did not even mention the *Barcelona Traction* rule

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[29] *Continental Casualty Co. v The Argentine Republic*, ICSID Case No. ARB/03/09, Decision on Jurisdiction (22 February 2006) para 79 (CS-0177).

[30] *See also Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment, ICSID Case NO. ARB/01/12 (1 September 2009) paras 107-08 (CS-0024); *Ronald S. Lauder v The Czech Republic*, UNCITRAL, Final Award (3 September 2001) paras 77, 120, 153, 154 (CS-0193); *Enron Corp. v The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004) para 60 (CS-0092); *CMS Gas Transmission Co. v. The Republic of Argentina*, ICSID Case NO. ARB/01/8, Decision on Jurisdiction (17 July 2003) paras 48, 68 (CS-0181), confirmed in *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment (25 September 2007) paras 58–76 (CS-0188); *Sempra Energy International v The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Jurisdiction (11 May 2005) para 79 (CS-0185).

[31] *See Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)*, ICJ Reports (1989) Judgment (20 July 1989) available at: https://www.icj-cij.org/public/files/case-related/76/076-19890720-JUD-01-00-EN.pdf

[32] *See, e.g., GAMI Investments Inc. v The United Mexican States*, UNCITRAL, United States Submission (30 June 2003) paras 17-18 (CL-0110-ENG).

as precluding investors from filing claims for indirect damages under Article 1116.[33] To the contrary, the United States' submissions in *Myers v Canada* and *Pope & Talbot v Canada* state that, where the qualifying investment is not a separate company, "*any damage to the investment will be a direct loss to the investor*, and the investor will have standing to bring a claim under Article 1116."[34]

29 As shown above, the United States' interpretation of Article 10.15.1(a) of the FTA is contrary to well-settled norms and canons of treaty interpretation under the Vienna Convention, does not accord with international investment law, and inexplicably departs from the history of investment treaties concluded by the United States.

II. Definition of Investment under Article 10.27(c) of the FTA

30 The U.S. Submission also comments on the definition of "investment" under Article 10.27, and in particular subsection (c), which refers to debt instruments. According to the United States, *"[c]onsistent with the distinction drawn in footnote 9, certain shorter-term forms of debt, in contrast to, e.g., long-term notes, are less likely to have the characteristics of an investment*."[35]

31 While Claimants do not disagree with this general comment, it bears little to no weight against the facts of this case. As the United States has noted, it "does not take a position" on how any of its comments "appl[y] to the facts of this case."[36] First, as Claimants have argued at length, the Transactions at issue involved transfers of title of the Commodities, and were not used as "shorter-term forms of debt" for a loan. Alternatively, Claimants submit that, as stated by the parties' agreements that govern the Transactions (including the Amended and Restated Master Commodity Transaction Agreement or "MCTA"), if the Transactions were somehow found to be a financing, notwithstanding the governing agreements, then under the FTA, Carlyle's initial payment for the Commodities would still be considered a debt or loan such that Carlyle would be entitled to the proceeds of any unauthorized sale of such

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[33] *See S.D. Myers, Inc. v The Government of Canada*, UNCITRAL ("*S.D. Myers, Inc. v Government of Canada*"), Submission of the United States of America (18 September 2001) paras 6-10 (CL-0107-ENG); *Pope & Talbot, Inc. v Government of Canada*, UNCITRAL ("*Pope & Talbot (Seventh Submission*")*,* Seventh Submission of the United States (6 November 2001) paras 2-10 (CL-0108-ENG). Moreover, the *Pope & Talbot* tribunal specifically rejected Canada's *Barcelona Traction* arguments. *See Pope & Talbot (May 2002)* paras 75-80 (CL-0109-ENG).

[34] *S.D. Myers, Inc. v The Government of Canada*, para 7 (CL-0107-ENG); *Pope & Talbot (Seventh Submission*, para 4 (CL-108-ENG) (emphasis added). By contrast, where the qualifying investment is, in fact, a separate company registered in the host State, the U.S. submissions state that "any damage to the investment will be a *derivative* loss to the investor and the investor will have standing to bring a claim under Article 1117." *Id.* (emphasis added). The United States in these submissions makes clear that Article 1117 was intended to complement, not restrict, the claims that could be brought under the broad language of Article 1116.

[35] *See* U.S. Submission, para 15.

[36] *See* U.S. Submission, para 1.

Commodities.[37] In all events, though, any such arrangement would have involved a transfer of title of the Commodities.

32 Regardless, this arrangement constitutes an "investment" under Article 10.27, including footnote 9 appended to subparagraph (c). As explained in Claimants' Rejoinder and by Professor Schreuer, the well-established principle of the unity of the investment requires that Claimants' investments be considered as a *whole*. In this case, that principle means that all Transactions should be considered together, such that any financing component that is even arguably a part of the arrangement included not only a transfer of title to the Commodities, but also the existence of options (Put Rights) intended to last for at least three years.[38]

33 As Professor Schreuer has stated:

> . . . . Tribunals, when examining the existence of an investment for purposes of their jurisdiction, have not looked at specific transactions or activities but at the overall operation. They refused to dissect investments into individual segments, even if these segments were identifiable as separate legal transactions. What mattered for the identification and protection of the investment was that the entire operation was directed at the investment's overall economic goal.
>
> It follows for the present case that, in examining the duration of the investment operation, it would not be permissible to look at the individual Investment Confirmations that governed specific transactions. Both parties to the transactions operated under the assumption that the overall arrangement was for a long-term relationship.
>
> The investment was governed by a Master Commodity Transaction Agreement (MCTA) a Summary of Terms and Conditions for Crude Oil Purchase and Sale Transactions as well as a Commodities Storage Agreement (CSA). This was accompanied by a Commitment Letter under which Claimants and SAMIR committed to engage in commodities investment for at least three years. These documents, collectively referred to as the Investment Agreements, provided the legal framework for the individual transactions. . . .[39]

[37] *See* MCTA, § 16 (d) (MO-0003).

[38] *See* Rejoinder, paras 91, 97-98, 112, 124; First Schreuer Legal Opinion, paras 60-68. For a sample of the overwhelming case law supporting the principle of the unity of the investment, see First Schreuer Legal Opinion, paras 60-66.

[39] *Id.* paras 66-68.

34 In light of the above principles, even *if* the Transactions are deemed to be financings (which they were not), they would qualify under the definition of "investment" found in Article 10.27 subsection (c).

III. Conclusion

35 For all of the foregoing reasons, Claimants respectfully submit that the Tribunal disregard the United States' statements regarding the interpretation of Article 10.15.1(a) of the FTA.

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Respectfully submitted,

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